NEW YORK LABOR & EMPLOYMENT LAW DESK REFERENCE

Prepared by:
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Revised February 2023

This publication is available at online at
www.probonopartner.org/learning-center/articles-on-demand-webinars

The following is a brief summary of New York State and New York City employment laws. This summary is provided for general information only and is not intended as legal advice. Employers should consult legal counsel for more specific guidance.

I. DISCRIMINATION/RETALIATION LAWS

A. New York State Human Rights Law (NYSHRL)

1. Generally

The NYSHRL prohibits employment discrimination by all private-sector employers on the basis of age (18 or over), creed, race (including traits historically associated with race, including but not limited to, hair texture and hairstyles such as braids, locks, and twists), color, sex, sexual orientation, national origin, marital status, domestic violence victim status, disability, pregnancy-related condition, military status, arrest or conviction record, predisposing genetic characteristics, familial status, religion, and gender identity or expression. N.Y. Exec. Law § 296. New York law also prohibits discrimination on the basis of any clothing or facial hair in accordance with the requirements of an employee's religion. Under the NYSHRL, employees and supervisors may be held individually liable for acts that aid, abet, incite, compel or coerce the doing of any prohibited discriminatory actions under law. N.Y. Exec. Law § 296(6).

It is unlawful to retaliate or discriminate against an individual for opposing any discriminatory conduct prohibited by the NYSHRL, or because an individual filed a complaint, testified, or assisted in any proceeding under the NYSHRL. N.Y. Exec. Law § 296(7). The NYSHRL specifically prohibits "disclosing an employee's personnel files because he or she has opposed any practices forbidden" by the statute. *Id*.

The NYSHRL defines "disability" more broadly than the Americans with Disabilities Act (ADA) to include any physical, mental, or medical impairment—including a temporary one—that, upon the provision of reasonable accommodations, does not prevent the employee from performing, in a reasonable manner, the activities involved in the job sought or held. N.Y. Exec. Law § 292(21). The NYSHRL also requires employers to engage in an interactive process with an employee who is disabled regarding the provision of a reasonable accommodation. *Id*. A requested accommodation may be subject to an undue hardship defense. Employers are also required to make reasonable accommodations to victims of domestic violence when they must be absent from work for a reasonable time for certain purposes. N.Y. Exec. Law § 296(22).

The NYSHRL expressly provides that it shall be interpreted "liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of [the NYSHRL], have been so construed." N.Y. Exec. Law § 300. Thus, "exceptions to and exemptions from" its provisions "shall be construed narrowly in order to maximize deterrence of discriminatory conduct." *Id*.

2. Applicable to Contractors' Employees

The prohibitions against unlawful discrimination under the NYSHRL extends to nonemployees in the workplace. N.Y. Exec. Law § 296-d. An employer may face liability for discrimination, harassment, or retaliation against a nonemployee where the employer, its agents, or supervisors knew or should have known that the nonemployee was subjected to an unlawful discriminatory practice in the workplace and failed to take immediate and appropriate corrective action. A nonemployee under this section is defined as an individual who is a contractor, subcontractor, vendor, consultant, or other person providing services pursuant to a contract in the workplace or who is an employee of a contractor, subcontractor, vendor, consultant, or other person providing services pursuant to a contract in the workplace. In harassment cases involving nonemployees, "the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the harasser" will be considered. The NYSHRL also covers interns, regardless of whether they are compensated. N.Y. Exec. Law § 296-c.

3. Applicable Standard for Harassment Under the NYSHRL

Harassment is considered an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions, or privileges of employment because of his or her protected characteristics. N.Y. Exec. Law § 292. Employers have a seemingly narrow affirmative defense to liability where "the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences." *Id*. The employer's liability is not foreclosed merely because "such individual did not make a complaint about the harassment to [his or her] employer." *Id*. The same standard applies to claims made by domestic workers. *Id*. The *Faragher-Ellerth* affirmative defense, which is available with regard to claims made under Title VII of the Civil Rights Act of 1964, cannot be asserted in responses to claims of harassment under the NYSHRL.

4. Election of Remedies and Damages

Complainants have three years from an alleged adverse action to file a complaint with the New York State Division of Human Rights (NYSDHR). N.Y. Exec. Law § 292. Administrative exhaustion is not a prerequisite to filing a claim under the NYSHRL. However, under the "election of remedies" doctrine, a plaintiff must choose to either file an administrative claim with the NYSDHR or sue privately in court. *Williams v. City of N.Y., 916 F. Supp. 2d 517, 521 (S.D.N.Y. 2013)*. A plaintiff cannot escape this bar by raising distinct legal theories in a NYSDHR complaint and a private lawsuit if those theories are premised on the same underlying event. *Rosario v. N.Y.C. Dep't of Educ., 2011 WL 1465763, at *2 (S.D.N.Y. Apr. 15, 2011).* Damages under the NYSHRL include compensatory damages and punitive damages. Attorneys' fees may be awarded to a prevailing plaintiff on a discrimination claim, as well as a prevailing defendant, if the defendant can show the claim was frivolous. N.Y. Exec. Law § 297(10).

B. New York State Sexual Harassment Prevention Laws

1. Sexual Harassment Policy Requirements

All employers in New York State are required to adopt a sexual harassment prevention policy that equals or exceeds the minimum standards provided by the model sexual harassment policy issued by the New York State Department of Labor (NYSDOL) in consultation with the NYSDHR. At a minimum, an employer's policy must:

- prohibit sexual harassment consistent with guidance issued by the NYSDOL in consultation with the NYSDHR;
- provide examples of conduct that would constitute unlawful sexual harassment;
- include information about federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws;
- include a complaint form;
- include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;
- inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and
- clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.

The model policy is publicly available on the NYSDOL's and NYSDHR's websites.

2. Sexual Harassment Training Requirements

All employers in New York State are required to provide annual anti-harassment training to all employees. The NYSDOL, in consultation with the NYSDHR, has published a model sexual harassment prevention training program. Employers must adopt the model program or implement a training program that equals or exceeds the minimum standards provided by the model program. At a minimum, the model sexual harassment prevention training program must be interactive and must include:

- an explanation of sexual harassment, consistent with guidance issued by the NYSDOL;
- examples of conduct that would constitute unlawful sexual harassment;
- information concerning federal and state statutory provisions concerning sexual harassment;
- details on remedies available to victims of sexual harassment;
- information concerning employees' rights of redress and all available forums for adjudicating complaints; and

- information addressing conduct by supervisors and any additional responsibilities for supervisors.

3. Policy and Training Notification Requirements

An employer must provide its employees with its policy in writing, both at the time of hiring and during each annual training. Per the State's guidance, the notice must be delivered in writing, in print or electronically, and must link to or include, as an attachment or printed copy, the policy and training materials. Training materials include any printed materials, scripts, questions and answers (Q&As), outlines, handouts, presentation slides, etc. If a copy is made available on a work computer, employees must be able to print a copy for their own records.

Employers must provide employees with these materials in both English and in an employee's primary language, if the primary language is Spanish, Chinese, Korean, Polish, Russian, Haitian-Creole, Bengali, Italian, or any other language to which the State has translated the model materials.

C. New York City Human Rights Law (NYCHRL)

1. Generally

The NYCHRL prohibits employment discrimination within New York City on the basis of actual or perceived age, race, religion, creed, color, national origin, gender (including perceived gender identity), disability, marital status, partnership status, caregiver status, sexual orientation, uniformed service, alienage or citizenship status, arrest or conviction record, credit history, unemployment status, salary history, sexual and reproductive health decisions, and status as a victim of domestic violence, stalking, and sex offenses. N.Y.C. Admin. Code § 8-107. The NYCHRL also protects employees from discrimination on the basis of pregnancy, childbirth, or any related medical condition. *Id*. Like the NYSHRL, the NYCHRL also prohibits retaliation and provides for individual liability for unlawful discriminatory practices. N.Y.C. Admin. Code § 8-126. Further, the New York City Commission on Human Rights (NYCCHR) has issued enforcement guidance confirming protections under the NYCHRL for New Yorkers who maintain "natural hair or hairstyles most closely associated with Black people."

The NYCHRL covers interns, freelancers, and independent contractors, who are also counted for determining whether an entity meets the definition of "employer" under the law. N.Y.C. Admin. Code § 8-107(23). The extension of the NYCHRL to nonemployees also includes the right of nonemployees to receive reasonable accommodations related to disabilities, pregnancy, lactation, religious observances, and status as victims of domestic violence, sexual offenses, or stalking offenses.

2. Applicable Standard

Pursuant to the Local Civil Rights Restoration Act of 2005, courts are to analyze NYCHRL claims independently of federal and state discrimination claims. The law is to be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Albunio v. City of New York*, 16 N.Y.3d 472, 477-78 (2011). To establish a claim under the NYCHRL, the plaintiff must show that the employer treated him or her "less well," at least in

part for a discriminatory reason. "To count as being treated 'less well,' a plaintiff must merely plausibly allege 'differential treatment that is more than trivial, insubstantial, or petty.'" *Torre v. Charter Communs., Inc.*, 493 F. Supp. 3d 276, 285 (S.D.N.Y. 2020). A defendant asserting a legitimate, nondiscriminatory reason for an employment decision must show that unlawful discrimination played "no role" in the decision. *Lefort v. Kingsbrook Jewish Med. Ctr.*, 203 A.D.3d 708 (2d Dep't 2022). Therefore, summary judgment is only appropriate in NYCHRL cases if "no jury could find defendant liable under any of the evidentiary routes—*McDonnell Douglas*, mixed motive, 'direct' evidence, or some combination thereof." *Bennett v. Health Mgt. Sys., Inc.*, 92 A.D.3d 29 (1st Dep't 2011).

3. Employer Liability for Manager or Supervisor Conduct

The NYCHRL provides that an employer is liable for a discriminatory practice by an employee where: (1) the employee exercised managerial or supervisory responsibility; (2) the employer, either itself or through an employee who exercised supervisory or managerial responsibility, knew of the employee's discriminatory conduct and acquiesced in the conduct or failed to take immediate and appropriate corrective action; or (3) the employer should have known of the employee's discriminatory conduct and failed to exercise reasonable diligence to prevent it. N.Y.C. Admin. Code § 8-107(13)(b). In most cases, this amounts to strict liability for discriminatory actions by managers or supervisors. *Zakrzewska v. New School*, 14 N.Y.3d 469, 480-81 (2010). However, good faith compliance procedures may be a factor to be considered in mitigation of punitive damages. N.Y.C. Admin. Code § 8-107(13)(d)-(e).

4. Cooperative Dialogue Requirement/Reasonable Accommodation

The NYCHRL is broader than the ADA and extends to persons who have any physical, medical, mental or psychological impairment, or a history or record of such impairment. N.Y.C. Admin. Code § 8-102.

The NYCHRL requires covered employers to engage in a "cooperative dialogue" with persons who have disabilities, victims of domestic violence, individuals with pregnancy and related conditions, and those who have religious needs for potential accommodations. N.Y.C. Admin. Code §§ 8-102, 8-107. A "cooperative dialogue" requires a good faith written or oral dialogue "concerning the person's accommodation needs; potential accommodations that may address the person's accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may pose for the covered entity." *Id*. Under the NYCCHR's guidance, employers are required to initiate a dialogue with an employee about potential reasonable accommodations if the employer knows or should know that the employee needs an accommodation, regardless of whether the employee has requested one. The employer also must document this process and the outcome of the cooperative dialogue, including whether an accommodation is granted or denied, and provide a copy to the employee. N.Y.C. Admin. Code §8-107(28).

5. Election of Remedies and Damages

As with the NYSHRL, administrative exhaustion is not a prerequisite to filing a claim under the NYCHRL directly in court. Also like the NYSHRL, the election of remedies doctrine

applies to claims arising under the NYCHRL. The NYCHRL provides broader remedies than under federal law, including uncapped compensatory and punitive damages and attorneys' fees awards. N.Y.C. Admin. Code § 8-502.

Unlike Title VII of the Civil Rights Act of 1964, which provides for punitive damages where a plaintiff proves malice or reckless indifference, the New York Court of Appeals instead has held that "the standard for determining punitive damages under the NYCHRL is whether the wrongdoer has engaged in discrimination with willful or wanton negligence, or recklessness, or a 'conscious disregard of the rights of others or conduct so reckless as to amount to such disregard.'" *Chauca v. Abraham*, 30 N.Y.3d 325 (2017).

6. New York City Anti-Sexual Harassment Law

In 2018, the Stop Sexual Harassment in NYC Act amended the NYCHRL and other laws. The statute of limitations under the NYCHRL was extended for filing gender-based harassment claims from one year to three years. The NYCHRL's policy statement was updated to declare that gender-based harassment is a form of discrimination that "threatens the terms, conditions and privileges of employment." N.Y.C. Admin. Code § 8-107.

a. Posting and Notice Requirements

All employers, regardless of size, must conspicuously display the anti-sexual harassment rights and responsibilities posters (in both English and Spanish), designed and published by the NYCCHR, and distribute a fact sheet (in English and Spanish) to individual employees at the time of hire, which may be included in an employee handbook. The poster is available on the City's website.

b. Mandatory Anti-Sexual Harassment Training

Private employers with 15 or more employees are required to conduct annual anti-sexual harassment interactive training for all covered employees, including supervisors and managerial employees. N.Y.C. Admin. Code § 8-107. For this purpose, the City's guidance provides that independent contractors—regardless of the number of days or hours they work—and employees not based in New York City are considered employees.

After 90 days of hire, training is required for employees, including interns, who work more than 80 hours in a calendar year who perform work on a full-time or part-time basis within New York City. *Id*. Under the City's guidance, an independent contractor who works (a) more than 80 hours in a calendar year and (b) for at least 90 days (which need not be consecutive) must receive training.

The training must be interactive, which is defined as "participatory teaching whereby the trainee is engaged in a trainer-trainee interaction, use of audio-visuals, computer or online training program or other participatory forms of training as determined by the commission." *Id*. However, the training is not required to be live or in person. *Id*. The NYCCHR has created a model online interactive training module that an employer may (but is not required to) use to train its employees, which meets both the State and City law requirements.

At a minimum, such anti-sexual harassment interactive training used by a New York City employer must include:

- an explanation of sexual harassment as a form of unlawful discrimination under local law;
- a statement that sexual harassment is also a form of unlawful discrimination under state and federal law;
- a description of what sexual harassment is, using examples;
- any internal complaint process available to employees through their employer to address sexual harassment claims;
- an explanation of the complaint processes available through the NYCCHR, the NYSDHR, and the U.S. Equal Employment Opportunity Commission (EEOC), including contact information;
- a prohibition on retaliation, pursuant to NYCHRL, and examples of such retaliation;
- information concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention; and
- a description of the specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation, and measures that such employees may take to appropriately address complaints.

N.Y.C. Admin. Code § 8-107.

Employers must keep records of all trainings—including signed employee acknowledgments, which may be electronic—for at least three years. *Id*. An employee who has received anti-sexual harassment training from one employer within the required training cycle will not be required to receive additional anti-sexual harassment training from another employer until the next cycle. *Id*.

D. Equal Pay

The New York Labor Law prohibits any differentials in pay because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, disability, predisposing genetic characteristics, familial status, marital status, and/or domestic violence victim status. In addition to prohibiting differentials among individuals who perform "equal work," the law also prohibits differentials among individuals who perform "substantially similar work." N.Y. Labor Law § 194(1). Specifically, employers are prohibited from paying an employee in one or more protected class or classes at a wage rate that is less than the rate at which an employee without that status is paid, for:

- equal work on a job, which requires equal skill, effort, and responsibility, and which is performed under similar working conditions; or
- substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.

A pay differential may be permitted when such differential is based on:

- a seniority or merit system;
- a system measuring earnings by quantity or quality; or

- a bona fide factor other than status within one or more protected class or classes that is job related and consistent with business necessity, such as education, training, or experience.

Employers cannot use a factor that is based on status in a protected class to justify a differential. Under the law, an employee can overcome an employer's justification by demonstrating that:

- an employment practice causes a disparate impact on the basis of status within one or more protected class or classes,
- an alternative practice exists that would serve the same purpose and not produce such differential, and
- the employer refused to adopt the alternative practice.

E. Whistleblower Protections

An employer may not retaliate against an employee or independent contractor who:

- discloses, or threatens to disclose to a supervisor or to a public body, an activity, policy, or practice of the employer that the employee reasonably believes is in violation of law, rule, or regulation or that the employee reasonably believes poses a substantial and specific danger to the public health or safety;
- provides information to, or testifies before, any public body conducting an investigation, hearing, or inquiry into any such activity, policy, or practice by such employer; or
- objects to, or refuses to participate in any such activity, policy, or practice.

N.Y. Labor Law § 740(2). To be protected from retaliation when making a disclosure to a public body, the employee or contractor must first have made a good faith effort to notify the employer by bringing the activity, policy, or practice to the attention of a supervisor and afforded the employer a reasonable opportunity to correct such activity, policy, or practice. Employer notification is not required where:

- there is an imminent and serious danger to the public health or safety;
- the employee or contractor reasonably believes that reporting to the supervisor would result in a destruction of evidence or other concealment of the activity, policy, or practice;
- such activity, policy, or practice could reasonably be expected to lead to endangering the welfare of a minor;
- the employee or contractor reasonably believes that reporting to the supervisor would result in physical harm to the employee or any other person; or
- the employee reasonably believes that the supervisor is already aware of the activity, policy, or practice and will not correct such activity, policy, or practice.

The New York State Department of Labor has issued a notice informing employees of their rights under this law, which must be posted in a conspicuous and easily accessible location that is frequented by employees and applicants.

F. Protection of Lawful Off-Duty Activities

Pursuant to N.Y. Labor Law § 201-d(2), with limited exceptions arising from violations of trade secrets or collective bargaining agreements, employers may not take adverse employment action against an employee because of the employee's:

- political activities outside of working hours, off the employer's premises, and without use of the employer's equipment or other property, if such activities are legal (e.g., social media postings);
- legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours, off the employer's premises, and without use of the employer's equipment or other property;
- legal recreational activities outside work hours, off of the employer's premises, and without use of the employer's equipment or other property; or
- membership in a union or exercise of any rights related thereto.

G. Hiring

There are various restrictions and requirements that employers in both New York State and New York City must comply with throughout the hiring process.

1. Criminal Records

a. New York Correction Law Article 23-A

New York State allows the collection and use of criminal conviction information provided that the employer establishes: (1) a direct relationship between the previous criminal offenses and the specific employment sought; or (2) that the granting of employment would involve an unreasonable risk to property or the safety or welfare of specific individuals of the general public. N.Y. Correction Law § 752. When determining whether to collect and/or use criminal conviction record information, employers must consider:

1. the public policy of New York to encourage the employment of persons previously convicted of one or more criminal offenses;
2. the specific duties and responsibilities necessarily related to the employment sought or held by the applicant or employee;
3. the bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities;
4. the time which has elapsed since the occurrence of the criminal offense or offenses;
5. the age of the person at the time of the occurrence of the criminal offense or offenses;
6. the seriousness of the offense or offenses;
7. any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; and

8. the legitimate interest of the public agency or private employer in protecting property and the safety and welfare of specific individuals of the general public.

N.Y. Correction Law § 753.

Employers that conduct a criminal background check must provide the employee or job applicant with a copy of Article-23A of New York Correction Law. N.Y. Gen. Bus. Law § 380-c.

b. New York City Fair Chance Act

As amended by the Fair Chance Act (FCA), the NYCHRL prohibits discrimination based on arrest or conviction records when denial of employment is a violation of N.Y. Correction Law Article 23-A. N.Y.C. Admin. Code § 8-107(10). With limited exceptions, New York City employers with four or more employees are prohibited from inquiring about or obtaining job applicants' pending arrest or criminal conviction records until after a conditional offer of employment has been extended. *Id*. § 8-107(11).

A "conditional offer" is one that can be revoked only on the basis of:

- the results of a criminal background check, after the FCA process has been followed;
- the results of a medical exam as permitted by the Americans with Disabilities Act; or
- other information the employer could not have reasonably known before making the conditional offer if the employer can show as an affirmative defense that, based on the information, it would not have made the offer regardless of the results of the criminal background check.

Even after extending a conditional offer, aside from criminal convictions, an employer may not inquire about or consider noncriminal offenses, youthful offender adjudications, or criminal cases that are not "pending" such as acquittals, dismissals, or adjournments in contemplation of dismissal. N.Y.C. Admin. Code § 8-107(11)(a), (11)(b).

An employer's job posting and recruitment materials must not at all reference the performance of criminal background checks. However, statements such as "people with criminal histories are encouraged to apply" are permissible. If an applicant inadvertently discloses criminal information during the initial application process, the employer must make a good faith effort to exclude such information from its decision as to whether to extend a conditional offer.

If an applicant intentionally misrepresents information about his or her criminal history, the employer can disqualify the applicant on that basis provided it (1) provides the applicant a copy of any information that led the employer to believe the applicant intentionally misrepresented the criminal record, and (2) affords the applicants at least five business days to respond. If the applicant can credibly demonstrate that he or she did not misrepresent the criminal history or that the misrepresentation was unintentional, the misrepresentation does not provide a basis for disqualification.

If an individual's criminal record is the basis for potential adverse employment action—whether for an applicant or a current employee—employers must perform a "Fair Chance Analysis" prior to making a final determination. The analysis requires employers to establish either that (1) there is a "direct relationship" between the criminal offense and the job, or (2) employment would involve an unreasonable risk to property or the safety or welfare of the general public before taking adverse action. The list of the comprehensive factors an employer must consider to determine whether this standard is met is substantially the same as the factors required by the state of New York under N.Y. Correction Law § 753.

New York City has issued guidance on how employers may comply with the requirements of the FCA.

c. Other Localities' Restrictions on Inquiries into Criminal History

The cities of Rochester, Buffalo, and Albany, as well as Westchester County and Suffolk County, have also adopted ordinances that prohibit employers from inquiring about a job applicant's prior criminal conviction on initial employment applications.

2. Salary History

a. New York State

New York Labor Law Section 194-A prohibits an employer from, either orally or in writing, personally or through an agent (directly or indirectly), making any inquiry concerning an applicant's salary history. The law also prohibits an employer from relying on an applicant's salary history as a factor in determining whether to interview or offer employment or in determining what salary to offer. An "applicant" is someone who took an affirmative step to seek employment and who is not currently employed with that employer, its parent company, or a subsidiary. This includes part-time, seasonal, and temporary workers, regardless of their immigration status. Employers also may not request prior salary history information from current employees as a condition of being interviewed or considered for a promotion. Under the State's guidance, employers may consider information already in their possession as to existing employees (e.g., an employee's current salary or benefits). For example, an employer may use an employee's current salary to calculate a raise but may not ask that employee about his or her salary history with other employers.

b. New York City and Other Localities

For all private employers in New York City with four or more employees, it is an unlawful discriminatory practice to inquire about the salary history of a job applicant, which includes the applicant's current or prior wage, benefits, or other compensation, or otherwise rely on salary history during the hiring process. Employers are also prohibited from communicating such inquiries to an applicant's current or prior employer, in writing or otherwise, for the purpose of obtaining such applicant's salary history. Similarly, the law makes it unlawful for an employer to conduct a search of publicly available records or reports for the purpose of obtaining an applicant's salary history. The law has narrow exemptions for (1) actions taken by an employer pursuant to foreign or international law that authorizes the disclosure of salary history or requires knowledge

of salary history; (2) private positions for which compensation is set pursuant to procedures established by collective bargaining; and (3) actions taken by headhunters, recruiters, and agents, who also may be held liable if they intentionally aid and abet a violation of the law. The NYCCHR has issued a list of frequently asked questions and answers regarding when employers may inquire or learn about an applicant's salary history.

The counties of Albany, Westchester, and Suffolk have adopted similar salary history bans.

3. Salary Transparency in Job Advertisements

Any employer with four or more employees—with at least one working in New York City—advertising for any job, promotion, or transfer opportunity must state in the posting the minimum and maximum salary that the employer in good faith believes it would pay for the position. An "advertisement" is any written description of an available job that is publicized to a pool of applicants whether printed or on the internet. The salary range refers to the base wage or rate of pay, not including other forms of compensation, such as benefits or bonuses. The salary range must also be included in any posting for an internal promotion or transfer opportunity. However, the law does not apply when a position cannot and will not be performed, at least in part, in New York City. Also, the law does not apply to ads for temporary employment at a temporary help firm. NYCCHR Salary Transparency Fact Sheet. Westchester and Albany Counties and the City of Ithaca have adopted similar wage transparency laws.

New York State passed a similar salary transparency law effective September 17, 2023. The state law goes further than the city law in requiring employers to (1) disclose the job description if one exists for the posted position, (2) disclose that compensation will be based on commission for any position that is to be paid solely on a commission basis, and (3) maintain necessary records to comply with the law, including but not limited to the history of compensation ranges for each job, promotion, or transfer opportunity and the job descriptions for such positions, if such descriptions exist. Any person claiming to be aggrieved by a violation of the state law may file a complaint with the commissioner of labor, who may award appropriate remedies and impose civil penalties.

4. Drug and Alcohol Testing

New York State generally does not prohibit employers from testing for alcohol and drug use by employees and the law does not protect individuals who use drugs illegally. However, the NYSHRL generally protects recovered or recovering alcoholics or drug addicts to the extent that such conditions are considered disabilities.

New York has limited medical marijuana protections for certified patients with certain serious medical conditions; individuals carrying medical marijuana cards are deemed to be disabled. However, the law does not bar the enforcement of policies prohibiting employees from performing their employment duties while impaired by a controlled substance. N.Y. Pub. Health Law § 3369.

The recreational use of marijuana by adults is lawful in New York, and it is unlawful for an employer to refuse to hire, discharge, or otherwise discriminate against persons who legally use cannabis before or after working hours, off the employer's premises, and without the use of the

employer's property, subject to limited exceptions. An employer may, however, lawfully prohibit possession and consumption of recreational marijuana on its premises or in its vehicles. N.Y. Labor Law § 201-d(4).

New York law prohibits employers from testing employees for marijuana or for taking adverse employment action based on an employee's marijuana use unless required to do so by federal law or unless an employee manifests specific, articulable symptoms of impairment that either (1) decrease or lessen the employee's job performance or (2) interfere with the employer's obligation to provide a safe and healthy work environment. N.Y. Labor Law § 201-d(4-a)(i)(ii). Private employers generally cannot test job applicants for marijuana use, subject to narrow safety-related exceptions. *Id*.; N.Y.C. Admin. Code § 8-107(31).

5. Consumer Credit Reports

In addition to federal requirements, under New York State law, an employer that requests or conducts a consumer report on a job applicant or employee must provide notice that a report may be requested, and, upon request, the employer must provide to the applicant or employee the name and address of the consumer reporting agency. N.Y. Gen. Bus. Law § 380-b.

In addition, under the New York City Stop Credit Discrimination in Employment Act (SCDEA), it is an unlawful discriminatory practice for any New York City employer (1) to request or use the consumer credit history of an applicant or employee for the purpose of making any employment decision; or (2) to otherwise discriminate with regard to hiring, compensation, or any other term of employment based on an applicant's or employee's consumer credit history, whether or not it leads to an adverse employment action. The NYCCHR has also opined that "employment forms requiring applicants to authorize a credit or background check are prohibited." The SCDEA includes various exemptions; however, the NYCCHR has cautioned that these exemptions are to be construed narrowly and that the employer has the burden of establishing that an exemption should apply. The NYCCHR's guidance states that the exemptions do not apply to an entire employer or industry; rather, they apply to specific positions or roles.

6. Use of Artificial Intelligence (New York City)

Beginning April 15, 2023, any New York City employer using an "automated employment decisions tool" to screen candidates for hiring and promotion must notify any such candidate or employee who resides in New York City—at least 10 days prior to using the tool—that an AI tool will be used in the assessment of their candidacy, as well as job qualifications and characteristics that the AI tool will use in the assessment of such candidate or employee. N.Y.C. Admin. Code §§ 20-871(b). An "automated employment decision tool" is broadly defined as "any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence (AI), that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons." § 20-870. The advance notification must allow a candidate or employee to request an alternative selection process or accommodation.

In addition, no AI tool can be used unless it has been the subject of a "bias audit" within the past year. § 20-871(a)(1). A bias audit is an impartial evaluation by an independent auditor that

tests the tool to assess any disparate impact resulting from use of the tool on the basis of sex, race, or ethnicity.

Before using an automated employment decision tool, an employer or employment agency must post on its website a summary of the results of the most recent bias audit of such tool as well as the distribution date of the tool to which such audit applies. § 20-871(a)(2). Also, unless publicly disclosed online, the employer or employment agency must provide to a candidate or employee the type of data collected for the automated employment decision tool, the source of such data, and the employer or employment agency's data retention policy within 30 days of a written request from such individual. § 20-871(a)(2).

H. Termination of Employment

1. At-Will Employment

Except with respect to fast food workers in New York City, New York is an at-will employment state and does not recognize wrongful termination claims. *Lobosco v. N.Y. Tel. Co./NYNEX*, 96 N.Y.2d 312, 316 (2001). In the absence of an agreement establishing a fixed duration of employment, an employment relationship is presumed to be freely terminable by either party at any time, for any reason, or for no reason, provided it is not for a reason prohibited by law. *Horn v. N.Y. Times*, 100 N.Y.2d 85, 90-91 (2003). New York courts have only recognized two narrow exceptions to the at-will doctrine: (1) where the employer had a written policy limiting its right of discharge, which the employee was aware of and relied detrimentally in accepting employment, *Weiner v. McGraw Hill, Inc.*, 57 N.Y.2d 458, 462 (1982); and (2) attorneys who are discharged for complying with their ethical obligations to report wrongdoing. *Wieder v. Skala*, 80 N.Y.2d 628, 632 (1992).

a. New York City—"Just Cause" for Fast Food Employees

Fast food employees in New York City enjoy "just cause" employment protection. A fast food employer may not discharge or substantially reduce an employee's hours (defined as at least 15 percent of the employee's regular schedule or 15 percent of any weekly work schedule), absent (1) an employee's failure to satisfactorily perform job duties, or (2) misconduct that is demonstrably and materially harmful to the fast food employer's legitimate business interests. N.Y.C. Admin. Code § 20-1271, § 20-1272(a). "Just cause" protection applies only after the completion of an initial probationary period (maximum 30 days).

To satisfy the just cause standard, employers must utilize a progressive discipline policy, defined as a "disciplinary system that provides for a graduated range of reasonable responses to a fast food employee's failure to satisfactorily perform such fast food employee's job duties, with the disciplinary measures ranging from mild to severe, depending on the frequency and degree of the failure." Use of progressive discipline is excused in the case of an employee's "egregious misconduct." § 20-1272(c). A fast food employer must supply a discharged employee with a written explanation of the reason for discharge within five days of the discharge. The employer bears the burden of establishing the discharge was valid under the written reasons it provided to the employee. § 20-1272(d)-(e).

2. New York WARN Act

The New York State Worker Adjustment and Retraining Notification (NY WARN) Act, N.Y. Labor Law §§ 860, *et seq*., largely mirrors the federal Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101, *et seq.*, but is more expansive in the following ways:

- NY WARN Act applies to employers with 50 full-time employees, rather than 100 full-time employees under the federal WARN Act, or 50 or more employees that work in aggregate at least 2,000 hours per week;

- NY WARN is triggered by:
  - a plant closing that affects 25 full-time employees during any 30-day period (rather than 50 employees under the federal WARN Act);
  - a mass layoff that affects 250 employees (rather than 500 employees under the federal WARN Act); or
  - a relocation of greater than 50 miles.

- Job losses for two or more groups of workers within a 90-day period are aggregated for purposes of determining coverage under the NY WARN Act (even if each individual job loss viewed separately would not meet the minimum threshold), unless the employer demonstrates that the employment losses during the 90-day period were the result of separate and distinct actions and causes.

- The NY WARN Act requires 90 days' notice to affected parties (rather than 60 days under the federal WARN Act) and has more extensive requirements regarding the contents of and recipients required to receive notice.

a. New York City Displaced Building Service Workers Protection

The New York City Displaced Building Service Workers Protection Act (DBSWPA) sets forth requirements related to the termination of building service contracts and the employment of building service workers. NYC Administrative Code § 22-505. It covers not only the termination of building services contracts and the provision of such services by whomever intends to provide substantially similar building services, but also transfers of controlling interests in any building in which building services employees are employed. It covers both commercial and residential building contracts, as well as successor employers acquiring such building contracts. "Building service employees" are those who have been employed on a part-time or full-time basis for at least ninety days prior to any transition in employment, and perform building care and maintenance.

In addition to certain notice and information requirements prior to ending any building services contract or transferring a controlling interest in any building in which building service employees are employed, the successor employer must retain the building service employees for a 90-day transition period, with narrow exceptions for changes in building service needs and for-cause terminations. These requirements apply to covered employers that retain building service employees or building service contractors, such as a lessee of commercial space, housing cooperative, condominium associations, building management agent, or any other person who

owns, leases, or manages real property. The requirements do not apply to (i) residential buildings with fewer than 50 units, (ii) commercial office, institutional, or retail buildings of less than 100,000 square feet, (iii) any lessee of commercial space whose leasehold is less than 35,000 square feet, or (iv) to the extent that such requirements conflict with state finance law.

The DBSWPA does not apply to any covered employer or successor building contractor that agrees to assume an existing collective bargaining agreement of the former building service contractor, so long as the agreement provides terms for the discharge of employees. The remedies available for a violation of the DBSWPA can include reinstatement, back pay, cost of benefits, and attorneys' fees.

3. Other Notices and Requirements Concerning Termination of Employment

Employers must notify any employee discharged from employment, in writing, of the exact date of termination as well as the exact date of cancellation of employee benefits, and in no case may notice of termination be provided more than five working days after the date of termination; failure to notify an employee of cancellation of accident or health insurance subjects an employer to an additional penalty. N.Y. Labor Law § 195(6). This notice requirement applies to terminations facilitated by the employer as well as voluntary employee resignations and retirements.

Upon termination of employment, the employer must pay the remaining wages no later than the regular payday for the pay period during which termination occurred. N.Y. Labor Law § 191(3). If requested by the employee, the wages must be paid by check and placed in the mail. *Id.* Employers need not pay out an employee's accrued and unused paid vacation time unless the employer has a clear policy or practice of paying out accrued and unused vacation time at termination. At the time of termination, employers must provide a Record of Employment form for unemployment insurance purposes. 12 NYCRR § 472.8. This form must be provided regardless of whether the employee is discharged voluntarily or involuntarily.

II. WAGE AND HOUR

A. Minimum Wage

The minimum wage in New York varies by region and industry. In New York City and the counties of Nassau, Suffolk, and Westchester, the minimum wage is $15.00 per hour. In the rest of New York State, the minimum wage is $14.20 as of January 1, 2023, for non-fast food workers. Future increases above $14.20 per hour will be based on an indexed schedule to be set by the state director of the Division of the Budget in consultation with the New York State Department of Labor following an annual review of the impact. The minimum wage for fast food workers in all of New York is $15.00. In addition, New York State and many cities and municipalities have prevailing wage rates for government contractors and other employers.

There are additional, detailed wage and hour requirements that apply to employers covered by the New York Hospitality Industry Wage Order, which includes food service and hotel service workers.

There are additional minimum wage and allowance requirements that apply to employers covered by the Minimum Wage Order for the Building Service Industry, which includes janitors and other building service industry workers.

B. Overtime and Exemptions

Subject to exemptions, employees who work in excess of 40 hours in one week must be compensated at the overtime rate of one-and-one-half times the regular rate of pay. N.Y. Labor Law § 160; 12 N.Y.C.R.R. § 142-3.2.

New York law generally follows the Fair Labor Standards Act (FLSA) regarding so-called white-collar exemptions, except that the minimum weekly salary under the executive and administrative exemptions are as follows: in New York City and the counties of Nassau, Suffolk, and Westchester, $1,125.00 per week; in the rest of New York State, $990.00 per week. There is no minimum salary for the professional exemption in New York.

New York's exemption and job duties tests, while very similar to those of the FLSA, are slightly more stringent. 12 NYCRR § 142-2.14. Therefore, there may be positions that qualify as exempt under the FLSA but are nonexempt under New York law.

C. Wage Deductions

Wage deductions are narrowly circumscribed under New York law and require strict adherence to various permitted categories and circumstances. N.Y. Labor Law § 193. Employers are permitted to make deductions from wages, with an employee's written authorization, only for: health and welfare benefits, including gym membership dues and certain child care expenses; pension and savings benefits; charitable benefits paid to a bona fide charity; discounted parking or public transportation items; cafeteria, vending machines, and pharmacy purchases at the employer's business; tuition, room, and board for certain educational institutions; insurance premiums and prepaid legal plans; United States bonds; union dues; and to recapture overpayments of the employee's wages as well as repayments for loans or advancements the employer made to such employee. N.Y. Labor Law § 193(1); 12 N.Y.C.R.R. § 195-4.4. Under a catch-all provision, deductions also are permitted if they are "similar payments for the benefit of the employee." N.Y. Labor Law § 193(1)(b). However, this provision generally excludes mere convenience to the employee or deductions that provide a financial gain to the employer at the expense of employees. 12 N.Y.C.R.R. § 195-4.3.

Provided that deductions meet one of these limited categories, authorizations must be executed prior to the deduction being made. An employee will be deemed to have authorized a permitted deduction if it is set forth in a collective bargaining agreement. For all other employees, authorizations require a written agreement between the employer and the employee that is express, written, voluntary, and informed. The authorization must include all terms and conditions of the deduction, its benefit, and the details of the manner in which deductions shall be made. Any substantial change to the deduction (e.g., a reduction in the benefit received) requires a separately executed authorization. N.Y. Labor Law § 193(1)(b); 12 N.Y.C.R.R. § 195-4.2.

For the recovery of inadvertent overpayments, NYSDOL regulations contain detailed requirements regarding the timing, notice, and circumstances of deductions, as well as a procedure

for employees to challenge the claimed overpayment. For example, in such cases where the entire overpayment is less than or equal to the net wages earned after other permissible deductions in the next wage payment, the employer may recover the entire amount of such overpayment in that next wage payment. However, where the recovery of an overpayment exceeds the net wages after other permissible deductions in the immediately subsequent wage payment, the recovery may not exceed 12.5 percent of the gross wages earned in that wage payment nor shall such deduction reduce the effective hourly wage below the statutory state minimum hourly wage. 12 N.Y.C.R.R. § 195-5.1.

D. Frequency of Wage Payments

Pursuant to N.Y. Labor Law § 191 and guidance from the NYSDOL, the timing of wage payments must be as follows:

- "Manual workers" must be paid on a weekly basis (unless the employer has obtained prior authorization from the NYSDOL);
- "Clerical and other workers" must be paid according to the terms of their employment agreement and not less frequently than semi-monthly on regular pay days designated in advance by the employer;
- "Commission salespersons" must be paid in accordance with their agreed terms of employment but not less frequently than once in each month and not later than the last day of the month following the month in which the wages were earned;
- "Bona fide executive, administrative or professional capacity" employees whose earnings are in excess of the exempt salary basis thresholds must be paid according to the terms of their employment contracts.

Section 190(4) of the New York Labor Law defines a "manual worker" as "a mechanic, workingman or laborer." It has been the long-standing interpretation of the NYSDOL that individuals who spend more than 25 percent of working time engaged in physical labor are "manual workers." The term "physical labor" has been interpreted broadly to include almost any physical tasks. An employee may have a private right of action to seek to recover liquidated damages in cases where he or she was paid late, regardless of whether the employee is ultimately paid all wages owed before commencement of an action. Liquidated damages are typically measured as the full amount of the wages the employee received late. *Vega v. CM & Assocs. Construction Management LLC*, 175 A.D.3d 1144 (1st Dep't 2019).

Food delivery workers in New York City must also be paid weekly pursuant to New York City Local Law 116.

E. New York State Wage Theft Prevention Act (WTPA)

Every New York State employer must provide new employees with a WTPA wage notice at the time of hiring. Wage notices must include the pay rate and basis thereof; whether payment is by the hour, shift, day, week, salary, piece, commission, or other; the hourly rate and overtime rate (if applicable); allowances claimed as part of the minimum wage (if applicable); the regular pay day; and the employer's name (including any d/b/a, address, and telephone number of the employer). N.Y. Labor Law § 195(1)(a). Employers must also provide a new WTPA notice when there is a change to the above information, except that employers outside of the hospitality industry

may notify employees of a wage increase via a compliant paystub if the information contained therein is accurate. *Id*. at § 195(2).

Written WTPA notices must be in English or, if English is not the employee's primary language, in the employee's primary language provided that the New York State Department of Labor has issued a template in that language (currently, Chinese, Haitian Creole, Italian, Korean, Polish, Russian, and Spanish). N.Y. Labor Law § 195(1)(a)-(c). The employer must obtain an acknowledgment of each written notice and retain it for six years. N.Y. Labor Law § 195(1)(a). Pre-approved notice forms are available on the NYDOL website.

F. Paystubs

Pursuant to N.Y. Labor Law § 195(3), paystubs must be furnished to each employee with every payment of wages and must include the following:

- dates of work covered by that payment of wages;
- name of employee;
- name, address, and phone number of employer;
- rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other;
- gross wages;
- deductions;
- allowances, if any, claimed as part of the minimum wage; and
- net wages.

For all nonexempt employees, the paystub must also include the following:

- regular hourly rate or rates of pay;
- overtime rate or rates of pay;
- number of regular hours worked; and
- number of overtime hours worked.

For all employees paid a piece rate, the paystub must include the applicable piece rate or rates of pay and number of pieces completed at each piece rate. Upon the request of an employee, an employer shall furnish an explanation in writing of how such wages were computed.

Under New York City Paid Safe and Sick Leave Law, employers must notify employees of their accrued, used, and total safe and sick leave balance on paystubs or through other forms of employee-accessible documentation.

G. Tip Credits

A hospitality employer may take a credit towards the minimum hourly rate if a service employee or food service worker receives a sufficient amount in tips and if the employee has been notified of the tip credit. 12 N.Y.C.R.R. § 146-1.3. The applicable minimum hourly wages and maximum hourly tip credits for hospitality industry workers are available on the NYSDOL website. No tip credit is permitted for fast food employees.

Employers covered by New York State's Minimum Wage Order for Miscellaneous Industries and Occupations are required to pay all employees the full minimum wage, without any tip credit. Such employees receive the full minimum wage directly from the employer and retain all tips.

H. Tip Pooling/Sharing

Directly tipped employees may voluntarily agree to pool and redistribute their tips, and food service employers may require such tip pooling. 12 N.Y.C.R.R. § 146-2.16. Employers that operate tip pools must maintain records for at least six years. 12 N.Y.C.R.R. § 146-2.17.

However, employers may not demand or accept, directly or indirectly, any parts of the gratuities received by an employee or retain any part of a gratuity. N.Y. Labor Law § 196-d. (This provision does not apply to the checking of hats, coats, or other apparel, or the sharing of tips by a waiter with a busboy or similar employee.) A "gratuity" is money given by a customer to an employee for service provided to the customer. A mandatory service charge is a gratuity if a reasonable customer would believe the charge serves as compensation to employees in lieu of a gratuity. *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 81 (2008). The Second Circuit has held that a "delivery fee" is not a gratuity for the delivery worker when the employer clearly stated that the service fee was not a tip, and the fee did not resemble a tip. *Belizaire v. Ahold U.S.A., Inc.*, 19-457-cv (2d Cir. 2020).

I. Commission Agreements

N.Y. Labor Law § 191(1)(c) requires that any commission agreement must be in writing and signed by both the employer and the employee. The agreement must contain:

- a description of how wages, salary, drawing accounts, commissions, and all other monies earned and payable will be calculated;
- how often the employee will be paid;
- the frequency of reconciliation (if the agreement provides for a revocable draw); and
- any other details pertinent to the payment of wages, salary, drawing accounts, commissions, and all other monies earned and payable when the employment relationship ends.

An employer also must provide the commissioned employee, upon written request, with a statement of earnings paid or due and unpaid.

J. Call-In Pay

Employees who report for work by request or permission of an employer must be paid the minimum wage for at least four hours or the number of hours in a regularly scheduled shift, whichever is less. 12 N.Y.C.R.R. § 142-2.3. The NYSDOL has opined that meetings that occur less frequently than once per pay period require call-in pay. NYSDOL Opinion No. RO-09-0117 (Oct. 5, 2009). NYSDOL regulations require additional payment only where an employee's wages for the workweek are less than the minimum and overtime wage rate for all hours worked plus any call-in pay owed. For example, if the amount paid to an employee for the workweek exceeds the

minimum and overtime rate for the number of hours worked and the minimum wage rate for any call-in pay owed, no additional payment for call-in pay is required during that workweek. NYSDOL Opinion No. RO-09-0113 (Dec. 2, 2009).

K. Meal Breaks

N.Y. Labor Law § 162 requires unpaid meal breaks as follows:

- Factory workers must be allowed at least 60 minutes for the noonday meal. When factory workers are employed for a period or shift of more than 6 hours starting between the hours of 1:00 p.m. and 6:00 a.m., they shall be allowed at least 60 minutes for a meal break.
- Nonfactory employees must be allowed at least 30 minutes for the noonday meal between 11:00 a.m. and 2:00 p.m for shifts six hours or longer that extend over that period.
- Nonfactory employees employed for a period or shift of more than 6 hours starting between the hours of 1:00 p.m. and 6:00 a.m. shall be provided 45 minutes for a meal period at a time midway between the beginning and end of such employment.
- All workers who work a period or shift starting before 11:00 a.m. and continuing later than 7:00 p.m. must be allowed an additional meal period of at least 20 minutes between 5:00 and 7:00 p.m.

The NYSDOL will presumptively permit employers to provide a meal period of at least 30 minutes without filing an application provided that the shorter meal period does not cause a hardship to employees. Employers may also obtain a written waiver from the NYSDOL for a shorter meal period.

Complete waiver of applicable meal breaks may be permissible if negotiated and executed by individual employees or their bargaining representative. *Amer. Broadcasting Cos. v. Roberts*, 61 N.Y.2d 244 (1984). However, the NYSDOL has taken the position that private party waivers are narrowly enforceable only if: the operational needs of the industry make strict compliance with the meal period provisions impractical; the waiver was obtained openly and knowingly, absent duress or coercion, through good faith negotiations such as through a union; and the employees received a desired benefit in return for such waiver. NYSDOL Opinion No. RO-10-0085 (Feb. 1, 2011).

There is no private right of action to enforce meal breaks in New York, and enforcement is through the NYSDOL.

L. Compensable Time

Employers must pay employees for all time they are permitted to work or required to be available to work. "Waiting time" qualifies as hours worked if the employee is unable to use time productively for his or her own purposes. §146-3.6. Travel time is deemed to be hours worked if travel is part of the employee's duties. *Id*. These rules do not apply to the hospitality, farming, or building services industries.

M. Rounding of Hours

Rounding practices are permissible in New York so long as they are even-handed and do not result, over a period of time, in the failure to compensate employees for all the time they actually worked. DOL RO-09-0129.

N. Weekly Day of Rest

For any factory, mercantile establishment, hotel, restaurant, or elevator operator, a 24-hour rest period must be provided each week unless the employer designates an alternate day, subject to exceptions. N.Y. Labor Law § 161.

O. Spread of Hours and Split Shifts

Minimum wage employees are entitled to one additional hour of pay at minimum wage—in addition to regular-rate-of-pay for hours worked—for each day in which they work more than 10 hours and/or if there is a split shift, so that the number of hours between the start of the first shift and the end of the last shift exceeds 10 hours in one day. 12 N.Y.C.R.R. § 142-2.4.

P. New York City Mandatory Temporary Changes to Schedules

New York City employers are required to allow employees who have been employed for at least 120 days and who work at least 80 hours in New York City in a calendar year to make two temporary schedule changes per year for certain personal events. 12 N.Y.C.R.R. §§ 20-1261, *et seq*. Employers are only required to grant temporary changes two times per year for up to one business day per request. If an employer permits an employee to use two business days for one request, granting a second request is not required. An employer may deny a request for a temporary change relating to a personal event only if the employee has already exhausted the two allotted requests in the calendar year or if an exemption applies. Employees are not required to use Earned Safe and Sick Time Act leave before requesting schedule changes. Unpaid leave granted for a personal event does not count toward any Earned Safe and Sick Time leave. Likewise, leave granted under the Earned Safe and Sick Time Act does not satisfy the requirements under this law.

Q. New York City Fair Workweek Laws

The New York City Fair Workweek laws impose significant constraints and obligations on fast food and retail employers operating in New York City. N.Y.C. Admin. Code §§ 20-1201, *et seq*.; 6 R.C.N.Y §§ 7-601, *et seq*. The laws aim to ensure predictable paychecks and work schedules and include strict notice and recordkeeping requirements. The Office of Labor Policy and Standards (OLPS) within the New York City Department of Consumer Affairs (DCA) is tasked with enforcing the laws.

Covered retail employers are those that employ 20 or more employees in New York City. Covered fast food employers are establishments located in New York City that are part of a chain, primarily serve food and beverages, offer limited service, and are one of 30 or more establishments nationally.

The scheduling requirements do not apply to any retail employee covered by a valid collective bargaining agreement, including an agreement that is open for negotiation, if (i) such provisions are expressly waived in the collective barganing agreement and (ii) the agreement addresses employee scheduling.

1. Retail Employers

- Retail employers are prohibited from requiring employees to work on-call shifts.
  - On-call shifts are defined as requiring an employee to be ready and available to work at the employer's call for a period of time, regardless of whether the employee actually works or is required to report to a work location.
- Retail employers are prohibited from requiring employees to work call-in shifts within 72 hours of the start of the shift.
- Retail employers are prohibited from cancelling shifts with less than 72 hours' notice.
- Retail employers are prohibited from requiring employees to work shift additions with less than 72 hours' notice unless the employee consents in writing.
- Retail employers are required to provide 72 hours' advance notice of work schedules but may make changes to schedules with less than 72 hours' notice:
  - to grant an employee time off pursuant to an employee's request;
  - to allow two employees to trade shifts; or
  - if the employer's operations cannot begin or continue due to threats to employees or to the employer's property; public utility failure or shutdown of public transportation; fire, flood, or other natural disaster; or a state of emergency declared by the president of the United States of America, the governor, or the mayor of New York City.
- An updated written schedule is required if changes are made with less than 72 hours' notice.

2. Fast Food Employers

- Fast food employers are required to provide a written, good faith estimate to employees, no later than their first workday, of the days, times, locations, and total number of hours the employee can expect to work each week.
- Fast food employers are required to provide 14 days' (2 weeks') advance notice of work schedules.
- Fast food employers are required to pay employees premium pay for all schedule changes with less than 14 days' notice, with certain exceptions, including changes due to threats to employees or property of employees, natural disasters, states of emergency, voluntary changes or shift swaps, or where overtime pay is otherwise required.
- Fast food employers are required to obtain written employee consent plus a $100 premium to work "clopening" shifts (defined as "two shifts with fewer than 11 hours between the end of the first shift and the beginning of the second shift when the first shift ends the previous calendar day or spans two calendar days.")

- Fast food employers are required to give priority to existing employees to work newly available shifts before an employer hires new employees.
- Fast food employers may not lay off a fast food employee absent a bona fide economic reason. A "bona fide economic reason" is a closing or structural change to a business resulting in a worsening economic performance. Layoffs based on bona fide economic reasons shall be done in reverse order of seniority.

Additional resources and guidance may be found on the NYC Consumer and Workforce Protection website.

III. LEAVE LAWS

A. New York State

1. Paid Sick Leave Law

Pursuant to the New York State Paid Sick Leave Law (PSLL), private employers must provide sick leave to employees who physically work in New York State. Sick leave must be accrued by each employee at a rate of at least one hour for every thirty hours worked, paid at the employee's regular rate of pay. The total amount of sick leave for which an employee is eligible in a calendar year, and whether such leave is paid or unpaid, depends on the size of the employer, as follows:

- For employers with 4 or fewer employees in any calendar year and net income of $1 million or less in the previous tax year, each employee will be entitled to up to 40 hours of *unpaid* sick leave;

- For employers with 4 or fewer employees in any calendar year and net income greater than $1 million in the previous tax year, each employee will be entitled to up to 40 hours of *paid* sick leave;

- For employers with between 5 and 99 employees in any calendar year, each employee will be entitled to up to 40 hours of *paid* sick leave;

- For employers with 100 or more employees in any calendar year, each employee will be entitled to up to 56 hours of *paid* sick leave.

In lieu of calculating employee accruals, employers may choose to front-load sick time at the beginning of the calendar year. However, an employer may not later revoke or reduce such front-loaded leave if the employee works fewer hours than anticipated. Unused sick leave must be carried over to the next calendar year; however, an employer may cap annual usage at 40 hours (for small employers) or 56 hours (for employers with 100 or more employees).

Qualifying reasons for the use of sick leave include:

- a mental or physical illness, injury, or health condition of the employee or a family member, regardless of whether such illness, injury, or condition has been diagnosed or requires

medical care at the time that leave is requested;

- the diagnosis, care, or treatment of a mental or physical illness, injury, or health condition of, or the need for medical diagnosis of, or preventive care for the employee or a family member; or

- an absence from work due to any of the following reasons when the employee or a family member has been the victim of domestic violence, a family offense, a sexual offense, stalking, or human trafficking:

    a. to obtain services from a domestic violence shelter, rape crisis center, or other services program;

    b. to participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members;

    c. to meet with an attorney or other social services provider to obtain information and advice on and prepare for or participate in any criminal or civil proceeding;

    d. to file a complaint or domestic incident report with law enforcement or to meet with a district attorney's office;

    e. to enroll children in a new school; or

    f. to take any other actions necessary to ensure the health or safety of the employee or the employee's family member or to protect those who associate or work with the employee.

Employers may not require employees to provide verifying documentation in connection with sick leave that lasts less than three consecutive (scheduled) workdays or shifts. Employers may set minimum increments at which employees are allowed to use sick leave, not to exceed four hours.

Upon returning to work following leave, an employee must be restored to the same position with the same pay and other terms and conditions of employment. An employer is not required to pay out unused sick leave upon an employee's discharge, resignation, retirement, or other separation from employment.

An employer is in compliance with the PSLL if it provides aggregate annual sick and personal time to employees that is at least equal to the number of hours required by law, provided that an employee is permitted to take such time without any restrictions other than as set forth in the law. The PSLL prohibits retaliation against an employee in any way for exercising his or her rights to use sick leave provided by law.

2. Paid Family Leave

New York State provides paid family leave (PFL) benefits to eligible employees for the care of a close relative (spouse, domestic partner, child, parent, parent-in-law, sibling, grandparent, or grandchild) who is suffering a serious health condition, to bond with a new child (including absences required to meet adoption and foster care obligations), or to assist with needs arising from when a family member is deployed abroad on active military service. N.Y. Workers' Compensation Law § 200, *et seq*. PFL may also be used for the care of a minor or dependent child subject to a mandatory or precautionary order of quarantine under certain circumstances.

PFL benefits are fully funded through employee payroll deductions. Eligible employees are provided up to 12 weeks of PFL, paid at a rate of 67 percent of the employee's average weekly wage or 67 percent of the average New York statewide weekly wage, whichever is less. Some part-time employees may waive PFL benefits such that they do not make payroll contributions. Employees returning from PFL are entitled to return to the same position or one with an equivalent salary and terms and conditions of employment.

The State maintains an informational website to provide guidance regarding PFL for employers, employees, and medical providers.

3. Military Leave

Private employers are prohibited from discharging employees for taking military leave. Employees on active duty must be reemployed unless an exception applies. The spouse of a member of the armed forces who has been deployed during a period of military conflict to a combat theater or combat zone of operations is allowed up to 10 days unpaid leave. N.Y. Military Law §§ 317, 318; N.Y. Labor Law § 202-i.

4. Voting Leave

Employers must provide employees with up to two hours of ***paid*** time off (PTO)—and up to two additional hours of ***unpaid*** time off—to vote if they do not have "sufficient time to vote." N.Y. Election Law § 3-110. An employee is deemed to have sufficient time to vote if the employee has four consecutive hours to vote either from the opening of the polls to the beginning of the employee's work shift or four consecutive hours between the end of the employee's work shift and the closing of the polls. Employees must take their time off to vote at the beginning or end of the workday, unless otherwise mutually agreed upon. An employee must request time off to vote at least two but not more than ten workdays prior to the election day. Not less than ten working days before every election, every employer must conspicuously post a notice setting forth voting leave rights and keep it posted until the close of the polls on election day.

5. Jury Duty Leave

Employers must provide unpaid leave to employees who are summoned to serve on a jury, provided that employers with more than ten employees pay $40 of such juror's daily wages during the first three days of jury service. N.Y. Judiciary Law § 519.

6. Adoption Leave

Employers must provide the same benefits to pregnant women and adoptive parents of preschool children (and handicapped or hard to place children under age 18) as provided to other temporarily disabled employees. N.Y. Exec. Law §§ 292, 296; N.Y. Labor Law § 201-C.

7. Blood Donation Leave

Employers that employ twenty or more employees at at least one worksite are required to provide leave for blood donations. An employee who works an average of twenty or more hours per week is entitled to three hours of unpaid leave each calendar year for the purpose of donating blood off the employer's premises. However, an employer need not provide blood donation leave if it allows such employees—without use of accrued paid time off—to donate blood during work hours at least two times per year at a convenient time and place set by the employer, such as a blood drive at the place of employment. N.Y. Labor Law § 202-j.

8. Bone Marrow Leave

Private employers with at least 20 employees must grant unpaid leave to employees who undergo a procedure to donate bone marrow, provided that the combined amount of leave may not exceed 24 work hours unless otherwise agreed. N.Y. Labor Law § 202-a.

9. Volunteer Emergency Responders Leave

New York employers must provide unpaid leave to employees who serve as volunteer firefighters or volunteer ambulance personnel whenever the governor declares a state of emergency. N.Y. Labor Law 202-l. In the event of any declared local or state emergency, employers must grant an employee's request for leave for as long as the employee is engaged in the actual performance of his or her duties as an emergency responder. The employer must grant the request unless the leave would cause an undue hardship on the conduct of the employer's business. Employees requesting emergency response leave must provide written documentation from the head of the employee's fire department or volunteer ambulance service notifying the employer of the employee's status as a volunteer emergency responder. After leave has been granted, employers may request a notarized statement from the head of the employee's fire department or volunteer ambulance service certifying the period of time that the employee responded to the emergency.

10. Vacation and Other Personal Leave

New York does not require employers to provide paid vacation, holiday, bereavement, or other personal time off. An employer may voluntarily adopt such policies for paid or unpaid time off and must notify its employees in writing or by publicly posting its policy. N.Y. Labor Law § 195(5). An employer's policy may provide that accrued but unused vacation or other paid time off is not paid out at the time of termination of employment.

11. Paid COVID-19 Quarantine Leave

Employees under mandatory or precautionary orders of quarantine related to COVID-19 may be entitled to paid leave at their regular rate of pay, depending on the size and revenue of their employers. Employers may not charge this time against any other paid time off (PTO) the employee has accrued.

Employees entitled to paid quarantine leave may use it for a maximum of three orders of quarantine. However, employees are not entitled to paid quarantine leave if:

- they are asymptomatic and able to work remotely; or
- they are under an order of quarantine because they returned from travel, not under the direction of their employer, and their employer notified the employee of the Centers for Disease Control and Prevention (CDC) travel health notice and the limitations on receiving paid benefits prior to the travel.

To the extent an employee is under mandatory quarantine for longer than he or she is entitled to the paid leave, the employee may collect both PFL and short-term disability benefits for the remainder of the quarantine.

12. Paid COVID-19 Vaccination Leave

New York employees are entitled to up to four hours of paid leave per COVID-19 vaccine. Employers may not charge this time against any other PTO the employee has accrued. The law is currently set to expire at the end of 2023.

13. Nursing Mothers and Lactation Accommodations

Employers must provide reasonable unpaid break time or permit employees to use paid break time or meal time each day to express breast milk for their nursing child for up to three years following child birth. Employers may not discriminate against an employee who chooses to express breast milk in the workplace, and must provide notice to employees of their rights under the law (via posting, company handbook, or personal notice). N.Y. Labor Law § 206-c.

Employers with four or more employees in New York City also must provide employees needing to express breast milk with access to a lactation room, unless it would pose an undue hardship. The lactation room must be a sanitary place, other than a restroom, that can be used to express breast milk, shielded from view and free from intrusion. The lactation room must also include at least an electrical outlet, a chair, a surface on which to place a breast pump and other personal items, and nearby access to running water. If the room designated for lactation is also used for other purposes, then (i) the sole function of the room must be as a lactation room while an employee is using the room to express breast milk, and (ii) the employer must provide notice to other employees that the room is given preference for use as a lactation room. Employers also must provide a written breastfeeding policy to each employee upon hire and annually thereafter, as well as to employees returning to work after the birth of a child. The NYCCHR has published a model policy. N.Y.C. Admin. Code § 8-102.

With respect to employees outside New York City, employers must make "reasonable efforts" to provide a room or other location, in close proximity to the work area, where an employee can express milk in privacy and can store her expressed milk. Effective June 7, 2023, however, the "reasonable efforts" standard is eliminated. Instead, employers must, upon request by an employee who chooses to express breast milk in the workplace, designate a room or other location to be made available to the employee for that purpose, with essential features similar to those required under New York City law, and must have a written policy regarding the right of nursing employees to express breast milk. The New York State Department of Labor is required to develop a written policy regarding the rights of nursing employees to express breast milk in the workplace, and, once that policy is issued, employers must adopt and provide the written policy to its employees upon hire and to all current employees on an annual basis, as well as to employees when they return to work following the birth of a child.

14. Prohibition on Discipline or Discrimination for Legally Protected Absences

Effective February 19, 2023, employers are prohibited from discriminating or retaliating against employees for any absences that are legally protected under local, state, or federal law. Specifically, employers may not assess any demerit, occurrence, point, or deduction from an allotted bank of time, which subjects or could subject an employee to disciplinary action based upon the use of legally protected absences, such as may occur under certain "no fault" attendance policies. An employee subjected to discipline or discrimination for a lawful absence may bring an action for damages, and the NYSDOL also may assess civil penalties. N.Y. Labor Law § 215(1)(a).

B. New York City

1. New York City Earned Safe and Sick Time Act

Private employers must provide sick and safe time to their employees who work in New York City. N.Y.C. Admin. Code §§ 20-911, *et seq*. The New York City Earned Safe and Sick Time Act (ESSTA) provides that, for every thirty hours an employee works, the employee must accrue a minimum of one hour of either paid or unpaid sick and safe time up to a maximum amount. The maximum amount of sick leave for which an employee is eligible in a calendar year, and whether such leave is paid or unpaid, depends on the size of the employer, as follows:

- Employers with 4 or fewer employees must provide up to 40 hours of *unpaid* safe and sick leave if the employer had a net income of less than $1 million in the previous tax year.

- Employers with 4 or fewer employees must provide up to 40 hours of *paid* safe and sick leave if the employer had a net income of $1 million or more in the previous tax year.

- Employers with at least 5 but not more than 99 employees must provide up to 40 hours of *paid* sick and safe time per calendar year.

- Employers with 100 or more employees must provide up to a maximum of 56 hours of paid sick and safe time per calendar year.

An employee may use leave in partial-day increments, but an employer may set a minimum increment of not more than 4 hours. Unused sick leave must be carried over to the next calendar year; however, an employer may cap annual usage at 40 hours (for small employers) or 56 hours (for employers with 100 or more employees).

Employers may not require employees to provide verifying documentation in connection with sick or safe leave that lasts less than 4 consecutive (scheduled) workdays or shifts.

In lieu of tracking employee accruals, an employer may front-load the full amount of leave to the employee at the beginning of the calendar year. Upon termination of employment, the employer is not required to pay for accrued but unused sick and safe time.

The ESSTA requires that employers provide all employees with a notice of employee rights. The ESSTA also requires that employers conspicuously post the notice in an area that is visible and accessible to employees.

An employer is in compliance with the ESSTA if it provides aggregate annual sick and personal time to employees that is at least equal to the number of hours required by law, provided that an employee is permitted to take such time without any restrictions other than as set forth in the law.

a. Sick Leave

Eligible sick leave includes time off due to:

- the employee's mental or physical illness; injury or health condition; need for medical diagnosis, care, or treatment; or need for preventive medical care;

- care of a family member needing such medical diagnosis, care, treatment, or preventive medical treatment;

- closure of the place of business due to a public health emergency (as declared by the commissioner of health and mental hygiene or the mayor); or

- care of a child whose school or childcare provider is closed due to a public health emergency; however, the mayor may suspend the ESSTA for the duration of any public disaster.

A "family member" is defined to include an employee's child, spouse, domestic partner, parent, sibling (including half siblings, step siblings, and adopted siblings), grandchild, grandparent, or the child or parent of an employee's spouse or domestic partner.

b. Safe Leave

Employees are permitted to take safe time if they are victims of a family offense matter, sexual offense, stalking, or human trafficking, or if a family member has been a victim of such crimes, in the following circumstances:

- to obtain services from a domestic violence shelter, rape crisis center, or other shelter or services program for relief from a family offense matter, sexual offense, stalking, or human trafficking;
- to participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members from future family offense matters, sexual offenses, stalking, or human trafficking;
- to meet with a civil attorney or other social service provider to obtain information and advice on, and prepare for or participate in, any criminal or civil proceeding, including but not limited to, matters related to a family offense matter, sexual offense, stalking, human trafficking, custody, visitation, matrimonial issues, orders of protection, immigration, housing, discrimination in employment, or consumer credit;
- to file a complaint or domestic incident report with law enforcement;
- to meet with a district attorney's office;
- to enroll children in a new school; or
- to take other actions necessary to maintain, improve, or restore the physical, psychological, or economic health or safety of the employee or the employee's family member or to protect those who associate or work with the employee.

There is no private right of action under the ESSTA. The New York City Department of Consumer and Worker Protection is charged with its enforcement and is empowered to assess penalties of $50 per employee for failure to provide the required notice, as well as additional civil penalties and restitution for other violations of the law.

2. NYC Paid Child Vaccination Leave

Employees who are parents are entitled to up to four hours of paid time off—in addition to other accrued PTO—at their regular rate of pay to (1) accompany a child to receive a COVID-19 vaccination, or (2) care for a child who is experiencing side effects from a COVID-19 vaccine injection. This leave is per COVID-19 injection per child under the age of 18 (or disabled dependent). Employees must be paid on the next regular payday following the period in which they use child vaccination leave. This leave must be in addition to leave already provided under the ESSTA. The law is set to expire at the end of 2022.

IV. EMPLOYEE NOTICES AND RECORDS

A. Mandatory Notices

1. Workplace Posters

Every employer must keep posted in a conspicuous place in its establishment a digest and summary of New York's minimum wage law or applicable wage order. N.Y. Labor Law § 661.

New York also requires numerous posters regarding compliance with the criminal conviction law, discrimination law, employment of minors, health and safety, unemployment insurance, workers' compensation and benefits, and no-smoking signs. The New York State Department of Labor website has a list of posting requirements and model posters.

All posters that are required by state or federal law to be posted physically in the workplace also must be made available to employees electronically, either through the employer's website or by email. Employers must provide notice that all required physical posters are also available electronically.

The NYCHRL requires New York City employers to provide written notice to their employees regarding the right to be free from discrimination in relation to pregnancy, childbirth, and a related medical condition. The NYCCHR has created a Pregnancy and Employment Rights poster, available in seven languages, to satisfy the requirement.

2. Leave Policies

Employers must notify its employees in writing of their rights under the federal Family and Medical Leave Act (FMLA), New York Paid Family Leave Act, New York Paid Sick Leave Law, and the New York Blood Donation Leave Act. New York City employers must additionally notify employees of their rights under New York City's Earned Safe and Sick Time Act. Employers must also notify employees in writing or by public posting of its own policy on sick leave, vacation, personal leave, holidays, and hours. N.Y. Labor Law § 195(5).

3. Electronic Monitoring

New York employers that monitor or intercept the telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage of employees—or wish to retain the right to do the same—must give prior written notice upon hiring to, and obtain written acknowledgment from, all employees who may be subject to such monitoring.

A notice of electronic monitoring must also be posted in a conspicuous place readily available for viewing by the employees who may be subject to such monitoring. The notice must state the following:

> any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times by any lawful means.

The law does not apply to processes that:

- manage email, voicemail, or internet systems;
- are not targeted to an individual; and
- are performed solely for the purpose of system maintenance and/or protection.

B. Recordkeeping

1. Payroll Records

Employers must establish, maintain, and preserve at least six years of contemporaneous, true, and accurate payroll records showing employees' hours worked each week, the rate or rates of pay and basis thereof, any deductions claimed as part of the minimum wage, and net wages for each employee. N.Y. Labor Law §§ 195(4), 661. For all employees who are nonexempt, the payroll records shall include the regular hourly rate or rates of pay, the overtime rate or rates of pay, the number of regularly worked hours, and the number of overtime hours worked. For all employees paid a piece rate, the payroll records shall include the applicable piece rate or rates of pay and number of pieces completed at each piece rate. The NYSDOL is entitled to inspect employers' payroll records at any reasonable time.

2. Right to Access Personnel Files

New York does not require private employers to give their employees access to personnel files. *Cf.* N.Y. Civ. Rights Law § 50-a; *Bigelow v. Board of Trustees*, 63 N.Y.2d 470, 472 (1984).

V. RESTRICTIVE COVENANTS, ARBITRATION AGREEMENTS, & SETTLEMENTS

A. Restrictive Covenants

Restrictive covenants are agreements between an employer and employee that restrict the post-employment activity of the employee. The three primary types of restrictive covenants are (1) noncompetition agreements, restricting an employee's right to work for competitors; (2) nonsolicitation agreements, restricting an employee's right to solicit their employer's customers, clients, or employees; and (3) confidentiality agreements, restricting an employee's right to disclose trade secrets or other proprietary information derived from their employment.

Restrictive covenants are enforceable in New York to the extent they (1) are necessary to protect the employer's legitimate interests, (2) do not impose an undue hardship on the employee, (3) do not harm the public, and (4) are reasonable in time and geographic scope. *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp*, LLC, 813 F. Supp. 2d 489 (S.D.N.Y. 2011). Nonsolicitation agreements are generally viewed as more reasonable and less burdensome than noncompetes because the departing employee is not precluded from pursuing his or her livelihood. *Genesee Val. Trust Co. v. Waterford Group, LLC*, 130 A.D.3d 1555 (4th Dep't 2015).

Confidentiality agreements may not interfere with an employee's right to discuss wages, hours, or other terms or conditions of employment with employees, nonemployees, or the media, nor may they prevent the disclosure of factual information related to any future claim of discrimination unless the employee is notified they are not prohibited from speaking to civil and criminal enforcement authorities. *NLRB v. Long Island Ass'n for Aids Care*, 870 F.3d 82 (2d Cir. 2017); N.Y. Gen. Oblig. Law § 5-336(2).

The "employee-choice doctrine" is an exception to the rule that restrictive covenants must be reasonable. The doctrine holds that if, upon the voluntary separation of an employee, an

employer conditions a post-employment benefit upon that employee's signing of a restrictive covenant, courts will enforce the covenant without requiring it to be reasonable. *Morris v. Schroder Capital Mgmt. Int'l*, 7 N.Y.3d 616 (2006).

If a restrictive covenant is overly broad, courts will usually sever the offending provision and reform the agreement to make it reasonable. However, such partial enforcement will only be granted if the court finds that the employer had "in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing." *BDO Seidman v. Hirshberg*, 93 N.Y.2d at 394 (1999).

At-will employment is sufficient consideration to support a restrictive covenant when the agreement is entered into at the commencement of employment. *Zellner v. Stephen D. Conrad, M.D., P.C.*, 183 A.D.2d 250 (1992). Continued employment is generally also considered adequate consideration for a restrictive covenant entered into after the commencement of at-will employment if the employment relationship continues for a substantial period after parties execute the restrictive covenant. *Id*.

B. Mandatory Arbitration Clauses

New York has attempted to prohibit employers from requiring employees to sign agreements that require mandatory binding arbitration of claims relating to any form of employment discrimination. N.Y. C.P.L.R. § 7515. However, the vast majority of courts have found C.P.L.R. § 7515 to be preempted by the Federal Arbitration Act, which generally favors arbitration. *Wyche v. KM Sys., Inc.*, 2021 U.S. Dist. LEXIS 74887, at *2 (E.D.N.Y. 2021); *Rollag v. Cowen Inc.*, 2021 U.S. Dist. LEXIS 39942, at *5 (S.D.N.Y. 2021); *Fuller v. Uber Tech.*, 2020 NYLJ LEXIS 1618, at *5 (Sup. Ct., N.Y. Cty. 2020); *Gilbert v. Indeed, Inc*, 2021 U.S. Dist. LEXIS 9717, at *15 (S.D.N.Y. 2021).

C. Nondisclosure Provisions in Settlements

New York employers are prohibited from requiring nondisclosure clauses in any settlement or other resolution of any claim, "the factual foundation for which involves discrimination, in violation of laws prohibiting discrimination, including but not limited to, [the NYSHRL]" unless the condition of confidentiality is the employee's preference. N.Y. Gen. Obligations Law § 5-33(1)(a)); N.Y. C.P.L.R. § 5003-b. If such language is included, the employee must have 21 days to consider such a term or condition, and his or her preference must be memorialized in an agreement signed by all parties. The twenty-one-day period cannot be waived or shortened. The employee must then have at least seven days following the execution of such agreement to revoke. The NYSDOL, in consultation with the NYSDHR, has published detailed guidance regarding compliance with this restriction.

Additionally, any nondisclosure term is "void to the extent that it prohibits or otherwise restricts the individual from: (i) initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, state, or federal agency; or (ii) filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled." N.Y. Gen. Obligations Law § 5-336(1)(c).

Further, any agreement entered into on or after January 1, 2020, "that prevents the disclosure of factual information related to any future claim of discrimination is void and unenforceable, unless such provision notifies the employee or potential employee that it does not prohibit him or her from speaking with law enforcement," the EEOC, NYSDHR, a local commission on human rights, or an attorney retained by the employee.

VI. MISCELLANEOUS

A. Independent Contractors

While independent contractors do not qualify for protection under many New York labor laws, in recent years the prohibitions on discrimination in the workplace have been extended to cover nonemployees, including independent contractors (as discussed above). In addition, employers that misclassify employees as independent contractors may be liable for failing to provide such workers with employment-related benefits—such as minimum wage or overtime pay, unemployment insurance, and other benefits.

In determining whether a worker is an employee or independent contractor, New York considers the actual duties of the worker and the relationship between the worker and employer, rather than the label given to the relationship. An employer-employee relationship exists when the employer exercises significant supervision, direction, and control over the manner, means, and result of the work performed. Conversely, independent contractors are generally free from supervision, direction, and control in performing their duties, with employers only controlling the results of the work. *Matter of Vega*, 2020 NY Slip Op 02094, *2-3 (2020); *Matter of Yoga Vida NYC, Inc.*, 28 N.Y.3d 1013 (2016).

New York City: Gig workers in the food delivery industry have specific rights and protections, covering standards of payment, bathroom access, gratuity policies, insulated delivery bags, and distance and route limits. Before drivers accept delivery, food delivery apps must share route details and disclose customer tips. Apps must also provide delivery drivers with a free insulated bag after six deliveries, and compensate delivery drivers once a week. Effective January 1, 2023, new rules will establish a minimum pay rate and method of determining minimum payments for delivery workers, without including gratuities.

B. Data Privacy

The Stop Hacks and Improve Electronic Data Security Act (SHIELD Act) expanded the requirements for notifying affected parties in the event of a data breach and sets forth a demanding list of security measures that must be implemented to "maintain reasonable safeguards" to protect private information.

C. Fingerprinting Employees

An employer may not require employees to be fingerprinted as a condition of obtaining or continuing employment, except as required by law and subject to certain exceptions for hospitals and government agencies. N.Y. Labor Law §§ 201-a. The prohibition extends to biometric timekeeping systems that scan fingerprints, even if the system does not store the fingerprints. NYSDOL Opinion Letter (RO-10-0024). However, the "voluntary" use of a biometric time clock

that scans fingerprints is permitted. NYSDOL has interpreted "voluntary" to mean informed consent.

D. New York Health and Essential Rights (HERO) Act

The New York HERO Act requires all New York employers to adopt a written airborne infectious disease exposure prevention plan. Employers may adopt the model standard created by the New York State Department of Health or establish an alternative plan that meets or exceeds the model plan's requirements. If the employer intends to establish an alternative plan, and its employees are represented by a union, the employer must negotiate with the union over the plan.

The plan must be included in an employee handbook, if the employer has one, and must be posted in a visible and prominent location within each worksite. The plan need only be "activated" when the commissioner of health has identified an airborne disease that poses a serious risk of harm to public health.

The act also forbids retaliation against any employee who in good faith reports violations of the act or concerns about airborne disease exposure to authorities, or who refuses to work in an environment he or she reasonably believes creates an unreasonable risk of exposure to an airborne infectious disease, provided that risk results from the employer's failure to follow the HERO Act or any other applicable law, and the employee notifies and gives the employer an opportunity to cure those unlawful conditions.

The act also requires all private employers with at least 10 employees to allow employees to establish and administer a joint employer-employee committee authorized to raise workplace health and safety issues and evaluate applicable policies.

(Last updated February 1, 2023)