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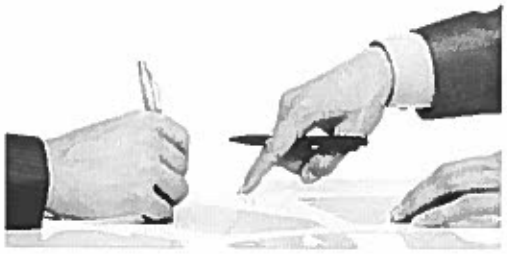

LAW IN THE WORKPLACE CONFERENCE

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Presented by: Labor and Employment Committee and Academy of Law Chair – Scott Michael Mishkin, Esq.

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Preventive Strategies and
Positive Solutions for the Workplace...

May 4, 2017
Suffolk County Bar Center, NY

Richard K. Zuckerman represents management in all public and private sector labor and employment law areas, including collective bargaining, discipline and litigation-related matters. His public sector clients include school districts, libraries, cities, counties, towns, villages and fire and ferry districts. He also serves as general counsel to school districts and as a hearing officer in General Municipal Law Section 207-a and 207-c disputes.

Mr. Zuckerman is the Acting Chair of the New York State Bar Association (NYSBA's) Local and State Government Law Section and a former Chair of the NYSBA's Labor and Employment Law Section, as well as a former President of the New York State Association of School Attorneys. He has also served as a member of the NYSBA's House of Delegates. Mr. Zuckerman is a Fellow of the Governors of The College of Labor and Employment Lawyers, a Fellow of the American and New York Bar Foundations, and an Inaugural Member of the Board of Advisors for the St. John's University School of Law Center for Labor and Employment Law. He is one of the co-editors for the New York State Bar Association's treatise "Lefkowitz on Public Sector Labor and Employment Law, Fourth Edition," as well as its Third Edition and Supplements, and was an editor for the American Bar Association's treatise "Discipline and Discharge in Arbitration" and Supplement. In addition, he was a contributing author to the 6th edition of the ABA's contract arbitration treatise "How Arbitration Works" (Elkouri & Elkouri), and has co-authored numerous articles, including those entitled "Romance in the Workplace: Employers Can Make Rules if They Serve Legitimate Needs" and "Romance in the Workplace: To What Extent Can Employers Dictate the Rules?"

Mr. Zuckerman has been named as a Best Lawyer in America© since 2012 and was the Best Lawyers' 2017 "Lawyer of the Year: Labor Law – Management" for Long Island and the 2015 New York City "Labor Law – Management "Lawyer of the Year." He has repeatedly been named a New York Super Lawyer® in Labor and Employment Law, a Who's Who in American Law®, and a Long Island Business News' Who's Who in Labor Law. He has presented at numerous programs regarding various labor, education and employment law-related topics. He is admitted to practice before the United States Supreme Court, the federal Second Circuit Court of Appeals and the Eastern and Southern Districts of New York, as well as New York State courts. Mr. Zuckerman is a graduate of the Columbia University School of Law, where he served as Director of the First Year Moot Court program. He graduated summa cum laude from the State University of New York at Stony Brook, where he was elected to Phi Beta Kappa in his junior year and received the William J. Sullivan Award, the University's most prestigious academic and service award.

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SUFFOLK COUNTY BAR ASSOCIATION
26TH ANNUAL LABOR & EMPLOYMENT LAW CONFERENCE
LAW IN THE WORKPLACE 2017

Public Sector Labor Law Update

May 4, 2017

By: Richard K. Zuckerman, Esq.[1]

Legislation

Injunctive relief provisions extended to June 30, 2017. 2015 N.Y. Laws, ch. 47

Interest arbitration provisions including those for "fiscally eligible" municipalities extended to July 1, 2019. 2016 N.Y. Laws, ch. 57.

Good Faith Negotiations

Utica City School District, 48 PERB ¶3008

Employer ordered to provide union with names, addresses and telephone numbers of unit employees.

City of New York v. NYS Nurses Association, 130 AD3d 28, 48 PERB ¶7501 (1st Dep't 2015)

Union entitled to certain information pertaining to disciplinary grievances. Information was needed to represent employees under contractual disciplinary system. Pfau v. PERB, 69 AD3d 1080 (2010) distinguished.

TWU of Greater New York v. Bianco, 130 AD3d 507, 48 PERB ¶7502 (2015)

Contractual disciplinary provisions concerning employee suspension valid. CSL §75 can be supplemented, modified or waived by the terms of a collective bargaining agreement.

City of Ithaca, 49 PERB ¶3030

A union which objects to an employer's petition for compulsory interest arbitration does not waive right to bargain, but employer thereby satisfies its duty to bargain for the two years that could have been covered by an award. Board does not decide whether a union in this circumstance surrenders its right to petition for interest arbitration for an award covering the two-year period. See Director of Concilliation Dec. 23, 2016 letter ruling under Miscellaneous decisions.

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[1] We would like to extend our appreciation to John Crotty, Esq. for granting us permission to use these materials for this presentation.

County of Madison/Sheriff, 49 PERB ¶3029

Demands to have employees paid after 30 days on a pre-determination disciplinary suspension not arbitrable. Demand to increase amount of compensatory time employees can accumulate held not directly to compensation. Demand to have employer's denial of stipends paid for job related college degrees be reviewable under grievance procedure is not directly related to compensation because it is primarily procedural in

Chenango County & Sheriff, 50 PERB ¶____

Demand for premium rate to be paid for work on holidays arbitrable as directly related to compensation. Demands relating to Workers' Compensation and GML §207-c not arbitrable as certain parts are not directly related to compensation. Police canine equipment demands not arbitrable. Economic canine demands (food; vet; kenneling; dog purchase) arbitrable. Defense and indemnification demand not arbitrable. Sale of dog to handler one dog is retired not arbitrable.

Unilateral Changes In Terms And Conditions Of Employment/Discontinuation Of Expired Contract Terms

State of New York (Comptroller's Office), 48 PERB ¶3009

Record established a practice by which wage rates for student assistants could be increased, decreased or left unchanged from year to year in the discretion of State Civil Service and Division of Budget. Union was on at least constructive notice of such practice. Therefore, decrease in wage rate not improper because it was consistent with practice.

State of New York (SUNY Brockport), 48 PERB ¶3013

Upon State's proper withdrawal from local agreement regarding work on holidays, State properly followed prior practice that local agreement had changed.

County of Nassau, 48 PERB ¶3014

Management rights clause giving employer the right to regulate work schedules and how many employees are on duty coupled with broad zipper clause waived union's bargaining rights. Employer could, therefore, change meal break times.

City of Albany, 48 PERB ¶3026

City did not violate Act when it unilaterally changed employees' health insurance benefits on retirement. No enforceable past practice. City had previously changed benefits and coverages without union objection. Changes negated any reasonable expectation benefits would remain unchanged.

County of Cortland and Sheriff, 48 PERB ¶3028

Unilaterally imposed health insurance dependent audit improper. Negotiability analysis not done on the facts of the particular case.

County of Nassau, 49 PERB ¶3001

Contractual management rights and zipper clause waived union's right to bargain unilateral change to certain employees' vacation preference

Village of Sag Harbor, 49 PERB ¶3006

Employer violated Act by removing a detective's take home vehicle. That the practice benefitted one employee not controlling. Can be an enforceable practice even if just one employee is the beneficiary of the practice.

Town of Ulster v. PERB, 49 PERB ¶7003 (Sup. Ct. Albany County 2016)

PERB's decision (47 PERB ¶3028) holding that recording of civilian dispatcher's disciplinary interview is mandatorily negotiable confirmed. Dispatchers are not "members" of police department for purposes of Town Law §155.

City of Schenectady v. PERB, 136 AD3d 1086, 49 PERB ¶7002 (3d Dep't 2016), leave to appeal granted, 27 NY3d 970 (2016)

Police discipline procedures mandatorily negotiable given that the Second Class Cities Law is expressly subordinated to later enacted laws, the Act being one.

Kent v. Lefkowitz, 27 NY3d 499, 49 PERB ¶7005 (2016), rev'g 119 AD3d 1208, 47 PERB ¶7003.

Duty to bargain wage reduction satisfied by side letter agreement giving Director of Budget discretion within specified limits to set seasonal per diem wage rates.

Town of Ulster, 49 PERB ¶3023

Town violated Act §209-a.1(d) and (e) by substituting local law disciplinary procedure for contractual system in proceedings involving civilian dispatchers. No repudiation of contract because Town's argument about civilian discipline being a prohibited subject, although "mistaken" and "unpersuasive', was not a "clearly foreclosed" interpretation of Town Law. See above.

Cayuga Community College, 50 PERB ¶3003

Demand to bargain is not a precondition to charge alleging a unilateral change to a mandatorily negotiable subject. Private sector law not controlling. No waiver or duty satisfaction.

State of NY (DOT), 50 PERB ¶3004

Use by employees of State car for commuting purposes was conditional benefit based on State's determination that vehicle was "for the benefit of the State". Discontinuation was consistent with condition. Therefore, no unilateral action.

Subcontracting/Transfer of Unit Work

Lawrence UFSD, 48 PERB ¶3007, rev'd, 49 PERB ¶7001 (Sup. Ct. Albany Co. 2016)

Board held school district's decision to transfer pre-kindergarten teaching functions to another institution is not mandatorily bargainable upon conclusion that Education Law §3602-e establishes legislative intent to exempt school districts from duty to bargain this issue. Court reverses, holding statute does not plainly exempt employer from Act's bargaining obligations.

State of New York, (Div. of State Police), 48 PERB ¶3012

A change in qualifications need not be affirmatively pled and proven. Facts obvious on the record. Civilianization analysis applies if work is taken from uniformed personnel and given to civilians or vice versa even if skills and training of uniformed personnel are not strictly necessary to perform at issue job tasks.

Cayuga Community College, 50 PERB ¶3003

Transfer of unit work to part-time, non-unit retirees violation. No change in qualifications. No compelling operational need defense established.

State of New York (SUNY Buffalo), 50 PERB ¶3001

State's contractual right to subcontract to third parties satisfied duty to negotiate work transfer to a public employer that is not the State of New York.

Practice & Procedure

East Meadow UFSD, 48 PERB ¶3006

ALJs' credibility determinations are to be accepted unless they are manifestly incorrect.

ALJ remedial order issued upon a charge later held moot by the Board vacated.

UFT (Gibson), 48 PERB ¶3015

Timely filed exceptions were dismissed because there was no proof the exceptions were timely served on the parties.

UFT (Barnes), 48 PERB ¶3017

Exceptions filed one day late dismissed.

ALJ credibility resolutions are to be sustained unless manifestly incorrect.

Cruz v. PERB, 48 PERB ¶7003 (Sup. Ct. NY County 2015)

CPLR Art. 78 petition dismissed as untimely filed. Court holds filing period for appeals runs from service of PERB's decision and order by mail not receipt.

Elwood Teachers' Alliance, 48 PERB ¶3020

ALJs' credibility determinations to be accepted unless manifestly incorrect.

City University of New York, 48 PERB ¶3021

Exceptions not taken are waived.

Hudson Valley Community College v. PERB, 132 AD3d 1132, 48 PERB ¶7005 (3d Dep't 2015)

PERB's remedial order remitted to PERB to develop record to ascertain who is owed compensation and in what amounts as to second jobs that were "sporadic".

Spence v. Miller, 48 PERB ¶7004 (Sup. Ct. Alb. County 2015)

Union applied to court pursuant to PERB's authorization for injunctive relief as to fingerprinting and background checks. IR granted as court finds reasonable cause to believe subjects are mandatorily negotiable and without injunction there would be irreparable harm because employer would have information it is not entitled to have.

New York State Housing Finance Agency, 49 PERB ¶3002

Board reverses ALJ's merits determination in favor of charging party and remands to ALJ to consider a merits deferral of (d) and (e) allegations. County of Sullivan, 41 PERB ¶3006 distinguished.

County of Nassau, 49 PERB ¶3001

Affirmative defenses need not be specifically named. Sufficient if the answer contains enough facts to put the charging party on notice of the nature of the defense.

County of Suffolk & Sheriff, 49 PERB ¶3005

ALJ prematurely deferred charge given respondent's claim in court that underlying CBA is a nullity. Can be no deferral to grievance forum if that forum is claimed by employer to not exist.

New York City Board of Education, 49 PERB ¶3010 and 49 PERB ¶3024

Collateral estoppel applied to bar relitigation of facts and issues decided adversely to employer in prior proceeding involving different union. See 44 PERB ¶3003, conf'd, 47 PERB ¶7007, aff'd, 103 AD3d 145, 46 PERB ¶7001 (3d Dep't 2012).

New York City Board of Education, 49 PERB ¶3012

Withdrawn charge reopened because employer did not comply with conditions for withdrawal. Not exclusively a contract repudiation standard.

CSEA (Harper), 49 PERB ¶3013

Interlocutory appeal from ALJ ruling denied. No extraordinary circumstances.

County of Nassau, 49 PERB ¶3014

Board declined charging party's request to withdraw improper practice charge after Board issued decision on merits. Board will not "lightly vacate an issued decision". At a minimum, there must be a "significant showing of cognizable prejudice." Withdrawal of charge "with prejudice" constitutes a merits disposition, but Board did not decide when and whether such a withdrawal will be given res judicata or collateral estoppel effect in future improper practice case.

Greater Amsterdam City School District, 49 PERB ¶3011

Hearsay evidence admissible and can form sole basis for an administrative determination. ALJ credibility determinations accepted unless manifestly incorrect.

State of New York v. PERB, 137 AD3d 1467, 49 PERB ¶7004 (3d Dep't 2016)

Court confirms PERB's decision to not vacate parties' stipulation regarding placement of positions into unit. Director not required to hold a hearing when parties consent. Stipulations are favored and will not be set aside absent fraud or mistake or are against public policy.

State of New York (OMH) (Josey), 49 PERB ¶3022

Charging Party's unexplained failure to attend conference warrants dismissal of charge. ALJ to be confirmed unless dismissal is an abuse of discretion.

City of New York & PBA, 49 PERB ¶6501

Interest arbitration award mooted scope of negotiation issues.

City of Lockport v. Lockport Professional Firefighters Association, Inc., 141 AD3d 1085, 49 PERB ¶7503

Stay of arbitration denied. Grievance regarding staffing reduction not barred. Grievance raised employee safety issues not a job security provision.

State of New York (SUNY Buffalo), 50 PERB ¶3001

ALJ correctly denied the charging party's motion for reconsideration. Evidence could have been discovered with due diligence and would not likely produce a different result.

Interference & Discrimination

East Meadow UFSD, 48 PERB ¶3006

Leafletting in support of union held not protected because Education Law §3020-a Hearing Officer had held action obstructed school traffic. Adopting Hearing Officer's findings, Board holds leafletting as conducted was not protected.

Town of Tuscarora, 48 PERB ¶3011

Board's finding on motion to dismiss that charging party had established a prima facie case is not a finding conclusively proving animus. ALJ must make express findings of fact on the ultimate issues.

UFT (Gibson), 48 PERB ¶3015

Union's disagreement with union representative's recommendation to take grievance to arbitration is not improper by itself.

UFT (Leon), 48 PERB ¶3016

Matters pertaining to internal union affairs (office holding) cannot be a basis for DFR claim. There must be employment action. Conclusory allegations will not suffice to establish a DFR breach.

Elwood Teachers' Alliance, 48 PERB ¶3020

Alleged violation of union's constitution and by-laws is not an improper practice within PERB's jurisdiction. Conclusory allegations are insufficient to support a DFR breach.

Bellmore-Merrick CSD, 48 PERB ¶3022

Discriminatory refusal to hire established by record evidence. Remand on remedy due to "highly atypical circumstances".

County of Nassau, 48 PERB ¶3023

High level supervisor's verbal threats to employees unlawful. That supervisor is in the same bargaining unit as employees does not privilege statements made in his supervisory capacity and as employees' commanding officer. Statements attributable to employer under agency principles. Express condonation or authorization for statements not required.

De Oliveira v. PERB, 132 AD3d 1010, 48 PERB ¶7006 (3d Dep't 2015)

PERB's decision finding no DFR breach (47 PERB ¶3008) confirmed. Substantial evidence to support PERB's decision. No intentional or bad faith actions and good faith mistakes do not constitute a DFR breach.

DC 37, Local 372 (Candelario), 49 PERB ¶3015

Union did not breach duty of fair representation by not taking employee's discharge to arbitration. Merits based decision without basis to conclude decision was arbitrary, discriminatory or made in bad faith.

New York City Transit Authority (Burke), 49 PERB ¶ 3021

Employee's allegation that he was discriminated against for having filed improper practice charges not established.

Buffalo City School District, 49 PERB ¶3028

Employer's written and verbal statements to employees urging employees to advocate against a contractual grievance that had been filed by the union held to be improper coercion. Announced layoff of employees caused by uncertainty as to outcome of grievance not unlawful.

County of Westchester, 49 PERB ¶3031

Abolition of position because incumbent was union officer who used contractual union release time violated Act §209-a.1(a) and (c) despite absence of union animus and underlying legislative action. Arbitrators award does not determine scope of Board's remedial authority. Reinstatement to equivalent position in different department held sufficient.

State of New York (DOT), 50 PERB ¶_____

State violated Act when it issued revised W-2s increasing the tax liability of only those employees named in improper practice charge. Asserted claim of business justification dismissed as pretext.

Representation

City University of New York, 48 PERB ¶3021

Petitioner's affidavit in support of request to fragment peace officers from blue-collar unit was sufficient to raise questions as to conflict of interest and inadequate representation by incumbent union. Dismissal of petition reversed and case remanded for development of record.

County of Franklin & Sheriff, 48 PERB ¶3025

Corrections Lieutenant added to existing county unit. Title shares a community of interest with other unit titles.

Cayuga County & Community College, 49 PERB ¶3007

Adjunct faculty not appropriately placed with full-time faculty because of conflict of interests.

Village of Scarsdale, 49 PERB ¶3009

Employer's U/P petition to add newly created Lieutenant position to fire fighter unit dismissed. The position was vacant such that no duties were being performed nor were any performed in the past.

Miscellaneous

McLaughlin v. Hankin, 132 AD3d 675, 48 PERB ¶7503 (2015)

Without DFR breach, employee's wrongful termination lawsuit against employer was dismissed. Employee required to exhaust contractual grievance procedure unless DFR violation.

City of Rensselaer, 49 PERB ¶3016

Director of Conciliation is empowered to dismiss petition for interest arbitration in its entirety because of partial invalidity of petition even after arbitration panel has been designated.

Kilduff v. Rochester City School District, 24 NY3d 505, 49 PERB ¶7501 (2014)

Tenured teacher had right from September 1, 1994 to elect Education Law §3020-a disciplinary procedures. Could not be forced to use contractual disciplinary system. Contractual process determination annulled.

Carver v. County of Nassau, 135 AD3d 888, 49 PERB ¶7502 (2016)

County charter that vested Commissioner of Police with power over police discipline controlled over language in subsequent local law and collective bargaining agreement that allowed arbitration of certain types of disciplinary charges.

City of Springfield, 49 PERB ¶8001 (2015) (Mass. Employment Relations Bd. 2015)

Installation of GPS tracking devices in vehicles driven by public works employees mandatorily bargainable.

Hyde Leadership Charter School-Brooklyn, 49 PERB ¶8002 (NLRB determination August 24, 2016)

Majority of NLRB holds charter schools are private entities within the NLRB's jurisdiction. Charters are not political subdivisions exempt from the NLRB's jurisdiction. NLRB will not decline to exercise its jurisdiction. Dissent concludes charters are political subdivisions and "alternative public schools". Moreover, charters are administered by officials who are responsible to public officials or the general electorate. In any event, dissent would decline jurisdiction.

City of Ithaca, Director of Conciliation letter ruling. (Dec. 23, 2016) (exceptions filed)

Union which objects to employer's petition for interest arbitration may not thereafter proceed to interest arbitration pursuant to its own later filed petition for the two years that could have been covered by an award that could have issued pursuant to the employer's petition if it had been processed. Expired CBA rolls over unchanged for two years.

IRV MILJONER

IRV MILJONER is the Director of the Long Island District Office for the U.S. Department of Labor's Wage and Hour Division. The agency enforces the Fair Labor Standards Act, which sets minimum wage, overtime, recordkeeping requirements, and child labor rules, prevailing wage laws, the Family Medical Leave Act and other federal labor laws.

Irv has over 42 years of federal government service, with 24 years in the U.S. Labor Department's Long Island office, where he's been District Director for the Wage & Hour Division for the past 22 years. In that time, his office has recovered over $50 million in wage underpayments for workers who hadn't received lawfully due wages, and protected the interests of the employer communities against unfair competition.

Irv has been recognized for his many public service, outreach, and mentorship activities, and leadership in forging partnerships with business organizations, worker and community groups, other government agencies, law, CPA, HR and other professional associations on Long Island, for whom he is a frequent guest speaker. Irv has also lectured and instructed at area colleges, and has been quoted and interviewed often by media, on federal Wage Hour law topics.

Irv is the National VP of the Federal Managers Association - DOL chapter, for whose newsletter he's written a periodic human relations column. Among his many awards, Irv is a 2011 Martin Luther King Jr. Human Rights Award recipient for Nassau County, and has been awarded his agency's Public Service and Labor-Management Relations awards. He is active in a variety of civic, charitable, and community affairs and non-profit Boards, including service on the Board of Directors of Literacy Nassau.

IRV MILJONER, ESQ.

-- Fact Sheet #13 - Employment Relationship under FLSA (Employee vs. Independent Contractor) :http://www.dol.gov/whd/regs/compliance/whdfs13.pdf

-- Fact Sheet # 17A – Common "White Collar" Exemptions http://www.dol.gov/whd/regs/compliance/fairpay/fs17a_overview.pdf

-- Fact Sheet # 21 – Recordkeeping Requirements under FLSA http://www.dol.gov/whd/regs/compliance/whdfs21.pdf

-- Fact Sheet # 22 - "Hours Worked" under the FLSA: http://www.dol.gov/whd/regs/compliance/whdfs22.pdf

-- Fact Sheet # 23 – Overtime Pay Requirements under FLSA http://www.dol.gov/whd/regs/compliance/whdfs23.pdf

-- Fact Sheet # 28 – The Family and Medical Leave Act https://www.dol.gov/whd/regs/compliance/whdfs28.pdf

-- Fact Sheet #35 – Joint Employment under the FLSA https://www.dol.gov/whd/regs/compliance/whdfs35.pdf

-- Fact Sheet # 71 - "Internship Programs" under the FLSA: http://www.dol.gov/whd/regs/compliance/whdfs71.pdf

-- Fact Sheet # 77 – Prohibiting Retaliation under FLSA https://www.dol.gov/whd/regs/compliance/whdfs77a.pdf

-- FLSA / Federal Minimum Wage Poster: http://www.dol.gov/whd/regs/compliance/posters/flsa.htm (follow the instructions to download an appropriate size version)

PETER J. AUSILI, ESQ.

Peter J. Ausili is a law clerk to United States District Judge Leonard D. Wexler of the United States District Court for the Eastern District of New York. He was an associate with Weil, Gotshal & Manges and Kaye, Scholer, Fierman, Hays & Handler in New York City. His practice has included commercial litigation and white collar criminal defense. He graduated *magna cum laude* from St. John's University School of Law, where he was Notes & Comments Editor of the law review.

Mr. Ausili is a member of the Eastern District's Committee on Civil Litigation. He is a past or present member of various legal organizations, including the Federal Bar Council and the Suffolk County Bar Association (SCBA). For the SCBA, he served as a Director, Officer of the Suffolk Academy of Law, Co-Chair of the Federal Court and Labor & Employment Law Committees, and Assistant Legal Articles Editor of the Suffolk Lawyer.

Mr. Ausili serves as an adjunct professor at Touro Law School, teaching Evidence and Pretrial Litigation. He lectures extensively on federal courts and federal practice and has published various articles on federal courts, federal practice, and other topics in the New York Law Journal, the Suffolk Lawyer, and various law reviews and bar journals. He also lectures on other topics, including products liability, ethics, legal writing, and courtroom technology.

Mr. Ausili also participates in various civic, community, and sports-related organizations. He is a referee of various sports, and he has appeared in regional and New York International Fringe Festival theater productions.

Mary Ellen Donnelly devotes her practice to the representation of management exclusively in all aspects of labor relations, employment law, and related litigation. She litigates in state and federal courts throughout the country. She represents management before arbitration tribunals and administrative agencies on the state and federal level, including the United States Equal Employment Opportunity Commission and the New York State Division of Human Rights. She litigates cases before the National Labor Relations Board. Ms. Donnelly represents employers in health care, higher education, manufacturing, financial services, retail, and not-for-profit institutions.

In addition to litigation, Ms. Donnelly frequently counsels clients on a full range of state and federal labor and employment law issues. Ms. Donnelly has lectured on numerous employment law topics, including Title VII, Title IX, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Americans with Disabilities Act, the FLSA, Section 296 of the New York State Executive Law and various aspects of employment discrimination. Ms. Donnelly has provided training to executives, supervisors and employees on labor and employment law issues.

Ms. Donnelly received her law degree from Fordham University School of Law in 1991, where she served as Captain of the National Moot Court Team for the Moot Court Board. She received her undergraduate degree from Syracuse University in 1988. Ms. Donnelly is admitted to practice before the State Courts of New York and New Jersey, as well as before various Federal Courts, including the Second Circuit Court of Appeals, the District Courts for the Southern, Eastern and Western Districts of New York and the District of New Jersey. She is a member of the American Bar Association and the New York State Bar Association. Ms. Donnelly is recognized in the Best Lawyers and Super Lawyers publications.

Ms. Donnelly has lectured on numerous labor and employment law topics, including sexual harassment, the Fair Labor Standards Act, Family Medical Leave Act, the Americans with Disabilities Act, and various aspects of employment discrimination. Ms. Donnelly has provided training to executives, supervisors and employees on labor and employment law issues, including sexual harassment training. Ms. Donnelly has also trained executives and supervisors on diversity in the workplace, violence in the workplace and effective supervisory conduct.

Ms. Donnelly has conducted hundreds of training sessions on sexual harassment, which have included Executives and Officers, front line supervisors and non-supervisory employees. The training includes a lecture on the current state of the law, a review of the employer's non-discrimination policies and a discussion of specific factual situations that impact the workplace. In additional to her sexual harassment training, Ms. Donnelly has conducted numerous investigations into allegations of sexual harassment on behalf of employers to determine the validity of employee complaints of harassment.

Troy L. Kessler is a partner at Shulman Kessler LLP. He has extensive experience representing employees who have been the victims of discrimination, harassment, wrongful termination, retaliation, overtime and minimum wage violations.

Troy has spoken at CLE events sponsored by the American Bar Association, the Federal Bar Association, the National Employment Lawyers Association – New York and the Suffolk County Bar Association, on topics covering the white-collar exemptions to the FLSA, amendments to the Federal Rules of Civil Procedure, and drafting and negotiating proper settlement agreements.

Troy is also a contributing author for the American Bar Association's FLSA Midwinter Report, which serves as the annual supplement to the Ellen C. Kearns et al. eds., *Fair Labor Standards Act* (2d. ed. 2010). Troy is a board member of the National Employment Lawyers Association – New York, and the Federal Bar Association – Eastern District of New York Chapter, as well as a member of the Advisory Board of the Center for Labor and Employment Law at New York University School of Law.

Troy is licensed to practice law in the State of New York. He is also admitted in the United States District Courts for the Southern and Eastern Districts of New York. He received his law degree from Loyola University School of Law – Chicago, and his his bachelor's degree in Political Science and History from the University of Wisconsin.

Noel P. Tripp is a Principal in the Long Island office of Jackson Lewis P.C. Since joining Jackson Lewis as a summer associate in May 2005, he has practiced exclusively in employment law and early in his career was involved in matters pending before federal and state courts and administrative agencies covering the entire gamut of employment-related matters. His principal focus is the defense of class and collective action lawsuits under federal and state wage-and-hour laws, including both "white-collar" misclassification actions as well as actions brought in behalf of hourly employees seeking to recover unpaid minimum, regular and overtime wages, amounts unlawfully deducted from wages, unpaid commissions, and gratuities. He previously served as Coordinator for Jackson Lewis' wage-and-hour blog at www.wageandhourlawupdate.com.

He has spoken about wage-and-hour matters to the American Translators Association, the Women's Bar Association of New York, the New York County Lawyers Association, the New York City Bar Association and other industry and professional associations, and he is a frequent speaker on wage-and-hour topics at Jackson Lewis' popular Long Island Breakfast Series.

Mr. Tripp is a graduate of Dartmouth College (A.B. 1999), and Fordham Law School (J.D. 2006).

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Suffolk County Bar Association
Law in the Workplace Conference

WAGE AND HOUR LAW UPDATE

May 4, 2017

I. Joint Employment and Independent Contractors

A. Joint Employment

1. The FLSA is a remedial statute that broadly defines employment. *See, e.g., Brock v. Superior Care*, 840 F.2d 1054, 1058 (2d Cir. 1988).

2. Economic realities (a/k/a functional control) of the relationship is the key.

   See Grenawalt v. AT&T Mobility LLC, No. 15 Civ. 949, __ F. App'x __, 2016 WL 945048 (2d Cir. Mar. 14, 2016). The Second Circuit reversed an award of summary judgment in Defendant's favor, and remanded the case to the district court, finding that there were genuine issues of material fact regarding the six factor analysis set forth in *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003). The factors that must be considered in the totality of the circumstances, when considering whether there is joint employment are:

   a) Whether the alleged employer's premises and equipment was used for the worker's work;

   b) Whether the contractor had a business that could or did shift from one employer to another;

   c) The extent to which the worker performed a discrete line-job that was integral to the alleged employer's business

   d) Whether responsibility under the contracts could pass from one subcontractor to another without any material changes;

e) The degree to which the alleged employer supervised the worker's work;

f) Whether the worker worked exclusively or predominantly for the alleged employer.

See also Copper v. Calvary Staffing, LLC, 132 F. Supp. 3d 460 (E.D.N.Y. 2015) (motion to dismiss denied, where plaintiffs adequately pled that Enterprise Rental Car acted as their employer, despite the fact that they were also employees of Calvary Staffing).

3. *Godlewska v. Human Dev. Ass'n.*, 561 Fed. Appx. 108 (2d Cir. N.Y. Apr. 8, 2014)(affirming grant of summary judgment to New York City agencies on issue of whether agencies were "joint employer" of home health aides employed by contractor agency accepting City-administered assignment through Medicaid program).

4. United States Department of Labor Administrator's Interpretation 2016-1:

> In an effort to ensure that workers receive the protections to which they are entitled and that employers understand their legal obligations, the possibility of joint employment should be regularly considered in FLSA and MSPA cases, particularly where (1) the employee works for two employers who are associated or related in some way with respect to the employee; or (2) the employee's employer is an intermediary or otherwise provides labor to another employer.

Administrator David Weil, U.S. Dept. of Labor, Joint Employment Under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act, Admin. Interpret. No. 2014-2 (Jan. 20, 2016), available at www.dol.gov/whd/flsa/Joint_Employment_AI.htm

B. Independent Contractors

1. The FLSA is a remedial statute that broadly defines employment. *See, e.g., Superior Care*, 840 F.2d 1054 at 1058.

2. Under the FLSA, the economic realities of the relationship are the key. As delineated in *Superior Care*, 840 F.2d 1054 at 1058, the factors that must be considered in the totality of the circumstances are, when evaluating whether a worker is an independent contractor are:

a) The degree of control exercised by the employer over the worker;

b) The worker's opportunity for profit of loss and their investment in the business;

c) The degree of skill and independent initiative required to perform the work;

d) The permanence or duration of the working relationship; and

e) The extent to which the work is an integral part of the employer's business.

See also Hart v. Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d 901 (S.D.N.Y. 2013) (workers deemed to be employees under both the FLSA and NYLL).

3. *Compare Saleem v. Corp. Transp. Group, Ltd.*, 2017 U.S. App. LEXIS 6305 (2d Cir. Apr. 12, 2017)("undisputed facts demonstrate[d] that . . . Plaintiff [black car franchise holders] demonstrated 'initiative'" and that permanence and regularity of the relationship were "entirely of Plaintiffs' choosing," thus drivers were independent contractors).

4. United States Department of Labor Administrator's Interpretation 2015-1

> The very broad definition of employment under the FLSA as 'to suffer or permit to work' and the Act's intended expansive coverage for workers must be considered when applying the economic realities factors to determine whether a worker is an employee or an independent contractor. The factors should not be analyzed mechanically or in a vacuum, and no single factor, including control, should be over-emphasized. Instead, each factor should be considered in light of the ultimate determination of whether the worker is really in business for him or herself (and thus is an independent contractor) or is economically dependent on the employer (and thus is its employee).

Administrator David Weil, U.S. Dept. of Labor, The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors, Admin. Inter. No. 2015-1 (July 15, 2015), available at www.dol.gov/whd/workers/misclassification/ai-2015_1.htm.

5. The New York State independent contractor standard

a) *Bynog v Cipriani Group, Inc.*, 1 N.Y.3d 193, 198, 770 N.Y.S.2d 692 (2003). The Bynog factors "relevant to assessing control include whether the worker":

(1) Worked at his own convenience;

(2) Was free to engage in other employment;

(3) Received fringe benefits;

(4) Was on the employer's payroll; and

(5) Was on a fixed schedule.

b) Under the NYLL, the degree of control is critical to the independent contractor analysis as courts have recognized that "[i]ncidental control over the results produced—without further evidence of control over the means employed to achieve the results—will not constitute substantial evidence of an employer-employee relationship." *In re Hertz Corp.*, 2 N.Y.3d 733, 735, 778 N.Y.S.2d 743 (2004).

II. FLSA Settlements

A. Background

1. In *Cheeks v. Freeport International Pancake House*, 796 F.3d 199 (2d Cir. 2015), the Second Circuit held that stipulated dismissals settling FLSA claims with prejudice require the approval of the district court or the Department of Labor to take effect.

2. Thus, absent approval, a release of FLSA claims contained in a negotiated settlement agreement is not binding.

3. Some of the potential problems with FLSA settlements identified in *Cheeks* are:

a) Settlement containing a battery of highly restrictive confidentiality provisions. *See Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170 (S.D.N.Y. 2015).

b) Overbroad release that would "waive practically any possible claim against the defendants, including unknown claims and

claims that have no relationship whatsoever to wage-and-hour issues." *See id.*

c) Provision that would set the attorney's fee "between 40 and 43.6 percent of the total settlement payment" without adequate documentation to support such a fee award. *See id.*

d) Provision barring the plaintiff's attorney from "representing any person bringing similar claims against Defendants." *See Guareno v. Vincent Perito, Inc.*, No. 14 Civ. 1635, 2014 WL 4953746, at *2 (S.D.N.Y. Sept.26, 2014).

B. Court Approval of FLSA Settlements

1. The *Wolinsky* Factors

To determine the reasonableness of a proposed settlement, courts examine five factors:

a) Plaintiff's range of possible recovery;

b) The extent to which the settlement will enable the parties to avoid anticipated burdens and expenses in establishing their respective claims and defenses;

c) The seriousness of the litigation risks faced by the parties;

d) Whether the settlement agreement is the product of arm's-length bargaining between experienced counsel; and

e) The possibility of fraud or collusion.

2. In addition to the *Wolinsky* factors, in the wake of *Cheeks*, Courts are mindful of the *Cheeks* "admonitions."

a) Release Language

Courts may reject releases which extend to claims beyond those in the litigation. *See, e.g.*, *Castagna v. Hampton Creek, Inc.*, No. 16 Civ. 760, 2016 WL 7165975 (E.D.N.Y. Dec. 6, 2016); *Batres v. Valente Landscaping Inc.*, No. 14 Civ. 1434, 2016 WL 4991595 (E.D.N.Y. Sept. 15, 2016). *But see Souza v. 65 St. Marks Bistro*, 2015 U.S. Dist. LEXIS 151144 (S.D.N.Y. Nov. 6, 2015)(" A general release of the kind proposed in this case, with former employees who have no ongoing relationship with the employer, makes sense in order to bring complete closure. At settlement

conferences (including the one in this case), counsel for both employees and employers stress the importance of these release terms. Indeed, in some cases an employee has identified other (previously unpled) claims and will accordingly obtain a higher settlement as a result of agreeing to a general release. Accordingly, the Court is willing to approve the release terms of the settlement in this case, with the modification that the release be mutual in all respects.").

b) Non-disparagement Provisions

Only be permitted if they include a "carve-out for truthful statement about plaintiffs' experiences litigating their case." *Panganiban v. Medex Diagnostic and Treatment Center, LLC*, No. 15 Civ. 2588, 2016 WL 927183, at *2 (E.D.N.Y. Mar. 7, 2016) (quoting *Martinez v. Gulluoglu*, No. 15 Civ. 2727, 2016 WL 206474, at *1 (S.D.N.Y. Jan. 15, 2016)).

c) Confidentiality

"Simply stated, these types of provisions that 'bar plaintiffs from openly discussing their experiences litigating ... wage and hour case[s] ... run afoul of the purposes of the FLSA and the 'public's independent interest in assuring that employees' wages are fair.'" *Gonsales v. Lovin Oven Catering of Suffolk, Inc.*, No. 14 Civ. 2824, 2015 WL 6550560, at *3 (E.D.N.Y. Oct. 28, 2015) (quoting *Lopez v. Night of Cabiria*, LLC, No. 14 Civ. 1274, 96 F. Supp. 170, 178 (S.D.N.Y. 2015).

d) Attorney's Fees

(1) One-third contingency fees frequently approved as part of FLSA settlements in this district. *See, e.g., Abrar v. 7-Eleven, Inc.*, No. 14 Civ. 6315, 2016 WL 1465360 *3 (E.D.N.Y. Apr. 14, 2016) (approving attorneys' fees for one third of the total settlement as fair and reasonable and collecting cases); *Rangel v. 639 Grand St. Meat & Produce Corp.*, No. 13 Civ. 3234, 2013 WL 5308277, at *1 (E.D.N.Y. Sept. 19, 2013) (approving attorneys' fees of one-third of FLSA settlement amount, plus costs, and noting that such a fee arrangement "is routinely approved by the courts in this Circuit").

(2) The practice in the Second Circuit has been to apply the percentage method and loosely use the lodestar method as a "cross check." *Goldberger v. Integrated Resources, Inc.*,

209 F.3d 43, 50 (2d Cir. 2000). The Court should consider whether the proposed attorneys' fees are reasonable based on: (1) time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Goldberger*, 209 F.3d at 50.

3. Interplay with FRCP 68 Offers of Judgment

a) Most courts do not consider *Cheeks* to apply to offers of judgment. *Miranda v. Tong Shen Trading Inc.*, et al., No. 15-cv-01506, ECF No. 39 (E.D.N.Y. Jul. 1, 2016) (Tiscione, J.) (holding that "the judicial approval required by *Cheeks* . . . does not apply to Rule 68," and directing judgment to be entered in favor of the plaintiffs as provided in the "Acceptance of Rule 68 Offer of Judgment"); *Corado v. Nevetz Eleven Ice Cream Parlour*, No. 15-cv-05985, ECF No. 7 (E.D.N.Y. Apr. 5, 2016) (Spatt, J.) (holding that "apply[ing] *Cheeks* in the Rule 68 context, where there is no federal statutory exception, would be a bridge too far," and directing the Clerk to enter judgment on the accepted Rule 68 offer of judgment); *Baba v. Beverly Hills Cemetery Corporation, Inc.*, 2016 WL 2903597, at *1 (S.D.N.Y. Mar. 31, 2016) (McMahon, J.) (concluding that "I can see no basis for reading any exception into the absolutely mandatory language of Rule 68, which compels the Clerk of the Court to enter judgment on an accepted Offer of Judgment . . . [Cheeks] rests entirely on 'exceptional' language in Rule 41(a); there simply is no commensurate language in Rule 68"; and, after noting from a policy standpoint that the Court wished the compelled result were different, directing the Clerk to enter judgment on the accepted Rule 68 offer); *Lobillo v. United Hood Cleaning Corp.*, No. 15-cv-3581, ECF No. 15 (E.D.N.Y. Dec. 17, 2015) (Weinstein, J.) (holding that "court approval is not necessary for a settlement of FLSA claims under Federal Rule of Civil Procedure 68"); *Barnhill v. Fred Stark Estate*, 2015 WL 5680145, at *1, 3 (E.D.N.Y. Sept. 24, 2015) (Cogan, J.) (considering the issue of "whether the FLSA, as interpreted by *Cheeks*, requires court approval before the Clerk may enter judgment upon the [Rule 68] offer," and holding that "*Cheeks* should be confined to the Rule 41 context and does not reach an Offer of Judgment under Rule 68" because the decision set forth in *Cheeks* "did not involve or even mention Rule 68," and "[t]o hold that Rule 68 is not available in FLSA cases would be to rewrite it.") (emphasis added).

b) *But see* *Yu v. Hasaki Rest., Inc.*, 2017 U.S. Dist. LEXIS 54597 (S.D.N.Y. Apr. 10, 2017)(the conclusion that "settlements of FLSA claims pursuant to Rule 68 require judicial approval 'follows from the Second Circuit's reasoning in *Cheeks* and the contract law principles applicable to Rule 68.'").

DAVID M. COHEN

Mr. Cohen is a 1975 undergraduate of the University of Maryland. He attended Hofstra Law School where he was an Associate Editor of the Hofstra Law Review. He graduated law school with distinction in 1978 and was the recipient of that school's Labor Law Award. After two years as Associate Labor Counsel with Allied Chemical Corporation, Mr. Cohen joined the firm now known as Cooper, Sapir & Cohen, P.C. and has been a partner since 1985. Mr. Cohen's practice is devoted to representing management in the public and private sectors on matters pertaining to labor and employment, including union negotiations, arbitrations, practice before the National Labor Relations Board and the Public Employment Relations Board, employment discrimination matters before the NYS Division of Human Rights, the EEOC and in state and federal court, wage-hour issues before the NYS and US Departments of Labor and in state and federal court, employment contracts, severance agreements, unemployment insurance, whistleblowing, employee handbooks, etc. He and his firm are counsel to towns, villages, libraries, fire districts, and police departments, as well as not-for-profit corporations and manufacturing/service employers in diverse industries. Mr. Cohen is a member of the Labor and Employment Law Committees of the New York, Nassau and Suffolk Bar Associations, and is a past co-chair of the Suffolk Labor and Employment Law Committee. He has served on the Executive Board of the Long Island Chapter of the Industrial Relations Research Association, has lectured on various labor, employment and education law topics, and has been a speaker at the Law in the Workplace Conference since its inception over 26 years ago.

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Michael Krauthamer has worked primarily in the area of public sector labor relations since 1995. He is currently employed by the New York State United Teachers (NYSUT) as a Labor Relations Specialist working out of NYSUT's Suffolk County Regional Office. Mike represents both public and private sector unions in collective bargaining, grievance arbitration, disciplinary matters, civil service issues and matters before the PERB and the NLRB.

Mike was previously a partner in the Melville law firm Lamb & Barnosky where he represented municipalities including school districts, counties, towns and villages in all types of labor and employment matters. Prior to that, Mike was a labor arbitrator, mediator and hearing officer in the public and private sectors, counsel to the Suffolk County Public Employment Relations Board and a Labor Relations Specialist for the Civil Service Employees Association.

Mike has lectured extensively for the NYS Bar Association on public sector employment law issues and has appeared on News 12, Channel 55 and NBC's Today in New York on labor law issues and was listed in *Long Island Business News 2010 Who's Who in Labor Law* on Long Island. He is an editor of *Impasse Resolution Under the Taylor Law* 2d edition, published by the New York State Bar Association and has served as an instructor at Dowling College on labor management relations and dispute resolution.

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RECOUPMENT OF WAGES IN THE PUBLIC SECTOR

Michael Krauthamer, Labor Relations Specialist, NYSUT

GIFT OF PUBLIC FUNDS

Article 8, §1 of the New York State Constitution prohibits municipalities from granting gifts of public money or property. This section was intended to "curb raids on the public purse for the benefit of favored individuals or enterprises furnishing no corresponding benefit." *International Brotherhood of Teamsters v. Town of Cortlandt*, 327 N.Y.S. 2d 143 (Sup. Ct. Westchester Co. June 18, 1971). A Gift of Public Funds will often be found when an employee receives "compensation over and above that fixed by contract or by law when the services were rendered." *Mahon v. Bd. Of Educ. Of City of New York*, 171 N.Y. 263 (1902). The contract referred to can be a collective bargaining agreement.

Situation- Over the course of the school year, a teacher receives $80,000 in salary schedule base pay despite the fact that the salary schedule clearly indicates a base salary of $75,000.

A public employer is duty bound by the State Constitution to seek recoupment of an overpayment from a public sector employee that is based on a clerical error. This type of overpayment burdens taxpayers and constitutes an improper gift of public funds that a public employer owes the public a duty to recoup.

Initially, both sides should be sensitive to the other side's perspective in what often becomes not only a financial matter but an emotional one.

- Employers often have no sympathy for the employee believing that he/she should have realized the overpayment and may believe that the employee is trying to get away with something. Employers often lose sight of the fact that they made a mistake on an issue that their employees understandably trust them to get correct and that an overpayment can have a profound financial impact on an employee.
- Employees often get very upset because they have put their trust in the employer to get these matters correct and now will be negatively financially impacted for a mistake that their employer made and lose sight of the fact that they have an obligation as well to review their paycheck, make sure it is correct and speak up if it is not correct.

IS THE EMPLOYEE ATTEMPTING TO SCAM THE SYSTEM OR IS IT THAT WITH DIRECT DEPOSIT, ON-LINE BANKING ETC., MOST EMPLOYEES JUST DON'T REVIEW THEIR PAYCHECKS CLOSELY AND TRUST THEIR EMPLOYER TO GET IT CORRECT?

PROCEDURE TO RECOUP

In the Private Sector, the New York Wage Deduction Law, (NYS Labor Law §193) specifically authorizes and sets forth the procedure by which an employer may recoup a mistaken overpayment of wages. This became effective in 2012 and has been extended to November 6, 2018. This does not, however, apply to the public sector.

The process by which a public employer may recoup an overpayment is governed by common law.

The Court of Appeals, in *Leirer v. Caputo*, 81 N.Y.2d 455 (1993) held that a municipality may not exercise unilateral means to recoup an overpayment of wages. In *Leirer*, the Suffolk County Comptroller conducted an audit of payroll records and determined that an employee had been overpaid. The employee was provided an opportunity to submit evidence to contest the overpayment. The County then unilaterally began deducting 10% of her wages to recoup the $13,614.90 overpayment.

The Court held that the withholding of wages was improper because the overpayment was never reduced to an "established debt." In *Hennessey v. Board of Educ.* (2nd Dep't 1996) the Court held that the employer may not garnish wages but may seek recoupment of an overpayment in a separate proceeding. *See also Rampello v. East Irondequoit Cent. School Dist.*, 236 A.D.2d 797 (4th Dep't 1997)(a retirement bonus to an educator consitututed an impermissible gift of public funds and allowed the district to recoup the overpayment through litigation); *New York City Campaign Finance Board*, 804 N.Y.S.2d 662 (Civ. Ct., NY Co., 2005)(a plenary action to recoup an overpayment is permissible).

Leirer also stated that the recoupment process must be exercised with "procedural regularity" or fairness which includes providing notice of the exact amount to be recouped and providing a procedure for challenging the amount sought to be recouped.

The Taylor Law- The decision to recoup monies owed by employees from their salary and the procedures to do so are mandatory subjects of negotiation. In *County of Sullivan*, 41 PERB ¶ 3006 (2008), the County deducted hours from an employee's leave accrual after she had been unable to work due to an on-the-job injury. PERB held that the employer committed an improper practice when it unilaterally implemented a non-contractual method of recovering leave accruals and holiday pay. Collecting employee debts is a mandatory subject of bargaining which should have first been negotiated with the Union.

Best Practices:

1. Once a municipality discovers that an employee has been overpaid, it should meet with the employee to explain the situation and provide the employee with the exact amount owed and documentation substantiating the overpayment.

2. The employee should be provided an opportunity to challenge the overpayment.

3. If not in dispute, the employer and the employee should enter into a repayment agreement. Over what period of time usually becomes the sticking point.

4. If the overpayment is disputed or no agreement can be reached, the municipality should then initiate a separate legal action to recoup the overpayment.

THE TRANSFER OF BARGAINING UNIT WORK UNDER THE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT (TAYLOR LAW) CIVIL SERVICE LAW ARTICLE 14, SECTION 200 et seq.

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The unilateral transfer of exclusive unit work may give rise to a violation of an employer's duty to bargain under the Taylor Law. An improper practice charge making such an allegation asserts that §209-a.1(d)[1] of the Taylor Law was violated. This provision requires that employers bargain in good faith with the collective bargaining representative of a unit of employees concerning mandatory subjects of bargaining. Since the Board has long held that the transfer of exclusive unit work is a mandatory subject of bargaining, the transfer of such work without a valid defense is violative of the Act.

This paper discusses the salient issues about which both union and employer representatives should be aware when addressing whether a viable cause of action exists regarding the transfer of unit work. The defenses available to an employer in these types of cases are also presented.

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[1] Improper employer practices. It shall be an improper practice for an employer or its agents deliberately .... (d) to refuse to negotiate in good faith with the duly recognized or certified representative of its public employees.

Niagara Frontier Transportation Authority

The Board first established the framework within which to analyze whether the transfer of unit work gives rise to a bargaining obligation in *Niagara Frontier Transportation Authority.*[2] In that case, the Board stated:

> [T]he essential questions are whether the work had been performed by unit employees exclusively (footnote omitted) and whether the reassigned tasks are substantially similar to those performed by unit employees. If both these questions are answered in the affirmative, there has been a violation of §209-a.1(d), unless the qualifications for the job have been changed significantly. Absent such a change, the loss of unit work to the group is sufficient detriment for the finding of a violation. If, however, there has been a significant change in the job qualifications, then a balancing test is invoked; the interests of the public employer and the unit employees, both individually and collectively, are weighed against each other.

Accordingly, the essential elements needed to establish a violation of the Act is that the work transferred was substantially similar and that it was performed exclusively. While a charging party needs to demonstrate that the work transferred was in fact substantially similar to that which was performed by unit members, the most critical determination to be made is a definition of the work in issue. Parties therefore present varying definitions of the work in question and whether an ALJ or the Board accept a particular is often determinative of the outcome of the case. For example, in *Seaford Union Free School District,*[3] the Board affirmed an ALJ decision which held that the District transferred duties which had been performed exclusively by department chairperson at the high schools to nonunit administrators in violation of the Act. The

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[2] 18 PERB ¶3083, at 3182 (1985).

[3] 47 PERB ¶3034 (2014).

administrator's unit alleged that the work was not performed exclusively since it performed similar work at lower schools. The Board concluded that the chairpersons had exclusively performed the preliminary stages of the administrative process and administrators in the different unit performed further review and adoption of the decisions. If no such distinction was recognized between the work performed at the high school and lower school the result would have been different.

Additionally in *County of Monroe and Sheriff of Monroe County*,[4] the Board affirmed a decision that the joint employer violated the Act by unilaterally transferring screening duties at security facilities from deputy sheriffs to nonunit employees. The Board defined the work as security screening at the Jail or Correctional premises. The joint employer's argument that nonunit employees had performed similar functions at a different building and therefore the unit had not performed the work exclusively was rejected. Accordingly, the transfer of the work to nonunit personnel was a violation of the Act.

Discernible boundary

The "discernible boundary" test has been utilized for a number of the years by the Board in defining the work in question. If work falls within a discernible boundary and has been performed exclusively, the employer has a bargaining obligation to negotiate concerning the decision to transfer the work prior to doing so. This test has been a useful guide in assisting parties in determining whether certain work can be considered exclusive and the legal rights and obligations which flow from that

[4] 45 PERB 3048 (2012).

conclusion. The following is a recitation of several Board cases which set forth the criteria used to conclude whether a discernible boundary exists.

In *Manhasset Union Free School District*,[5] the Board stated it would utilize a past practice analysis in accordance with its test stated in *Chenango Forks Central School District*,[6] in resolving whether there has been a transfer of unit work in violation of the Act. A *prima facie* showing is made when the facts demonstrate that "the practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue." This showing is subject to a defense that an employer lacked actual or constructive knowledge and a lack of a bilateral acceptance of or acquiescence in the practice. Constructive knowledge exists when the past practice is reasonably subject to the employer's managerial and/or supervisory responsibilities and obligations.[7] Based upon a past practice analysis, the Board concluded that a discernible boundary existed around the work of transporting public school students. The District made an explicit and unequivocal decision, which was clear and explicit to use unit members. The practice was clear and unequivocal and

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[5] *Manhasset Union Free Sch Dist*, 41 PERB ¶3005, 3021-22 (2008), *confirmed and mod in part, sub nom. Manhasset USFD v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), *on remittur*, 42 PERB ¶ 3016 (2009).

[6] 40 PERB ¶3012 (2007).

[7] The Board overruled those cases which relied upon the "core component" criteria to the extent that they are inconsistent with past practice analysis.

gave rise to the reasonable expectation that it would continue, and the evidence showed that the District had both actual and constructive knowledge of the practice.[8]

A discernible boundary may be drawn around work when there is a clearly circumscribed past practice within which unit members performed certain clearly defined work duties.[9] A "charging party must establish a discernible boundary to the claimed unit work which would appropriately set it apart from work done by nonunit personnel."[10] The Board looks to a number of criteria in making this determination. It has stated that "[i]n order to determine whether a discernible boundary has been established around work, which may be deemed exclusive to the unit, we assess the nature, location and frequency of the work unit employees perform, ..."[11]

There must be a reasonable relationship between the components of the discernible boundary and the duties of unit employees to conclude that a discernible

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[8] In *Town of Riverhead*, 42 PERB ¶3032 (2009) the Board reaffirmed the vitality of the *Niagara Frontier* test. In doing so it commented upon its decision in *Manhasset Union Free School District*,[8] and, at 3119, stated "The application of past practice analysis for determining whether the work has been performed exclusively by bargaining unit members in transfer of unit work cases was reaffirmed in *Manhasset Union Free School District.* The applicable test for finding an enforceable past practice under the Act is whether "the practice was unequivocal and was continued for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the practice would continue." (citation omitted)

[9] *Town of West Seneca*, 19 PERB ¶3028 (1986).

[10] *County of Nassau*, 21 PERB ¶3038, at 3085 (1988).

[11] *City of Rome*, 32 PERB ¶3058, at 3140 (1999). See *City of Buffalo*, 24 PERB ¶3043 (1991); *Otselic Valley Cent. Sch. Dist*, 19 PERB ¶3065 (1986).

exists.[12] For example, in *Hudson City School District*,[13] the Board found a discernible boundary between the record keeping work performed in different school buildings in the same school district. In reliance upon its decision in *City of Rochester*,[14] the Board, at 3080, stated "that job location can form a discernible boundary to unit work within which a union may maintain exclusivity even if there is no exclusivity over the job function beyond that boundary."

In *City of Buffalo*,[15] the Board affirmed the dismissal of a charge which alleged that the employer unlawfully transferred unit work. Specifically, the union argued that the work of precinct desk duty was not exclusive because nonunit members had been assigned that duty for a year, and that this occurred at eight of fourteen locations. In rejecting this argument, the Board stated that:

> Although geographic location can be a component part of the definition of unit work, in the cases in which we have recognized this as a relevant factor, there was a relationship between the work location and the duties of the job as performed at these locations. There is no evidence to suggest that desk duty varies by precinct in any substantial and material respect. (citations omitted)

In *New York City Transit Authority,*[16] the Board found a discernible boundary to exist around the routine maintenance and repair of buses stationed at the employer's Staten Island depot. In relevant part, the Board, at 3008, stated:

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[12] *Town of Brookhaven,* 27 PERB ¶3063, at 3147 (1994). *See also City of Buffalo*, 24 PERB ¶3043 (1991).

[13] 24 PERB ¶3038, at 3085 (1988).

[14] 21 PERB ¶3040 (1988), *conf'd* 155 AD2d 1003, 22 PERB ¶7035 (4th Dept 1989).

[15] 24 PERB ¶3043, at 3086 (1991).

[16] 30 PERB ¶3004 (1997), *confirmed*, 31 PERB ¶7012 (1998), *motion for leave to appeal denied,* 31 PERB ¶7015 (1998).

> The record clearly establishes that only ATU's unit employees performed routine maintenance and repair of the buses stationed in Staten Island. That the same services are performed in depots located in other boroughs on buses stationed at those locations by nonunit employees in the same job title does not disturb ATU's exclusivity over the work here in issue.

Recently, in *County of Seneca and Seneca County Sheriff*,[17] the Board found a violation of the Act due to the transfer of certain security functions from full-time deputy sheriffs to nonunit part-time deputies. The evidence demonstrated a continuous and uninterrupted practice that reflected the parties' understanding that the work would be performed by unit members, limited only by the parties' agreement that permitted the County to assign work to nonunit employees when unit employees were unavailable.[18]

Incidental/Minimal work performed non-unit members

The Board has also held that incidental or minimal incursions by nonunit personnel into the exclusive performance of unit work will not defeat a claim that the work has been performed exclusively. In *County of Onondaga*[19] the Board held that brief and incidental use of a contractor did not defeat a unit's claim that it exclusively performed certain work. In that case, the Board held that the County violated the Act by the unilateral transfer of tests for certain sexually transmitted diseases to nonunit employees. In addressing the issue of exclusivity, the Board, at 3104, stated:

> ...[A] relatively insignificant number of syphilis tests incidental to a battery of unrelated tests were performed by Centrex between April and

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[17] 47 PERB ¶3005 (2014).

[18] The order was modified to the extent the County was permitted to continue to use nonunit personnel consistent with the established past practice.

[19] 27 PERB ¶3048 (1994).

> November, when the County contracted with Centrex to perform all testing for sexually transmitted diseases. On these facts, we find it unreasonable to conclude that this very limited and incidental use of Centrex would affect the historical fact that the County exclusively used CSEA unit employees to perform the testing for such diseases.
>
> We find, therefore, that the brief and incidental use of Centrex to perform a comparatively insignificant number of tests for syphilis, does not extinguish exclusivity over the testing of sexually transmitted diseases, generally, and syphilis, specifically.[20]

The Board utilized the same analysis in *Manhasset* and concluded that the instances in which a transportation contractor performed unit work were very limited and insignificant when viewed in the totality of the work performed.[21]

Defenses

Change in qualifications

As stated in *Niagara*, "If, however, there has been a significant change in the job qualifications, then a balancing test is invoked; the interests of the public employer and the unit employees, both individually and collectively, are weighed against each other." As discussed below, the Board has addressed and refined this defense in a number of contexts. A change in qualifications has often been raised as a defense to a unilateral transfer of work case.

The transfer of police duties to civilian employees has been found to be a *de facto* change in qualifications permitting such transfer. In *State of New York (Department of*

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[20] See also *Port Jefferson Union Free Sch. Dist.*, 35 PERB ¶3041 (2002).

[21] *See also Greater Amsterdam City Sch Dist.*, (U-31433 4/13/16).

Correctional Services),[22] the Board explained its analysis regarding the civilianization of a position. It stated, at 3125, that

> Implicit in our analysis in *County of Suffolk*, *City of Albany* and *City of New Rochelle*, was a determination that the reassignment of police duties to civilians was a result of a *de facto* change in qualifications deemed necessary by the employer to perform the duties, as well as a concomitant change in the level of service to be offered by the employer. That change in qualifications and level of service resulted in a balancing of the management interests against the employees' interests. In those cases, the employer had determined to redeploy police officers in areas in more critical need of their police training, while civilians undertook the duties formerly performed by the police officers, with no loss of work to the unit and no individual loss of employment or benefits. The balance there tipped in favor of the employer's interests, in no small part due to the absence of significant detriment to the unit or individual employees.

The Board further commented on the framework of the analysis to be utilized in determining whether the balancing test is applicable. Specifically, in *Fairview Fire District*,[23] *supra*, the Board, at 3098, stated:

> Our use in *State DOCS* of the term "de facto" was intended as nothing more than a recognition of the fact that civilians lack the "special employment qualifications" required of and possessed by police officers or fire fighters. We very recently had reason to reaffirm that these uniformed personnel are "fundamentally different from everyone else." The substitution of civilians for police officers or fire fighters to deliver service previously performed by those uniformed personnel necessarily reflects an employer's determination that the specialized training and skills of the uniformed officer are not necessary to the performance of a given set of tasks, e.g., dispatch. It is the employer's determination to substitute positions having fundamentally different qualifications which has always been held to embrace the managerial right to establish qualifications even when specific tasks are unchanged. Therefore, it is not material that one or more of the civilians may be as capable objectively of performing certain tasks as one or more of the uniformed officers they replaced.

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[22] 27 PERB ¶3055 (1994).

[23] 29 PERB ¶3042 (1996).

In *Town of Riverhead*,[24] the Board found that a change of qualifications was sufficient to trigger the balancing test under *Niagara* when duties were transferred from civilian to police and veterinarian personnel. The Board stated that there was no loss of employment or benefits and that the duty to bargain was not violated.

Recent Board decisions have also addressed the defense of a change in qualifications to a transfer of unit work charge. In *County of Suffolk and Suffolk County Sheriff*,[25] as relevant to this discussion, the Board found that deputy sheriffs had performed certain work exclusively, but that the transfer of that work to security personnel constituted a change in qualifications. Since the only adverse consequence was the loss of unit work, the charge was dismissed. Additionally, in *Town of Stony Point*[26] the Board dismissed a charge alleging that the Town violated the Act by unilaterally transferring security duties at the Town Court to non-unit members. The Town transferred the duties to employees who were not sworn police officers. The Board concluded that the PBA established the first prong under the *Niagara Frontier* test, in that the work had been performed exclusively for a sufficient period of time to have become a binding past practice. The Board then engaged in a balancing test of the respective interests to determine whether a violation has occurred. This matter involved the civilianization of services formerly provided by police. This constituted a *de facto* change in job qualifications, and in this case the Town's interests prevailed.

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[24] *Supra.*

[25] 47 PERB ¶3024 (2014).

[26] 45 PERB 3045 (2012).

In *State of New York (Division of State Police)*,[27] the Board affirmed in part and reversed and remanded an ALJ decision which found a violation of the Act due to the transfer of screening functions to police personnel which had been performed exclusively by other employees. The Board stated that "when an employer has determined that the skills of a civilian employee are not necessary to perform a given set of tasks but that different qualifications are better suited for such tasks, especially tasks that are also performed by uniformed personnel and were so performed before being assigned to civilians, there has been a *de facto* change in qualifications for performing those tasks." The State neither pleaded this issue nor raised it in its brief below. Since a change in qualifications gives rise to a balancing test, the matter was remanded for the purpose of making findings on this issue.

Unit work may also be transferred to nonunit employees who have the same level of qualifications. In those circumstances, the Board will find that the loss of unit alone, if all other requisite criteria are present, is sufficient to constitute a violation of the duty to bargain.[28]

Additional defenses

There are certain other defenses that the Board has recognized which provide an employer with a viable defense even if there has been a transfer of exclusive unit work. Fiscal or operational concerns are not among those defenses. In *City of Lockport*[29] the

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[27] (U-31666, September 10, 2015).

[28] *Cayuga Community College*, (U-32511, 1/24/2017).

[29] 47 PERB ¶3031 (2014)

Board affirmed an ALJ decision and held that the City violated the Act by unilaterally transferring the exclusive unit work of billing for ambulance services provided by the City. The parties agreed that the work had been performed exclusively by the Unit. The Board rejected the City's defense that fiscal or operational concerns are relevant to a determination of whether the transfer of unit work is negotiable.

In *County of Erie and Sheriff of Erie County,*[30] the Board affirmed an ALJ decision holding that the joint employer violated the Act by unilaterally reassigning nursing duties. In doing so, it rejected a number of defenses raised by the Employer. It rejected the employer's mission related arguments, finding that it failed to demonstrate that the unilateral transfer of nursing duties was inherently and fundamentally a policy decision necessary to accomplish its primary mission as a public employer.[31] The Board also rejected the argument that it had the right to unilaterally transfer unit work because of recruitment problems, or because the level of salary and benefits it negotiated with the union was insufficient.

The Board has recognized the following as affirmative defenses to a charge alleging a violation of the Act due to the transfer of unit work.

Compelling Need

In order to successfully rely upon a "compelling need" defense, an employer must demonstrate that the parties have negotiated to impasse, there is an emergent need to act unilaterally at that time, and that the employer indicates its willingness to

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[30] (Case No. U-29239 12/19/12).

[31] See also *County of Erie and Sheriff of Erie County, supra.*

continue negotiations. For example, in *Wappingers Cent Sch Dist*,[32] the Board rejected a compelling need defense because the employer had time to initiate negotiations but failed to do so. The employer claimed that an emergency situation existed requiring it to unilaterally transfer unit work because it was unable to provide transportation services since, among other reasons, the buses were not serviceable and it was unable to rent other buses. Since the employer failed to comply with the requirements of the compelling need defense, its argument that the contracting out of services was its only alternative was rejected. The Board also rejected this defense in *New York City Transit Authority.*[33] In that case, the employer asserted a compelling need to transfer bus repair work without having established any of the required criteria. Operational necessity alone does not establish defense to a unilateral transfer of work charge.

Contract Clauses – Waiver and Duty Satisfaction

An employer may transfer unit work if it has bargained the right to do so and a contract clause so indicates. The Board has found that if a union has waived its right to negotiate concerning the transfer of unit work or that an employer has satisfied its duty to bargain, the transfer of exclusive unit work does not violate the Act. The following sets forth the basic standards of waiver and duty satisfaction as stated by the Board and cases applying these principles.

Waiver has been defined as the "[T]he intentional relinquishment of a known right with both knowledge of its existence and intention to relinquish it. Such a waiver must

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[32] 19 PERB ¶3037 (1986).

[33] See 30 PERB ¶3004 (1997), *confd*, 31 PERB ¶7012, *motion for leave to appeal denied,* 31 PERB ¶7015 (2d Dept 1998).

be clear, unmistakable and without ambiguity."[34] In *County of Livingston*,[35] the Board held that a contract clause permitting an employer "to determine whether and to what extent the work required in operating its business and supplying its services shall be performed by employees covered by [the] Agreement,"[36] constituted a waiver of the Union's right to bargain concerning the transfer of unit work.[37] In *Garden City Union Free School District*,[38] the Board also dismissed a charge alleging the transfer of cafeteria services in violation of the Act. The Board held that the management rights clause in the parties' collectively negotiated agreement constituted a waiver of the right to bargain concerning the transfer of unit work.

Duty satisfaction is a concept which is related to and sometimes overlaps with waiver. The Board has stated that "Under this particular defense, a respondent is claiming affirmatively that it and the charging party have already negotiated the subject(s) at issue and have reached an agreement as to how the subject(s) is to be treated, at least for the duration of the agreement."[39] An analysis of the contract clauses

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[34] *CSEA v. Newman*, 88 AD2d 685, 450 NYS2d 901, 15 PERB ¶7011 3d Dep't 1982), appeal dismissed, 57 NY2d 775, 15 PERB & 7020 (1982).

[35] 26 PERB ¶3074 (1993).

[36] *Id.* at 3143.

[37] *Garden City Union Free Sch Dist*, 27 PERB ¶3029 (1993).

[38] *Supra*.

[39] *County of Nassau*, 31 PERB ¶3064, at 3142 (1998). [Case also contains a discussion concerning the distinction between the defense of waiver and duty satisfaction] *Shelter Island Union Free School District*, 45 PERB ¶ 3032 (2012). *See also Orchard Park CSD*, 47 PERB ¶ 3029, 3089 n. 3 (2014) citing *Dutchess Cnty College*, 46 PERB ¶ 3009, 3016 (2013) (quoting *County of Nassau*, 31 PERB ¶ 3064, 3142 (1998).

may determine whether there has been a waiver or satisfaction of a bargaining obligation in the regard.

Recently in *State of New York (State University of New York at Buffalo)*[40] the Board affirmed an ALJ decision finding that a contractual provision in the parties' CBA constituted a waiver of the right to bargain concerning the transfer of unit work. The ALJ held that the clause at issue constituted a waiver of the PBA's right to contest the transfer of unit work to third parties. In addressing the merits, the Board stated that "duty satisfaction occurs when a specific subject has been negotiated to fruition" and that it "may be established by contractual terms that either expressly or implicitly demonstrate that the parties had reached accord on that specific subject."[41] The clause in issue stated that in part that "[T]he employer shall not contract out for goods and services performed by employees which will result in any employee being reduced or laid off without prior consultation with the Union ...." Prior cases interpreting this clause stated that the clause did not waive a claim based on a transfer of work to other state employees but did with regard to private entities. The Board concluded, as relevant to this case, that the entity to which the work was contracted was a third party and that the term "third party" included both public employers and private parties. The charge was therefore dismissed.[42]

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[40] (Case No. U-32560 1/24/17).

[41] *Orchard Park Cent Sch Dist*, 47 PERB ¶3029, at 3089 (2014); *State of New York (Racing and Wagering Board)*, 45 PERB ¶3041 (2012). (subsequent history omitted).

[42] *See State of New York (Department of Health)*, 32 PERB 3067 (1999); *State of New York (Department of Correctional Services)*, 27 PERB 305 (1997).

Statutory Defenses – Bargaining Obligation Preempted by Statute

A statute may either explicitly, or implicitly by virtue of a statutory scheme, abrogate a bargaining obligation thereby permitting an employer to act unilaterally when a bargaining obligation would otherwise exist. This statutory preclusion defense is applicable to any obligation an employer may have regarding a mandatory subject of bargaining, including the transfer of unit work. In *Board of Education of the City School District of the City of New York v. PERB et. al.*,[43] the Court of Appeals stated "the obligation under the Taylor Law to bargain as to all terms and conditions of employment is a "strong and sweeping policy of the State"[44] This obligation may be abrogated if "a statute ... direct[s] that certain action be taken by the employer, leaving no room for negotiation." (at 7013).

In *Webster Central School District et. al. v. PERB et. al.*,[45] the Court of Appeals held that the decision to transfer summer school programs to a Board of Educational Cooperative Services (BOCES) did not constitute a mandatory subject of bargaining. The Court found that the statutory amendments to the Education Law were part of a major reform seeking to improve the quality of education in the State. The legislation sets forth a detailed procedure for utilizing BOCES' services, time frames for these procedures, and the criteria by which the Commissioner would approve a program. Of significance, the Court of Appeals found that it was not surprising that the amendment

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[43] 75 N.Y. 2d 660, (1990).

[44] *Matter of Cohoes City School Dist. v. Cohoes Teachers Assn.*, 40 NY 2d 774, 778; *Board of Educ. v. Associated Teachers of Huntington*, 30 NY 2d 122, 129.

[45] 75 NY 2d 619 (1990), (at 7018) (decided the same day as *Board of Education of the City School District of the City of New York, supra).*

was not more specific in demonstrating the legislative intent that the subject not be mandatory since "the unions had not, in the several decades of BOCES' operation, previously demanded bargaining of requests for shared services..." (at 7018). Further, the Court of Appeals discerned a legislative intent to preclude bargaining by the inclusion of a provision governing teacher's rights in the event of a BOCES' providing the program.[46]

In *County of Erie and Erie County Sheriff v. NYS PERB*,[47] the Court of Appeals reversed a Board decision which held that the unilateral transfer of correction work was a violation of the Act. Correction officers and deputy sheriffs had each guarded different classifications of inmates and when the classification of these inmates was combined both unions representing these units alleged the transfer of unit work to nonunit employees. The Court stated that the Corrections Law §500-b required that the Sheriff implement and maintain a formal and objective classification system. PERB's determination that the transfer of unit work to nonunit employees was not entitled to deference and was reversed. The Court noted that the impact of the decision, however, was subject to bargaining.

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[46] *See also Germantown Cent Sch Dist v. PERB*, 205 A.D. 961, 613 N.Y.S.2d 957, 27 PERB ¶7009 (3d Dep't 1994) in which the Court reversed a Board decision finding a subcontracting violation. The Court concluded that the provisions of the Education Law precluded it from operating the cafeteria program at a deficit and that the work could not be restored through collective bargaining; *New York State–Unified Court System*, 28 PERB ¶3044 (1995), terms of the statute displaced a bargaining obligation concerning the use of recording equipment in lieu of stenographers; *Vestal Employees Assn. NEA/NY, NEA v. New York State Pub Empl Relations Bd*, 94 NY2d 409 (2000) (printing was a service properly approved by the Commissioner and those services could be subcontracted to BOCES).

[47] 12 NY3d 72, 42 PERB ¶7002 (2009).

The Board in *Springs Union Free School District*,[48] affirmed an ALJ decision which dismissed a charge alleging a violation of the Act when the District unilaterally transferred certain pre-kindergarten duties to a private contractor which had been performed exclusively. The District entered into a contract with a private contractor to provide universal kindergarten services The contract was entered into pursuant to the provisions of Education Law §3602-e which set forth a comprehensive and conditions concerning a District entering into such a contract. EL §3602-e(5)(d) of the statute states that "Notwithstanding any other provision of law, the school districts shall be authorized to enter any contractual or other arrangement necessary to implement the district's pre-kindergarten plan." The Board concluded that, even in the face of the strong public policy favoring bargaining, the legislative scheme in the Education Law evidenced an intent to permit Districts to enter into such contract without bargaining. Accordingly, the charge was dismissed.[49]

The Board came to the same conclusion in *Lawrence Union Free School District*.[50] The Board's holding that the transfer of pre-kindergarten duties performed by unit personnel was not a violation of the Act, however, was reversed in *Lawrence Teachers' Association v. Lawrence UFSD*. The Court held that Education Law §3602-e does not alter a District's bargaining obligation concerning the transfer of unit work to

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[48] 45 PERB ¶3040 (2012).

[49] The charge also alleged a unilateral change in a past practice which was also dismissed.

[50] 49 PERB 7001, 2016 WL 3346017nn, Index No. 3495-15 (Albany Supreme Court 2015, (appeal pending)).

non-unit employees and that the transfer of exclusive bargaining unit work in that case was a mandatory subject of bargaining.

The Supreme Court in *Lawrence* found it significant that the Court of Appeals in both *Webster* and *Vestal* found that Education Law and Civil Service Law provisions provided for job protection for the affected unit employees. It did not find convincing the argument that the District could unilaterally transfer the work based upon, at least in part, EL §3602-e(5)(d). Accordingly the Board's decision was reversed.

REMEDY

The Board applies traditional make whole remedies when it has determined that an employer has violated the Act due to the transfer of unit work. The Board has stated that "[T]he purpose of our remedial orders is to make parties whole for the wrong sustained by placing them, as nearly as possible, in the position they would have been in had the improper practice not been committed."[51] These remedies include an order that an employer cease and desist from unilaterally transferring work to nonunit employees, making employees whole for any lost wages and benefits with interest at the maximum legal rate, and posting a notice notifying the unit employees of the Board's order.[52]

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[51] *Burnt Hills-Ballston Law Cent Sch Dist,* 25 PERB ¶3066, at 3139 (1992).

[52] *But see Manhasset, supra.* Since the buses which were used to transport students were sold by the District, the Court concluded that taxpayer approval may be necessary and compliance with the Board's order may be impeded due to its contractual obligations. The case was remitted to PERB to fashion a remedy that "will allow for the contingencies that could prevent petitioner's compliance."

26th ANNUAL

LAW IN THE WORKPLACE CONFERENCE

PUBLIC SECTOR WORKSHOP

DEFENSE AND INDEMNIFICATION OF PUBLIC EMPLOYEES

DAVID M. COHEN

MAY 4, 2017

Education Law § 3811

a. The statute requires that school districts defend teachers and other enumerated persons in civil actions arising out of the exercise of their duties and indemnify them from any resulting damages. Matter of Matyas v. Bd. of Educ., Chenango Forks Cent. Sch. Dist., 63 AD3d 1273, 1274, 880 N.Y.S.2d 378, 379 (3d Dept. 2009).

b. School districts are required indemnify a superintendent, principal, member of the teaching or supervisory staff, member of a committee on special education or subcommittees thereof, surrogate parent as defined in the regulations of the commissioner of education, or any trustee or member of the board of education of a school district, or non-instructional employee of any school district other than the city school district of New York or any board of cooperative educational services, in civil actions for damages that arise only from acts performed in the scope of his or her employment. An employee's actions are within the scope of his or her employment only if the purpose of such acts is to further the employer's interest, or to carry out the duties owed to the employer.

c. The duty to indemnify is not coextensive with the duty to defend and must be evaluated on a claim by claim basis. James v. Bd. of Educ. of Marathon Cent. Sch. Dist., 42 Misc.3d 1202(A), 983 N.Y.S.2d 203 (N.Y. Sup. Ct. 2013). If there is a duty to defend any of the causes of action, there is a duty to defend. "Thus, the duty to provide a defense of the entire action is triggered if any of the alleged actionable conduct reasonably falls within the discharge of the petitioner's duties as track coach."

d. **Good Faith Requirement**
    i. The statute provides that a school district's duty to indemnify is conditioned upon the teacher obtaining certification from the court or the Commissioner of Education that he or she "acted in good faith with respect to the exercise of his powers or the performance of his duties".

e. **Notice and Counsel**
    i. Within 5 days after service of process upon the employee, he/she must notify in writing the trustees of the board of education or board of cooperative educational services of the commencement of an action or proceeding against him/her. Thereafter, the board has right to designate

and appoint counsel for the employee within 10 days of receiving notice of the action or proceeding. In the absence of a timely designation of counsel, the employee can select his/her own counsel.

f. **Conflict of Interest**

i. No conflict of interest existed between the board of education and school employee, where the employee was a necessary party to a suit brought by another employee claiming a superior right to a position. Casey v. Tieman, 110 A.D.2d 167,493 N.Y.S.2d 572 (2d Dept. 1985). This case suggests that if a conflict of interests exists between the employee and the board of education, it would be inconsistent with the purposes of the statute to require that the employee be afforded a defense.

g. **Scope of Employment**

i. The petitioner was employed as a teacher and track coach by the school district. While attending to a female student who was thirteen and a member of the track team, the petitioner squatted beside the student to feel her left leg near her knee, and he continued by placing his hands on the student's running shorts, and then by using his right hand to grab and fondle her left buttock. He told the student that if she told anyone about his actions that he would remove her from the track team. Subsequently, the petitioner requested that the school district defend him in a civil suit brought by the student. James v. Bd. of Educ. of Marathon Cent. Sch. Dist., 42 Misc.3d 1202(A), 983 N.Y.S.2d 203 (N.Y. Sup. Ct. 2013).

1. The Court held that that petitioner's examination of the student in response to her complaint of knee pain was within the scope of his employment as a track coach for the school district, and, therefore, offered a defense of the entire action and indemnity against any damages that may arise from petitioner's negligence in performing that duty.

2. The Court also held that with respect to the allegations on which the second, third and fourth causes of action are based—that petitioner intentionally grabbed and fondled the student's left buttock and then threatened her with dismissal from the track team if she reported the incident—such conduct was not within the scope of petitioner's employment.

ii. While grading Regents examinations in the school library with a group of other teachers, the petitioner, a teacher employed by the respondent Board of Education of the Garden City Union Free School District, became involved in a physical altercation with a fellow teacher, Philip McCarthy, which culminated in the petitioner placing McCarthy in a headlock. The petitioner claimed that the altercation began when, as the designated "Teacher in Charge" of the exam-grading process, he directed McCarthy to sit down and resume grading examinations, at which point McCarthy threw water at him. McCarthy claimed that the altercation was unprovoked, and was begun by the petitioner because of the petitioner's personal animosity towards him. Cotter v. Bd. of Educ. of Garden City Union Free Sch. Dist., 63 A.D.3d 1060, 881 N.Y.S.2d 486 (2d Dept. 2009).

1. The Court held that it was unreasonable for the board of education to deny teacher's request to provide a defense and indemnification in an underlying action for assault arising from a physical altercation between the teacher and another instructor. The Court also took into account the fact that the altercation occurred on school grounds, while they were on duty grading examinations.

iii. The determination by a board of education of whether the employee was acting within the scope of his employment is reviewable in an Article 78 proceeding, and subject to an arbitrary and capricious standard. If there are material questions of facts as to whether the board's determination had a rational basis, a hearing may be necessary. Matyas v Board of Education, Chenago Forks Central School District, 63 A.D.3d, 880 NYS 2d 378 (3d Dept. 2009.

Education Law § 3028

a. The statute provides specifically for situations arising out of disciplinary action taken against any student of the district while in the discharge of the employee's duties within the scope of his/her employment or volunteer duties.

b. The statute does not provide indemnification, but only defense and defense costs, and only in civil and criminal actions arising from disciplinary action taken against a student. Timmerman v. Board of Educ. of City School Dist. of City of New York, 50 A.D.3d 592, 856 N.Y.S.2d 103 (1st Dept. 2008); Lamb v.

Westmoreland Cent. School Dist., 143 A.D.2d 535, 533 N.Y.S.2d 157 (4th Dept. 1988).

c. **Notice to the Board**

i. The statue requires employees to serve upon the board of education the actual or a copy of the accusatory instrument with which he had been served, within 10 days of its service upon him. Teacher's failure to comply with condition precedent of statute requiring timely notice to the board of education, warranted denial of application for legal representation and expenses in criminal proceeding. Eisenstein v. DeSario, 104 A.D.2d 992, 480 N.Y.S.2d 769 (2d Dept.1984).

d. **Scope of Employment**

i. Paraprofessionals employed in city schools were acting while in the "discharge of their duties" within the scope of their employment when one paraprofessional slapped a student in the face after he refused three times to go with her to the cafeteria and the other paraprofessional allegedly hit a student on the head when he did not do his work properly, and thus, under the Education Law, the paraprofessionals were entitled to a legal defense provided by the city to underlying civil suits brought by the students, even though their actions violated regulation prohibiting corporal punishment. Sagal-Cotler v. Board of Educ. of City School Dist. of City of New York, 20 N.Y.3d 671, 965 N.Y.S.2d 767 (2013).

ii. School district was statutorily obligated to provide elementary school teacher with service of attorney or reimburse him $6,297.69 plus interest for legal fees incurred with respect to his legal defense against charges of assault in third degree and endangering welfare of child that were filed after he grabbed student, removed him from class, and used his feet and legs to physically move student out of doorway; school teacher disciplined student while engaged in his employment as physical education teacher and his actions were generally foreseeable by his employer. Cromer v. City Sch. Dist. of Albany Bd. of Educ., 2002 WL 1174683 (Sup. Ct. Albany Co. 2002).

iii. Music teacher was statutorily entitled to reimbursement of costs of her legal defense against harassment charges filed after she slapped student during class, as her actions occurred while she was discharging her duties within scope of her employment; Board of Regents rule prohibiting use of corporal

punishment did not remove such conduct from scope of teacher's employment, extent of teacher's departure from performing her employment was not dramatic, and incident was of nature school board could reasonably have anticipated. Inglis v. Dundee Cent. School Dist. Bd. of Educ., 180 Misc.2d 156, 687 N.Y.S.2d 866 (N.Y. Sup. Ct. 1999).

Public Officer Law § 18

a. The statute is limited strictly to cover defense and indemnification procedures in civil cases.

b. Indemnification is not available for punitive damages, or where injury or damage results from intentional wrongdoing or recklessness. Neither indemnification or defense costs are available if the action or proceeding is brought by the public employer. Barkan v. Roslyn Union Free School District, 67 A.D.3d 61, 886 N.Y.S.2d 420 (2d Dept. 2009).

c. There are two ways in which a public body can adopt the statute: 1) in its entirety 2) or with modifications.

d. The statute applies to any public entity whose governing body **agrees** to confer these benefits and to be liable for its cost.

e. The statute permits a public entity to defend and indemnify its employees for any act or omission which occurred within the scope of the employee's employment or duties.

f. **Employee's Duty to Cooperate**
   i. The duty to defend and indemnify is conditioned upon full cooperation by the employee in the defense of the action. Failure to cooperate can be shown by: 1) Refusal to meet with and provide pertinent information to the employer's counsel; 2) Invocation of the Fifth Amendment at a deposition; 3) Not appearing at trial; 4) Not responding to request for documents, interrogatories and admissions. Banks v. Yokemick, 214 F.Supp. 2d 401, 404 (S.D.N.Y 2002).

ii. Village was entitled to withdraw defense and indemnification of municipal employees in civil Racketeer Influenced and Corrupt Organizations Act (RICO) action based on employees' refusal to accept a reasonable settlement offer, where employees were obligated to cooperate in defense, and village acted diligently to bring about their cooperation by responding to concerns and explaining why non-disparagement clause in settlement was proper. Lancaster v. Incorporated Village of Freeport, 22 N.Y.3d 30, 978 N.Y.S.2d 101, 1 N.E.3d 302 (2013).

g. **Conflict of Interest**

i. No conflict of interest existed between school district and school employees with regard to another employee's complaint filed with state division of human rights as would entitle employees to select private counsel, payable by school district. The school district, in its response to complaint, did not assert that employees were acting outside scope of their employment, or that they acted improperly in any way, but instead categorically denied all allegations in complaint, countered each allegation with detailed facts aimed at demonstrating their falsity, and asserted that it was complainant who had engaged in misconduct. Scimeca v. Brentwood Union Free School Dist., 140 A.D.3d 1174, 35 N.Y.S.3d 379 (2d Dept. 2016). **NOTE** that unlike Education Law Sec 3811, which omits any reference to conflicts of interest, Public Officer's Law Sec 18 expressly provides that if such a conflict exists, as determined by the public entity's counsel, or a court, the affected employee is entitled to be represented by counsel of his choice, paid for by the public entity.

ii. County Attorney had initially represented the County and individual employee defendants in an employment discrimination and harassment suit. During the course of the litigation the County Attorney became concerned that the County and the individual employee defendants may have a conflict of interest. Accordingly, the County passed a resolution authorizing payment of legal fees to eight law firms representing the individual defendants. A taxpayers' action was commenced against the County contending that these payments were improper. The court concluded the payments were appropriate. Merrill v. County of Broome, 244 A.D.2d 590, 664 N.Y.S.2d 144 (3d Dep't 1997).

iii. In an action against a Town, the ZBA and the Code Enforcement Officer, where land owners were unable to secure a building permit, there was no

conflict when a motion to dismiss the action treated all defendants equally and fairly, despite the potential for a conflict in the future. Kreamer v. Town of Oxford, 96 A.D.3d 1130, 1131-32, 946 N.Y.S.2d 284, (3d Dept. 2012).

iv. A conflict of interest existed where the Town failed to respond to one of the individual defendant's request to the Town to defend him, while the Town was defending two other individual defendants who asserted that any liability is the fault of the other individual defendant. The Town asserted it had no duty to defend because the other individual defendant did not act in good faith and within the scope of his employment. Relying on Hassan v. Fracciola, 851 F.2d 602 (2d Cir. 1988), the Eastern District of New York held that the duty to defend under the statute is broader than the duty to indemnify. The duty to defend is triggered by the allegations in the complaint, and does **not** allow the Town to make its own determination of fact as to whether the employee was acting within the scope of his employment. (But see Polak v. City of Schenectady, 181 A.D.2d 233, 585 N.Y.S.2d 844 (3d Dept.1992), which suggests that an investigation by the public entity of whether the employee was in fact acting within the scope of his employment is appropriate in determining the duty to defend). The duty to indemnify, however, requires the court to make a finding that the employee was in fact acting within the scope of his employment or duties. Higgins v. Town of Southampton, 613 F.Supp 2d 327 (E.D.N.Y. 2009).

v. If one defendant raises as a defense that other defendants were not acting within the scope of their employment, or were acting in violation of a municipal custom or policy, a conflict of interest would be triggered. Merrill v. County of Browne, 244 A.D.2d 590, 664 N.Y.S.2d 144 (3d Dept.1977).

h. **Duty to Defend**

i. Allegations in underlying federal civil rights complaint brought under § 1983, specifically alleging that former employee engaged in sexual harassment while he was acting in scope of his employment as town clerk, that town facilitated hostile work environment, and that town failed to prevent workplace harassment, were sufficient to trigger town's broad duty to defend former employee in underlying action. Bonilla v. Town of Hempstead, 131 A.D.3d 1166, 16 N.Y.S.3d 594 (2d Dept. 2015).

i. **Scope of Employment**

i. A director of a county's real estate division was acting outside the scope of his employment when he ran a private title insurance company that was the underlying basis for the cause of the action. Grecco v. Cimino, 13 A.D.3d 371, 786 N.Y.S.2d 204 (2d Dept. 2004).

ii. In a defamation action against a Mayor for statements made during an election debate, there was no allegation that he did so in the scope of his public employment. Moreover, there was an absence of evidence suggesting plaintiff was acting within the scope of his employment since all questions asked of plaintiff were as a candidate and not as the Mayor. Therefore, the Mayor was not entitled to defense and indemnification. Glacken v. Inc. Village of Freeport, 2014 WL 1836143 (E.D.N.Y. 2014).

General Municipal Law § 50-j

a. The statute governs the liability of municipal police officers for negligence in the performance of duty. In relevant part, it provides:
   i. every city, county, town, village, authority or agency shall be liable for, and shall assume the liability to the extent that it shall save harmless, any duly appointed police officer ... for any negligent act or tort, provided such police officer ... was acting in the performance of his duties and within the scope of his employment.

b. Unlike Public Officers Law §18, GML § 50-j is a statutory obligation imposed on all municipalities.

c. The statute does not require indemnification for punitive damages. However, the statute does authorize municipalities to pass local laws providing for that benefit. (General Municipal Law § 50-l, which applies to civil actions against Nassau County police officers, does require indemnification for punitive damages, but only if by majority vote of a panel consisting of one member appointed by the Nassau county board of supervisors, one member appointed by the Nassau county executive, and the third member being the Nassau county police commissioner or a deputy police commissioner, it is determined the officer had properly discharged his duties and acted within the scope of his employment.

d. The statute strictly applies to Police Officers. For example, Peace Officers and Court Security Officers are not covered by this statute.

e. **Scope of Employment:**

i. Whether the acts of a police officer are committed within the scope of employment and in the discharge of such duties is a factual question, in police officer's action seeking indemnification and defense to underlying charges. Schenectady Police Benevolent Ass'n. v. City Of Schenectady, 299 A.D.2d 717, 750 N.Y.S.2d 666 (3d Dept. 2002).

ii. On Duty Actions
    1. Actions taken while on duty and performing the ordinary functions of an officer's job will be found to be within the scope of employment. Schenectady Police Benevolent Ass'n v. City of Schenectady, 299 A.D.2d 717, N.Y.S.2d 666 (3d Dept. 2002).

iii. Off Duty Actions
    1. Off duty actions fall outside the scope of employment, unless the officer was directly responding to the need for a police officer or performing required duties.

    2. If the conduct was personal in nature, the conduct will be outside the scope of employment. For example, a police officer visiting another officer for a romantic rendezvous was not within the scope of employment, even though both individuals were officers. "In this wrongful death action, the Court properly found the City not liable on the basis of respondeat superior inasmuch as the defendant Williams was not acting within the scope of his employment as a police officer when he visited the decedent, a fellow police officer, at her apartment for personal reasons and spent the night with her as he had done numerous times before, and she used his off-duty weapon to commit suicide." Pinkney v. City of N.Y., 52 A.D.3d 242, 242-43, 860 N.Y.S.2d 22 (1st Dept. 2008).

    3. Exercising Police training techniques does not necessarily result in an officer acting within the scope of his or her employment. An off-duty police officer was not acting within scope of his employment when he shot and killed decedent, and thus city could not be held liable in wrongful death action brought by survivors. The officer precipitated the incident by approaching decedent, and had fought with decedent and his friends prior to shooting, even though officer testified that he employed his police training during incident and that he believed that he was acting as police officer. Johnson v. City of New York, 269 A.D.2d 359, 702 N.Y.S.2d 636 (2d Dept. 2000).

    4. Police officers may fall within the scope of employment when performing department procedures off duty. For example, an off-duty officer who was home and getting ready for work, had put his

service revolver down in order to answer the door. Departmental regulations required him to be available for duty and carry his service revolver at all times. An adult and a child entered the home and the child picked up the weapon and was injured when it accidentally discharged. On appeal, the Court of Appeals determined that the action against the city should not have been dismissed on motion. Rather, the question of whether the officer's negligence was in the course of his employment was an issue to be determined by the jury. Kull v. City of N.Y., 40 A.D.2d 829, 829-30, 337 N.Y.S.2d 341 (2d Dep't 1972) (dissent), rev'd 32 N.Y.2d 951 (1973).

Statutes

Education Law § 3811:

1. Whenever the trustees or board of education of any school district, or any school district officers, have been or shall be instructed by a resolution adopted at a district meeting to defend any action brought against them, or to bring or defend an action or proceeding touching any district property or claim of the district, or involving its rights or interests, or to continue any such action or defense, all their costs and reasonable expenses, as well as all costs and damages adjudged against them, shall be a district charge and shall be levied by tax upon the district. Whenever any superintendent, principal, member of the teaching or supervisory staff, member of a committee on special education or subcommittee thereof, surrogate parent as defined in the regulations of the commissioner of education, or any trustee or member of the board of education of a school district or non-instructional employee of any school district other than the city school district of the city of New York or any board of cooperative educational services shall defend any action or proceeding, other than a criminal prosecution or an action or proceeding brought against him by a school district or board of cooperative educational services hereafter brought against him, including proceedings before the commissioner of education, arising out of the exercise of his powers or the performance of his duties under this chapter, all his reasonable costs and expenses, as well as all costs and damages adjudged against him, shall be a district charge and shall be levied by tax upon the district or shall constitute an administrative charge upon the board of cooperative educational services provided that

(a) such superintendent, principal, member of the teaching or supervisory staff, member of a committee on special education or subcommittee thereof, surrogate parent as defined in the regulations of the commissioner of education, non-instructional employee of any school district or board of cooperative educational services or such trustee or member of a board of education

of such school district or board of cooperative educational services shall notify the trustees or board of education or board of cooperative educational services in writing of the commencement of such action or proceedings against him within five days after service of process upon him; and

(b) the trustees or board of education or board of cooperative educational services shall, at any time during the ten days next following the notice to them of the commencement of such action or proceedings, have the right to designate and appoint the legal counsel to represent such superintendent, principal, member of the teaching or supervisory staff, member of a committee on special education or subcommittee thereof, surrogate parent as defined in the regulations of the commissioner of education, non-instructional employee of any school district or board of cooperative educational services or such trustee or member of the board of education or board of cooperative educational services in such action or proceedings against him, in the absence of which designation and appointment within the time specified such superintendent, principal, member of the teaching or supervisory staff, member of a committee on special education or subcommittee thereof, surrogate parent as defined in the regulations of the commissioner of education, non-instructional employee of any school district or board of cooperative educational services or such trustee or member of the board of education or board of cooperative educational services may select his own legal counsel;

(c) it shall be certified by the court or by the commissioner of education, as the case may be, that he appeared to have acted in good faith with respect to the exercise of his powers or the performance of his duties under this chapter.

2. If the amount claimed hereunder be disputed by a district meeting, the board of education or the board of trustees, it shall be adjusted by the county judge of any county in which the district or any part of it is situated.

Education Law § 3028:

1. Notwithstanding any inconsistent provision of any general, special or local law, or the limitations contained in the provisions of any city charter, each board of education, trustee or trustees in the state shall provide an attorney or attorneys for, and pay such attorney's fees and expenses necessarily incurred in the defense of a teacher, member of a supervisory or administrative staff or employee, or authorized participant in a school volunteer program in any civil or criminal action or proceeding arising out of disciplinary action taken against any pupil of the district while in the discharge of his duties within the scope of his employment or authorized volunteer duties. For such purposes the board of education, trustee or trustees may arrange for and maintain appropriate insurance with any insurance company created by or under the laws of this state, or in any insurance company authorized by law to transact business in this state, or such board, trustee or trustees may elect to act as self-insurers to maintain the aforesaid protection. A board of education, trustee or board of trustees, however, shall not be subject to

the duty imposed by this section, unless such teacher, or member of the supervisory and administrative staff or employee or authorized participant in a school volunteer program shall, within ten days of the time he is served with any summons, complaint, process, notice, demand or pleading, deliver the original or a copy of the same to such board of education, trustee or board of trustees.

Public Officers Law § 18

1. As used in this section, unless the context otherwise requires:

(a) The term "public entity" shall mean (i) a county, city, town, village or any other political subdivision or civil division of the state, (ii) a school district, board of cooperative educational services, or any other governmental entity or combination or association of governmental entities operating a public school, college, community college or university, (iii) a public improvement or special district, (iv) a public authority, commission, agency or public benefit corporation, or (v) any other separate corporate instrumentality or unit of government; but shall not include the state of New York or any other public entity the officers and employees of which are covered by section seventeen of this chapter or by defense and indemnification provisions of any other state statute taking effect after January first, nineteen hundred seventy-nine.

(b) The term "employee" shall mean any commissioner, member of a public board or commission, trustee, director, officer, employee, volunteer expressly authorized to participate in a publicly sponsored volunteer program, or any other person holding a position by election, appointment or employment in the service of a public entity, whether or not compensated, but shall not include the sheriff of any county or an independent contractor. The term "employee" shall include a former employee, his estate or judicially appointed personal representative.

(c) The term "governing body" shall mean the board or body in which the general legislative, governmental or public powers of the public entity are vested and by authority of which the business of the public entity is conducted.

2. The provisions of this section shall apply to any public entity:

(a) whose governing body has agreed by the adoption of local law, bylaw, resolution, rule or regulation (i) to confer the benefits of this section upon its employees, and (ii) to be held liable for the costs incurred under these provisions; or

(b) where the governing body of a municipality, for whose benefit the public entity has been established, has agreed by the adoption of local law or resolution (i) to confer the benefits of this section upon the employees of such public entity, and (ii) to be held liable for the costs incurred under these provisions.

3(a) Upon compliance by the employee with the provisions of subdivision five of this section, the public entity shall provide for the defense of the employee in any civil action or proceeding, state or federal, arising out of any alleged act or omission which occurred or allegedly occurred while the employee was acting within the scope of his public employment or duties. This duty to provide for a defense shall not arise where such civil action or proceeding is brought by or at the behest of the public entity employing such employee.

(b) Subject to the conditions set forth in paragraph (a) of this subdivision, the employee shall be entitled to be represented by private counsel of his choice in any civil action or proceeding whenever the chief legal officer of the public entity or other counsel designated by the public entity determines that a conflict of interest exists, or whenever a court, upon appropriate motion or otherwise by a special proceeding, determines that a conflict of interest exists and that the employee is entitled to be represented by counsel of his choice, provided, however, that the chief legal officer or other counsel designated by the public entity may require, as a condition to payment of the fees and expenses of such representation, that appropriate groups of such employees be represented by the same counsel. Reasonable attorneys' fees and litigation expenses shall be paid by the public entity to such private counsel from time to time during the pendency of the civil action or proceeding with the approval of the governing body of the public entity.

(c) Any dispute with respect to representation of multiple employees by a single counsel or the amount of litigation expenses or the reasonableness of attorneys' fees shall be resolved by the court upon motion or by way of a special proceeding.

(d) Where the employee delivers process and a written request for a defense to the public entity under subdivision five of this section, the public entity shall take the necessary steps on behalf of the employee to avoid entry of a default judgment pending resolution of any question pertaining to the obligation to provide for a defense.

4. (a) The public entity shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in a state or federal court, or in the amount of any settlement of a claim, provided that the act or omission from which such judgment or claim arose occurred while the employee was acting within the scope of his public employment or duties; provided further that in the case of a settlement the duty to indemnify and save harmless shall be conditioned upon the approval of the amount of settlement by the governing body of the public entity.

(b) Except as otherwise provided by law, the duty to indemnify and save harmless prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee.

(c) Nothing in this subdivision shall authorize a public entity to indemnify or save harmless an employee with respect to punitive or exemplary damages, fines or penalties, or money

recovered from an employee pursuant to section fifty-one of the general municipal law; provided, however, that the public entity shall indemnify and save harmless its employees in the amount of any costs, attorneys' fees, damages, fines or penalties which may be imposed by reason of an adjudication that an employee, acting within the scope of his public employment or duties, has, without willfulness or intent on his part, violated a prior order, judgment, consent decree or stipulation of settlement entered in any court of this state or of the United States.

(d) Upon entry of a final judgment against the employee, or upon the settlement of the claim, the employee shall serve a copy of such judgment or settlement, personally or by certified or registered mail within thirty days of the date of entry or settlement, upon the chief administrative officer of the public entity; and if not inconsistent with the provisions of this section, the amount of such judgment or settlement shall be paid by the public entity.

5. The duty to defend or indemnify and save harmless prescribed by this section shall be conditioned upon: (i) delivery by the employee to the chief legal officer of the public entity or to its chief administrative officer of a written request to provide for his defense together with the original or a copy of any summons, complaint, process, notice, demand or pleading within ten days after he is served with such document, and (ii) the full cooperation of the employee in the defense of such action or proceeding and in defense of any action or proceeding against the public entity based upon the same act or omission, and in the prosecution of any appeal.

6. The benefits of this section shall inure only to employees as defined herein and shall not enlarge or diminish the rights of any other party nor shall any provision of this section be construed to affect, alter or repeal any provision of the workers' compensation law.

7. This section shall not in any way affect the obligation of any claimant to give notice to the public entity under section ten of the court of claims act, section fifty-e of the general municipal law, or any other provision of law.

8. Any public entity is hereby authorized and empowered to purchase insurance from any insurance company created by or under the laws of this state, or authorized by law to transact business in this state, against any liability imposed by the provisions of this section, or to act as a self-insurer with respect thereto.

9. All payments made under the terms of this section, whether for insurance or otherwise, shall be deemed to be for a public purpose and shall be audited and paid in the same manner as other public charges.

10. The provisions of this section shall not be construed to impair, alter, limit or modify the rights and obligations of any insurer under any policy of insurance.

11. Except as otherwise specifically provided in this section, the provisions of this section shall not be construed in any way to impair, alter, limit, modify, abrogate or restrict any immunity to liability available to or conferred upon any unit, entity, officer or employee of any public entity by,

in accordance with, or by reason of, any other provision of state or federal statutory or common law.

12. Except as otherwise provided in this section, benefits accorded to employees under this section shall be in lieu of and take the place of defense or indemnification protections accorded the same employees by another enactment; unless the governing body of the public entity shall have provided that these benefits shall supplement, and be available in addition to, defense or indemnification protection conferred by another enactment.

13. The provisions of this section shall also be applicable to any public library supported in whole or in part by a public entity whose governing body has determined by adoption of a local law, ordinance, bylaw, resolution, rule or regulation to confer the benefits of this section upon the employees of such public library and to be held liable for the costs incurred under these provisions.

14. If any provision of this section or the application thereof to any person or circumstance be held unconstitutional or invalid in whole or in part by any court, such holding of unconstitutionality or invalidity shall in no way affect or impair any other provision of this section or the application of any such provision to any other person or circumstance.

General Municipal Law § 50-j

1. Notwithstanding the provisions of any general, special or local law, charter or code to the contrary, every city, county, town, village, authority or agency shall be liable for, and shall assume the liability to the extent that it shall save harmless, any duly appointed police officer of such municipality, authority or agency for any negligent act or tort, provided such police officer, at the time of the negligent act or tort complained of, was acting in the performance of his duties and within the scope of his employment.

2. For purposes of this section, a police officer of any such municipal corporation, authority or agency, although excused from official duty at the time, shall be deemed to be acting in the discharge of duty when engaged in the immediate and actual performance of a public duty imposed by law and such public duty performed was for the benefit of the citizens of the community wherein such public duty was performed and the municipal corporation, authority or agency derived no special benefit in its corporate capacity.

3. No action or special proceeding instituted hereunder shall be prosecuted or maintained against the municipality, authority or agency concerned or such police officer unless notice of claim shall have been made and served upon such municipality, authority or agency in

compliance with section fifty-e of this chapter. Every such action shall be commenced pursuant to the provisions of section fifty-i of this chapter.

4. The provisions of this section shall not apply to the city of New York.

5. The provisions of this section shall not apply to the New York city housing authority.

6. a. In addition to the requirements of subdivision one of this section, upon discretionary adoption of a local law, ordinance, resolution, rule or regulation, any city, county, town, village, authority, or agency shall provide for the defense of any civil action or proceeding brought against a duly appointed police officer of such municipality, authority or agency and shall indemnify and save harmless such police officer from any judgment of a court of competent jurisdiction whenever such action, proceeding or judgment is for punitive or exemplary damages, arising out of a negligent act or other tort of such police officer committed while in the proper discharge of his duties and within the scope of his employment. Such municipality, authority or agency is hereby authorized and empowered to purchase insurance to cover the cost of such defense and indemnification.

b. The determination of whether any such police officer properly discharged his duties within the scope of his employment shall be made in a manner which shall be promulgated by the chief executive officer or if there be none, the chief legislative officer, and adopted by the governing board of such municipality, authority or agency.

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Domenique Camacho Moran is a partner and leads the firm's Labor & Employment Practice Group. Ms. Moran has represented employers – from start-ups to large corporations – in connection with all types of employment litigation, including matters arising under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Fair Labor Standards Act, and the New York Human Rights Law.

Acting as lead counsel, Ms. Moran has represented management in jury trials and hearings in federal and state courts, arbitrations and administrative proceedings. In 2009, she won a landmark defense verdict for an employer in a class action wage and hour trial. Many millions of dollars were potentially at stake in this lawsuit.

Domenique uses her extensive knowledge of employment law to help business owners comply with the many federal, state and local laws, rules and regulations that govern the employment relationship. Ms. Moran often helps companies by providing advice on the practical and legal implications of everyday employment decisions. In addition, Ms. Moran regularly prepares and reviews employee handbooks and personnel policies, negotiates and drafts separation agreements, and provides guidance to employers faced with reorganizations and reductions-in-force. Domenique conducts sexual harassment training for local and national employers that include investment banks, professional sports organizations, retail operations, manufacturing companies and food service providers. She is also a contributor to Farrell Fritz's New York Construction Law blog.

Ms. Moran is a dynamic speaker and has significant experience providing training on a myriad of employment-related topics including effective management techniques, human resources fundamentals, litigation avoidance, preventing workplace harassment and discrimination, conducting workplace investigations, and diversity awareness.

Prior to joining Farrell Fritz, Ms. Moran was a shareholder at Littler Mendelson, P.C.

Ms. Moran is a 1990 Dean's List graduate of the State University of New York at Stony Brook and a 1993 graduate of University of Notre Dame Law School. At Notre Dame she received the Kraft W. Eidman Award presented by the American College of Trial Lawyers for Excellence in Trial Advocacy and was the Lead Notes Editor of the Journal of College and University Law.

Ms. Moran is a member of the New York State Bar Association. She is admitted to practice in New York State, the District Courts for the Southern, Eastern and Northern Districts of New York and the Circuit Court of Appeals for the Second Circuit.

In 2013, Ms. Moran was appointed to the advisory board of Make-A-Wish Metro New York and chairs the Walk for Wishes, an annual fundraiser. She serves on the Mom-mentum Committee, presenting "Achieving Extraordinary, Women's Leadership Conference" and is a founding member of the American Heart Association's Go Red for Women Committee in Queens. She previously served on the board of the Girl Scouts of Nassau County.

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Practice Areas
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Commercial Litigation

Education
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Ms. Moran was named to *The Best Lawyers in America* (2013-2017) and to the 2013-2016 *New York Metro Super Lawyers* lists (Employment & Labor). She was honored by Long Island Business News as a "Top 50 Most Influential Women in Business" in 2011, 2013 and 2014, and as a "40 Under 40" award recipient in 2007. In 2008 and 2014, Ms. Moran was honored by *The Queens Courier* as a "Top Woman in Queens Business" and was inducted into their "Women in Business" Hall of Fame. Ms. Moran has been recognized by *Long Island Business News* in 2007, 2009, 2011, 2014 and 2017 in "Who's Who in Intellectual Property & Labor Law" and in 2009 and 2012 in "Who's Who in Women in Professional Services."

Saul D. Zabell is a principal and founding partner in the law firm of Zabell & Associates, P.C. Located at One Corporate Drive, Suite 103 Bohemia New York. Saul has dedicated his career to practicing law in the areas of labor and employment law, including employment discrimination and harassment issues, wrongful termination, wage and hour litigation, personnel policy review and development, employee discharge and discipline, employment contracts, restrictive covenants and trade secrets, Executive compensation structuring, labor relations, collective bargaining, union/management issues, and wage and hour compliance.

Mr. Zabell graduated from New York Law School after graduating from the State University of New York at Albany.

Mr. Zabell practices in a variety of labor and employment related areas of the law including the National Labor Relations Act, the Federal Railway Labor Act, State and Federal Wage/Hour Laws, Prevailing Wage, COBRA, IRCA, Laws against Discrimination, FMLA, ERISA and the ADA. In addition to traditional labor and employment laws, Mr. Zabell has represented clients under the Federal False Claims Act, otherwise known as Federal Whistle-Blower Law or Qui-Tam Law. He has negotiated collective bargaining agreements and individual employment agreements, as well as advised and represented employers in hundreds of grievances, mediations and arbitrations.

Mr. Zabell is an experienced litigator whose practice routinely finds him advocating and litigating on behalf of his clients before various administrative tribunals, State Courts in New York, New Jersey, Illinois and Michigan, United States District Courts, the United States Court of Claims, the Second Circuit Court of Appeals, the National Labor Relations Board and the United States Supreme Court.

Mr. Zabell is admitted to practice in New York and is a member of the Nassau County, Suffolk County, and New York State Bar Associations. He is also a member of the American Trial Lawyers Association.

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AREAS OF PRACTICE

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- Banking Litigation
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- Energy Litigation
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E-Discovery and Information Technology

Labor and Employment

ADMISSIONS

New York
Massachusetts
Maine
U.S. District Court, Eastern District of New York
U.S. District Court, Southern District of New York
U.S. District Court, Northern District of New York
U.S. District Court, Western District of New York
U.S. Court of Appeals, Second Circuit

EDUCATION

J.D., Fordham University School of

James G. Ryan

Partner

James Ryan is the head of the Commercial Litigation Department and is the chair of the firm's Employment Litigation practice. As head of the Commercial Litigation Department, Mr. Ryan has extensive experience in representing clients in financial services, corporate, energy, and higher education related litigation in the federal and state courts, and in various forms of alternative dispute resolution.

Mr. Ryan's commercial litigation practice focuses on energy related matters which include a broad range of disputes arising out of the production, transportation, distribution and sale of natural gas, natural gas liquids and electric power. He also represents numerous financial institutions in matters involving the defense of "lender liability" claims or other allegations of lender misconduct, actions to recover unpaid obligations from principals and guarantors, foreclosure actions, and assertion of claims for fraud on the part of borrowers or their principals.

As chair of the firm's Employment Litigation practice, Mr. Ryan also regularly represents the firm's clients in cases involving discrimination claims, post employment covenants, breach of contract, breach of fiduciary duty, trade secrets, whistleblowers, proprietary information, unfair business practices, covenants not to compete, hiring, promotion, termination, discipline, reductions in force, and sexual harassment. His caseload also includes matters involving the Family and Medical Leave Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, Title VII, Title IX, HIPAA, Sarbanes-Oxley, FERPA, ERISA, the New York State Human Rights Law, and the New York State Labor Law.

Law, 1985
B.S., Fordham University, College of Business Administration, 1982

Mr. Ryan appears on behalf of the firm's clients in federal and state courts, before federal, state and local administrative agencies, and in mediation and arbitration proceedings relating to all of the aforementioned areas. He offers advice and training, including seminars and bulletins, on avoiding discrimination, employment, and education claims. Mr. Ryan also contributes articles to and comments for various publications concerning e-discovery, education, and employment matters. He also co-authors blogs on these issues.

As to his representation of colleges and universities, Mr. Ryan has handled the full array of legal matters that confront every major institution, including labor and employment issues, faculty governance, intellectual property, student life, athletics, and fundraising. Over the years, he has addressed labor contracts, managed faculty work stoppages, negotiated real estate transactions and developed policies and procedures. Mr. Ryan has also represented colleges and universities in state and federal court and before state and federal agencies. As a result of this experience, he has been asked to lecture before the members of the Commission on Independent Colleges and Universities (cIcu) (whose members encompass approximately 100 colleges and universities which are based in New York) many times on topics such as Title IX, New York's "Enough is Enough" law which is codified in Article 129-B of the Education Law, and the proper techniques for conducting internal workplace investigations.

In 2008, Mr. Ryan founded the firm's E-Discovery Practice Group. The E-Discovery Group provides cost effective, expeditious and practical solutions to even the most challenging issues involving electronically stored information so that a client can focus its resources on its business and operations. The E-Discovery Group also develops or reviews document retention policies to ensure compliance with the litigation hold process, e-discovery obligations and statutory/ regulatory requirements. As a result of his lectures on e-discovery, in

September, 2010, Mr. Ryan was appointed to the New York State Unified Court System E-Discovery Working Group and to its education subcommittee to develop educational materials, including CLE courses and a bench book, on e-discovery for the New York State judiciary and judicial staff.

Mr. Ryan grew up in Massachusetts, graduated from Fordham University School of Law in 1985 and has been a litigator with the firm since shortly after his graduation from Fordham. He became a member of the firm in 1995. Mr. Ryan is a trained mediator for the United States District Court for the Eastern District of New York.

UPCOMING AND RECENT SPEAKING EXPERIENCE

- *Conducting Internal Investigations (December 1, 2016, CICU Seminar, PACE University)*
- *Are You Prepared for Employee Misconduct?* (April 19, 2016, Capital Region Chamber of Commerce)
- *Social Media in the Workplace and Courtroom* (September 25, 2015, NYS Bar Association, Labor and Employment Section)
- *Ethics of Social Media in the Workplace* (September 18, 2015, Suffolk County Bar Association)
- *Implementing New York State Campus Sexual Assault Law: Article 129-B* (September 11, 2015, CICU Seminar)
- *How to Conduct A Proper Internal Investigation* (September 8, 2015, Nassau County Bar Association)
- *How Employers Should Conduct an Internal Investigation* (May 11, 2015, Suffolk County Bar Association)
- *E-Discovery and the FRCP: Changes Afoot for Data Governance and Management* (March 25, 2015, The Knowledge Group Webcast)
- *Challenges of Conducting A Proper Internal Investigation* (March 4, 2015, Federal Bar Association)
- *Effectively Addressing Sexual Misconduct on Campus: Title IX and Clery Act Compliance* (February 23, 2015, CICU Seminar)
- *E-Discovery and The Municipal Attorney: Compliance and Cost Control Issues* (October 17-18, 2014, NYS Bar Association, Municipal Law Section)
- *Wage/Hour Issues and Self-Directed Services* (June 11, 2014, Third Annual Conference of the Interagency Council)
- *Wage and Hour Issues: Fair Labor Standards Act and New York State Law* (February 21, 2014, NYSARC Chapter Executive Meeting)
- Invited Speaker, Thirty-Fifth Annual American Gas Association Legal Forum (July 15-17 2012, San-Diego, California)

- *E-Discovery in Federal Litigation* (June 20, 2012, Suffolk County Bar Association)
- *Federal Discovery* (May 30, 2012, Nassau County Academy of Law)
- *Hiring and Firing: Background Checks, Social Media, and Other Arresting Developments* (October 25, 2011- Ali Aba Webcast)
- *Electronic Discovery Update: New York State Case Law and Developments* (June 14, 2011- Ali Aba Webcast)
- *Electronic Discovery* (May 2, 2011, Appellate Division, First Department)
- *E-discovery: What the Litigator Needs to Know to Avoid Professional Liability* (June 7, 2010)
- *Electronic Discovery – Avoiding Disaster* (September 9, 2009)

ARTICLES AND PUBLICATIONS

- *The Jury, Social Media and Zealous Advocacy* (New York Law Journal, October 20, 2015)
- Obergefell Decision Opens The Door For Anti-Discrimination Litigation (July 8, 2015)
- Second Circuit to Decide Rule 68 Offers' Application to Class Actions (June 17, 2015)
- Federal Judge Finds Michigan School District Liable for Failure to Train Staff on Title IX (April 2, 2015)
- *Should Court 'Deliver' in Pregnancy Discrimination Case?* (New York Law Journal, March 23, 2015)
- U.S. Supreme Court Addresses Disparate Impact Liability Under the Fair Housing Act (January 28, 2015)
- *Challenges in Conducting a Proper Investigation* (New York Law Journal, January 22, 2015)
- *Victory for Gay Marriage Doesn't Affect Workplace Rights (*New York Law Journal, January 2, 2015)
- Changing Times – A Guide to the Proposed Amendments to the Federal Rules of Civil Procedure (December 8, 2014)
- Title IX: A Shield Or A Sword? (Nassau Lawyer, November 2014)
- Governor Andrew Cuomo Proposes Plan to Combat Sexual Assault on SUNY Campuses (October 4, 2014)
- NCAA Passes Resolution Seeking To Clarify The Role of Athletic Departments in Campus Sexual Assault Investigations (August 28, 2014)
- Appeals Courts Issue Conflicting Decisions on Legality of Subsidies under the Affordable Care Act (July 29, 2014)
- Standing Committee Meets About the Proposed Amendment to the Federal Rule of Civil Procedure 37(e) (May 30, 2014)
- Supreme Court Expands Whistleblower Protections (March 31, 2014)

- Opened Web-based Emails Deemed "Electronic Storage" under the Stored Communications Act (January 24, 2014)
- Supreme Court Narrows Scope of Employer's Liability for Title VII Claims against Co-workers (July 18, 2013)
- The Southern District Sends FLSA Claims to Arbitration (December 21, 2012)
- Judge Scheindlin Sends Federal Agencies a "Message" About Their E-Discovery Obligations Under the Freedom of Information Act (August 24, 2012)
- New York Appellate Division Adopts Zubulake Standard to Determine Which Party Should Bear the Cost of Producing ESI (March 20, 2012)
- NYSBA Releases Guidelines for the Best Practices In E-Discovery In New York State and Federal Courts (January 5, 2012)
- I Have a Duty to Preserve Social Media Content, but Now What? (September 19, 2011)
- Can You Insult Your Employer On Facebook? (September 8, 2011)
- Court Reminds Advocates the Importance of Making Timely Spoliation Motions (August 9, 2011)

PROFESSIONAL & COMMUNITY ACTIVITIES

- Adjunct Professor, Molloy College
- Appointed Member, Judiciary Screening Committee of the Nassau County Bar Association
- Appointed Member, New York State Unified Court System's E-Discovery Working Group
- Mediator, Mediation Panel of the U.S. District Court, Eastern District of New York
- Member, National Association of College and University Attorneys
- Serves on the Council of Overseers for the Tilles Center for the Performing Arts
- Board Member and Coach, Rockville Centre Soccer Club
- Former Chair, Rockville Centre Travel Soccer Program
- Member, New York State Bar Association
- Member, Nassau County Bar Association
- Member, Massachusetts Bar Association
- Member, Federal Bar Council

HONORS & AWARDS

Mr. Ryan maintains an AV "pre-eminent" rating from Martindale-Hubbell.

Selected to the Super Lawyers List (2012 - 2016) by the Super Lawyer legal rating service issued by Thomson Reuters. A description of the selection methodology can be found at: http://www.superlawyers.com/about/selection_process.html. No aspect of this award has been approved by the Supreme Court of New Jersey.

In September, 2010, Mr. Ryan was appointed to the New York State Unified Court System E-Discovery Working Group and to its education subcommittee to develop educational materials, including CLE courses and a bench book, on e-discovery for the New York State judiciary and judicial staff.

In July 2014 he was appointed to Judicial Screening Committee of the Nassau County Bar Association.

NEWS & SPEAKING ENGAGEMENTS

James Ryan Published in the New York Law Journal Discussing Federal Discovery Sanctions, March 29, 2017

James Ryan Awarded AV Preeminent® Rating by Martindale-Hubbell® for 2017, March 13, 2017

James Ryan Conducting Mediation Advocacy Training Thursday March 16, 2017, January 25, 2017

James Ryan Appointed to the Alternative Dispute Resolution Advisory Counsel for the U.S. District Court, Eastern District of New York, January 12, 2017

James Ryan Quoted in USA Today College Discussing NLRB Ruling Regarding Unionization of Graduate Students, August 25, 2016

James Ryan Quoted in The Hill Discussing Admissibility of Past Accusations, July 12, 2016

James G. Ryan Quoted in Law360 on NFL and Deflategate Ruling, April 28, 2016

James G. Ryan Quoted in TheStreet on Political Beliefs in the Workplace, April 28, 2016

James Ryan Addresses Paid Sick Leave Issues in SHRM Online, March 3, 2016

James Ryan Comments on University of Tennessee Title IX Case, February 27, 2016

James Ryan Addresses Fair Housing Act Building Compliance Issues in Construction Dive, *Construction Dive*, February 23, 2016

James Ryan Quoted on Florida State University Settlement in Jameis Winston Title IX Case, January 26, 2016

Four Cullen and Dykman Attorneys Host CICU Event: Implementing Article 129-B and Campus Sexual

Assault Law, September 11, 2015

James Ryan Quoted in Society for Human Resource Management on Order Requiring Federal Contractors to Give Paid Sick Leave, September 10, 2015

James Ryan Quoted in Newsday on Federal Judge's Decision to Overturn Tom Brady's Suspension, September 3, 2015

James Ryan Quoted in New York Times on Obama's Draft Executive Order Concerning Paid Sick Leave for Federal Contractors, August 5, 2015

James Ryan Selected as "Top Rated Lawyer" by New York Law Journal and Martindale-Hubbell, *New York Law Journal*, August 4, 2015

Four Cullen and Dykman Attorneys Attend 2015 Annual National Association of College and University Attorney (NACUA) Conference in Washington D.C., July 20, 2015

James Ryan Quoted in The Hill on Same-Sex Marriage and Anti-discrimination Laws, May 9, 2015

Sixteen Cullen and Dykman Attorneys Named to Super Lawyers Lists for 2015, April 28, 2015

James Ryan Quoted In USA Today on Silicon Valley Discrimination Lawsuit, *USA Today*, March 13, 2015

CICU Seminar - Effectively Addressing Sexual Misconduct on Campus: Title IX and Clery Act Compliance, February 23, 2015

James Ryan Quoted in New York Times on the University of Virginia's Decision to Reinstate Fraternity at Center of Rolling Stone Article, *New York Times*, January 12, 2015

James Ryan Quoted in New York Times on Jameis Winston Lawsuit, *New York Times*, January 8, 2015

James Ryan Quoted by Associated Press on High Profile Sexual Misconduct Case, December 19, 2014

James Ryan Quoted by Chronicle of Education on University of Florida Sexual Misconduct Case, December 19, 2014

James Ryan Quoted by New York Times Regarding College Quarterback's Sexual Misconduct Proceeding, December 5, 2014

James Ryan Interviewed in USA Today Concerning NFL Concussion Suit Settlement, November 4, 2014

James G. Ryan is named as a 2014 "Top Rated Lawyer" in the area of litigation by Martindale-Hubbell and the New York Law Journal., September 30, 2014

Cullen and Dykman Partner named 2014 "Top Rated Lawyer" in Litigation, August 25, 2014

Wall Street Journal quotes Cullen and Dykman LLP partner, James G. Ryan, in racial profiling case brought

against Barneys, *Wall Street Journal*, August 12, 2014

James Ryan Quoted by Associated Press on O'Bannon-NCAA Litigation

James Ryan, Thomas Wassel and Robert Wakeman Conduct Seminar on "Wage/Hour Issues and Self-Directed Services" for Interagency Council, June 11, 2014

James Ryan and Thomas Wassel Conduct Seminar on Wage and Hour Issues for NYSARC, February 21, 2014

Eight Cullen and Dykman Attorneys Named 2013 Super Lawyers, October 3, 2013

James G. Ryan named a 2013 Top Rated Lawyer in Labor & Employment, *The American Lawyer & Corporate Counsel magazine - February 2013 issue*

James G. Ryan an Invited Speaker at the Thirty-Fifth Annual American Gas Association Legal Forum, July 17, 2012

James G. Ryan a Featured Presenter to the Nassau County Bar Association, May 30, 2012

Hiring and Firing: Background Checks, Social Media and Other Arresting Developments, October 25, 2011

Two Cullen and Dykman Partners Invited to Serve on New York State Chief Administrative Judge Ann Pfau's Task Forces Involving Electronic Discovery and Foreclosures, 2011

ADVISORIES

Colleges and Universities are Key Factor in Restraining Trump Travel Ban, February 10, 2017

Obama Administration Releases Additional Campus Sexual Misconduct Guidance Directed at College Presidents and Senior Administrators, January 6, 2017

Wage Law Changes Take Effect in New York State, January 3, 2017

Federal Court Kills New Overtime Rules--For Now, November 23, 2016

"Enough is Enough" Legislation Becomes Law: New York Education Law Article 129-B Establishes New Requirements for New York State Colleges' and Universities' Responses to Reports of Sexual Misconduct, July 7, 2015

SOCIAL MEDIA IN THE WORKPLACE

James G. Ryan, Esq.

I. INTRODUCTION

On Thursday, August 27, 2015, Facebook CEO Mark Zuckerberg posted that for the first time, "1 in 7 people on Earth used Facebook to connect with their friends and family." This was the first time Facebook reached that milestone, and it was "just the beginning of connecting the whole world." By December 2016, Facebook's daily active users averaged 1.23 billion, and its monthly active users approached 1.86 billion.

With sixty-seven percent of online American adults using at least one social media platform, seven-hundred and fifty tweets being produced every second, and the launch of approximately three million blogs per month, social media is vastly changing the world around us. *See* Colin K. Kelly and Aliyya Z. Haque, *A Trial Lawyer's Guide To Using Social Media Information During Trial*, FOR THE DEFENSE, Oct. 2013, http://www.alston.com/Files/Publication/eeb42dbc-6bb5-4e55-a394-cdf38f007263/Presentation/PublicationAttachment/778ab4c6-cdb2-4590-9096-4220f82ded2a/A%20Trial%20Lawyer's%20Guide.pdf (last visited April 24, 2017).

The genesis of the social networking frenzy began with Friendster in 2002, then MySpace and LinkedIn in 2003. Facebook and Twitter followed in 2004 and 2006, respectively. More recently, Instagram (acquired by Facebook in April 2012) released its mobile photo-sharing app in 2010, and Snap Inc., founded in 2012, went public in March 2017 on the strength of its mobile app Snapchat. In what seems to have been just a blink of an eye, the number of people and businesses using social networking has increased exponentially. The Internet opened the door to the explosion of what has become known as social networking. Social networking generally consists of a website or discussion forum in which users can connect and share information with others. As of November 6, 2016, 69% of adults utilize some type of social media site. *See* Social Networking Fact Sheet conducted by Pew Research Center, http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/ (last visited April 24, 2017).

Social networking provides employers with unprecedented opportunities to communicate with customers and potential customers. However, the swift development of social media has produced a number of legal obstacles for employers. As social networks expand, and as each "friend" "friends" another, and each tweet inspires another tweet, employers must consider the actions they take with respect to employees as a result of social media information. Employers must be aware of their employees' use of social networking both at work and after the workday has ended. That burden is further complicated by privacy rights, libel, and discrimination claims as well as the evolving rules covering the discovery of information on social networking websites in litigation.

Unfortunately, and not unexpectedly, employers and employees often have very differing views as to the use of social media in the workplace, which can create workplace issues. A 2012 Deloitte LLP study focusing on trust in the workplace notes that "there is a persistent gap

between employee and employer views on the appropriate use of and access to social media sites...." The Deloitte study claims that 41% of executives believe that social networking helps build trust in the workplace whereas only 21% of employees agree. Meanwhile, 45% of business leaders believe that social media has a positive impact on workplace culture, while only 27% of employees share the same view. *See* PRNewsWire.com, *The Social Divide - Employees, Executives Disagree on the Role of Social Media in Building Workplace Culture: Deloitte Survey*, June 13, 2012, *available at* http://www.prnewswire.com/news-releases/the-social-divide---employees-executives-disagree-on-the-role-of-social-media-in-building-workplace-culture-deloitte-survey-158862755.html (last viewed April 25, 2017).

This divide clearly shows the need for a clear workplace policy regarding the use of social networking. Unfortunately for employers, failure to have a clear policy with respect to social networking that is monitored and enforced could lead to serious consequences, including public relations disasters; the release of confidential information; or litigation in the form of harassment claims, privacy violations, or violations of intellectual property rights. Indeed, friending, linking, tweeting, gramming, snapping, or checking in with FourSquare, with or by employees can be an employer's worst nightmare.

II. SOCIAL MEDIA AND THE HIRING PROCESS

Today, the hiring process starts long before an individual arrives for the interview. Employers commonly use social media as a source to gather information in connection with their hiring decisions.

A. Laws to Consider

Although employers may utilize information from the Internet in their decision-making process, employers must exercise serious caution to guarantee they do not utilize such information to unlawfully discriminate against a potential employee.

1. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000(e) *et seq.*, prohibits discrimination when making employment related decisions. A company cannot make hiring, discipline, or termination decisions based on race, color, national origin, religion, and sex. The Pregnancy Discrimination Act of 1978 amended Title VII and makes it illegal to discriminate against a woman because of her pregnancy, childbirth, or medical condition related to pregnancy or childbirth.

Courts have often ruled that employment decisions are defined broadly and include promotion, demotion, compensation, and transfers. *See* Beyer *v. Count of Nassau*, 524 F.3d 160, 164-165 (2d. Cir. 2008), *citing Alvarado v. Texas Rangers*, 492 F.3d 605, 614 (5th Cir. 2007) (holding that denial of a transfer may be the objective equivalent of the denial of a promotion, and can constitute an adverse employment action).

2. The Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C.A. § 621 *et seq.*, protects individuals who are 40 years of age or older from employment discrimination. It is "unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).

3. The Americans with Disabilities Act of 1990

The Americans with Disabilities Act of 1990, ("ADA") 42 U.S.C.S. § 12101 *et seq.*, prohibits discrimination based on physical or mental handicap/disability. "Discrimination occurs when an employer does not make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business." *Goonan v. Fed. Reserve Bank of New York*, 916 F. Supp. 2d 470, 479 (S.D.N.Y. 2013) *citing* 42 U.S.C. § 12112(b)(5)(A); *see also U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

4. Genetic Information Nondiscrimination Law of 2008

Under the Genetic Information Nondiscrimination Law of 2008, ("GINA"), 42 U.S.C. § 2000(f)(f) *et seq.*, it is illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II (employment agencies, labor organizations and joint labor-management training and apprenticeship programs - referred to as "covered entities") from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.

5. New York Laws

States are free to add additional factors that are off limits when making employment decisions. However, New York law is pretty much aligned with the protections given to people under federal law. Specifically, New York prohibits employment discrimination on the basis of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status. *See* N.Y. CONST. art. I, § 11. *See generally* N.Y. Exec. Law § 296 (McKinney 2011). Disparate treatment claims arising under Title VII and the New York State Human Rights Law are both "assessed using the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." *Bowen-Hooks v. City of New York*, 13 F.Supp.ed 179, 210 (E.D.N.Y. 2014). To state a prima facie case for employment discrimination under Title VII or NYSHRL, an employee must prove: (1) he was a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination. *Brown v. City of Syracuse*, 673 F.3d 141, 150 (2d Cir. 2014.

B. Independent Background Research to Determine Who Gets Hired

Social media can land a company in hot water even before a person is hired. In evaluating

candidates, hiring managers often look to social media as a means of conducting background research to determine if the individual presents himself/herself in a professional manner, to verify the candidate's qualifications, and to determine if he/she is a good fit for the company. *See* CareerBuilder.com, Number of Employers Using Social Media to Screen Candidates Has Increased 500 Percent over the Last Decade, http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?ed=12/31/2016&id=pr945&sd=4/28/2016 (last visited April 24, 2017).

1. Interviewing John and Jane

Imagine John and Jane, equally qualified, both interview for the same job and Human Resources decided to do some basic searches on the Internet to make sure they are not running a Ponzi scheme through their Facebook page. Now imagine that the search for John turns up nothing, but the search for Jane shows several images on Facebook of her younger brother's bar mitzvah. Is there a problem with this? If you had asked Jane during her interview what her religion was, you certainly would have opened yourself up to a lawsuit. Gathering this information through a Google/Facebook search is no different.

The problem is that if you do not hire Jane, no matter how legitimate that decision was, you might have given her ammunition for a lawsuit against your company.

In *Gaskell v. Univ. of Kentucky*, 2010 WL 4867630 (E.D. Ky. 2010) the Plaintiff was a leading candidate to be a director of a new observatory at the University of Kentucky in 2007. He was not hired, however, in part because he posted his views on evolution online. The plaintiff subsequently alleged that the University violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq*, as amended, but a settlement was reached before the case went to trial for $125,000. In any event, this case demonstrates that even if the impermissible information is not utilized in making the employment or hiring decision, improper motive may be inferred if the employer has access to this information.

In *Nieman v. Grange Mut. Ins. Co.*, No. 11-3404, 2013 U.S. Dist. LEXIS 47685, (C.D. Ill. Apr. 2, 2013) the Plaintiff commenced an age discrimination suit after Integrity Mutual Insurance Company hired a younger candidate for its Vice President of Claims. The suit alleged that Integrity followed industry norms, i.e., using the Internet to research him. Plaintiff was 42 at the time of the suit. The job ultimately went to someone 39 years old. The Court concluded that Plaintiff's claim failed for two reasons: first, that Plaintiff was not qualified for the job. An interviewer made a subjective determination during Plaintiff's phone interview that Plaintiff did not possess the superior communication and excellent strategic skills that his competitor did. Second, Plaintiff's competitor was not substantially younger. The three-year age gap did not sufficiently meet the element that generally requires a ten-year difference.

Consider now, that you are about to make your hiring decision and decide to ask your summer intern to do one last search on the internet for information about Jane. Her search reveals a blog Jane wrote about how proud she is to have participated in a Race for the Cure in honor of her mother who had cancer and she reports this information to you. This information may cause your company to run afoul of GINA: the Genetic Information Nondiscrimination Law of 2008, which prohibits an employer from failing or refusing to hire someone because of genetic

information. Again, if you decide not to hire Jane it is possible that she may have a claim under GINA.

2. Avoiding Hiring Risks Based on Social Media Revelations

Social Media Review Using a Third Party: One simple method of avoiding the risks associated with hiring determinations based on social media is to use a third-party to conduct the searches. The vendor is then instructed to forward only job-relevant information. In addition, detailed records as to why each candidate was hired or not hired should be maintained to protect against any potential claims.

In-House Review of Applicants and Social Media: if your company decides not to use a third-party to conduct a social media search, it is important to remember the following:

- Process all applicants consistently by following the same process for each;
- Identify a designated searcher or searchers, and make sure the person conducting the search is not the hiring manager;
- Avoid revealing potential employees' protected information (i.e. age, race, religion, disability, genetic information, and political association) to the hiring manager;
- Limit the scope of the social media searches to publicly available, relevant, work-related information and never allow anyone to "friend" an applicant in order to see private profile information;
- Provide notice of social media searches to all prospective employees either on the employment application or in a separate disclosure;
- Consistently document the results of social media search;
- Fully document all decisions to reject an applicant based on social media search results; and
- Communicate social media policies to hiring managers, and advise them not to perform their own social media searches.

See Janelle Milodragovich, *What Happens in Vegas Doesn't Stay in Vegas: Best Practices For Using Social Media in The Recruiting Process*, May 10, 2011, http://www.washingtonworkplacelaw.com/private-employers/what-happens-in-vegas-doesnt-stay-in-vegas-best-practices-for-using-social-media-in-the-recruiting-p (last visited April 24, 2017).

By following this simple advice, your company will be less exposed to potential litigation and less likely to be subject to complaints regarding its hiring determinations.

3. Gaining Access to Social Media - Asking for Passwords

Let's go back to John and Jane. You keep trying to research information about John, but he

changed his social media privacy settings a week ago such that he is nearly invisible to the almighty Google algorithm, and you have not been able to learn anything helpful. Consequently, you go to the head of Human Resources and ask that a new policy be implemented requiring all interviewees disclose their social media accounts and the accompanying usernames and passwords. Anyone see a problem with this?

a. Public Relations

When Maryland's Department of Public Safety and Correctional Services instituted a policy of asking prospective employees for their passwords to social media websites as part of the hiring process, the backlash from the American Civil Liberties Union (ACLU) was swift. See ACLU.org, Your Facebook Password Should Be None of Your Boss' Business, https://www.aclu.org/blog/your-facebook-password-should-be-none-your-boss-business (last visited April 25, 2015.)

b. Violations of Federal Law and State Law

Additionlly, demanding accounts and passwords will certainly run afoul of federal and state law. *See Pietrylo v. Hillstone*, 2009 WL 3128420 (D. N.J. 2009) (holding two managers of Hillstone Restaurant Group liable for violating the Stored Communication Act and comparable state law after requesting an employee's login information to a private, invitation-only, password-protected MySpace group, which was created by the company's employees. The court found that since providing the password was not entirely voluntary on the part of the employee, access by use of that password was unauthorized)

The Stored Communication Act, ("SCA") 18 U.S.C. § 2701 *et seq.* addresses voluntary and compelled disclosure of "stored wire and electronic communications and transactional records" held by third-party internet service providers (ISPs). The SCA "protects users whose electronic communications are in electronic storage with an ISP or other electronic communications facility."

Under the SCA, an offense is committed by anyone who: "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided;" or "(2) intentionally exceeds an authorization to access that facility; and thereby obtains...[an] electronic communication while it is in electronic storage in such system." 18 U.S.C. § 2701(a)(1)-(2).

The Social Networking Online Protection Act was first introduced in April 2012 as H.R. 5050. The bill sought to prohibit employers from asking employees or applicants for social media account information. After initial support in the Senate, the bill was not enacted by the 112th Congress, yet was reintroduced in February 2013 as H.R. 537. Again, despite the Senate's initial support, the bill stalled in April 2013 after presentment to the Subcommittee on Workforce Protections. In April 2016, the house re-introduced the bill as H.R. 5107. But, as before, it did not pass. Considering the new administration and current political climate in Washington, it remains uncertain whether the bill's sponsor, Rep. Eliot Engel, D-NY 16th District, will seek to re-introduce the legislation again.

Nevertheless, a number of states have enacted password protection laws that prohibiting employers from requesting their applicants provide social media passwords. The laws forbid employers from requesting account names, usernames, passwords, and other personal account information for social networking sites. To date, twenty-five states (and Guam) have enacted laws that apply to employers. Sixteen state statutes extend the prohibition to Educational institutions. New York is not one of these states. *See* Listing of States with Password Protection Laws Provided by the National Conference of State Legislatures, http://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-usernames-and-passwords.aspx (last visited April 24, 2017).

III. SOCIAL MEDIA AND WORKPLACE DECISIONS

Employers in all sectors today are confronted by their employees' Internet and social media use while on the job. Social media use can occur privately while on company time or be wholly related to job activities or duties, i.e. managing the company's Facebook account. Additionally, social media use can occur outside of work, yet still related to the company.

Often employers may wish to terminate an employee in connection for such use. Doing so, however, is not without certain pitfalls that raise many different legal consequences.

A. National Labor Relations Act

The purpose of the National Labor Relations Act's (the "Act") is to "eliminate the causes of certain substantial obstructions to the free flow of commerce ... [and] encourag[e] the practice and procedure of collective bargaining...by protecting the exercise by workers of full freedom of association, [and] self-organization." 29 U.S.C. § 151.

Specifically, the Act protects the employee's right to "engage in... concerted activities for the purpose of collective bargaining or other mutual aid or protection ..." 29 U.S.C. § 157. Significantly, the Act applies to activities by both union and non-union employees.

Section 7 of the Act guarantees employees the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, as well as the right "to refrain from any or all such activities." In addition to organizing, Section 7 protects employees who take part in grievances, on-the-job protests, picketing, and strikes.

Generally speaking, Section 7 provides employees the right to associate together to improve the terms and conditions of their employment or their positions as employees, through channels outside the immediate employee-employer relationship. This may include discussions about wages, benefits, working hours, the physical environment, dress codes, assignments, and responsibilities.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.

B. National Labor Relations Board

In its administrative capacity, the National Labor Relations Board ("NLRB") enforces employee rights established under the Act. The NLRB protects employees' rights "to engage in "concerted activity." The NLRA doesn't define concerted activity, however, the NLRB's website state that "concerted activity occurs when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment." https://www.nlrb.gov/rights-we-protect/employee-rights (last visited April 25, 2017).

A single employee may also engage in protected concerted activity if he or she is acting with the authority of other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action. Examples of protected concerted activities include:

- "[t] wo or more employees addressing their employer about improving their pay";
- "[t]wo or more employees discussing work-related issues beyond pay, such as safety concerns, with each other"; and
- "[a]n employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions."

See NLRB.gov, Employee Rights, https://www.nlrb.gov/rights-we-protect/employee-rights. (Last visited April 25, 2017).

In recent years, the NLRB has taken notice of social media issues. In fact, the NLRB has taken an active role in monitoring how employers respond to employee social media activity. Recent pronouncements from the NLRB have disagreed with some firings for social media use, and instead find broader protections of employee rights signaling a shift from the NLRB's previous employer-friendly rulings. *See e.g. Chipotle Services LLC d/b/a Chipotle Mexican Grill*, 364 NLRB No. 72 (Aug. 18, 2016) (finding that an employee's tweet regarding wages and commuting to work during heavy snows qualify as protected concerted activity); *Hispanics United of Buffalo*, 359 NLRB 37 (December 14, 2012) (five employees engaged in protected concerted activity by posting comments on Facebook that responded to a co-worker's criticism of their job performance).

1. Complaints about Workplace Conditions "Posted" on Social Media

So you decide to hire both John and Jane because business is booming and you want to avoid a lawsuit. John is hired to sales and is extremely happy about his job, but tends to be a bit stuck-up. During the company's party for the company's biggest client, John is appalled to discover that the company is serving nothing but hot dogs, hamburgers, and beer. John races home after the party and immediately posts a comment on his Facebook page saying how embarrassed the company should be at the quality of the food served and that top shelf liquor and filet mignon must be served at the next party or else the company will be the laughing stock of the industry. By the way, John is surprisingly popular with most people in the industry and has "friended" most of your clients and fellow employees. So, should John be disciplined, terminated, or just warned that any similar posts in the future will result in immediate termination? Any one of those choices will almost certainly irritate the NLRB. *See Karl Knauz Motors, Inc.*, 358 NLRB

164 (2012) (finding that a Facebook post regarding the food served at a company picnic was protected concerted activity because it could have had an effect upon compensation).

In *N.W. Rural Elec. Coop.*, Case 18-CA-150605 (NLRB Sept. 28, 2016) (pending board decision), 2016 WL 5462097: A Facebook page called "Linejunk," which is devoted to recognizing and providing information about the electrical workers' power line trade, (in which workers are known as linemen), served as an on-line forum for linemen. The claimant posted a response to a safety inquiry written by the page's administrator, commenting on the inadequacy of the current six-man work crews. Approximately a week after the post, the Claimant was terminated. Despite mixed-motive arguments whereby the Respondent would have terminated the Claimant regardless of the post, the NLRB construed Claimant's post to be concerted activity for the purpose of mutual aid or protection, and deemed Respondent's asserted reasons for discharge as meritless and a pretext for its unlawful motivation.

In *Three D, LLC*, 361 NLRB No. 31 (Aug. 22, 2014): Employees complained on Facebook that they owed taxes due to the employer's accounting mistakes. An employee posted on Facebook "[S]omeone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!!" A bartender who worked at Triple Play commented on the Facebook post and a cook "liked" the employee's comment. As a result, both the bartender and the cook were terminated. The firings violated the NLRA - "liking" the comments of a former employee was protected, concerted activity under the NLRA. The Board found that the Respondent violated Section 8(a)(1) of the Act by unlawfully discharging the employees for their protected, concerted participation in a Facebook discussion in which they complained about perceived errors in the employer's tax withholding calculations.

2. The Company "Suggestion Box" Becomes a Blog

Jane is turning out to be a great hire and is performing well above expectations. In fact, Jane is so far ahead of the curve that she begins to see every workplace flaw that you could imagine. After filling the suggestion box, building a new, bigger suggestion box, and filling that, Jane decides she needs a bigger forum for her ideas. She creates a virtual soapbox in the form of a blog titled "YourCompanyIsRunByMorons.com." In her blog, she participates in exchanges between fellow employees about every problem they have with workplace conditions and about various ill-conceived solutions the company's managers have tried to implement. Any thoughts on how to respond to this? Unfortunately, there may not be much you can do about it. Jane is engaging in protected concerted activity: namely, communicating with other employees about the terms and conditions of their employment. Firing Jane would likely lead to an unfair labor practice claim.

In fact, the NLRB held that comments posted on Facebook by employees are protected to the same extent as if they were made by the "water-cooler." *Hispanics United of Buffalo*, 359 NLRB 37 (Dec. 14, 2012).

In *Hispanics United of Buffalo*, 359 NLRB 37 (2012), from her personal home computer, an individual posted on Facebook: "Lydia Cruz, a coworker feels that we don't help our clients enough at [Respondent]. I about had it! My fellow coworkers how do u feel?" Four off duty employees responded via Facebook posts. The subject of the Facebook post (Lydia Cruz) found out and complained to someone at the company about the Facebook comments. The employer

fired the Facebook poster and her four coworkers, stating their remarks were "bullying and harassment" and violated the employer's zero tolerance policy of bullying and harassment. It was held that Hispanics United of Buffalo, Inc. (the employer) violated Section 8(a)(1) of the NLRA by firing 5 employees for Facebook comments written in response to a co-worker's criticism of their job performance. The Facebook post qualified as concerted activity under Section 7 and protected activity and therefore they could not be discharged for their posting. The employees "were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz Moore was going to make to management."

3. Losing the Protection of the N.L.R.A.

Kevin, a long-term employee, sees what John and Jane are getting away with so he decides to get in on the action. He starts tweeting that the company's competitors are a bunch of "idiots," anyone West of the Mississippi River (most of your client base) lives in a flyover state whose opinions do not matter, and that the Boston office is full of hacks. Are you stuck with Kevin?

Not unless he's the boss's kid. Kevin's tweets have nothing to do with workplace conditions or the terms and conditions of his employment. Nor is Kevin attempting to involve other employees in employment issues. Therefore, the tweets are not protected and Kevin can be shown the door. *See e.g., Lee Enterprises, Inc., d/b/a Arizona Daily Star*, No. 28-CA-23267, 2011 WL 2492852 (Apr. 21 2011) (finding that an employee was not wrongfully terminated for writing inappropriate and offensive Twitter postings, because the postings did not relate to the terms and conditions of employment or seek to involve other employees in issues related to employment).

Determining whether or not an employee loses NLRB protection is very fact dependent.

When the issues involve direct communications, face-to-face in the workplace, between an employee and manager or supervisor, the administrative law judge will apply the *Atlantic Steel* standard. Under *Atlantic Steel*, the following factors are considered when determining if the employee loses NLRA protection: (i) the place of the discussion; (ii) the discussion's subject matter; (iii) the nature of the outburst on the part of the employee; and (iv) whether the outburst was provoked by the employer's unfair labor practices. *See Three D, LLC*, 361 NLRB No. 31 (2014), *enfd.* 629 F.App'x 33 (2d Cir. 2015);

In *Plaza Auto Center*, 360 NLRP No. 117 (May 28, 2014), during a meeting at which an employee sought to discuss minimum wage with the owner and two managers of a used car lot, the owner twice told the employee he was free to work elsewhere if he didn't like the company policies. In response, the employee went on an expletive-laced tirade directed at the owner and told him the owner would regret it if he was fired. Unsurprisingly, the employee was fired. The Board initially found the employee's conduct so severe to cut of protection from the Act. However the Ninth Circuit reversed, and the Board, in its second decision explained that while the employee's remarks must be given considerable weight in consideration of the third factor, because the employee targeted the owner personally during a face-to-face meeting discuss concerted activity, the three other factors outweighed the "nature of the outburst" factor thus affording the employee protection.

On the other side of the spectrum, employers have legitimate interests in protecting their reputations from disloyal or defamatory statements, made by employees to other employees or third parties. Often these statements are made off-duty or outside the work place. Here, the employer's interests are balanced against the Supreme Court's decisions in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), and *Linn v. Plant Guards Local 114*, 383 U.S. 53 (1966).

Under *Jefferson Standard*, an employee who publicly attacks its employer's product's quality or the employer's business practices, without relating their criticisms to a labor controversy, is subject to valid dismissal, because the employees' conduct amounts to disloyal disparagement of their employer and falls outside the Act's protection. *Jefferson Standard,* 346 U.S. at 475–477.

Under *Linn*, the Court limited the availability of State-law remedies for defamation in the course of a union organizing campaign "to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." *Linn*, 383 U.S. at 64–65. The Court indicated that the meaning of "malice," for these purposes, was that the statement was uttered "with knowledge of its falsity, or with reckless disregard of whether it was true or false." *Id.* at 61.

With these standards in mind, the NLRB has held that "'employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection.'" *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5 (July 21, 2011) (*quoting Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (April 17, 2000)).

In *Tasker Healthcare Group*, No. 04-CA-09422, 2013 WL 2285967 (May 8, 2013), an employee's Facebook comments, written in a private Facebook group, were not considered protected concerted activity because they merely reflected the employee's personal contempt for a co-worker and supervisor, rather than any shared employee concerns over terms and conditions of employment.

In *Richmond District Neighborhood Center*, 361 NLRB 74 (Oct. 28, 2014), the NLRB decided in favor of an employer whose employees, while working as activity leaders for an after school program, had made numerous Facebook posts on each other's pages. The posts described plans to perform certain activities without the employer's necessary permission. In describing those plans, the employees used profanity, described how they would undercut management, and how they could imperil the future of the after school program. The NLRB found that the employees went too far because the openly insubordinate behavior and detailed descriptions of the acts were "'so egregious as to take [them] outside the protection of the Act, or of such a character as to render the employee[s] unfit for further service.'" The Board further explained that the comments made by the employees could not be "explained away as joke…or hyperbole." The employer had a reasonable expectation to believe that the plans described in the posts might actually be carried out by the employees, and that the employer "was not obliged to wait for the

employees to follow through on the misconduct they advocated."

4. Off-site, Online Complaints to a Third-Party

Amy becomes frustrated with the company after her manager, Mike, failed to make accommodations for a female employee who made hostile work environment claims. When Amy went home from work that evening, she logged into her personal Facebook account deciding to complain to her senator by posting on his wall. Although Amy did not think the senator could actually help the situation, she wanted to publicly convey her thoughts on harassment at work, as well as provide specific incidents that occurred at her company. Her post expressed concerns about how companies manage sexual harassment issues and encouraged the senator to pass a law to force employers to take claims of harassment more seriously. A few days after returning to work, Amy was terminated for publicly posting disparaging remakes and confidential information. Do you think that Amy has a case against her employer?

As noted above, the NLRB's test for "concerted activity" is whether activity is engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action," and where individual employees bring "truly group complaints" to management's attention. *See Meyers Industries*, 281 NLRB 882, 887 (1986) (Meyers II); *Meyers Industries*, 268 N.L.R.B. 493 (1984) (Meyers I), *remanded sub nom*; *Prill v. N.L.R.B.*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 971 (1985), *decision on remand sub nom*; *Prill v. N.L.R.B.*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).

In Amy's situation, the NLRB may rule against her because she did not discuss her posting with any other employee, there were no employee meetings or any attempt to initiate a group action, nor was she trying to take employee complaints to management. Therefore, she did not partake in "concerted activity" as required by the statute. See *Rural Metro*, Case No. 25-CA-31802 (June 29, 2011) (The issue was whether the employer unlawfully discharged the party for posting messages on a U.S. Senator's Facebook page that allegedly violated the employer's Code of Ethics and Business Conduct policy. The Board concluded that the employer did not unlawfully discharge the party because she was not engaged in concerted activity).

IV. MONITORING EMPLOYEE'S INTERNET USAGE AND ACTIVITY

So Jane's suggestion box caught the eye of your president and he immediately promotes her. Jane decides the best way to make a name for herself is to begin a campaign of monitoring employee's computer usage. Jane is not simply some paranoid manager looking to catch her employees slacking off. Rather, Jane is interested to see if her employees are disclosing trade secrets, communicating with competitors, or harassing fellow employees. How can Jane implement these policies without giving an employee standing for a lawsuit?

A. Monitoring and the Employee's Reasonable Expectation of Privacy

The solution is two-fold: (i) monitoring should be motivated by a legitimate, work-related purpose, and (ii) under a policy that notifies employees that employers have the right to monitor

the Internet and computer related activities.

1. Personal Communications Sent on Company Computers

In *City of Ontario, Cal. v. Quon*, 560 U.S. 746 (2010), the Supreme Court found that the City of Ontario, CA did not violate its employees' privacy rights when it searched through text messages contained on city-issued, alphanumeric pagers. The court reasoned that even assuming that the employees had reasonable expectations of privacy, the city's audit was reasonable because it was motivated by a legitimate work-related purpose, and was not excessive in scope.

Courts have routinely found that employees have no reasonable expectation of privacy when using workplace email accounts and computer systems, when the employees are informed that they will be monitored. *Williams v. Rosenblatt Securities Inc.*, 136 F.Supp.3d 593, 607 (S.D.N.Y. 2015); *see also Shefts v. Petrakis*, 758 F. Supp.2d 620, 635 (C.D. Ill. 2010) (finding employer's access to employee's work email authorized by its manual states that emails received on company equipment are subject to monitoring); *Miller v. Blattner*, 676 F.Supp.2d 485, 497 (E.D. La. 2009) ("[The employer] had an express policy which provided that all emails, personal or professional, that were contained on [the employer's] computers were the property of [the employer]. Thus, [the employee] could not have had a reasonable expectation over these documents. Where, as here, an employer has a rule prohibiting personal computer use and a published policy that emails on [the employer's] computers were the property of [the employer], an employee cannot reasonably expect privacy in their prohibited communications.)

This rule, however, is not extended to every situation. Courts have ruled that an employee has a reasonable expectation of privacy in their personal e-mail accounts if the e-mails were located on, and accessed from, third-party communication service provider systems, and there is no implication that the accounts were used for work purposes, or that the employer paid or supported maintenance of those accounts. *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 559-60 (S.D.N.Y. 2008) ("the employee ... did not store any of the communications which his former employer now seeks to use against him on the employer's computers, servers, or systems; nor were they sent from or received on the company e-mail system or computer. These e-mails were located on, and accessed from, third-party communication service provider systems. There is not even an implication that [the employee's] personal e-mail accounts were used for [the employer's] work, or that [the employer] paid or supported [the employee's] maintenance of those accounts.)

Further, in *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001), the Second Circuit held that an employee had a reasonable expectation of privacy in the contents of his office computer where the employee occupied a private office with a door, had exclusive use of the computer in his office, and did not share use of his computer with other employees or the public, notwithstanding the fact that there was a policy which "prohibited 'using' state equipment 'for personal business. *Id.* at 74. There was no clear policy or practice regarding regular monitoring of work computers and technical staff conducted infrequent and selective searches for maintenance purposes only. *See Id.*

2. Workplace Issues: Off-site, On-line Harassment

Mike has been promoted to Vice President of Efficiency and immediately tackles the issue of employee communication. With so many offices, branches, and cubicles, he realizes that the best way to spark collaboration and boost company morale would be to create an in-house social networking site, since the company previously blocked access to external social networking sites). Mike doesn't know much about hosting websites, so he hires an independent contractor to develop and host the site. The website launch goes off without a hitch. Unfortunately, some of the employees in the Boston office log in after work hours and out of the office and begin harassing the lone female employee in that branch. Does the company have any obligation to stop this behavior since it is off-duty and outside of the workplace?

The key issue regarding whether an employer has a duty to stop harassment or other such actions is whether the forum is sufficiently related to the workplace to impute a duty to the employer. In this case, it almost certainly does.

In *Blakley v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J. 2000), the court held that employers have a duty to remedy co-employee harassment to avoid a hostile work environment, when the employer has notice of such activity. There, a male employee used a company bulletin board to harass a female employee based upon her sex and in retaliation for her filing a lawsuit. "Although the electronic bulletin board may not have a physical location within a terminal, hangar or aircraft, it may nonetheless have been so closely related to the workplace environment and beneficial to Continental that a continuation of harassment on the forum should be regarded as part of the workplace. As applied to this hostile environment workplace claim, we find that if the employer had notice that co-employees were engaged on such a work-related forum in a pattern of retaliatory harassment directed at a co-employee, the employer would have a duty to remedy that harassment." *Id.* at 543.

Thus, it is important for an employer to not only have an internet usage policy in order to avoid issues involving the privacy rights of employees. A well rounded policy makes clear that (i) employees do not have an expectation of privacy in communications made through company-owned technology or equipment, and (ii) their computer usage may be monitored.

V. SOCIAL MEDIA POLICIES

The NLRB's scrutiny of employer social media policies has increasingly intensified over the past few years. However, it remains well settled that a clearly drafted and consistently enforced social media policy helps employers reduce their exposure to potential liability arising from disciplining and/or terminating employees for inappropriate social media use. The drafting of social media policies is now at the forefront of liability prevention programs at many companies due to pre-employment and post-employment issues that arise as a result of misuse of social media. This policy should be maintained and updated yearly.

Back to our story: So Jane decides monitoring her employees is not the best way to get promoted through the ranks and decides that she is going to write the definitive social media policy. Only this time Jane decides she wants some other people to shoulder some of the

responsibility. Kevin is back (turns out he was the boss's son) and was quickly promoted to vice-president of company outings. John has never stopped complaining about the company's food at the summer softball game, causing Kevin to try to promote John in an effort to distract him from this topic. So when Jane asks for some help she gets saddled with Kevin and John. After the first team meeting, Jane presents her ideas for what the social media policy should look like and hands out specific tasks to Kevin and John. Unfortunately, John was still thinking about the lousy beer at last summer's picnic and Kevin was thinking about what social media policy he will implement once the company's president retires, so John and Kevin each draft their own social media policy.

A. Restrictive Policies

The NLRB has initiated enforcement actions against companies for a wide variety of policies it finds overly restrictive. Kevin is still upset about how he got fired for his Tweets and wants to impress his Dad, so he decides to draft a policy that prohibits employees from criticizing the company or management. Five minutes after implementing his policy, the employees in his division start a Facebook page criticizing Kevin for such a restrictive policy. Will Kevin get a call from anyone else? Probably the NLRB for adopting policies regarding blogs and other posted content that improperly restrict employee rights to communicate about their working conditions.

B. Oral Policies

John is still a little gun-shy from his last experience with social media, so he decides to not write his social media policy. Instead, he decides he is going to just give oral instructions. John hears about what Kevin's division did so he gathers this group and warns them about the dangers of social media and the potential harm it could cause their careers if they make reckless decisions. John goes on to warn them of his own run-in with social media. Is John going to get a call from the NLRB? Probably not, since his policy is more reflective of general advice and do not contain any threats of reprisal or discipline. Rather, it is more like professional advice. However, simply because a policy is oral does not mean it does not violate the NLRA.

C. Broad Policies

Jane starts writing her social media policy, but starts law school in the meantime so her policy is fairly comprehensive. Jane's policy begins with an introductory paragraph explaining the company's social media policy. It says that it does not intend to "restrict the flow of useful and appropriate information, but to minimize the risk to the Company and its associates." The policy then listed several "prohibited subjects," which employees were not permitted to discuss online, including (1) proprietary information, (2) information regarding clients, (3) intellectual property, (4) disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects, (5) references to illegal drugs, and (6) disparagement of any protected class. The policy makes clear that it was not intended to limit or prohibit protected communications. Jane is quite proud of the fact that she slipped in the restrictions on disparaging the company, but will the company's union and NLRB be proud of her?

In a 2012 decision, the NLRB held that a similar social media policy to be invalid in *Costco Wholesale Corp.*, 358 N.L.R.B. 1100 (2012). In that case, the policy stated "[a]ny communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment." The Board interpreted such a provision as potentially prohibiting Section 7 activities. The Board restated the test for determining whether the maintenance of a work rule violates Section 8(a)(1) as follows:

If the rule explicitly restricts Section 7 rights, it is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Noting that the policy was overly broad, the NLRB stated that the policy failed to "present accompanying language that would tend to restrict its application. It therefore allows employees to reasonably assume that it pertains to—among other things—certain protected concerted activities, such as communications that are critical of the Respondent's treatment of its employees. The Respondent's maintenance of the rule thus has a reasonable tendency to inhibit employees' protected activity and, as such, violates Section 8(a)(1)."

Similarly, in *Durham School Servs., L.P.*, 360 NLRB 694 (2014), the Board held that a school bus operator's social networking policy, which contained unreasonably broad and vague language had also violated the NLRA. The policy threatened disciplinary action against those "[e]mployees who publicly share unfavorable written, audio or video information related to the company or any of its employees or customers should not have any expectation of privacy, and may be subject to investigation and possibly discipline...." The Board noted that "[i]n determining whether the existence of specific work rules violates the Act...the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." Further, where rules are likely to have a chilling effect on Section 7 rights, "the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." Here, again, in the absence of limiting or qualifying language, employees "could reasonably interpret this policy language as restraining them in their . . . right to communicate freely with fellow employees and others regarding work issues and for their mutual aid and protection."

Likewise, in *EchoStar Techs., LLC*, No. 27-CA-066726, 2012 WL 4321039 (Sept. 20, 2012), Echostar had a policy in which it prohibited employees from "mak[ing] disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services...." The NLRB found that the term "disparaging" like the term "derogatory,"... goes beyond proper employer prohibition and intrudes on employees Section 7 activities." "A reasonable employee—who I also find will take the English language at its fair and correct meaning, would read the prohibited action 'disparaging' to intrude on that employees protected activity and the employee's Section 7 activities would be impermissibly chilled thereby."

D. Drafting Social Media Policies

There are a few key points to consider when drafting a social media policy:

1. Consider how your company wants to use social media. If it is integral to marketing, recruiting, etc. or is it something your employees do after hours.

2. The policy should remind employees that what they post reflects on the company. Any inappropriate, embarrassing, or unkind comments about employees, customers, clients, or competitors can be read by virtually anyone and thus can damage the organization's image or reputation.

3. The social media policy should be clearly communicated to all individuals subject to the policy. Depending on the size of the organization this may include creating a training program in order to ensure that all employees understand the policy, and the possible consequences of noncompliance.

4. Establish two persons for all issues involving social media who employees can turn to with questions, issues, or reporting violations. Two people are critical to avoid a situation where the point person is the person committing the violation.

5. Cross-reference other company policies, such as an anti-harassment and confidentiality policies. Make it absolutely clear that these policies apply equally to online activities.

6. Make it clear that any off-duty social networking should in no way suggest that the employee is representing the employer and that employees cannot use any company logos, trademarks, or company images in a manner that suggests they are representing the company.

7. The policy should also prohibit employees from making false statements about the company. If an employee chooses to talk about work related matters, the policy should require the employee to disclose their affiliation to the company and require them to clearly state that the views they express online are not on behalf of the company.

VI. CLOSING

For all of the benefits that social networking provides to businesses, social media can result in serious legal consequences. Lawyers understand their clients' existing social media policies and tailor them to comply with current law. Lawyers must do so even in the face of many clients' belief that social networking provides a transparency in communicating with their employees and clients that outweigh any potential costs.

For further information or assistance designing or implementing social media policies or advice on any labor or employment related issue, please contact James G. Ryan at (516) 357-3750 or jryan@cullenanddykman.com.