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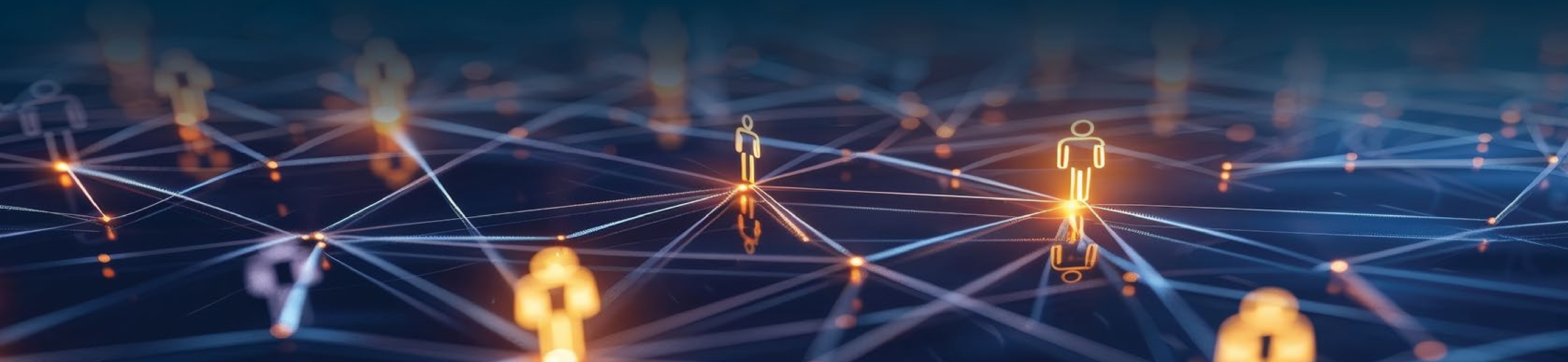
29th Annual Labor & Employment Conference

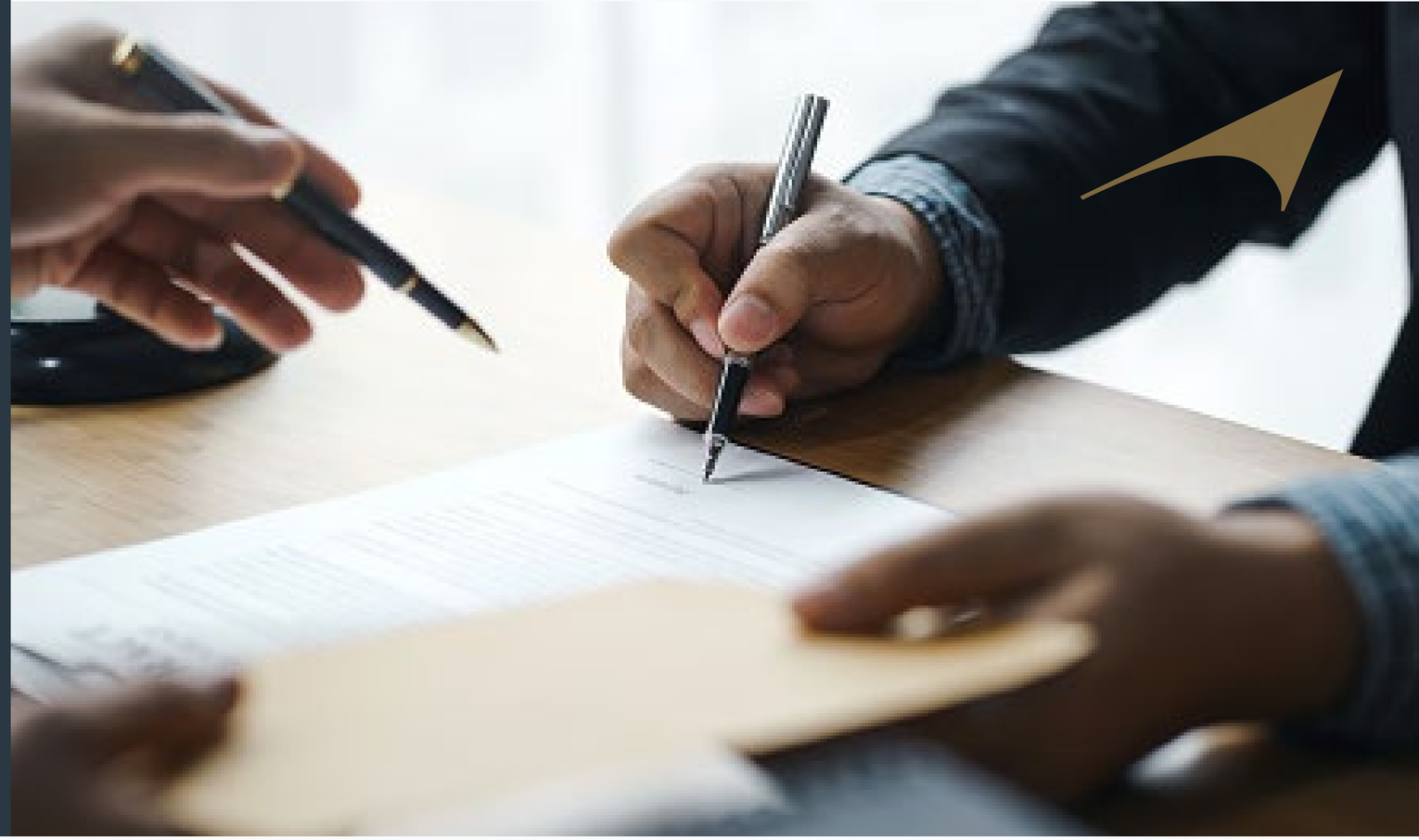
Tuesday, November 19, 2024



Injured and Disabled Employees:

Managing Employee Performance Amidst Statutory Leave and Disability Protections

2024 Labor & Employment Conference



November 19, 2024

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Agenda

- Family and Medical Leave Act (FMLA)
- New York Paid Family Leave (PFL)
- New York State Paid Sick Leave (PSL)
- New York Paid Prenatal Leave
- Leave as a Reasonable Accommodation
- Pregnant Workers Fairness Act (PWFA)
- New York Legally Protected Absence Law
- Hypotheticals and Practical Applications

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Family and Medical Leave Act

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FMLA

Applicability

- The FMLA generally requires employers with 50 or more employees to provide eligible employees up to 12 weeks of leave per 12-month period.
- Eligible employees are those who:
  - Have been employed by the employer for at least 12 months;
  - Have worked at least 1,250 hours for the employer during the 12-month period preceding the leave; and
  - Work in a location where the employer has 50 or more employees within a 75-mile radius.
    - For remote employees, employers must consider the physical office location to which the remote employee reports and from which he or she receives work as the work location.
    - If a remote employee's reporting office employs 50 or more employees within a 75-mile radius (and he or she otherwise meets the eligibility requirements), the remote employee would be eligible for FMLA leave.

FMLA

Qualifying Reasons for Leave

- Eligible employees may take FMLA leave for any of these qualifying reasons:
  - Birth of a child or placement of a child with the employee for adoption or foster care, to care for the child within one year of birth or placement.
  - To care for a family member (i.e., child, spouse, or parent) who has a serious health condition.
  - For an employee's serious health condition rendering the employee unable to perform the functions of his or her position.
  - Qualified exigencies resulting from a covered servicemember called to duty in the Armed Forces.
  - To care for a covered servicemember who is injured or becomes ill while on covered active duty.

FMLA

Leave for Pregnancy or Childbirth

- Expectant mothers are entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of a child.
  - In appropriate circumstances, the leave may begin before the birth of the child.
  - An expectant mother is entitled to FMLA leave for prenatal care or if her condition renders her unable to work.
    - Leave is available for incapacity due to pregnancy even if the expectant mother does not receive treatment from a healthcare provider because of the absence and even if the absence does not last for more than three consecutive days.
- A spouse is entitled to FMLA leave if needed to care for a pregnant spouse who is incapacitated, if needed to care for her during her prenatal care, or if needed to care for her following the birth of a child if she has a serious health condition.

FMLA

FMLA

Intermittent Leave

- Leave can be taken intermittently where it is occasioned by a serious health condition, a covered servicemember's injury or illness, or a qualifying exigency.
  - Intermittent includes (a) leave taken in separate blocks of time, or (b) on a reduced schedule basis.
  - Intermittent leave may be taken in the smallest increment of time the employer allows for the use of other forms of leave, as long as no more than one (1) hour.
  - Intermittent leave can be taken for birth, placement, or bonding, but only if the employer and employee agree.

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FMLA

Intermittent Leave

- An employer may temporarily transfer an employee who is taking intermittent or reduced schedule leave to an available alternative position for which the employee is qualified, and which better accommodates recurring periods of leave than the regular position.
  - The position to which the employee transfers must have the same pay and benefits as the previous position, although the duties may be different.
  - This option may be used only in situations where the need for intermittent or reduced schedule leave is foreseeable. It is not available for unforeseeable intermittent or reduced schedule leave.

FMLA

Employee's Notice Obligations

- An employee must provide notice of the need to take FMLA leave.
  - Where the need for leave is **foreseeable**, an employee must give the employer at least 30 days' notice when it is possible and practical to do so.
  - Where the need for leave is **unforeseeable**, the employee must give notice as soon as is practicable under the circumstances.
    - It should generally be practicable for the employee to provide notice of leave that is unforeseeable within the time required by the employer's usual and customary notice requirements.

FMLA

Employer's Notice Obligations

- Within five (5) business days of the employee's leave request, the employer must provide the employee with (a) the FMLA Eligibility Notice & Rights and Responsibilities Notice, and (b) if requiring an FMLA certification form, the appropriate certification form with the employer portion completed.
- An employer may request an FMLA medical certification form when an employee has requested leave due to the serious health condition (employee or family member), a covered servicemember's illness/injury, or a qualifying exigency.
- An employer may also request reasonable documentation or a statement to establish the relationship between the employee and the family member at issue (e.g., child's birth certificate, a court document, documents regarding foster care or adoption-related activities).

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FMLA

Employer's Notice Obligations

- Within five (5) business days of having enough information to determine whether leave is FMLA-qualifying, the employer must provide the employee with notice that the leave will be designed as FMLA-qualifying.
- This FMLA Designation Notice should:
  - Be provided for each FMLA-qualifying reason per applicable 12-month period.
  - Identify any substitution of paid leave or fitness-for-duty requirements.
  - Provide the amount of leave that is designated and counted against the employee's FMLA entitlement, if known.
    - If the amount of leave is not known at the time of the designation, the employer must provide this information to the employee upon request, but not more often than once in a 30-day period and only if leave is taken in that period.
- If the requested leave is not FMLA-qualifying, the notice may be a written statement that the leave does not qualify and will not be designated as FMLA.

FMLA

Interaction with Paid Time Off

- During any unpaid leave under the FMLA, employers may require employees to use any type of accrued and unused paid time off (including vacation, sick, and personal time) concurrently with FMLA leave.
  - Because an employee is not “unpaid” while receiving, for example, paid disability benefits or workers’ compensation benefits, the above rule does not apply, and an employer cannot require employees to use their paid time off concurrently with FMLA leave.
  - But where an employee’s pay is only partially replaced by disability benefits or workers’ compensation (as is typically the case with such benefits), the employer and employee may be able to agree to have paid leave supplement such benefits.

FMLA

Interaction with Paid Time Off

- If the employer does not require the use of paid time off during unpaid FMLA, employees have the right to use their paid time off during such FMLA leave.
- Employers must make employees aware of any additional procedural requirements in conjunction with the use of paid leave.
  - This information should be provided to employees in the Rights & Responsibilities Notice.

New York State Paid Family Leave

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NYSPFL

Covered Employers

- All private sector employers with limited exceptions.
  - For example, certain Native American enterprises, domestic employers, and businesses with no employees.
- Public employers are covered only if they elect to be covered.

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NYSPFL

Covered Employees

- Employees whose regular schedule is 20 or more hours per week and who have been “in employment” for at least 26 consecutive work weeks immediately preceding the first full day of PFL.
- Employees whose regular schedule is under 20 hours per week and who have worked 175 days “in such employment” immediately preceding the first full day of PFL.
- Excludes workers who fall outside of the definition of “employee” for purposes of PFL and NYS Disability. For example:
  - Persons engaged in a professional or teaching capacity for a religious, charitable or educational institution.
  - Executive officers of religious, charitable, or educational institution.
  - Owners/shareholders of partnerships, LLCs, LLPs, sole proprietorships without employees.

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NYSPFL

Available Leave

- An eligible employee may take up to twelve (12) weeks of PFL leave in any 52-week period, which is computed retroactively with respect to each day for which PFL benefits are claimed.
  - Maximum of 26 weeks of combined NYS Disability Benefits and PFL in a 52-week period.
- Employees may take PFL intermittently, rather than in a consecutive block, but in increments no smaller than full day increments.

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NYSPFL

Qualifying Reasons for Leave

- An eligible employee may take PFL for any of the following reasons:
  - To care for a “family member” with a serious health condition;
  - To bond with a child during the first 12 months after the child’s birth or placement for adoption or foster care or to meet adoption or foster care obligations.
  - To meet “qualifying exigencies” (as defined in the FMLA) arising from the fact that a spouse, domestic partner, child, or parent of the employee is on active duty or “has been notified of an impending call to active duty” in the U.S. Armed Forces.

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NYSPFL

Monetary Benefits

- PFL benefits are paid by the employer's PFL insurance carrier as follows:
  - 2023: 67% of employee's Average Weekly Wage ("AWW"), capped at a maximum of $1,131.08 per week.
  - January 1, 2024: 67% of employee's AWW, capped at a maximum of $1,151.16 per week.
  - January 1, 2025: 67% of the employee's AWW, capped at a maximum of $1,177.32 per week.
- The caps are the equivalent of 67% of the New York State AWW.

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NYSPFL

Contributions

- PFL may be funded by employees through payroll deductions at a contribution rate set by the New York Department of Financial Services.
  - 2023: The employee contribution was 0.455% of an employee's gross wages each pay period, capped at an annual contribution of $399.43.
  - 2024: The employee contribution is 0.373% of an employee's gross wages each pay period, capped at an annual contribution of $333.25.
  - 2025: The employee contribution will be 0.388% of an employee's gross wages each pay period, capped at an annual contribution of $354.53.

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NYSPFL

Notice Obligations

- An employee must provide notice of the need to take PFL leave.
  - Where the need for leave is **foreseeable**, an employee must give the employer at least 30 days' notice when it is possible and practical to do so.
    - If 30 days is not possible (e.g., due to lack of knowledge, change in circumstance, a medical emergency, short-notice deployment), notice must be provided as soon as practicable under the circumstances, which ordinarily means that same day or the next business day.
  - Where the need for leave is **unforeseeable**, the employee must give notice as soon as is practicable under the circumstances.
    - It generally should be practicable for the employee to provide notice within the time prescribed by the employer's usual and customary notice requirements applicable to such leave.
  - When an employee takes intermittent PFL, the employer may require the employee to provide notice as soon as is practicable before each day of intermittent leave.

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NYSPFL

Interaction with Paid Time Off

- An employer cannot require employees to use any type of accrued and unused paid time off (including vacation, sick, and personal time) concurrently with PFL leave.
- But an employer may permit an employee to elect whether to use any of his or her paid time off (including vacation, sick, and personal time) in order to receive full salary. Two potential options:
  - The employee uses his or her paid time off accruals to receive full pay from the employer and the employer submits a request for reimbursement to its PFL insurance carrier for any PFL benefits that would have been paid to the employee for the period the paid time off was used (so that employees receive only 100% of his or her regular salary/wages and not more).
  - The employee's paid time off accruals are paid *concurrently with* the PFL benefits, but only enough to "top off" the employee to 100% pay.

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NYSPFL

Key Distinctions with FMLA

- PFL covers employees who are not covered by the FMLA (i.e., employees who have not worked 1,250 hours in preceding year, employees who work for smaller employers)
- PFL does not apply to the employee's own "serious health condition"
- "Family member" under the PFL is broader than under the FMLA. Specifically, it includes:
  - Domestic partners
  - Grandparents
  - Grandchildren
  - Parents-in-law
  - Domestic partner's child
  - New as of 2023: Siblings (including biological, adopted, step, half)
- Employer cannot require employees to use paid time off concurrently with PFL leave. May only permit an employee to elect to do so.

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New York Paid Sick Leave

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NYPSL

New York Paid Sick Leave

- Employers with 0-4 employees:
  - If net income is $1 million or less, must provide up to 40 hours of unpaid sick leave.
  - If net income is greater than $1 million, must provide up to 40 hours of paid sick leave.
- Employers with 5-99 employees must provide up to 40 hours of paid sick leave per year.
- Employers with 100+ employees must provide up to 56 hours of paid sick leave per year.
- Sick leave must accrue at a rate not less than one hour for every thirty hours worked.
  - Employers may choose to frontload the full amount of paid sick time at the start of each year.
- All employees, whether full-time, part-time, seasonal, per diem, etc., are covered by the New York Paid Sick Leave Law.

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NYPSL

Coverage

- For mental or physical illness, injury, or health condition of the employee or the employee's family member – regardless of whether the condition has been diagnosed or requires medical care at the time of the request for leave.
- For the diagnosis, care, or treatment of a mental or physical illness, injury or health condition; or need for medical diagnosis or preventive care for the employee or the employee's family member.
- For victims of domestic violence, family offense matters, sexual offenses, stalking, and human trafficking, including:
  - To obtain services from a domestic violence shelter, rape crisis center, or other services program;
  - 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;
  - 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;
  - 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 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.

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NYPSL

Notice Obligations

- There are no specified notice or time requirements an employee must satisfy to an employer.
- The regulations require, however, that the employee make a verbal or written request to the employer prior to using the accrued sick leave, unless otherwise permitted by the employer.
- Employers must notify employees in writing or by posting a notice in the worksite, prior to the leave being earned, of any restrictions in their leave policy affecting the employees' use of leave, including any limitations on leave increments.

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NYPSL

Documentation

- Where the employee uses paid sick leave for three (3) or more consecutive previously scheduled workdays or shifts, the employer can request documentation confirming eligibility to take sick leave.
  - Requests for documentation must be limited to:
    - An attestation from a licensed medical provider supporting the existence of a need for sick leave, the amount of leave needed, and a date that the employee may return to work; or
    - An attestation from the employee of their eligibility to leave.
  - An employer cannot require an employee or the medical professional providing documentation to disclose the reason for leave, except as required by law.
  - An employer cannot require an employee to pay any costs or fees associated with obtaining medical or other verification of eligibility for use of sick leave.

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Paid Prenatal Leave

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Prenatal Leave

Amendment to NY Labor Law § 196-b (i.e., the Paid Sick Leave Law)

- The New York State Paid Sick Leave Law was amended to add prenatal leave, effective **January 1, 2025**.
- Every employer will be required to provide employees 20 hours of paid prenatal personal leave during any 52-week calendar period.
  - Prenatal personal leave means leave taken for the health care services received by an employee during their pregnancy or related to such pregnancy, including physical examinations, medical procedures, monitoring and testing, and discussions with a health care provider related to the pregnancy.
- This leave is **in addition to** the Paid Sick Leave already provided under the New York State Paid Sick Leave Law.

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Prenatal Leave

Amendment to NYPSL

- Paid prenatal leave may be taken in hourly increments, and benefits for prenatal leave must be paid in hourly installments.
- There is no accrual provision for paid prenatal leave—all employees are entitled to up to 20 hours.
- Employers are not permitted to require identifiable health information for employees seeking paid prenatal leave.

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Leave as a Reasonable Accommodation

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ADA & HRL

General Applicability

- An employee who is a "qualified individual with a disability" may be eligible for leave as a reasonable accommodation under the Americans with Disabilities Act (ADA) and/or the New York State Human Rights Law (HRL).
- To be "qualified" under the ADA/HRL, the individual must:
  - Have the requisite skills, experience, education, licenses, etc. for the job; and
  - Be able to perform the essential functions of the job, either with or without reasonable accommodation.

ADA & HRL

Applicability Under the ADA

- Under the ADA, an “individual with a disability” is “any person who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.”
  - The ADA was amended in 2009 to make it easier for individuals to qualify as disabled.
  - For instance, “major life activities” and “substantially limits” are interpreted quite broadly and do not impose a high bar for establishing a “disability”.

ADA & HRL

Applicability Under the HRL

- Under the HRL, disability means “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.”
  - Also includes having a record of such impairment or a condition regarded by others as such an impairment.
  - The HRL’s definition of “disability” is broader than under the ADA; thus, the HRL covers more conditions as compared to the ADA.

ADA & HRL

Reasonable Accommodations

- An accommodation is defined as a modification or adjustment to the job application process, the work environment, or the manner or circumstance under which the position is customarily performed that enables a qualified individual with a disability to perform the essential functions of that position.
- A **reasonable** accommodation is one that "seems reasonable on its face, i.e., ordinarily or in the run of cases."
- Examples of potentially reasonable accommodations include modified work schedule, extra break time, change in workspace location, exceptions from certain policies, job restructuring, reassignment, and **unpaid leave**.

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ADA & HRL

The Interactive Process

- Generally, it is the employee's responsibility to inform the employer that an accommodation is needed.
- The employer is entitled to know that the individual has a covered disability and that he or she needs an accommodation because of the disability.
- The employer should engage in an "interactive process" with the employee to obtain relevant information and explore potential accommodations.
- Ultimately, the employer has the right to choose among multiple reasonable accommodations, if the chosen accommodation is effective.

ADA & HRL

Undue Hardship Defense

- An employer has a defense to providing a reasonable accommodation if the accommodation would impose an “undue hardship”.
- “Undue hardship” is defined as “significant difficulty or expense incurred” by the employer. Factors considered include:
  - The nature and net cost of the accommodation, taking into consideration the availability of tax credits and deductions, and/or outside funding;
  - The overall financial resources of the facility or facilities, the number of persons employed at such facility, and the effect on expenses and resources;
  - The overall financial resources of the employer, the overall size of its business, the number of its employees, and the number, type and location of its facilities;
  - The type of operation or operations of the employer, including the composition, structure and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer; and
  - The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

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Pregnant Workers Fairness Act & Lactation Accommodation

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PWFA

Pregnant Workers Fairness Act

- The PWFA became effective in June 2023 and applies to employers with 15 or more employees. Final regulations were issued on April 15, 2024.
- Similar to the ADA, the PWFA requires employers to provide reasonable accommodations to employees for "known limitations" related to pregnancy, childbirth, or related medical conditions, unless doing so would cause undue hardship to the employer.
  - "Known limitations" may be modest, minor, or episodic and need not meet the definition of "disability" under the ADA.
- If an employee/applicant cannot perform all essential job functions with reasonable accommodation, he or she can still qualify for accommodations under the PWFA if (a) the inability to perform an essential job function is for a temporary period; (b) the essential job function(s) could be performed in the near future; and (c) the inability to perform the essential function(s) can be reasonably accommodated.

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PWFA

Reasonable Accommodations

- The final rule provides that a "reasonable accommodation" includes "modifications or adjustments" to the "job application process" or "work environment" or "modifications or adjustments" that enable a qualified employee with known limitations under the PWFA "to enjoy equal benefits and privileges of employment," or the "temporary suspension of essential function(s)."
  - An employer cannot require leave from work (whether paid or unpaid) if another reasonable accommodation exists.
- The regulation identifies several "predictable assessments" that will "virtually always" be found to be reasonable accommodations that do not constitute an undue hardship:
  - (1) allowing an employee to carry or keep water near and drink, as needed; (2) allowing an employee to take additional restroom breaks, as needed; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and (4) allowing an employee to take breaks to eat and drink, as needed.

PWFA

PWFA Accommodations

- Examples of reasonable accommodations:
  - Frequent breaks;
  - Schedule changes, part-time work, and paid and unpaid leave;
  - Telework;
  - Parking;
  - Light duty;
  - Making existing facilities accessible;
  - Modifying the environment;
  - Job restructuring;
  - Temporarily suspending one or more essential functions;
  - Acquiring or modifying equipment, uniforms, or devices; and
  - Adjusting or modifying examinations or policies.

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PWFA

Documentation

- Employers may seek documentation verifying the need for an accommodation only when it is reasonable under the circumstances for the employer to determine whether to grant an accommodation.
- Employers may not seek documentation when: (1) need for an accommodation is obvious; (2) the employer has sufficient information to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; (3) the employee is pregnant and requests a work adjustment listed as a "predictable assessment"; (4) the reasonable accommodation is related to a time and/or place to pump at work, other modifications related to pumping at work, or a time to nurse during work hours; and (5) the requested accommodation is available to employees without known limitations under the PWFA pursuant to a covered entity's policies or practices without submitting supporting documentation.
- Even when an employer is justified in seeking verification, employers may only require the minimum information needed to confirm the physical or mental condition that is related to pregnancy, childbirth, or related medical conditions, and that a modification is necessary.
  - Employers may not require a specific form but may require documentation from healthcare provider (which includes a doula, lactation consultant, or industrial hygienist).

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PUMP ACT

PUMP for Nursing Mothers Act ("PUMP Act")

- As part of the Consolidated Appropriations Act of 2023, the federal PUMP Act expanded on the 2010 Break Time for Nursing Mothers Act ("Break Time Act").
  - Break Time Act was an FLSA amendment that entitled most employees to a reasonable break time and private space, other than a bathroom, in which to pump breastmilk during the workday.
  - Overtime-exempt employees (Executive, Administrative, Professional, etc.) were originally excluded from the Break Time Act's protections.
- Under the PUMP Act, time spent pumping breastmilk is paid working time for purposes of calculating minimum wage and overtime if it is taken during an otherwise paid break or if the employee is not completely relieved from duty.
  - No deductions should be taken from the salary of an exempt employee because of pumping breaks.
- Employers with fewer than 50 employees do not need to comply with the Break Time Act and/or PUMP Act when doing so would create an "undue hardship."

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PAID LACTATION BREAKS

New York Labor Law § 206-C

- New York Labor Law was amended, effective June 19, 2024, to further expand the protections of employees to express breast milk at work.
- This law applies to all public and private employers in New York, regardless of the size or nature of their business.
- Employers must provide all employees with **paid break time** to pump breast milk at work.
  - Specifically, the employer must provide a **30-minute paid** lactation break each time a covered employee has a reasonable need to express breast milk.
  - The employer must also allow employees to use existing paid break time or meal periods for any lactation break in excess of 30 minutes.
  - Employees are entitled to this paid break time for up to **three years** following the birth of a child.

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New York Legally Protected Absence Law

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Absence Law

The Legal Standard

- Effective February 19, 2023, NY Labor Law § 215 prohibits New York employers from discriminating or retaliating against any employee because he or she has "used any legally protected absence pursuant to federal, local, or state law."
- This includes:
  - Assessing any demerit, occurrence, any other ***point***, or deductions from an allotted bank of time, which subjects or could subject an employee to disciplinary action, which may include, but not be limited to, failure to receive a promotion or loss of pay.

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Absence Law

A Legally Protected Absence

- "Legally protected absence" includes absences covered by:
  - The Family and Medical Leave Act
  - The New York Paid Family Leave
  - The New York Paid Sick Leave
  - The Americans with Disabilities Act
  - The New York Human Rights Law
  - Jury duty leave
  - Voting leave
  - Blood and bone marrow donation leave
  - Domestic violence leave
  - Military leave
- Does not matter whether the absence is paid or unpaid.

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Absence Law

Violations

- Violations can be punishable by a court or by the Commissioner of Labor, and penalties can include:
  - A civil penalty up to $20,000;
  - Enjoinment of the employer's conduct;
  - Reinstatement;
  - Lost compensation;
  - Front pay;
  - Liquidated damages; and
  - Attorneys' fees.
- "Any employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person who violates subdivision one of this section shall be guilty of a **class B misdemeanor**."

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Questions?

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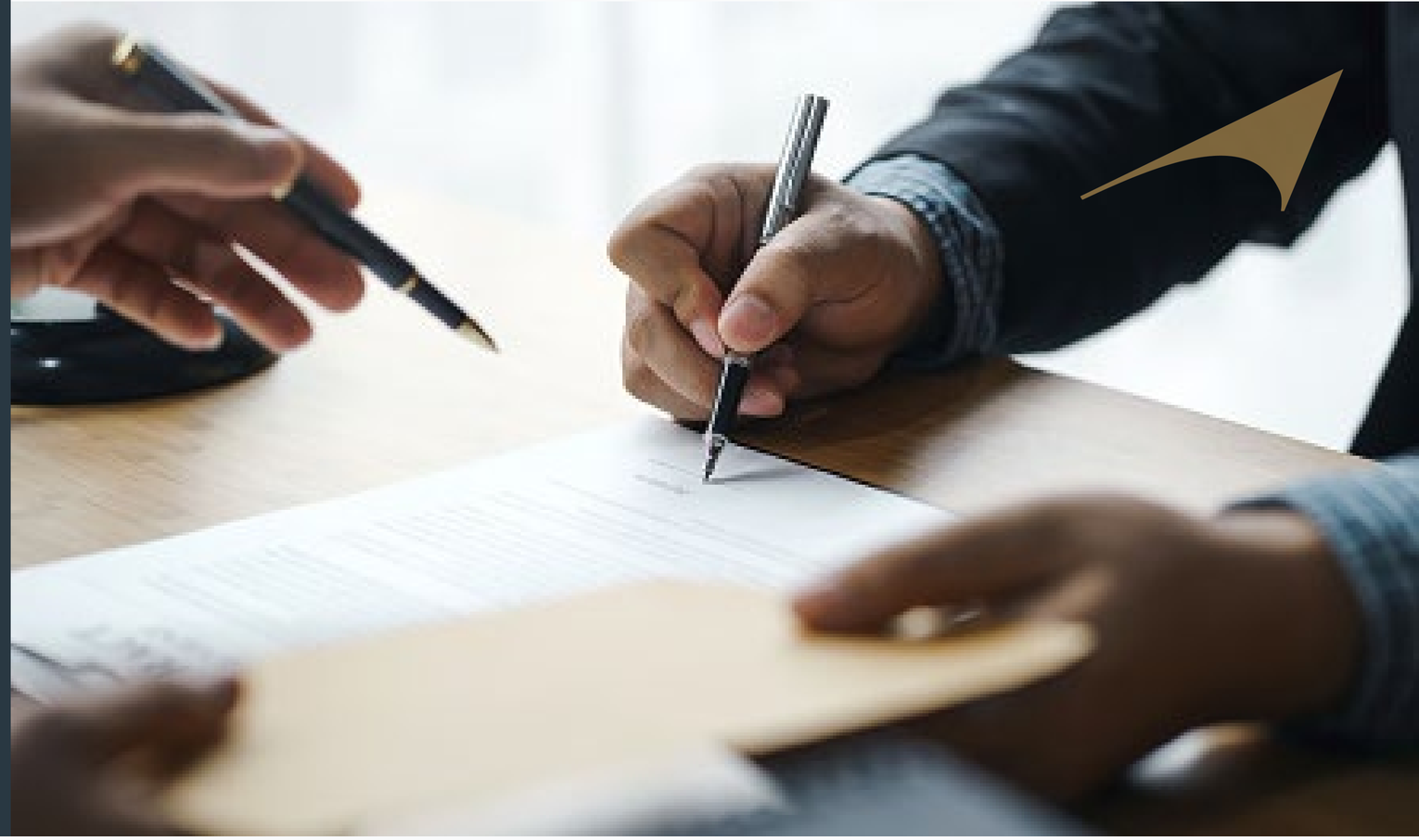
Protecting Assets Through Post-Employment Covenants – What's Still Enforceable?

29th Annual Labor and Employment Conference

November 19, 2024



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Glen P. Doherty, Esq.

Post-Employment Covenants/ Restrictive Covenants

- An agreement between an employer and an employee that restricts the activities of the employee following a separation of employment.

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Many Types; Many Forms

- Non-Compete.
- Non-Solicitation.
  - Employees and customers.
- Non-Disclosure.
- Return of Property.

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The Current Landscape

- Use of restrictive covenants was once commonplace.

- Recent shift to restrict the use of restrictive covenants.

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Legal Developments

- FTC Rule Banning Non-Competes.
  - “Functional” non-competes
- NLRB General Counsel Memo.
- New York State and New York City Legislation.
- New York State’s Test of Enforceability.
- Confidentiality Agreements.

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Legal Developments

FTC Rule Banning Non-Competes – Proposed Final Rule

- The FTC issued its final rule prohibiting "non-competes" **was** scheduled to take effect September 4, 2024.

- The FTC's rule **would** have:

  - Prohibited employers from including "non-compete clauses" in contracts with employees entered after September 4, 2024.

  - Prohibited enforcement, and required recission, of all "non-compete clauses" in employer-employee contracts in effect as of September 4, 2024, except for contracts between employers and "senior executives."

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Legal Developments

FTC Rule Banning Non-Competes – The Blessed Covenants

- The FTC's final rule lists several restrictive covenants that do not violate prohibition against "non-competes clauses."
  - A non-compete clause entered as part of a **"Bona Fide" Sale Of A Business** is permissible so long as the seller has a reasonable opportunity to negotiate the terms.
  - **Bonus Repayment Clause** requiring repayment of a bonus if the employee leaves before a certain period is permissible so long as:
    - repayment amount does not exceed the bonus received, and
    - agreement is not tied to who the employee can work for.
  - **Garden Leave** where employee is still employed and receiving the same total annual compensation and benefits on a *pro rata* basis is permissible.
    - Garden Leave is still permissible even where the employee will be unable to earn a particular aspect of their expected compensation, i.e., a performance bonus.

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Legal Developments

FTC Rule Banning Non-Competes – Ryan LLC, et al. v. FTC

- On August 20, 2024, the Federal District Court for the Northern District of Texas, Dallas Division, set aside the FTC "non-compete" rule.
- The ruling applies nation wide.
- The Court held:
  - that the FTC exceeded its statutory authority in implementing the rule, and
  - that the rule is arbitrary and capricious.
- The FTC appealed to the Fifth Circuit on October 18, 2024.
- Donald Trump elected President on November 5, 2024.

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Legal Developments

National Labor Relations Board General Counsel

- In May 2023, NLRB General Counsel issued a Memo (GC 23-08) addressing non-compete agreements.
  - According to the General Counsel, non-compete agreements "interfere with employees' exercise of rights under Section 7 of the [NLRA]."
  - Excludes managers and supervisors, but covers both union and non-union employees.
  - Except in limited circumstances, "the proffer, maintenance, and enforcement of such agreements violate Section 8(a)(1) of the [NLRA]."
  - Urged Regional Directors to submit to NLRB's Division of Advice involving non-compete provisions.

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Legal Developments

National Labor Relations Board – Permissible Non-Compete Per GC

- Examples of permissible, narrowly tailored non-compete agreements, according to the NLRB's General Counsel:
  - Provisions that clearly restrict only individuals' managerial or ownership interests in a competing business; and
  - "[T]here may be circumstances in which a narrowly tailored non-compete agreement's infringement on employee rights is justified by special circumstances."

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Legal Developments

National Labor Relations Board – December 7, 2023 Advice

- On December 7, 2023, Advice issued a memorandum analyzing how the General Counsel's interpretation of non-competes under the NLRA applied to the specific facts of an unfair labor practice charge, in which it was alleged that an employer's employment agreement and related lawsuit against a former employee violated the Act.
  - Advice evaluated the legality of the lawsuit and the provisions included in the employer's employment agreement related to non-competition, business disclosures (confidentiality), termination, and employee duties.
  - Not really a non-compete (although Advice called it a non-compete), but more akin to a customer non-solicitation provision.
  - Former employee allowed to work for a competitor so long as the former employee did not solicit or seek the business of any of the prior employer's customers, clients or accounts.

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Legal Developments

National Labor Relations Board – December 7, 2023 Advice

- Advice found that the restriction did not violate the Act because it does not prevent an employee from accessing other employment opportunities.
  - Instead, employees were "only restricted from soliciting the employer's existing customers in order to provide similar services for a period of one year."
  - Different result possible if there was a limited pool of customers in the industry, such that the restriction effectively foreclosed other employment opportunities.

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Legal Developments

National Labor Relations Board – December 7, 2023 Advice

- Next, Advice applied the Board's *Stericycle* decision to the confidentiality provision.
  - Concluded that it did not have a reasonable tendency to chill employees in the exercise of Section 7 rights.
  - Employer identified only trade secrets and other clearly proprietary information such as marketing plans and customer lists.
    - Advice emphasized that nondisclosure provision did not refer to employee, wage information, or anything else relating to terms and conditions of employment. And that distinguishes from other rules the Board has found unlawful.

- Advice also found lawful the termination provision requiring the return of company property.
    - Employer property does not implicate information that may be used in Section 7 activity.

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Legal Developments

National Labor Relations Board – December 7, 2023 Advice

- Advice did find the employee duties provision unlawful under the Act.
  - Provision at issue states:
    - "Except as hereinafter provided, the Employee shall at all times during the continuance of this AGREEMENT devote her full time to the conduct of the business of the Employer and shall not directly or indirectly, during the term of this AGREEMENT engage in any activity competitive with or adverse to the Corporation's business or welfare whether alone, or as a partner, officer, director, Employee, advisor, agent or investor of any other individual corporation, partnership, joint venture, association, entity or person."
  - Advice concluded that provision was overbroad under *Stericyle*, and would have a reasonable tendency to chill employees in the exercise of their Section 7 rights.
    - Provision could be read to prohibit engagement in union organization or other protected concerted activities (e.g., speaking out publicly about terms and conditions of employment).

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Legal Developments

National Labor Relations Board – Region 9 Settlement

- Advice memorandum provided some good news and helpful guidance, but a recent settlement in *Juvly Aesthetics* is a warning for employers whose restrictive covenants contain broad restrictions.

- Restrictive covenants at issue contained:
  - non-competes with 20-mile radius and prevented employees from engaging in the following activities for a period of 24 months after separation: (1) practicing aesthetic medicine and related services at competitor facilities; and (2) having an ownership interest in or investing in competitor facilities,
  - a non-disparagement provision and a non-solicitation provision that not only prevented contact with former clients, but also responses to any general questions about employment status, and
  - upon employee's violation of the non-compete or departure from the company before 12 months, provided for liquidated damages in the form of employee reimbursement remitted to the employer for the costs of training.

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Legal Developments

National Labor Relations Board – Region 9 Settlement

- In settlement, *Juvly* agreed to $27,000 in monetary relief and the issuance of a remedial notice. The settlement also invalidated the following provisions.
  - Non-solicitation of employees.
  - Any rule that requires employees to refrain from conduct or communication which may damage the goodwill, brand, or business reputation of employer.
  - Non-solicitation of clients.
  - Non-disclosure (including salary information).
  - Liquidated damages.
  - Collection of training costs if employees violated the unlawful non-compete and confidentiality agreement.
  - Prohibits employees from discussing terms of the policy.
  - Prohibits employees (during and after employment) from making negative comments about the employer.
  - Prohibits practicing aesthetic medicine within a 20-mile radius.

Legal Developments

National Labor Relations Board

- **Advice** versus ***Juvly*** Settlement.
  - Non-compete reviewed by Advice did not prevent employees from obtaining outside employment.
  - Both address non-solicitation, but the provision analyzed by Advice only restricted customer solicitation for the purpose of providing competing products/services.

Legal Developments

National Labor Relations Board's General Counsel on Remedies and "Stay-or-Pay"

- In October 2024, the NLRB's General Counsel issued a Memo (GC 25-01) addressing remedies and "stay-or-pay" agreements.

Legal Developments

National Labor Relations Board's General Counsel on Remedies

- General Counsel asserts that whole relief is necessary to remedy illegal non-competes.
  - Compare to longstanding practice of ordering rescission to remedy unfair labor practices.
  - According to General Counsel, rescission alone is inadequate because non-compete provisions have reduced employee wages and benefits by restricting job opportunities.
    - Would even include relocation costs.

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Legal Developments

National Labor Relations Board's General Counsel on Remedies

- General Counsel recommends that NLRB add the following to its standard notice posting:
  - Alert employees that they may be entitled to wages and benefits if post-employment affected by non-compete.
  - Notify former employees of enhanced remedies.
  - Direct individuals to contact the regional office if they have evidence related to above.

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Legal Developments

National Labor Relations Board's General Counsel on "Stay-or-Pay" Provisions

- Refers to a contract under which employee must pay the employer if employee separates from employment.
  - Training repayment agreements.
  - Educational repayment contracts.
  - Sign-on bonuses.
- General Counsel opines that all such agreements are presumptively unlawful.

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Legal Developments

National Labor Relations Board's General Counsel on "Stay-or-Pay" Provisions

- To rebut presumption of illegality, employer must demonstrate that the provision/agreement at issue:
  - Is voluntarily entered into in exchange for a benefit;
  - Has a reasonable and specific repayment amount;
  - Has a reasonable "stay" period; and
  - Does not require repayment if the employee is terminated without cause.

Legal Developments

National Labor Relations Board's General Counsel on "Stay-or-Pay" Provisions

- General Counsel recommends two types of remedies.
  - If voluntary but not narrowly tailored – blue pencil.
  - For non-voluntary agreement – rescission and forgiveness of debt.

Legal Developments

National Labor Relations Board's General Counsel Memos

- They do not have the force of law, but provide an important alert to both employers and employees regarding the General Counsel's policy objectives and intended course of action in responding to ULP charges related to non-compete agreements.
  - Again, no binding legal effect on NLRB.
  - But, General Counsel will instruct the various regions to bring complaints.

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Legal Developments

New York State Legislative Update

- On June 20, 2023, the NY State Legislature passed legislation that would effectively ban future non-compete agreements.

- The legislation would prohibit employers from seeking, requiring, demanding, or accepting a non-compete agreement from any covered individual.
  - A non-compete agreement is “any agreement, or clause contained in any agreement, between an employer and a covered individual that prohibits or restricts such covered individual from obtaining employment, after the conclusion of employment with the employer included as a party to the agreement.”
  - A covered individual is any “person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.”

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Legal Developments

New York State Legislative Update

- Proposed NY Legislation would also render void every contract to the extent "anyone is restrained from engaging in a lawful profession, trade, or business of any kind."
  - Functional Non-Competes? What would the impact be on:
    - NDAs,
    - Non-Solicits
    - Forfeiture Upon Competition
    - Training Repayment Agreements
    - Bonus Repayment
    - Garden Leave
- The New York legislation expressly excludes: agreements establishing a "fixed term of service;" non-disclosures governing trade secrets or confidential and proprietary client information; and non-solicitation provisions related to clients or customers a worker learned about during employment.

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Legal Developments

New York State Legislative Update

- The New York legislation creates a private cause of action.
  - Void any non-compete that violates the law.
  - Injunctive relief.
  - Liquidated damages up to $10,000 per covered individual.
  - Lost compensation.
  - Attorneys' fees and costs.

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Legal Developments

New York State Legislative Update

- Open questions remain under the NY legislation.
  - The legislation does not address the common practice of imposing non-compete obligations on sellers of a business.
  - The legislation does not address compensation for non-competition.
  - The legislation does not address forfeiture – upon – competition provisions.

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Legal Developments

New York State Legislative Update

- Governor Hochul vetoed the bill on December 22, 2023.
- The Governor has indicated that she would support a bill that allows non-compete agreements for high earners.
- She has also indicated support for a bill that only applies to employees earning under $250,000.

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Legal Developments

New York State Legislative Update

- Roads to New York's next bill.
  - Legislature could pass a bill during the next legislative session, and once delivered to the Governor, she would have 10 days to sign, veto, or ignore (become law without signature).
  - If a bill passes in a special session (like last time), the Governor has 30 days to sign, veto, or ignore (a pocket veto).
  - The Governor could propose a chapter amended to the proposed law (a three-way agreement).
    - Chapter amendments usually result in passage of the law during the following legislative session.

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Legal Developments

New York City Legislative Update

- Following the Governor's veto, the New York City Council unveiled a trio of bills that would drastically change things in New York City.

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Legal Developments

New York City Legislative Update

- Ban on All Non-Compete Agreements (0140-2024).
  - Broad ban for both employees and contractors.
  - Non-compete is “an agreement between an employer and a worker that prevents, or effectively prevents, the worker from seeking or accepting work for a different employer, or from operating a business, after the worker no longer works for the employer.”
  - Existing agreements must be rescinded by the effective date.
  - No private cause of action. Any non-compete entered into or maintained in violation of the law would be deemed unenforceable, with a $500 civil penalty per violation.
  - No reference to customer non-solicitation agreements or confidentiality provisions.
  - No exception for non-competes entered in connection with the sale of a business.
  - No income limitations.

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Legal Developments

New York City Legislative Update

- Ban on Non-Competes for Low-Wage Workers (0146-2024).
  - Non-compete agreement refers to any agreement that limits an employee's ability to work for a different employer for a specified geographic region or to engage in similar work for a different employer compared to which they did for their employer.
  - The ban covers all employees except: manual workers; railroad workers, commission salespeople; or bona fide executives, administrative, or professional employees earning over $1,300 per week ($67,600 per year).
  - Does not address existing agreements.
  - Requires notice to high-wage employees at time of hire (that they will be required to sign non-compete agreements.
  - No private right of action. NYC Office of Labor Policy and standards to enforce.

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Legal Developments

New York City Legislative Update

- Ban on Non-Competes for Freelance Workers (0375-2024).
  - Bans any agreements that restrict a freelance worker from engaging in similar work for other parties, unless the hiring party pays the freelancer a “reasonable and mutually agreed upon sum” on a bi-weekly or monthly basis, for the duration of the non-compete period.
  - Freelance worker means independent contractor.
  - Excluded from the definition are sales representatives, lawyers, doctors and members of FINRA.
  - Private right of action. Freelancers can pursue and a legal action to void the non-compete, along with statutory damages of $1,000.

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Current New York State Law

The Rule of Reason

- To enforce a restrictive covenant, the employer must show that it:
  - Is designed to safeguard a protectable interest of the employer;
  - Is reasonable in its scope and duration;
  - Is not harmful to the general public; and
  - Is not unreasonably burdensome to the employee.

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Current New York State Law

Legitimate Protectable Interest

- Employers may use restrictive covenants to protect **legitimate protectable interests**, including:
  - Trade Secrets.
  - Confidential Customer Information And Customer Lists.
  - Employer's Customer Goodwill.
  - Preventing Loss Of Special, Unique, Or Extraordinary Services.

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Current New York State Law

Reasonable Scope and Duration

- Restrictive covenants will only be enforced if they are **reasonable in scope and duration**.
  - There are no *per se* lines demarcating what constitutes an unreasonable duration or geographic scope. Reasonableness is judged based upon the specific facts underlying the agreement and the nature of the employer's confidential information.
  - The durational reasonableness of a non-compete agreement is judged by the length of time for which the employer's confidential information will be competitively valuable.
  - The reasonableness of a geographic limitation is dependent on the locations where the employer conducts business and the responsibilities of the employee.

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Current New York State Law

Harm To The Public

- In addressing whether a restrictive covenant is injurious to the public, the Court must take account of any diminution in competition likely to result from slowing down the dissemination of ideas and any impairment of the function of the market in shifting manpower to areas of greatest productivity.

- New York Courts may not enforce a restrictive covenant that purports to prevent a former employee from accepting business from clients that initiate contact with the former employee voluntarily and unsolicited.

Current New York State Law

Unreasonably Burdensome To The Employee

- Is the employee prohibited from making a living in his/her chosen profession?
  - Garden Leave may prevent an employee from prevailing on this argument.

- Employee Choice Doctrine
  - NY Courts do not inquire into the reasonableness of a non-compete provision where:
    - the employee voluntarily terminates his or her employment; and
    - the employee has a choice between working for a competitor and forfeiting post-employment benefits, or accepting the post-employment benefits and not working for a competitor.

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Current New York State Law

Blue Penciling

- Restrictive covenants that are less broad are more likely to be enforced, or at least, partially enforced.

- NY Courts may enforce an overly broad restrictive covenant to protect a legitimate business interest if **the employer** demonstrates **"an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct."**

- Factors weighing against partial enforcement:
  - The imposition of the covenant in connection with hiring or continued employment as opposed to in connection with a promotion to a position of responsibility and trust;
  - The existence of coercion or a general plan of the employer to forestall competition;
  - The employer's knowledge that the covenant was overly broad.

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Strategies to Consider

- The FTC's proposed rule is not yet effective (and may never be effective).
- The NLRB's Memo is merely the General Counsel's position on non-competition.
  - It does not apply to managers and supervisors.
  - A narrowly tailed non-compete may be permissible.
- New York's legislation applies prospectively.
  - Existing agreements not affected.
- Well drafted non-solicit and non-disclosure agreements are not impacted.
- Confidentiality Agreements.

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Confidentiality Agreements

- Confidentiality Agreements can act like non-competes.

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Confidentiality Agreements

- Not a blanket prohibition on competition.
- Rather, it is simply a promise not to use or disclose specific information.
- Encompasses trade secrets AND any information given to an employee in confidence.

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Confidentiality Agreements

- A legal document.
- Provides clear expectations of workers' obligations.
  - Clear delineation of what is protected.
  - Identify consequences.
- Protects trade secrets.

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Confidentiality Agreements

- Enforceable when signed.
  - Must have sufficient consideration, but such can be continued employment (at least in NY).
  - Avoid drafting errors.
    - Overly broad language.
    - Not confidential information.
    - Request for something illegal.
    - Consideration not clear.

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Confidentiality Agreements

- Legal recourse.
  - Breach of contract.
  - Breach of fiduciary duty.
  - Misappropriation of trade secrets.
  - Copyright infringement.
  - Other IP violations.

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Confidentiality Agreements

- Precise language is essential.
- Ambiguities or loopholes lead to legal disputes.

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Questions?

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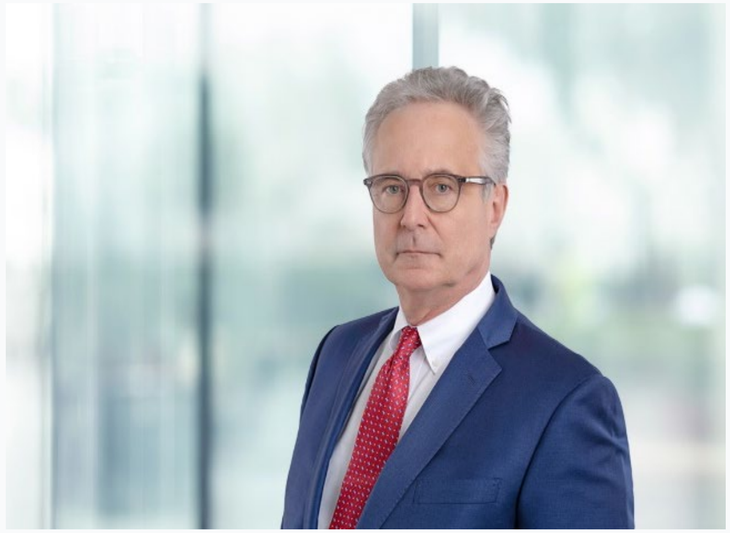

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Labor Law Creep: The NLRB's Expanded View of its Role in the Employment Relationship

November 19, 2024

Charles H. Kaplan, Esq.
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Agenda

- What's New in Traditional Labor Law?
- Restrictive Covenants
  - Non-Compete Agreements
    - Make-Whole Remedies
    - "Stay-or-Pay" Provisions
- Fair Choice – Employee Voice Final Rule
  - Revival of the Pre-2020 "Blocking Charge Policy"
  - Return of the Immediate Voluntary Recognition Bar
- The End of Consent Orders
- Confidentiality and Non-Disparagement
- Handbook Rules and Employer Policies

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What's New in Traditional Labor Law?

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What's New in Traditional Labor Law?

- On October 14, 2024, the NLRB issued a press release confirming the continued increase in union organizing efforts.
  - This trend, which has sharply risen over the last couple of years, is likely due to a combination of factors, including:
    - more aggressive union organizing drives;
    - the NLRB's ruling in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023); and
    - the implementation of the quicker election rules that have made it far easier for unions to organize.

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What's New in Traditional Labor Law?

- Representation petitions, requesting that the NLRB conduct a secret-ballot election to determine whether the employees wish to be represented by a union, increased by 27% increase from October 1, 2023 to September 30, 2024.
  - The increase from 2,593 petitions in FY 2023 to 3,286 petitions in FY 2024 puts FY 2024 at more than double the number of petitions the NLRB received just three years ago, in FY 2021.
- With the rise in petitions, also came a rise in ULP charges, which increased 7% from FY 2023 to FY 2024.
  - The NLRB General Counsel credited the surge in cases to "workers knowing and exercising their rights under the National Labor Relations Act" and to "board agents' accessibility and respectful engagement with them."
- The release also noted an increase in the NLRB's adjudication productivity which rose 5% from FY 2023 to FY 2024.

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What's New in Traditional Labor Law?

- Have recent United States Supreme Court cases questioned the future of traditional labor law?
  - *Janus vs. AFSCME*, 138 S. Ct. 2448 (2018).
  - *Starbucks v. McKinney*, 144 S.Ct. 1570 (June 13, 2024)
  - *Securities and Exchange Commission v. Jarkesy*, 144 S.Ct. 2117 (June 27, 2024)
- In various federal court cases, corporate giants, including Amazon, Starbucks, SpaceX, and Trader Joe's have responded to complaints from the NLRB by challenging the constitutionality of the NLRB.

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What's New in Traditional Labor Law: Did we Survive the Presidential Election?

- The President appoints the 5 members of the NLRB. By tradition, a majority of the NLRB's members are from the President's political party.
  - In 2020, President Biden created a Democratic majority, which has significantly reshaped traditional labor law in favor of unions.
  - A party-change in the White House usually means a corresponding change at the NLRB and a quick reversal of many of the outgoing Board's decisions. However, Senate Democrats have moved up upset this tradition.
- The NLRB currently consist of 3-1 Democratic majority. The remaining seat has been vacant since late 2022.
  - In August 2024, Senate Democrats moved to reconfirm 1 of their current Democratic members whose term expires in December 2024 and moved to nominate a management-side attorney to the vacant seat. Senate Democrats presented same as a bipartisan package deal; however, if their member is reconfirmed it will cement a Democrat majority until August 2026.
- Put simply, if Senate Democrats are successful, even with Former President Trump's reelection, many of the pro-union decisions of the current NLRB may remain in effect under President Trump's 2nd Term.

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What's New in Traditional Labor Law: Did we Survive the Presidential Election?

- Immediate Changes:
  - New General Counsel;
    - Many current General Counsel memos will be rescinded.
  - Extraordinary remedies; consequential damages;
  - Full remedies in settlement agreements;
  - Electronic monitoring and algorithmic management of employees;
  - "Stay-or-pay" provisions in employment agreements; and
  - Captive audience meetings.

- Future Changes:
  - Board composition;
  - Ordering union recognition;
  - Work rules and handbook policies;
  - Confidentiality and non-disparagement provisions;
  - Independent contractor test;
  - "Quickie election" final rule; and
  - Election procedures final rule.

- Unlikely to Change:
  - Expanded protected concerted activity;
  - Weingarten rights;
  - Use of office computers for non-work purposes;
  - The joint-employer standard; and
  - It is highly likely that the NLRB's case processing backlogs will continue;
    - Recent data indicates the average time between filing a ULP and disposal increased by nearly 50% from 2022 to 2023.
    - The number of field employees who investigate and try ULP charges has decreased by a third in the past 10 years, and the NLRB is unlikely to received increased funding to hire additional agents to address its backlog.

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Restrictive Covenants

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Restrictive Covenants: Non-Compete Agreements

- On May 30, 2023, the NLRB General Counsel issued Memorandum (GC 23-08), which addresses non-compete agreements.
  - The General Counsel took the position that, ***except in limited circumstances***, the proffer, maintenance, or enforcement of non-compete agreements violates the NLRA.
- Examples of permissible, narrowly tailored non-compete agreements, include:
  - Those that clearly restrict ***only*** individuals' managerial or ownership interests in a competing business; and
  - Those that are "justified by special circumstances."

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Restrictive Covenants: Non-Competes

- According to the General Counsel, non-compete agreements:
  - "interfere with employees' exercise of rights under Section 7 of the [NLRA];" and
  - "chill[] employees from engaging in Section 7 activity because:
    - Employees know that they will have greater difficulty replacing their lost income if they are discharged for exercising their statutory rights to organize and act together to improve working conditions;
    - Employees' bargaining power is undermined in the context of lockouts, strikes, and other labor disputes; and
    - An employer's former employees are unlikely to reunite at a local competitor's workplace, and thus be unable to leverage their prior relationships – and the communication and solidarity engendered thereby – to encourage each other to exercise their rights to improve working conditions in their new workplace."

Restrictive Covenants: Make-Whole Remedies

- On October 7, 2024, the General Counsel issued a follow-up Memorandum (GC 25-01) which also addressed non-compete agreements.
  - In this more recent Memorandum, the General Counsel provides additional information about her "intent to urge the [NLRB] ***not only*** to find certain non-compete provisions unlawful ***but also***, as fully as possible, to remedy the harmful effects on employees when employers use and apply them." (emphasis added)
  - "Accordingly, where the Board finds an employer has maintained an unlawful non-compete provision, rescission alone will fail to remedy all the harms caused by the provision."

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Restrictive Covenants: Make-Whole Remedies

- The General Counsel instructed the NLRB regional offices to seek monetary "make-whole remedies" when employees "demonstrate that they were deprived of a better job opportunity as a result of [an unlawful] non-compete provision."
  - To warrant such relief, an employee must show that:
    1) There was a vacancy available for a job with a better compensation package;
    2) They were qualified for the job; and
    3) They were discouraged from applying for or accepting the job because of the non-compete provision.

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Restrictive Covenants: Make-Whole Remedies

- Employees who have separated from the employer "may also be entitled to make-whole relief for additional harms or costs associated with complying with the unlawful non-compete provision."
  - These harms can include:
    - lost pay for being without a job,
    - the difference in pay from a job with lesser compensation,
    - moving costs to relocate outside a geographic region covered by the noncompete provision, or
    - retraining costs to obtain a job in another industry.

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Restrictive Covenants: Make-Whole Remedies

- In addition to these remedial positions, the General Counsel also recommended that the NLRB regional offices update the standard NLRB notice postings in non-compete cases to include various notifications to current and former employees about the availability of potential compensation if they were harmed by a noncompete during the NLRA's statutory limitations period.
  - The General Counsel recommended that the notices include language directing current and former employees to contact regional offices if they have evidence meeting the standards the GC created for "unenforceable" non-competes.
- If adopted and implemented, such NLRB notices will begin to look like notices commonly mailed to potential members of class action cases.

Restrictive Covenants: “Stay-or-Pay” Provisions

- In the recent October Memorandum, the General Counsel also argued that “stay-or-pay provisions” also violate the NLRA because they restrict employee mobility by creating financial barriers to quitting and chill employees from exercising their rights for fear that termination will trigger payment obligations.
  - The General Counsel defined stay-or-pay provisions as agreements with payments tied to a mandatory stay period under which employees must repay their employer certain bonuses/benefits if they voluntarily or involuntarily separate from employment before the expiration of the stay period. Examples include:
    - sign-on bonuses;
    - relocation bonuses;
    - educational repayment contracts; and
    - training repayment agreement provisions.

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Restrictive Covenants: “Stay-or-Pay” Provisions

- Stay-or-pay provisions are presumed to violate the NLRA unless they are “narrowly tailored” to minimize any interference with employees’ protected rights.
  - Employers can rebut the presumption by proving that the provision:
    1) advances a legitimate business interest;
    2) is narrowly tailored to minimize infringement of employee rights under the NLRA.
- Employers could face expanded “make-whole” remedies, in the same manner as non-compete agreements, for proffering, maintaining, or enforcing “stay-or-play” provisions deemed unlawful.

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Restrictive Covenants: “Stay-or-Pay” Provisions

- To be narrowly tailored, a stay-or-pay provision must:
  - Be fully voluntary and in exchange for a benefit conferred on the employee unrelated to mandatory training;
  - Have a reasonable and specific repayment amount specified in advance and no more than the employer’s cost of the benefit bestowed;
  - Have a reasonable “stay” period, the length of which will vary based on factors such as the cost of the benefit bestowed, the benefit to the employee, whether the repayment amount decreases over time, and the employee’s income; and
  - Not require repayment if the employee is terminated without cause.

Restrictive Covenants: “Stay-or-Pay” Provisions

- The General Counsel asserts that the NLRB should order the rescission and replacement of unlawful stay-or-pay provisions ***even if*** the employee voluntarily entered into them.
  - Employers may also be liable for other remedies, including make-whole remedies, for missed employment opportunities similar to the General Counsel’s position regarding non-compete provisions.
- The General Counsel announced that she will not pursue cases involving preexisting stay-or-pay provisions ***if*** the employer takes affirmative action to conform the provisions to the framework and provides notice to employees of the changes.
  - The 60-day window runs through December 6, 2024.
  - **NOTE**: Any stay-or-pay agreements proffered or enforced after October 7, 2024 ***will not*** receive the 60-day reprieve to avoid the issuance of a complaint.

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Restrictive Covenants: What You Need to Know

- Although not legally binding, the Memorandums outline a proposed framework to determine the lawfulness of non-compete agreements and stay-or-pay provisions.
  - The General Counsel is the prosecutorial arm of the NLRB, the Memorandums indicate how the NLRB will rule in the future. *See J.O. Mory, Inc.*, 2024 WL 3010808 (N.L.R.B. Div. of Judges, June 13, 2024) and *Planned Companies d/b/a Planned Building Services*, 22-CA-321532 (N.L.R.B. Div. of Judges, July 6, 2023)
- Employers — whether unionized or not — should thoroughly review their non-compete agreements to best mitigate risk.
- Employers — whether unionized or not — should assess any stay-or-pay provisions for employees covered by the NLRA (*i.e.*, most private sector employees, excluding *bona fide* supervisors.
  - Employers have 60 days, through December 6, 2024, to cure any existing unlawful stay-or-pay provisions.

Fair Choice – Employee Voice Final Rule

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Fair Choice – Employee Voice Final Rule: Revival of the Pre-2020 "Blocking Charge Policy"

- On July 26, 2024, the NLRB issued its Fair Choice – Employee Voice Final Rule ("Final Rule").
  - The Final Rule allows regional directors to delay an election, including a decertification election, when ULP charges are pending for alleged conduct that interferes with employee free choice in an election or that is inherently inconsistent with the election petition itself.
  - Before the Final Rule, an election would be held regardless of a pending blocking ULP, and the votes would be impounded until the merits of the ULP charge were determined so that only a certification of results were delayed.

Fair Choice – Employee Voice Final Rule: Revival of the Pre-2020 “Blocking Charge Policy”

- Delaying, or blocking the election benefits unions, who are able to file meritless charges in order to block an election and allows them to continue their organizing campaigns during the delay.
  - During this pause, which could take up to a year to adjudicate the merits of the ULP charge, employers must continue to refrain from making changes to the terms and conditions of its employees’ employment, including wage increases or performance-based bonus payouts, for fear of drawing additional ULP charges.

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Fair Choice – Employee Voice Final Rule: Return of the Immediate Voluntary Recognition Bar

- The Final Rule also eliminated the 45-day window that allowed employees, who may not have supported union recognition, to challenge an employer's voluntary recognition of a union that claimed majority support.
  - Under the NLRA, an employer may voluntarily recognize a union, based on the union's claim of majority support among its employees without an election.
- Following an employer's voluntary recognition, the union becomes the exclusive representative of the employees, and the employer has a duty to bargain with the union.
  - However, employees had the right to challenge an employer's voluntary recognition of a union within 45 days of notice of same.

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Fair Choice – Employee Voice Final Rule: Return of the Immediate Voluntary Recognition Bar

- Now, under the Final Rule, the 45-day window has been eliminated and employees cannot file a decertification petition:
  - for a minimum of six months; and
  - a maximum of one year from the date of the first bargaining session; and
  - if the parties execute a collective bargaining agreement, employees cannot petition for decertification for three years after the agreement has been executed.

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The End of Consent Orders

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The End of Consent Orders

- On August 22, 2024, the NLRB issued a decision in *Metro Health, Inc. d/b/a Hospital Metropolitano Rio Piedras*, 373 NLRB No. 89 (August 2024), ending more than 50 years of the NLRB's practice of approving consent orders, whereby an administrative law judge resolved an ULP cases absent the agreement of the charging party and the General Counsel.
- Historically, a ULP could be resolved in one of four ways:
    1) dismissal by the General Counsel;
    2) bilateral settlement (between the respondent and the General Counsel and/or the charging party);
    3) litigation through hearing; or
    4) consent order.
- In the context of ULPs, a consent order is the procedure by which a respondent can propose a resolution for approval by the presiding ALJ, and without agreement from the General Counsel and/or charging party.

The End of Consent Orders

- The majority's rationale was four-fold:
  1) The NLRB Rules and Regulations do not mention the term "consent order," much less authorize the NLRB or an ALJ to accept one.
  2) The NLRB "do[es] not believe the administrative benefit of retaining the consent order practice outweigh the costs."
  3) Consent orders undermine the General Counsel's prosecutorial authority by empowering ALJs to resolve cases over the General Counsel's objections.
  4) Consent orders are inferior to settlements because they do not require the parties to meet in the middle and find a mutually acceptable resolution. Because consent orders were often entered over the objections of the charging party and General Counsel, they "risk[ed] further inflaming the very labor dispute that lead to the fling of unfair labor practice charges in the first place."

Confidentiality and Non-Disparagement

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Confidentiality and Non-Disparagement

- The NLRB ruled that broad confidentiality and non-disparagement provisions in severance agreements violate the NLRA. *McLaren Macomb*, 372 NLRB No. 58 (2023).
  - McLaren involved a severance agreement that "broadly prohibited [employees] from making statements that could disparage or harm the image of the [employer] and further prohibited them from disclosing the terms of the [severance] agreement" to any third party.
  - Such provisions have a reasonable tendency to interfere with, restrain, or coerce the exercise of rights under Section 7.
    - Employees have Section 7 rights to make critical public statements about their workplace, employer, terms and conditions of employment, etc. for the purpose of mutual aid and protection.
    - This includes statements made to fellow employees, former coworkers, the union, the NLRB, other government agencies, the media, or almost anyone else.
    - Employees also have Section 7 rights to discuss the terms of the severance agreement with their former coworkers, the union, the NLRB. Employees have Section 7 rights to assist coworkers with workplace issues concerning their employer, and communicating with others, including a union and the Board, about their employment.

Confidentiality and Non-Disparagement

- Confidentiality Agreement. The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
- Non-Disclosure. At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

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Confidentiality and Non-Disparagement

- Key Takeaways:
  - Merely offering a severance agreement containing unlawful confidentiality/non-disparagement provisions violates the NLRA.
  - Likely would apply to non-disparagement and confidentiality language in commission agreements, non-disclosure agreements, and employment agreements.
- Open Issues:
  - Can disclaimer language in a severance agreement that exempts Section 7 rights cure problems with an agreement's confidentiality and non-disparagement provisions?
  - Will more narrowly drafted non-disparagement and confidentiality language meet the Board's approval?

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Handbook Rules and Employer Policies

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Handbook Rules and Employer Policies

- *Stericycle Inc.*, 372 NLRB No. 113 (Aug. 3, 2023).
- The NLRB adopted a new test regarding the lawfulness of facially-neutral handbook policies and workplace rules.
- Now, when evaluating the lawfulness of a facially-neutral handbook policy or workplace rule, the NLRB General Counsel need only show that the challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights.
- The employer may rebut the presumption that the rule is unlawful by establishing that the rule advances legitimate and substantial business interests that cannot be achieved with a more narrowly-tailored rule.

Questions?

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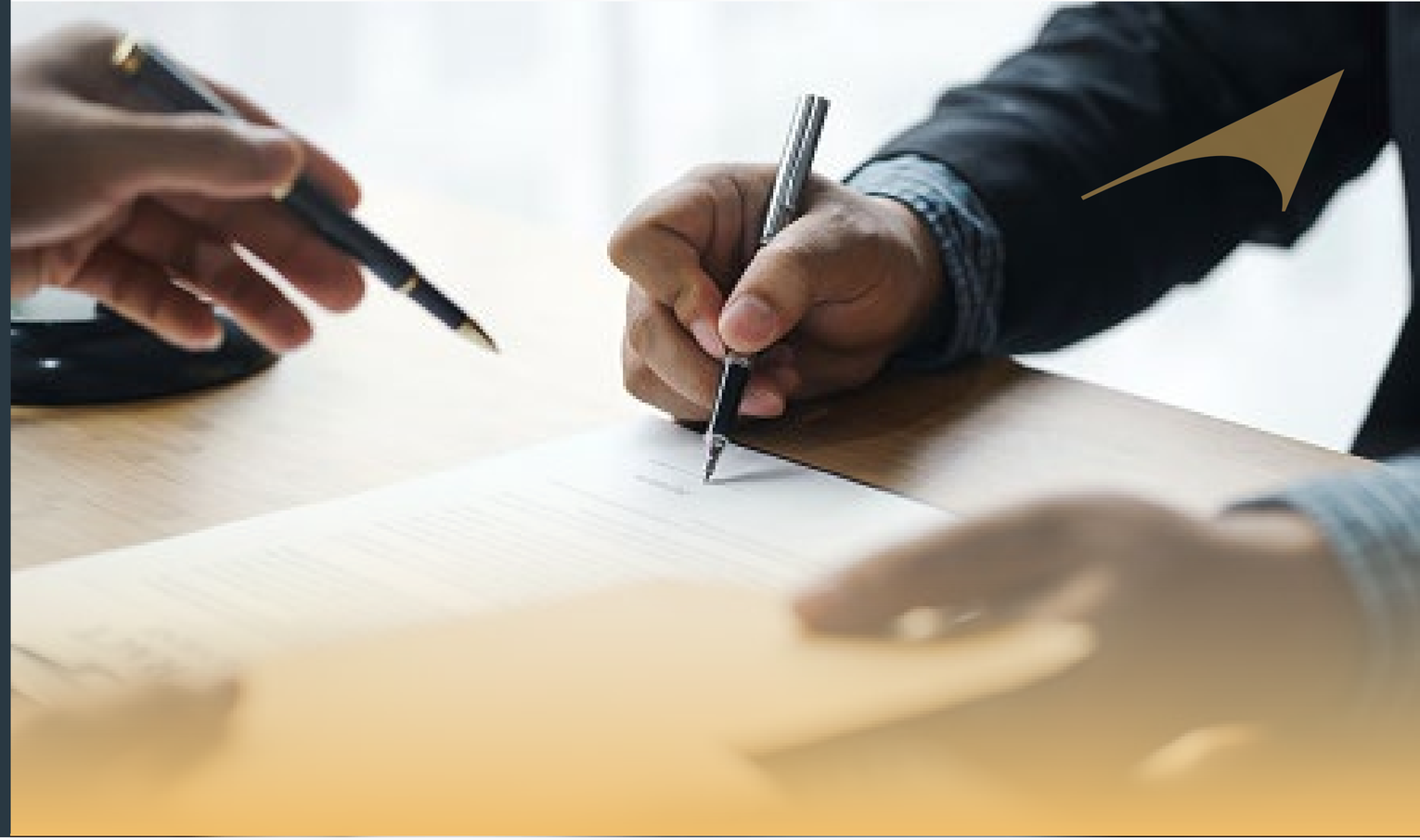
How to Properly Classify and Compensate Your Contractors



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November 19, 2024

John M. Godwin, Esq.
Jordan R. Einhorn, Esq.

Agenda

- Risks of Misclassification
- Properly Classifying
  - The Common Law Direct-and-Control Test
  - The Economic Realities Test
  - The ABC Test
- Properly Compensating
  - FLSA and New York Labor Law considerations
  - The New York State Freelance Isn’t Free Act
- Hypotheticals

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Independent Contractor Classification Overview

- There are rarely bright-line answers to whether a worker is properly classified as an independent contractor.
- The tests vary depending on the jurisdiction, the industry, and the legal purpose.
  - For example, the United States Department of Labor may analyze the contractor-employee relationship for FLSA purposes differently than the New York Department of Labor will for unemployment insurance purposes or the IRS will for federal employment tax purposes.
- Across the board, no single factor is dispositive, and an independent contractor's classification is rarely certain.

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Risks of Misclassification

- **Wage and Hour Liability**
  - Backpay for minimum wage and unpaid overtime under the FLSA and state analogues.
- **Employment Tax Liability**
  - Employers are responsible for federal, state, and local income withholding taxes, FICA, FUTA, and SUTA.
    - Back taxes, interest, and penalties may be assessed.
    - Certain owners, officers, or other persons with authority over the financial affairs of a business may be found personally liable.
    - In rare circumstances, criminal penalties can be imposed for attempting to evade or defeat a tax.

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Risks of Misclassification

- **Workers' Compensation and Disability Benefits**
  - Failure to secure workers' compensation and disability benefits coverage can result in civil penalties, debarment from government contracting, and render a business liable for an employee's injuries.
- **Employee Benefits**
  - A misclassified employee inappropriately excluded from an employer-sponsored benefit plan (e.g., group health insurance, 401(k), profit-sharing plans, etc.) may bring a claim against the employer.
- **Immigration**
  - Increased penalties in a Form I-9 audit.
- **Non-compliance with the WARN**
  - Failure to count or consider
- **Non-Compliance with Leave Laws**
  - FMLA, NYS Paid Sick Leave, NYS Paid Family Leave, etc.

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Common Law Direction-and-Control Test

- The common law direction-and-control test focuses on whether the business retains the right to direct and control the worker with respect to the manner and means (i.e., the “how”) of the worker’s performance.
- In a 1987 revenue ruling, the Internal Revenue Service examined years of court cases and identified a list of **20 factors** that should be examined in determining whether an employer-employee relationship exists.
- These 20 factors have since been relied on by courts and administrative agencies, and applied to state tax laws and anti-discrimination statutes.

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Factors from Common Law Direction-and-Control Test

1. Instructions: If the person for whom the services are performed has the right to require compliance with instructions, this indicates employee status.
2. Training: Worker training (e.g., requiring attendance at training sessions) indicates that the person for whom services are performed wants the services performed in a particular manner (which indicates employee status).
3. Integration: Integration of the worker's services into the business operations of the person for whom services are performed is an indication of employee status.
4. Services rendered personally: If the services are required to be performed personally, this is an indication that the person for whom services are performed is interested in the methods used to accomplish the work (which indicates employee status).
5. Hiring, supervision, and paying assistants: If the person for whom services are performed hires, supervises, or pays assistants, this generally indicates employee status. However, if the worker hires and supervises others under a contract pursuant to which the worker agrees to provide material and labor and is only responsible for the result, this indicates independent contractor status.
6. Continuing relationship: A continuing relationship between the worker and the person for whom the services are performed indicates employee status.
7. Set hours of work: The establishment of set hours for the worker indicates employee status.
8. Full time required: If the worker must devote substantially full time to the business of the person for whom services are performed, this indicates employee status. An independent contractor is free to work when and for whom he or she chooses.
9. Doing work on employer's premises: If the work is performed on the premises of the person for whom the services are performed, this indicates employee status, especially if the work could be done elsewhere.
10. Order or sequence test: If a worker must perform services in the order or sequence set by the person for whom services are performed, that shows the worker is not free to follow his or her own pattern of work, and indicates employee status.

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Factors from Common Law Direction-and-Control Test

11. Oral or written reports: A requirement that the worker submit regular reports indicates employee status.
12. Payment by the hour, week, or month: Payment by the hour, week, or month generally points to employment status; payment by the job or a commission indicates independent contractor status.
13. Payment of business and/or traveling expenses: If the person for whom the services are performed pays expenses, this indicates employee status. An employer, to control expenses, generally retains the right to direct the worker.
14. Furnishing tools and materials: The provision of significant tools and materials to the worker indicates employee status.
15. Significant investment: A worker's investment in facilities used by him or her indicates independent contractor status.
16. Realization of profit or loss: A worker who can realize a profit or suffer a loss as a result of the services (in addition to profit or loss ordinarily realized by employees) is generally an independent contractor.
17. Working for more than one firm at a time: If a worker performs more than de minimis services for multiple firms at the same time, that generally indicates independent contractor status.
18. Making service available to the general public: If a worker makes his or her services available to the public on a regular and consistent basis, that indicates independent contractor status.
19. Right to discharge: The right to discharge a worker is a factor indicating that the worker is an employee.
20. Right to terminate: If a worker has the right to terminate the relationship with the person for whom services are performed at any time he or she wishes without incurring liability, that indicates employee status.

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Internal Revenue Service Standards

- For federal employment tax purposes, the IRS has since refined its standards to gauge the level of control and independence exerted by the worker. The IRS now groups factors into three categories:
  - **Behavioral Control**
    - Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired.
  - **Financial Control**
    - Facts that show whether the business has a right to control the business aspects of the worker's job.
  - **Parties' Relationship**
    - Facts that show the type of relationship between the business and the worker.

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United States Department of Labor – Economic Realities Test

- Over the past several years, the United States Department of Labor ("USDOL") has developed different standards for evaluating independent contractor status.
- In 2021 and 2024, the USDOL promulgated two different rules on how to determine employee status. Both focus on the "economic realities" of the relationship.
- The 2021 IC Rule identified five (5) economic reality factors to guide the inquiry into a worker's status:
  - **The nature and degree of the individual's control over the work,**
  - **The individual's opportunity for profit or loss,**
  - The amount of skill required for the work,
  - The degree of permanence of the working relationship between the individual and the putative employer, and
  - Whether the work is part of an integrated unit of production.
- The first two factors were identified as "core factors" that were the most probative and carried greater weight in the analysis.
  - The 2021 IC Rule stated that if these two core factors pointed towards the same classification, there was a substantial likelihood that it was the worker's accurate classification. According to the rule, it was "highly unlikely" that the three other factors could outweigh the combined probative value of the two core factors.

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United States Department of Labor – Economic Realities Test

- Effective March 11, 2024, the USDOL replaced the 2021 IC rule, changing the analysis in key ways.
- The 2024 Rule maintains an economic reality test, but evaluates the "totality of the circumstances," considering the following six (6) non-exhaustive factors:
  - The worker's opportunity for profit or loss;
  - Investments by the worker and the potential employer;
  - The degree of permanence of the relationship;
  - The degree and nature of the potential employer's control over the work;
  - The extent to which the work is "integral" to the potential employer's business; and
  - The worker's skill or initiative.
- These standards are currently in effect, though subject to challenge in court.

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Industry-Specific Statutory Tests in New York

- The **New York State Construction Industry Fair Play Act** and **New York State Commercial Goods Transportation Industry Fair Play Act** presume that any person working for a construction contractor or as a commercial goods transportation driver, respectively, is an employee, **unless** he or she satisfies either:
  - (i) the three-part "ABC Test"; **or**
  - (ii) a statutory "separate business entity" test.
- Very strict!

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ABC Test

- Under the ABC Test, to be properly classified as an independent contractor, the answer must be **yes** to each of the following three questions.
  - (A) Is the worker free from control and direction while performing the job?
  - (B) Is the worker performing services outside of the company's usual course of business?
  - (C) Is the worker customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue?
- Employers with multi-state workforces should be aware that the ABC Test is also commonly used in several other states, including California, Connecticut, Massachusetts, and New Jersey, among others.

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“Separate Business Entity”

- Even if a worker does not satisfy the ABC Test under the Construction Industry Fair Play Act or Commercial Goods Transportation Industry Fair Play Act, a worker may still constitute an independent contractor if the worker is a **separate business entity**.
- The separate business entity tests are highly specific:
  - The Commercial Goods Transportation Industry Fair Play Act imposes an 11-step inquiry, and the Construction Industry Fair Play Act imposes a 12-step inquiry.
  - The inquiries are similar, but not identical.
- Some shared requirements are:
  - The business entity is performing the service free from the direction or control over the means and manner of providing the service;
  - The business entity is not subject to cancellation or destruction upon severance of the relationship with the contractor;
  - The business entity has a substantial investment of capital in the business entity;
  - The business entity performs services under the business entity’s name;
  - The business entity is not represented to customers as an employee;
  - The business entity has the right to perform similar services for others on whatever basis and whenever it chooses.

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Compensation Considerations

- The Fair Labor Standards Act ("FLSA") sets the nationwide floor for minimum wage and overtime obligations.
- Non-exempt employees must receive at least minimum wage for all hours worked, and overtime premium pay for all hours worked beyond 40 hours in a workweek.
- Exempt employees are not entitled to overtime pay.
- New York State law contains many obligations that go beyond what is required by the FLSA.

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Minimum Wage for Non-Exempt Employees

Date	NYC, Nassau, Suffolk, and Westchester Counties	Remainder of New York State	FLSA
January 1, 2024	$16.00 per hour	$15.00 per hour	$7.25 per hour
January 1, 2025	$16.50 per hour	$15.50 per hour	$7.25 per hour
January 1, 2026	$17.00 per hour	$16.00 per hour	$7.25 per hour

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“White Collar” Exemptions

- **Executive Exemption**
  - Be paid a fixed amount equal to or greater than the required **minimum salary** on a **salary basis**.
  - Primary duty must be **managing the enterprise**, or a customarily recognized department or subdivision of the enterprise.
  - Must **customarily and regularly direct the work of at least two or more** other full-time employees or their equivalents.
  - Must have the **authority to hire or fire**, or his or her recommendations as to hiring, firing, advancement, promotion, or other change in status is given particular weight.
- **Administrative Exemption**
  - Be paid a fixed amount equal to or greater than the required **minimum salary** on a **salary basis**.
  - Primary duty must be the performance of office or **non-manual work directly related to the management or general business operations of the employer**, or of the employer’s customers.
  - Primary duties must include the **exercise of discretion and independent judgment** with respect to matters of significance.

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Professional Exemptions

- **Professional Exemptions**
  - **Learned Professional Exemption**
    - Be paid a fixed amount equal to or greater than the required **minimum salary** on a **salary or fee basis**.
    - Primary **duty** must be the **performance of work requiring advanced knowledge in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction**.
  - **Creative Professional Exemption**
    - Be paid a fixed amount equal to or greater than the required **minimum salary** on a **salary or fee basis**.
    - Primary duty must be the performance of **work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor**.

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White Collar Exemption Salary Thresholds

- The FLSA sets the minimum salary amounts required to satisfy the EAP exemptions.
- New York law imposes higher salary thresholds for Administrative and Executive Employees, but does not require any salary for Professional Employees.

Effective Date	NYC, Nassau, Suffolk, & Westchester Counties	Remainder of New York State	FLSA
July 1, 2024	$1,200 per week ($62,400)	$1,124.20 per week ($58,458.50)	$844 per week ($43,888)
Jan. 1, 2025	$1,237.50 per week ($64,350)	$1,161.65 per week ($60,405.80)	$1,128 per week ($58,656)
Jan. 1, 2026	$1,275 per week ($66,300)	$1,199.10 per week ($62,353.20)	

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Exemptions Beyond the White Collar Exemptions

- **Outside Sales Exemption**
  - The employee's primary duty must be making sales or obtaining orders or contracts for services, and must customarily and regularly do so away from the premises of the employer or any other fixed site.
- **Retail Sales and Service Exemption**
  - The employee must be employed at an establishment where 75% of annual dollar volume comes from sales of goods or services to the general public, and more than half of the employee's total earnings must consist of commissions.
  - The employee's regular rate of pay in any workweek where more than 40 hours are worked must exceed 1.5 times the applicable minimum wage.
- **Computer Employee Exemption**
  - Applies to an employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker who is compensated at a rate of no less than $27.63 per hour or $844 per week.

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Exemptions Beyond the White Collar Exemptions

- **Highly Compensated Employee Exemption**
  - An employee who earns $132,964 per year (at least $844 of which is paid on a salary basis), performs non-manual or office work, and customarily performs at least one exempt duty.
  - Threshold for highly compensated employees is scheduled to increase to $151,164 on January 1, 2025.
- **Motor Carrier Exemption**
  - An employee who provides motor vehicle transportation for compensation or transports property to further a commercial enterprise.
  - Employee must also perform “safety-affecting activities” on motor vehicles used in transportation on public highways in interstate or foreign commerce.
  - Exception for most workers who, in a given workweek, work on “small vehicles” weighing 10,000 pounds or less.

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New York State Freelance Isn’t Free Act

- New York State recently adopted the Freelance Isn’t Free Act, effective August 28, 2024.
- The Act was initially signed into law on November 21, 2023, following the passage of A6040/S5026, which created new Section 191-d of the New York Labor Law.
- On March 1, 2024, Governor Hochul signed S8036/A8535, which repealed Section 191-d of the Labor Law and enacted the Act under new Article 44-A of the General Business Law (“GBL”).
- The substantive provisions of the Act are unchanged, but the GBL contains different enforcement mechanisms than would have applied under Labor Law Section 191-d.
- The Act largely mirrors the New York City Freelance Isn’t Free Act, which was adopted in 2016 and took effect in 2017.

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New York State Freelance Isn't Free Act

- It applies to all private sector "hiring parties," defined as any person who retains a freelance worker to provide services.
- The Act creates protections for "freelance worker[s]," defined as "any natural person or organization composed of no more than one natural person, whether or not incorporated or employing a trade name, that is hired or retained as an independent contractor by a hiring party to provide services" in exchange for compensation that equals or exceeds $800.
- However, the definition excludes:
  - Sales representatives covered by Labor Law Section 191-a;
  - Persons engaged in the practice of law;
  - Licensed medical professionals; and
  - Construction contractors.

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New York State Freelance Isn't Free Act GBL Section 1411

- Section 1411 requires that freelance workers be compensated on or before the date when compensation is due under the written contract.
- If the contract does not specify when payment is due or provide a mechanism for determining a such a date, payment must be provided no later 30 days after the completion of the freelance worker's services under the contract.
- After the freelance worker commences services, the hiring party "shall not require as a condition of timely payment that the freelance worker accept less compensation than" provided by the contract.

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New York State Freelance Isn't Free Act GBL Section 1412

- Section 1412 requires that the contract between the hiring party and freelance worker be reduced to writing. The contract must include:
  - The names and mailing addresses of the parties;
  - An "itemization" of the services to be performed and the "value" of the services;
  - The rate and method of compensation; and
  - The date by which the freelancer must submit a list of services rendered to enable the hiring party to process and issue timely payment.
- The NYSDOL has published a six-page model contract on its website.

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New York State Freelance Isn't Free Act
GBL Section 1412

- The hiring party must furnish a copy of the written contract, either physically or electronically, to the freelancer and must retain the contract for at least six years.
- The contract must be made available to the Attorney General upon request; failure to comply will give rise to a presumption that the terms that the freelance worker has presented are the agreed-upon terms of the contract.

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New York State Freelance Isn't Free Act GBL Section 1413

- Section 1413 prohibits hiring parties from "discriminating" against a freelance worker for exercising his, her, or its rights under the Act.
- Prohibited discriminatory actions include threatening, intimidating, disciplining, harassing, denying a work opportunity (including a "future work opportunity"), or taking "any other action that penalizes" the freelance worker or is "reasonably likely" to deter the freelance worker from exercising or attempting to exercise rights under the Act.

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New York State Freelance Isn't Free Act Enforcement Provisions

- Labor Law Section 191-d would have vested the Commissioner of Labor with wide-ranging enforcement power, including to:
  - Accept and investigate complaints of violations of the Act;
  - Attempt to "adjust equitably controversies between freelance workers and hiring parties relating to" the Act;
  - Take assignments of claims for "wages" under the Act from freelance workers or third parties and sue hiring parties on claims so assigned;
  - Join in a single action any number of "wage" claims against the same hiring party;
  - Enter into reciprocal agreements with other state departments of labor for collection in other states of "wages" on assigned claims; and
  - Under some circumstances, maintain actions in the courts of other states to collect "wages" on assigned claims.

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- Under GLB Article 44-A, the Commissioner of Labor plays no role in enforcement.
- Rather, the Attorney General, is authorized to investigate complaints of, and bring actions in the name and on behalf of the people of the State of New York to enjoin and obtain restitution for, violations of the Act.
- Courts adjudicating such actions may award preliminary relief in accordance with the CPLR and may award civil penalties not to exceed $1,000 for a first violation, $2,000 for a second violation, and $3,000 for third and subsequent violations.

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New York State Freelance Isn't Free Act Enforcement Provisions

- As would have been the case under Labor Law Section 191-d, a freelance worker has a private right of action for perceived violations of GBL Article 44-A.
- The statute of limitations varies based on the Section of Article 44-A alleged to have been violated:
  - Section 1411 (payment requirement): six years.
  - Section 1412 (written contract requirement): two years.
  - Section 1413 (discrimination prohibition): six years.
- A plaintiff who alleges solely a violation of Section 1412 must prove that he or she requested a written contract before the contracted work began.

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- The remedies available to the freelance worker also vary based on the Section of Article 44-A found to have been violated:
  - Section 1411 (payment requirement): double damages plus reasonable attorney's fees and costs. Injunctive relief is also available.
  - Section 1412 (written contract requirement): statutory damages of $250.
  - Section 1413 (discrimination prohibition): "statutory damages" equal to the value of the underlying contract for "each violation."
- "A plaintiff who prevails on a claim alleging a violation of one or more claims under provisions of this article shall be awarded statutory damages equal to the value of the underlying contract for the violation in addition to the remedies specified in this article for such other violations."

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New York State Freelance Isn’t Free Act Enforcement Provisions

- The Attorney General and a freelance worker may both pursue civil actions based on the same facts.
- If a trier of fact finds that a hiring party has engaged in a “pattern or practice” of violating Article 44-A, a civil penalty of no more than $25,000, payable to the general fund of the State, may be awarded.

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Hypothetical 1

- Iris is a CPA in Buffalo, NY who recently wound down her private accounting practice.
- A manager of a local manufacturing facility offers Iris a contractor position to assist the facility with bookkeeping and various accounting tasks. Iris charges a fee of $75 per hour for her services. Before Iris starts, the manager has her sign the company's standard confidentiality agreement, which contains a two-year non-competition covenant.
- Iris performs her work out of the company's offices, using her own computer and personal license to accounting software that she previously acquired when she had her own practice. She has no assigned hours, but generally spends anywhere between 20-50 hours per week performing tasks assigned to her by the manager.
- To Iris's chagrin, the manager is a micromanager who closely supervises all of her work, and regularly has her redo things to match the style he prefers.

Hypothetical 2

- Sales Co. hires Sal as an independent contractor to be a remote salesperson for their product. Sal works from his home office out of state. He primarily performs his sales duties via email, phone, and video conferences, using his own phone and computer. The Company does not set his hours or restrict him from working for other businesses. He typically spends 60 hours per week trying to make sales for the Company. Given the time he commits to his sales efforts for the Company, he does not work for any other businesses.
- Sal obtains all of his sales leads from the Company's business development team and is required to follow the Company's standard talking points when making sales pitches. He is also required to submit weekly reports to the company outlining the status of his efforts.
- Sal is paid on a straight commission basis.

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Hypothetical 3

- Dee O. Elle is a director of I.C. Corp. The company's CEO is looking to retain Dee as a consultant and business coach. Dee will be permitted to use company resources and equipment as necessary to fulfill her consulting duties, but will primarily rely on her years of industry experience to advise the CEO on strategic matters.
- The company proposes a consulting agreement under which Dee will be required to commit as much time to the consulting role as is necessary to meet the needs and requests of the CEO, with a minimum commitment of 25 hours per week.
- Dee requests to be compensated $145,000 annually.

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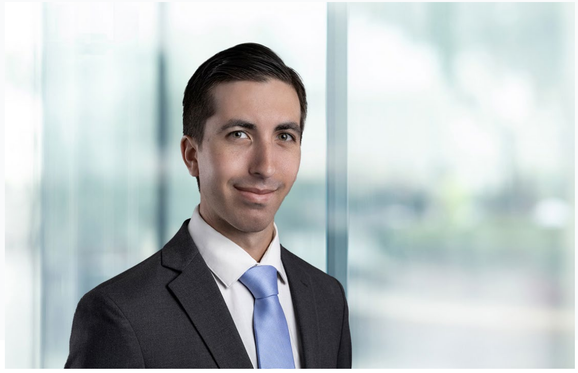

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