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NCBA COMMITTEE MEETING CALENDAR
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SAVE THE DATE

WE CARE CHILDREN'S FESTIVAL
WEDNESDAY, FEBRUARY 19, 2020
See pg. 16 for details

NASSAU ACADEMY OF LAW BRIDGE-THE-GAP WEEKEND
MARCH 14 AND 15, 2020
Contact Jennifer Groh at (516) 747-4070 or jgroh@nassaubar.org.

WE CARE DRESSED TO A TEA
THURSDAY, MARCH 26, 2020
See pg. 16 for details

LAW DAY
YOUR VOTE, YOUR VOICE, OUR DEMOCRACY
WEDNESDAY, APRIL 29, 2020
See pg. 6 for details

121ST ANNUAL NCBA DINNER DANCE
SATURDAY, MAY 9, 2020
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WHAT'S INSIDE

Labor & Employment Law/ Immigration Law

OF NOTE

NCBA Member Benefit - I.D. Card Photo
Obtain your photo for Secure Pass Court ID cards at NCBA Tech Center
Only For New Applicants
Cost $10 • February 4, 5, and 6
9:00 AM—4:00 PM

UPCOMING PUBLICATIONS COMMITTEE MEETINGS AT THE BAR ASSOCIATION

Thursday, February 6, 2020 at 12:45 PM
Thursday, March 5, 2020 at 12:45 PM

Nominating Committee Seeks Candidates for NCBA Board of Directors

The NCBA Nominating Committee is seeking applications from active members of the Nassau County Bar Association to serve on the NCBA Board of Directors. The deadline to apply is Monday, January 27, 2020.

The NCBA Board of Directors consists of the President, President-Elect, Vice-President, Treasurer, Secretary, and 24 elected Directors, as well as the Dean of the Nassau Academy of Law, Chair of the Young Lawyers Committee, and all past presidents on the Bar Association.

NCBA officers serve for one-year terms. The 24 elected Directors are divided into three classes of eight members each. One class is elected at each Annual Meeting in May and holds office until the expiration of a 3-year term.

NCBA Members who wish to be nominated must be a Regular or Sustaining Member of the Association for at least three consecutive years, and an active member of a committee for at least two consecutive years. The Nominating Committee also considers each applicant's areas of practice, leadership positions in the Nassau County Bar Association and other organizations, and the diversity of experience and background a candidate would bring to the Board.

The Nominating Committee consists of nine voting members of the Association who have served on the Board of Directors. Steven G. Leventhal, NCBA Immediate Past President "once removed," is Chair of the Committee, and Immediate Past President Elena Karabatos serves as Vice-Chair. According to Leventhal, "The Nominating Committee is seeking candidates with diverse experiences and skills who are committed to serving our Long Island community and legal profession; Bar Leaders who can confront the challenges and create opportunities for our Bar Association in the new decade."

Interviews with candidates will begin in February. The Committee will issue its report—nominating one person for each Officer and Director position—at least one month prior to the 2020 Annual Meeting and Election on Tuesday, May 12.

NCBA members interested in applying to become a Director, or any Officer position other than President or President-Elect, should forward a letter of intent, application, and resume or curriculum vitae no later than January 24 to Nominating Committee Chair Steven Leventhal at epost@nassaubar.org or NCBA, 15th & West Streets, Mineola, NY 11501. The application can be downloaded on the Bar's homepage at www.nassaubar.org.

2019 Holiday Celebration

NCBA Members, families, and friends enjoyed the 87th Annual Holiday Celebration at the NCBA on Thursday, December 12, 2019.
Photos by Hector Herrera

As is tradition, NCBA Past Presidents joined in the mixing of the Wassail Bowl, and President-Elect Dorian Glover told the "True Tail of Wassail" with his own creative and personal twist to the story. This year's holiday sing-a-long was led by NCBA Past Presidents Andy Simons, Joe Ryan, and Susan Katz Richman. The children and guests in the audience enjoyed singing along and ringing jingle bells. The ceremony was followed by a delicious holiday buffet and ice cream bar. See page 15 for more photos.

Labor & Employment Law/Immigration Law

Moving the Needle Towards Pay Parity Among the Sexes

At some point everyone has been there: searching for a new job, filling out countless applications, interviewing for positions, and preparing answers to anticipated questions. Invariably, one line of questioning is at the forefront: how to address questions regarding salary? A Google search yields countless results, often raising more questions than answers.

While local laws throughout New York State already restrict the types of questions employers can ask regarding an employee's salary, beginning in January 2020, all employers in New York State will be prohibited from inquiring into prospective employees' wage history.

Purpose of the Laws

In 2017, Governor Andrew Cuomo announced his intention to close the gender pay gap in New York and tasked the New York State Department of Labor with investigating the issue and recommending a solution. A year later, in April 2018, the New York State Department of Labor published a report, "Closing the Gender Wage Gap in New York State," outlining its findings.[1] Based on its investigation, the New York State Department of Labor determined that in New York full-time female employees earned 89 cents for every dollar earned by their male counterparts.[2] The 11-cent differential in New York is comparatively small when measured against the pay gaps existing in other states across the country. In fact, in 2016, New York had the narrowest gender wage gap in the United States.[3] Louisiana, on the other hand, had the largest gender wage gap, with female employees earning an astounding 69 cents for every dollar earned by their male colleagues.[4] Given the current rate of progress, the New York State Department of Labor estimates pay parity between the sexes can be reached by 2049.[5]

Michael A. Berger

Local Laws Designed to Reduce the Gender Pay Gap

Beginning in September 2016, with Albany County, legislatures in New York began proposing and enacting local laws designed to reduce the gender pay gap.[6] These county legislatures determined that the pay differential between male and female employees often begins upon entering the workforce. Since female employees typically earn wages below that of their male counterparts in their first job, permitting subsequent employers to inquire about and consider past wages in determining the employee's current salary only serves to perpetuate and exacerbate wage inequality.[7] Furthermore, the legislatures in both Westchester and Suffolk Counties found that female applicants typically request a lower salary than males and are stigmatized when engaging in salary negotiations.[8]

In light of these concerns, the Albany County Legislature proposed and enacted legislation in October 2017 making it unlawful to: (1) "screen job applicants based on their wage;" (2) "request or require as a condition of being interviewed, or as a condition of continuing to be considered for an offer of employment, that a job applicant disclose prior wages or salary history;" or (3) "seek the salary history of any job applicant from any current or former employer."[9]

New York City followed suit shortly thereafter, amending the New York City Administrative Code on October 31, 2017, by making it an "unlawful discriminatory practice for an employer … [t]o inquire about the salary history of an applicant for employment"[10] or "[t]o rely on the salary history of an applicant in determining the salary, benefits or other compensation for such applicant during the hiring process."[11] Under the New York City Administrative Code, if an employer discovers an applicant's salary history, absent voluntary disclosure by the applicant, the employer is precluded from considering such information in making a salary determination.[12]

In April 2018, Westchester County amended Section 700.03 of the Laws of Westchester County to adopt similar legislation.[13] In addition to reducing the gender pay gap, the legislature also intended that the amendment protect older workers who experience difficulty finding work because they may be perceived as too expensive for a position, as well as individuals who are returning to the workforce after being out of the job market for an extended period of time (e.g., leaving the workforce to raise children).[14] Importantly, the Westchester County legislation contains a provision that the amendment will be null and void and preempted by a statewide ban on questions about salary history.[15]

In September 2018, Suffolk County became the latest county to address the salary history ban with the RISE Act, a Local Law to Restrict Information Regarding Salary and Earnings. The legislature amended Section 528-7 of the Suffolk County Code to make it

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2020: Strength in Membership

FROM THE PRESIDENT

Richard D. Collins

I hope everybody enjoyed the holiday season! As 2020 gets underway, I am excited that 2019 was such a vibrant year for our Association. We had many well-attended events, robust committee activity, and the dining hall was busy most days of the week. I have endeavored to pop into every committee meeting and event that I can to show my support for all the wonderful work being done. It's hard to believe that I have reached the halfway mark of my presidency, which spans two anniversary years: 2019 was the 120th anniversary of the NCBA and 2020 is the 90th anniversary of our home at Domus. I thank everyone—my partners, office staff, colleagues, and the NCBA staff—for making my term so enjoyable and productive.

With the holidays behind us, I look forward to a busy season ahead. I want to emphasize the importance of your membership in the NCBA. Without members, there is no Bar Association. Membership is one of my top priorities as NCBA President. I am delighted that at a time when many bar associations are struggling with declining membership, we continue to maintain a strong roster of around 5,000 members. The high rate of retention tells me that we are providing great value. Our decision to incorporate free CLE into the dues structure was clearly a great move. Our Association remains strong. However, as I said in my inaugural column, I am committed to making this bar association even stronger. To do that, we need to grow our membership.

The students in our local law schools are vital to our Association. They are the future lawyer-members of the NCBA, and our future NCBA leaders. We offer free membership to law students. It seems to me that every law student at St. John's, Hofstra, and Touro would derive incredible benefits from NCBA membership. Where else can you find such an array of internship and clerking opportunities, potential mentorship connections, and the chance to rub elbows with lawyers of all ages and practice areas, not to mention judges? I'm working with the Membership Committee to expand our efforts to bring more law students into our Association.

Recently, recognizing that the practice of law has changed and evolved and that non-lawyer office staff personnel often work closely with lawyers, we opened up NCBA membership to paralegals and law office administrators. We now have standing committees to provide a structure for these members. I have appointed chairs to lead these committees and instructed them to recruit new members from the Nassau County legal community. I urge all lawyer members to encourage their staff to join the NCBA. Non-lawyer membership rates are very reasonable. Paying the dues for your legal staff employees is a smart move. You can call Donna Gerdik at (516) 747-4876 for eligibility details. Our Association is holding programs to expand and develop the skills of your law office workers to enhance their productivity and skill sets. It is a way of investing in your employees that benefits both of you.

Of course, newly admitted lawyers are the most immediate future of our Association and so they are of great importance. It occurs to me that local bar associations are the next natural step in the evolution of a legal professional. If you think about it, from an early age we pass from one institution to another: elementary school to middle school to high school to college to law school, with each successive institution providing support for our growth and development and preparing us for what lies ahead. Each institution provides a nurturing environment committed to expanding our skills, and providing a safety net for those who need it. Then, upon law school graduation, all of that abruptly ends. Suddenly there is no institution committed to continued support and no safety net. Employers simply can't provide the menu of services and benefits that bar membership can provide, especially to a new lawyer. A law firm isn't typically an appropriate replacement for the nurturing institutions of our youth, and not every employer is committed to the long-term, big-picture success of its associates. For example, tellingly, not all employers reimburse their associates for bar association dues. I am proud that my firm has always done so because we believe that the professional development and business networking that bar association membership provides is a benefit to both the associate lawyer and the law firm (we think of it as an investment in our associates).

For new lawyers, the first year of membership is free, just as it was during law school. Membership to get a year of free CLE and all of the benefits of networking, mentorship, and professional development that a local bar association can offer is a no-brainer. Even Bridge-the-Gap, scheduled for the weekend of March 14 and 15 this year, is free. (Note that Bridge-the-Gap weekend is not just for new lawyers—it's even for experienced lawyers who want to learn something new or catch up on credits.)

For new lawyers, after that first year of free membership there are reduced dues for the second through fifth year of practice. Historically, we see a drop-off in members once membership is no longer free. My goal is to retain as many members as possible at this critical point in their careers. I have been working with Donna Gerdik to woo back our new lawyer members, recently sending a personal letter to all those who did not renew membership after their first year of practice and inquiring how I as president can increase the value in their continued membership. In addition, I have asked the leaders of the New Lawyers Committee to divide the list of non-renewing members among their committee members and the members of the Membership Committee and to place personalized phone calls in support of my letter.

Which brings me to you. I ask for your help. I ask you to reach out to a colleague, even an acquaintance or an adversary, and ask them to renew their membership in the NCBA. If they have not been a member before, invite them to join. Invite them to lunch at Domus. If you think a personal call from me would help, let me know and I will call them myself and invite them to enjoy the many benefits that membership offers.

Together, we can make the NCBA stronger than ever. If there's anything that I can do to bring more value to your membership, please call me at (516) 294-0300. I look forward to an exciting year ahead in 2020!

Nassau Lawyer welcomes articles written by members of the Nassau County Bar Association that are of substantive and procedural legal interest to our membership. Views expressed in published articles or letters are those of the authors alone and are not to be attributed to *Nassau Lawyer*, its editors, or NCBA, unless expressly so stated. Article/letter authors are responsible for the correctness of all information, citations and quotations.

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Labor & Employment Law/Immigration Law

A Working Guide to Public Sector Employment

The New York State Civil Service Commission (NYS Commission) has jurisdiction over the personnel operations of 101 local civil service commissions,[1] including the Nassau County Civil Service Commission (NC Civil Service). The NC Civil Service portfolio includes approximately 50 Nassau County agencies and departments, Nassau Community College, Nassau University Medical Center, the Towns of North Hempstead and Oyster Bay, Nassau County's school districts, libraries, all incorporated villages, and Nassau County's special districts.

The Appointment Process

Referred to as appointing authorities,[2] the agencies and municipalities must canvass, interview and then appoint employees from competitive examination lists established by NC Civil Service, in accordance with their own staffing needs and budget capability. In addition to New York State Civil Service Law (Civil Service Law), the Nassau County Rule Book and its appendices, which are now available on-line, govern NC Civil Service determinations.[3]

Rule Book amendments generally result from appointing authority requests for new or additional exempt, unclassified or non-competitive positions; the amendments require New York State approval.[4] Prior to referral to the NYS Commission for approval, proposed amendments are voted on at NC Civil Service's duly noticed public hearings. With that vote, the amendments are still subject to NYS Commission approval.[5] NC Civil Service, however, does have discretion in setting its own standards. For example, the Appellate Division held[6] that the NC Civil Service acted within the scope of that discretion when it adopted a resolution that modified the New York State Municipal Police Training Commission audiology standards[7] by making them more stringent.[8] In doing so, NC Civil Service did not contravene New York law for the adoption of rules.[9]

Eligibility for tests and appointments are subject to strict requirements: when an application is received, Nassau County Commission staff reviews it and its supporting documents, such as transcripts, to determine examination eligibility. Applicants are responsible for monitoring the status of their application and examination scheduling by following common-sense steps such as providing accurate email contact and by obtaining a working knowledge of Civil Service rules through the Commission website and examination announcements.[10] Applicants also are required to acknowledge in writing that they are subject to penalties for providing false information.[11] False information can not only disqualify an applicant,[12] but can remove an employee from an appointment.[13]

Martha Krisel

Susan Tokarski

Termination Procedures

Sections 75 and 76 protect post-probationary employees from automatic termination by providing due process safeguards that appointing authorities must follow. Section 75 governs removal procedures through a hearing process.[14] Misconduct, which includes willful or intentional acts, or incompetence, which includes negligent acts, are grounds for termination, regardless of an employee's status.[15] For example, actions taken by a library director that violated Civil Service Law have been held to establish misconduct that warrants dismissal.[16] Time limitations in bringing charges—eighteen months from the alleged incompetency or misconduct—do not apply when the charges include the commission of crimes. For example, a building inspector overseeing demolition with knowledge of unabated asbestos argued unsuccessfully that his 2013 actions could not be used against him in 2016.[17]

In contrast, a public sector probationary employee can be terminated for any reason other than an illegal reason, such as discrimination. While a post-probationary employee is entitled to a Section 75 hearing, a probationary employee can simply be discharged without a hearing and without written charges.[18] Specifically, probationary employees are not entitled to a Section 75 hearing or to seek judicial review of their termination by filing an Article 78 proceeding in court, as long as the appointing authority effectuates the termination within the probationary time period.

To ensure that the appointing authority termination procedure is valid, NC Civil Service staff will not remove a post-probationary employee from the appointing authority's payroll until adherence to the Section 75 and Section 76 process has been verified. This includes NC Civil Service review of a vested property rights employee who has a position in the "non-competitive or labor class"—*other than* a position that is categorized as "confidential" or is a position with assignments that involve policymaking—who is also entitled to a hearing.[19]

Although the appointing authority that has brought charges selects the hearing officer, that selection does not obligate the appointing authority to adopt the hearing officer's findings and recommendations. Instead, the appointing authority can reject those findings and issue its own. And although the terminated employee can appeal the hearing officer's determination or the appointing authority's subsequent determination,[20] the appeal can be to NC Civil Service or to court. When the appeal is to the NC Civil Service, the Commissioners—or a person designated by the Commission—review the charges, the transcript from the hearing, the hearing officer's findings and recommendations and the appointing authority's response to those findings and recommendations.[21]

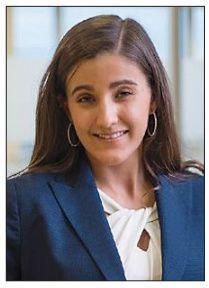
NC Civil Service, can adopt, reject, or modify the hearing officer's findings and recommendation. The decision of NC Civil Service is "final and conclusive, and not subject to further review in any court."[22] When the decision is to appeal to the NC Civil Service, judicial review is only available if the appointing authority has acted illegally,

See PUBLIC SECTOR, Page 22

Labor & Employment Law/Immigration Law

New York's Frequency of Pay Statute: A Hidden Danger

Douglas Rowe



Desiree Gargano

Two recent court decisions are demonstrating a peril for employers hiding in plain sight under Labor Law § 191(1)(a) that could cost employers millions in statutory damages: the requirement that manual workers be paid on a weekly basis. The decisions are *Scott v. Whole Foods Market Group, Inc.,* No. 18-CV-0086(SJF)(AKT), 2019 WL 1559424 (E.D.N.Y. April 9, 2019) and *Vega v. CM and Assoc. Construction Management, LLC.*[1] While this frequency of pay requirement does not sound dangerous at first blush, employers who get caught violating Section 191(1)(a) potentially will owe a significant amount of money in liquidated damages under Labor Law § 198 for their technical payroll mistake despite having paid all wages earned by their employees.

Thus, the new *million-dollar question* for New York employers is: what constitutes a manual worker under the Labor Law? Unfortunately, the answer is not as clear as one would hope for such a serious issue, which is why the frequency of pay requirement under § 191(1)(a) is a hidden danger for all employers alike.

Review of the Law

Section 191 provides in pertinent part:

1. Every employer shall pay wages in accordance with the following provisions:
   a. Manual worker—(i) A manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned; provided however that a manual worker employed by an employer authorized by the commissioner pursuant to subparagraph (ii) of this paragraph or by a non-profitmaking organization shall be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly.[2]

According to Labor Law § 190, "manual worker" is defined as "a mechanic, workingman or laborer."[3] Additionally, the New York State Department of Labor ("NYS DOL") has opined both in its frequently asked questions materials posted on its website and in past published opinion letters that "[i]t has been the long-standing interpretation of this Department that individuals who spend more than 25% of working time engaged in 'physical labor' fit within the meaning of the term 'manual worker.' Furthermore, the term 'physical labor' has been interpreted broadly to include countless physical tasks performed by employees."[4]

The question of whether an employee qualifies as a "manual worker" is a fact-intensive inquiry into the type and overall number of physical tasks the employer asks the employee to perform. Consequently, there are numerous categories of employees that might qualify as "manual workers" under Section 191 which employers might not have previously considered to be manual workers. For example, food service workers, mail room workers, hairdressers, pizzeria workers, warehouse clerks, drivers, and chauffeurs have in certain instances been found to be manual workers by the NYS DOL.[5]

Where there exists a violation of the frequency of pay provision for manual workers under Section 191, the remedial provisions set forth in Section 198 provide the possible damages. Section 198 provides in pertinent part:

> In any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due.[6]

Based on the above quoted section, manual workers who were not paid on a weekly basis are arguably entitled to recover prejudgment interest on all wages that were not timely paid, liquidated damages in the amount of 100% of all wages that were not timely paid, and reasonable attorney's fees expended in pursuing their claim. Moreover, as it is unlikely that the frequency of pay practices of any given employer would only apply to a single employee, a violation of the Section 191 easily lends itself to class action treatment thereby increasing the employer's damages exponentially with every affected employee. The viability of such claims was unsuccessfully challenged by the employers in both *Scott v. Whole Foods Market Group, Inc.* and *Vega v. CM and Assoc. Construction Management, LLC* for the reasons described below.

Court Analysis and Treatment

The defendant employers in both *Scott v. Whole Foods Market Group, Inc.* and *Vega v. CM and Assoc. Construction Management, LLC* attempted to challenge the employees' ability to state a claim for the violation of Section 191.

In *Scott v. Whole Foods Market Group, Inc.,* the employer argued that there was no private right of action for a violation of the frequency of pay requirements of Section 191 redressable under Section 198. The District Court disagreed, holding that there is an implied private right of action for manual workers who are not paid wages timely as required by Section 191.[7] In addition, the defendant employer claimed that the employees failed to state a claim for damages actually caused to them by the delayed payment of wages.[8] Again, the District Court disagreed and explained: "[the employees'] injury comes from not receiving their earned pay weekly, as required by law, and thus it is the very delay that causes damage to that worker. The statute requires no additional evidence of actual damages beyond that delay, and an inquiry into actual damages is not made in cases involving violation of § 191."[9]

Similarly, in *Vega v. CM and Assoc. Construction Management, LLC,* the employer attempted to argue that Section 198 only provides a remedy to employees in the event of a nonpayment or partial payment of wages, not the delayed payment of wages.[10] The Appellate Division rejected the employer's

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Labor & Employment Law/Immigration Law

Classifying Workers in the "Gig" Economy

The transformative "gig" economy—a subsector of the economy primarily associated with work obtained via internet applications—is modifying and challenging the traditional employer-employee relationship that exists under New York jurisprudence. Using technological advances, specifically algorithmic management, the gig economy most often provides work engagements, often with limited time frames, via electronic applications.

For purposes of employment classification, most businesses involved in the gig economy have utilized the independent contractor classification for workers who accept tasks. The most commonly known gig economy work is transportation-based via apps such as Uber and Lyft, but the range of personal services offered through the internet is growing exponentially. This new platform impacts how businesses interact with workers and raises a profound, yet simple, question that impacts both business and workers: is an app-based worker (also known as a dependent worker) an employee or independent contractor under New York State law.

The expansion of the gig economy—now roughly estimated at 2.4 million workers in the United States[1] as of 2018—has (and will continue to) impact the field of employment law. This is evident from the legislative efforts of states, including California, Massachusetts, and New York, to address the booming growth of this sector in the United States' economy, including legislation introduced in the New York State legislature in 2019 that will most likely be pursued in 2020's legislative session.

Understanding the history of the employer-employment classification system in New York jurisprudence and the impact the gig economy is having on that jurisprudence precedes and informs the on-going discussion in the New York State legislature regarding the future of gig-dependent worker classification.

James W. Versocki

Definition Employees—A Complex Analysis

Even before the rise of the gig economy, New York courts have long struggled to apply complex common-law tests to determine the employment status of workers. These tests focus on an analysis of the level of control exerted by an employer: the higher the level of control, the more likely a finding of an employer-employee relationship. In New York, determining employment status can vary depending on the nature of the claims asserted as the application of the federal Fair Labor Standard Act, and its accompanying "economic realities" test,[2] differs from the application of the New York State Labor Law and its common-law "control" test.[3] The application of these separate tests can lead to varying results involving worker classification as employees or independent contractors.

For businesses, the stakes for avoiding the determination of an employment relationship are high. Employment status affords an employee numerous rights, including protection under wage and hour laws (minimum wage and overtime), federal and state anti-employment discrimination protections, and the right to join a union. Similarly, employers are obligated to pay employment-related taxes (unemployment and payroll taxes) and insurance premiums (workers' compensation, disability, and paid family leave) on behalf of employees. Competitors who classify workers as independent contractors avoid the aforementioned expenses.

In New York, determining employment-related status becomes even more complex as administrative New York agencies, including the Department of Labor Unemployment Insurance Board, the Department of Taxation and Finance, and the Workers' Compensation Board all use varying tests to determine employment-related status for purposes of enforcing their statutory mandates.[4]

The misclassification of workers as independent contractors has become a high-stakes game pitting New York State against businesses that gain a competitive advantage when they misclassify workers. During the period of 2002-2005, misclassification cost the State of New York revenue on over $4.3 billion in misclassified wages.[5]

Construction Industry Misclassification—New York Passes a New Test

Faced with rampant independent misclassification in the construction industry, in 2010 New York State changed the paradigm for employment classification in the construction industry. With the passage of the Construction Industry Fair Play Act,[6] New York created a rebuttable presumption that all workers in the construction industry are employees.[7] New York took these steps to protect workers and businesses in the construction industry by ensuring worker safety and wage-and-hour protections apply to all construction workers, and that all construction employers compete on a level economic playing field.[8]

The Construction Industry Fair Play Act, and its presumption of employment status, set a precedent for worker classification that is now being discussed in the context of gig workers throughout the country. The same concerns involving loss of worker rights and revenues to local and state governments caused by misclassification in the construction industry are now being discussed in the context of gig workers, especially those obtaining work through internet and app-based companies.

California Acts

In 2018, California's Supreme Court ruled that all workers are presumptively employees in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*.[9] The *Dynamex* decision set the stage for the passage of California Assembly Bill 5 ("AB5") which codified that decision. Signed into law in September 2019, with an effective date of January 1, 2020, AB5 adopted the stringent worker classification model adopted in the *Dynamex* decision. California's AB5 presumes that a "worker is

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Labor & Employment Law/Immigration Law

Due Diligence Is Imperative When Representing Lawful Permanent Residents

From January 2019 to March 2019, U.S. Immigration and Customs Enforcement (ICE) arrested and removed 63,540 non-citizens from the United States.[1] Nathalie R. Asher, Executive Associate Director of ICE, claims that upwards of 91 percent of the foreign nationals removed from the interior of the United States had criminal convictions or pending criminal charges.[2]

The adverse effects of criminal convictions for non-citizens include, but are not limited to, life-time bans, separation from spouses, children, and other family members, as well as, in some cases, the loss of the breadwinner.[3] The stakes are higher for permanent residents who have established a life here. In making their permanent home in the United States, lawful permanent residents (LPR) may develop multifaceted, long-term ties, often stronger than those developed in their country of origin. Based on ICE's first and second quarter statistics for 2019, it is apparent that the agency's directive is to deport non-citizens who have had low-level charges, minor infractions, arrests, misdemeanors, and charges that may not even lead to a conviction—essentially, any non-citizen who comes in contact with the law.[4]

Diandra N. Archibald

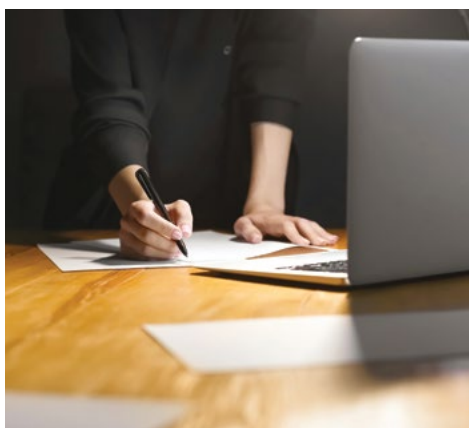
In 1996, Congress enacted two pieces of legislation that allowed deportations based on criminal convictions pending and non-pending.[5] The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA) expanded the number of crimes considered to be aggravated felonies.[6] This expansion made low-level crimes such as single marijuana charges a deportable offense.[7] For instance, a lawful permanent resident with a single 1998 marijuana conviction, no subsequent convictions, twenty years of continuous residence in the United States, strong family ties, and a lawful occupation could be subject to removability and deportation in 2019.

Although non-immigrant visa and green card holders are granted permission to enter and remain in the United States for a period of time or permanently, such permission may be subject to revocation.[8] The U.S. Immigration and Nationality Act (INA) enumerates numerous grounds of removability. Non-citizens who face charges of deportation under INA § 237, if placed into removal proceedings, may challenge the charge(s) and seek relief from removal.[9]

Section 240A(a) of the INA formulates cancellation of removal for lawful permanent residents facing deportation charges. Cancellation of removal is a form of discretionary relief that may be pursued by those in removal proceedings whereby, after fulfilling certain enumerated criteria, the lawful permanent residents will be permitted to retain their existing permanent residence.[10] The criteria provided by INA § 240A(a) is as follows: "Lawful permanent resident status for at least five years; continuous residence in the United States for at least seven years after having been lawfully admitted but before the notice to appear; and no conviction of an aggravated felony."[11]

The burden is on the LPR client to prove he or she meets the criteria.[12] Legal advocates have several ways to deal with the "no conviction of an aggravated felony" requirement. Strategies found to be effective include showing that there was no conviction, demonstrating the conviction is not an aggravated felony, or establishing that there was no "admission" of offense. Keep in mind that the government has the burden of proving removability by clear and convincing evidence and will go to great lengths to prove the existence of an aggravated felony conviction.[13]

When representing a lawful permanent resident who has a criminal background in immigration proceedings, it is essential to do a painstakingly detailed intake. Legal advocates must request records of all criminal dispositions at the onset of the case and research the client's criminal history thoroughly. A state misdemeanor offense may still be a deportable offense if it is analogous to a federal felony offense.[14] Thus, it is important to cross-reference the state charges with relative federal statutes when seeking relief under these circumstances.

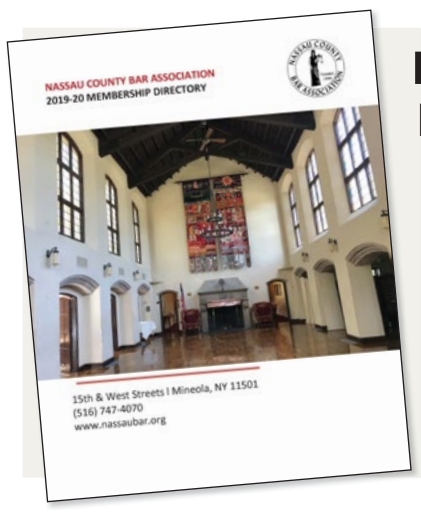


Dealing with vacated or expunged offenses can be tricky, depending on the reason for the vacatur. Criminal convictions that have been vacated on legal or constitutional grounds rather than pursuant to a rehabilitative statute or for the sole purpose of obtaining immigration relief will support cancellation of removal. Note that specific inadmissibility grounds are triggered not only by convictions but also by admissions, which is why methodical examination of the client's criminal file is paramount.

The best strategy for advocates is to use the tools available to ensure we have a well-rounded grasp of all the areas of law that may affect our clients. Advocates are encouraged to become involved in outreach programs that share information and educate non-citizens about the harsh immigration penalties that are related to crime. Moreover, when representing those LPR charged with crimes, it is imperative to consider the immigration consequences of any plea bargain that may be offered to your client; the subsequent deportation consequences can result in harsher penalties than the sentence itself. In representing LPR in pending criminal cases, therefore, the attorneys are well-advised to consult with an immigration specialist if they are uncertain whether a seemingly favorable plea-bargain agreement can have unintended deportation consequences for the clients.

Diandra Archibald is an Associate Attorney at Fusco, Brandenstein & Rada, P.C., Woodbury, and the managing attorney in the firm's immigration department.

1. Natalie R. Asher, *ICE releases FY19 second quarter enforcement data,* Official Website of the Department of Homeland Security, (July 8, 2019), available at https://bit.ly/2PCQZN9.
2. *Id.*
3. *Fong Yue Ting v. United States,* 149 U.S. 698 (1893).
4. Natalie R. Asher, *ICE releases FY19 second quarter enforcement data,* Official Website of the Department of Homeland Security, (July 8, 2019), available at https://bit.ly/2PCQZN9.
5. *Immigration and Naturalization Services v. St. Cyr,* 533 U.S. 289 (2001).
6. American Civil Liberties Union, *Analysis of Immigration Detention Policies,* (Oct. 25, 2019), available at https://bit.ly/2PctiMD.
7. *Padilla v. Kentucky,* 559 U.S. 356, 365 (2010).
8. 8 USC. § 1155; 8 USC § 1227(a).
9. 8 USC § 1227.
10. INA § 240A; 8 USC § 1229(b).
11. 8 USC § 1229(b).
12. Matter of S-Y-G-, 24 I&N Dec. 247, (BIA 2007); Matter of Jean, 27 I&N Dec. 373, (BIA 2002).
13. *Woodby v. INS,* 385 U.S. 276 (1966).
14. 8 USC § 1101(a)(43)(B); INA § 101(a)(43)(B).



Labor & Employment Law/Immigration Law

The Faithless Servant Doctrine

One of the most draconian remedies in our jurisprudence arises in claims that employees violate their duty of loyalty to their employers by faithless misconduct. The faithless servant doctrine provides for the forfeiture of employee compensation during the period of disloyalty. "An employee 'forfeits his right to compensation for serviced rendered by him if he proves disloyal.'"[1]

Because of the onerous remedies imposed for an employee's breach of the duty of loyalty, its application is limited to a few discrete categories of misconduct.[2] Courts applying New York law have imposed forfeiture of compensation when faithless employees engaged in conduct directly competitive with their employers and thereby diverted business opportunities from their employers.[3] Forfeiture of compensation has also been ordered where employees embezzled funds or accepted kickbacks.[4]

More than Moonlighting

Some employees attempt to supplement their income with second jobs or by engaging in side businesses. Some moonlighting employees may use their primary employers' facilities and resources, including work time, email, or office equipment. Faithless servant claims against such employees are generally dismissed in the absence of allegations of competition, diversion of corporate opportunities, or theft.

In *Veritas Capital Management,* defendant was a high ranking employee of plaintiff investment firm whose employment contract required him to "devote all of his working time exclusively to the business of [plaintiff] and he will not engage independently or with others in other investments or business ventures of any kind."[5] Plaintiff employer alleged that defendant violated this covenant by engaging in investment activity with another investment firm, "devoting a substantial amount of time, effort and resources to these outside investment activities…and was using [plaintiff's] resources to work on his [outside] investment activities during business hours."[6]

Mark E. Goidell

The plaintiff in *Veritas* brought claims for breach of the duty of loyalty and breach of fiduciary duty. The court dismissed the claims because plaintiff failed to allege competitive conduct, diversion of any corporate opportunities, theft, or improper kickbacks.[7] The First Department affirmed, holding that a breach of the duty of loyalty claim "is available only where the employee has acted directly against the employer's interests—as in embezzlement, improperly competing with the current employer, or usurping business opportunities."[8]

In *Grewal v. Cuneo,* an unsuccessful faithless servant claim was brought by a law firm against a moonlighting attorney who, among other things, surreptitiously and independently represented two clients.[9] The court held these allegations, "unaccompanied by any facts that she benefitted from these cases *to the detriment of the firm* - [are] insufficient as a matter of law to state a claim for breach of fiduciary duty or the duty of loyalty."[10]

As demonstrated by *Grewal,* competitive conduct by itself is insufficient to establish a faithless servant claim. Diversion of business opportunities is also required. "Even assuming that plaintiff has established that defendants were disloyal in operating a competing business while employed by plaintiff, plaintiff has failed to establish that the defendants usurped any corporate opportunity, by showing that it was seeking any of defendants' allegedly competing projects, or that its survival was jeopardized by its failure to acquire any of those projects."[11]

Side Work on Company Time Not Actionable

An employee's use of employer resources and time is also generally insufficient to establish a claim. In *Vanacore v. Expedite Video Conferencing Services, Inc.,* District Judge Seybert adopted the Report & Recommendation ("R&R") of Magistrate Judge Brown dismissing counterclaims for breach of the duty of loyalty.[12] The facts are set forth in Judge Brown's R&R:

> Expedite discovered that since 2017, plaintiff performed information technology services for hire on behalf of [another] entity…as well as other persons or entities (collectively, "other clients")….
>
> Defendants allege that plaintiff provided work for the other clients from his home office at Expedite's expense, using the home office supplies paid for by Expedite…. In addition, defendants allege that [plaintiff] performed work for other clients while being paid by Expedite….
>
> As a result, defendants seek various remedies, including offset, disgorgement, an accounting of hours and services paid by the other clients, and a money judgment as a result of damages incurred by Expedite.[13]

Judge Brown recommended the dismissal of the counterclaim for breach of the duty of loyalty because there was no evidence or allegation that plaintiff competed with defendants, and "'misuse of the employer's resources to compete with the employer is generally required.'"[14] District Judge Seybert agreed:

> Allowing an employer to sue an employee for breach of fiduciary duty merely because the employee was not devoting enough time to his job is contrary to the current state of the law and would create unnecessary line-drawing problems. *Employers already have an adequate remedy for this kind of conduct--they can fire the employee.*[15]

Whether allegations are sufficient to establish diversion of a corporate opportunity is dependent upon the "tangible expectancy" of the employer. "The prevailing method for determining what constitutes a protected corporate opportunity asks whether the corporation had a 'tangible expectancy' in

See FAITHLESS, Page 21

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A special thank you to the following individuals and firms for generously donating to the NCBA Annual Holiday Staff Fund this year.

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Labor & Employment Law/Immigration Law

New Rules for Immigrants Regarding Public Charge Inadmissibility

Amidst the tumult in current immigration law, new regulations were set to take effect on October 15, 2019. These regulations governed the way a foreign national who applies for residence is screened for the likelihood of becoming a public charge. Shortly after publication, the proposed regulations were enjoined from implementation by rulings issued in three separate US District Courts.[1]

Inadmissibility on the grounds of being a public charge has been part of immigration law for more than one hundred years. Since 1996, the public charge provision is contained in §212(a)(4) of the Immigration and Nationality Act. The proposed change was issued through the rule making process. This consists of publication in the Federal Register of rule changes and the asking of public comment.[2] These changes would apply to people seeking legal residence, not to people who are renewing residence or applying for naturalization.

Totality-of-the-Circumstances Approach

The proposed rules are a cause of great concern for immigrants and the attorneys who represent them. Under the new guidance, the approach will be a totality-of-circumstance analysis wherein no one factor is determinative. The current approach found an applicant for permanent residence to be admissible if the petitioner guaranteed the financial stability of the applicant by an Affidavit of Support.

If the petitioner did not meet economic guidelines to guarantee the beneficiary, a joint sponsor could provide an additional financial guarantee. Any US citizen or legal resident could serve as a joint sponsor; a family relationship was not required. From the government's point of view, the commitment to provide financial assistance has not always been bona fide, reliable, or effective.

Linda G. Nanos

Under the totality-of-circumstances approach, an Affidavit of Support by the petitioner, with a joint sponsor if indicated, is still required but is only one factor to be considered. Other factors which can negatively affect an applicant's chances include:

1. an applicant's lack of recent employment (unless a student or primary caregiver);
2. the receipt of specified public benefits during twelve months of the past thirty-six months (to be counted after the effective date of the regulation, and not applied retroactively);
3. a medical condition that is likely to interfere with financial sufficiency or is not likely to be insured by private health insurance; and
4. being under the age of eighteen or over age sixty-one when benefits are more likely needed.

Conversely, there are factors which can be weighted positively in the applicant's favor. These factors are household income and assets that are at least 250% above Federal Poverty Guidelines, current authorized employment, private health insurance (not including subsidized plans), proficiency in English, obtaining a High School diploma or its equivalent, and the acquisition of vocational skills as factors of employability.

Effect of Public Assistance

The new rules also expand the kinds of public assistance that can adversely impact the intending immigrant's application. Presently, public cash assistance for income maintenance and primary dependence on government support result in a finding of being a public charge. If the new rules are formally adopted, a finding can then occur for an individual receiving non-cash assistance such as food stamps, public housing, and non-emergency Medicaid. If these benefits were received prior to the effective date, they will be given a minor negative weight.

In determining the likelihood of becoming a public charge based upon the receipt of benefits another change has been proposed. If adopted, each separate benefit would be counted in a way that if two benefits are given within the same month it would result in a calculation of there having been two months' worth of assistance. As an example, if someone receives both food stamps and non-emergency Medicaid simultaneously for six months, the benefits would be calculated to reflect the person having received a year's worth of benefits. This method of calculation could increase the likelihood of a person being deemed a public charge for 12 months during the 36-month period subject to review.

Benefits received by US citizen family members would not be taken into account in making a determination. Certain vulnerable populations are eligible to receive public benefits without prejudice. The exempt groups include refugees, asylees, victims of domestic violence, special immigrant juveniles, and foreign nationals under Temporary Protected Status (TPS). Beneficiaries of nutritional supplements of WIC (Women, Infants, and Child), Medicaid benefits during pregnancy and for sixty days after the child's birth, and Medicaid to foreign nationals under age twenty-one will as well be exempt.

The Application Process

The new rules have spawned additional forms and amendments to existing forms. Among the additional forms is an onerous Affidavit of Self Sufficiency, which is fifteen pages in length. It analyzes the foreign national applicant's household size and income, assets, liabilities, credit score, health insurance, past and present use of public benefits, and education and skills.

Every application for adjustment of status for a legal resident would have to be accompanied by the applicant's Affidavit of Sufficiency in addition to the Petitioner's Affidavit of Support. If the Applicant appears to be likely to become a public charge, the US Citizenship and Immigration Service (USCIS) can then request a public charge bond of a minimum of $8,100. The bond can be breached by the use of public benefits over a period of five years after the applicant was granted legal residence.

Adjudication of applications is more certain under existing public charge rules. Currently, an attorney can present properly executed Affidavits of Support with documentation and be confident that the public charge ground of inadmissibility will not be an issue. There is inherently much more discretion and flexibility in the totality-of-circumstance approach and an applicant and his or her representative can be blindsided by an adjudicator's analysis. Nowhere will this be more critical than in the case of applicants applying for residence outside of the country.

Many applicants for admission as permanent residents do not qualify for interviews in the United States. Because of their unlawful status, they must be interviewed at the consulate in their home country. American consulates throughout the world are under the jurisdiction of the US Department of State. The State Department has promulgated its own set of interim rules to dovetail with those published by USCIS.[3] There is a brief comment period. Its rules have not been enjoined in a federal court as the USCIS rules have been. The State Department has submitted a proposed form, parallel to that developed by USCIS, for evaluating an intending immigrant's risk of becoming a public charge.

Applicants Abroad

The uncertainties raised by the totality-of-circumstance analysis pose additional risks for applicants for legal residence applying outside the United States and their families. For if the intending immigrant is found ineligible to return to the US, they may be unable to rejoin their loved ones. Applicants who have lived in the US unlawfully require a waiver of unlawful presence, which they are permitted to obtain in advance of their departure for submission at their immigrant interview.

If the individual is found to be inadmissible based upon likelihood of becoming a public charge at his or her consulate interview, the provisional waiver will be invalidated. It is only valid if there are no other grounds of inadmissibility. There is no appeal from the decision of a consular officer who has the ultimate discretion when making determinations of inadmissibility.

Further complicating the public charge evaluation, President Trump issued a Presidential Proclamation on October 4, 2019 that requires intending immigrants to demonstrate that they will have unsubsidized health insurance within thirty days of arrival in the United States, or in the alternative, sufficient financial ability to pay for medical care out of pocket. This places an increased burden on intending immigrants with medical conditions, such as elderly parents immigrating to join their sons and daughters. A Temporary Restraining Order to block implementation was granted by the US District Court in Oregon.[4]

Conclusion

Overall, the new rules. if they take effect, will generate a great deal of uncertainty and an enormous increase in the case preparation

See NEW RULES, Page 19

Labor & Employment Law/Immigration Law

COBRA Compliance in Corporate/Business Restructurings

Lisa Casa

The deal is almost done. Transaction documents are making their final rounds and a closing date is marked on the calendar. All signs point to a successful merger. As with any stock transfer, asset sale, merger, acquisition, and/or business reorganization, redundancies are inevitable and not everyone will be joining the newly formed team. Executives from both sides have sat down to determine who will be on the new team, and who will be offered a severance package. One item that may be overlooked in a business reorganization is ensuring continuation of coverage for those qualified individuals under the Consolidated Omnibus Budget Reconciliation Act ("COBRA").

Continuation of Coverage Requirements

COBRA is a federal statutory scheme that requires employers to offer continuation of medical coverage to qualified employees who would otherwise lose medical coverage due to certain qualifying events.[1] COBRA applies to any employer with 20 or more employees who offers a qualified group health plan.[2] New York State also has a COBRA statute, referred to as "mini-COBRA," which applies to any employer with less than 20 employees, or who are not covered by COBRA.[3] Both the federal COBRA and New York's mini-COBRA require employers who offer a qualifying health insurance plan to offer continuation of health insurance coverage when employees, their spouses, and/or dependents lose their coverage for certain qualifying events.

The qualifying events that trigger COBRA's continuation of coverage requirements under the federal and state statutes are: (a) a covered employee's death; (b) a covered employees job loss or reduction in hours for reasons other than gross misconduct; (c) a covered employee becoming eligible for Medicare; (d) a covered employee's divorce or legal separation; and (e) a child's loss of dependent status.[4] Continuation of coverage for eligible employees, and their spouses and dependents must be offered for a period of 18 to 36 months.[5] The cost of premiums are paid by the eligible employees; however, the premium charged cannot exceed 102 percent of the cost of the plan's premium for similarly situated employees who did not experience a qualifying event.[6]

Notice Requirements

To ensure that qualified individuals are notified of their rights under COBRA, plan administrators have to comply with notice requirements within the strict time limits. Employers must notify the health plan administrator that an employee or qualified individual has undergone a qualifying event within thirty days.[7] The health plan administrator must then notify the qualified individuals within 14 days of their election rights.[8] The qualified individuals then have 60 days to elect whether to continue coverage.[9] Failure to timely choose continuation of coverage results in a waiver of that right.

Penalties Under COBRA

The penalties for violating COBRA's continuation of coverage and notice requirements can be costly for employers and plan administrators. Failing to provide appropriate notice results in a penalty of $110 per day of non-compliance.[10] Additionally, qualified individuals who were not offered continuation of coverage can bring a civil action for the cost of uncovered medical treatments and seek attorneys' fees and costs.[11]

COBRA in Mergers, Acquisitions, and Reorganizations

Employers may still owe an obligation to qualified employees when there will be a loss of coverage due to a loss of employment because of a business reorganization, merger, stock sale, and/or asset sale. Regulations have been promulgated by the Internal Revenue Service that outline the continuation of coverage and notice requirements in the event of a business reorganization.[12] For purposes of the regulations, a business reorganization is broadly defined as a stock sale ("a transfer of stock in a corporation that causes the corporation to become a different employer") or an asset sale ("a transfer of substantial assets, such as a plant or division or substantially all assets of a trade or business.")[13] These regulations apply to employees who are either receiving COBRA continuation of coverage from the selling entity or whose employment status is changed as a result of the reorganization.[14] The requirements on both the selling and acquiring entity vary depending on the type of transaction and its outcome.

Under the regulations, the party responsible for providing continuation of coverage is generally determined based on these rules. If the selling group maintains a group health plan after the sale then the selling group must provide COBRA continuation of coverage and comply with all notice requirements. However, if the selling group will not maintain a group health plan after the sale, the purchasing entity must provide COBRA coverage to M&A qualified beneficiaries if: (a) the buying group maintains a group health plan; and (b) in the case of an asset sale, the purchasing group is a successor employer.[15] In an asset sale, the purchasing entity is a successor employer if "the employer who purchased the assets hires most of the same employees to work in their same jobs and continues the business operations."[16]

The regulations provide that parties to a transaction may contractually deviate from these general rules and allocate responsibility for COBRA among themselves.[17] However, if the party contractually obligated to provide COBRA defaults on their obligation, then the party obligated under the regulations to provide COBRA will be found liable if coverage or the appropriate notice is not provided.

The Takeaway

When preparing for a business reorganization, practitioners should not forget that COBRA obligations extend beyond the deal's closing. It is always best to allocate responsibility in the transaction documents. However, it is important to ensure that the party who agrees to provide COBRA follows through on their obligations because the penalties for failing to provide continuation of coverage and appropriate notice can be harsh.

Lisa M. Casa is an Associate with the Labor and Employment Practice Group at Forchelli Deegan & Terrana, LLP.

1. *See* 29 U.S.C. §116(a).
2. *See* 29 U.S.C. §1161(b).
3. *See* N.Y. Ins. L. §3221; L. 2009 Ch. 236.
4. *See* 29 U.S.C. §1163; N.Y. Ins. L. §4305(e).
5. *See* 29 U.S.C. §1162; N.Y. Ins. §3221; N.Y. Ins. L. §4305.
6. *See* 29 U.S.C. §1164.
7. *See* 29 U.S.C. §1166(a); s*ee also Carner v. MGS - 576 5th Ave. Inc.*, 992 F. Supp. 340, 354 (S.D.N.Y. 1998).
8. *See* 29 U.S.C. §1166(c).
9. *See* 29 U.S.C. §1165.
10. *See* 29 C.F.R. § 2575.502c-1.
11. *See, e.g., Local 217 Hotel & Rest. Employees Union v. MHM, Inc.*, 805 F. Supp. 93, 113–14 (D. Conn. 1991), *aff'd*, 976 F.2d 805 (2d Cir. 1992).

12. *See* 26 C.F.R. §54.4980B-9. These regulations also outline COBRA compliance requirements when an employer withdraws from a multi-employer plan.
13. *See* 26 C.F.R. §54.4980B-9(A-1).
14. *See* 26 C.F.R. §54.4980B-9(A-4).
15. *See* 26 C.F.R. §54.49080B-9(A-8).
16. *Risteen v. Youth For Understanding, Inc.*, 245 F. Supp. 2d 1, 10 (D.D.C. 2002).
17. *See* 26 C.F.R. §54.49080B-9(A-7).

PROGRAM CALENDAR

January 15, 2020
Dean's Hour: Recent and Upcoming Amendments to the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure
Sponsored by NCBA Corporate Partner Global Telecom Supply
With the NCBA Federal Courts Committee
Sign-in begins at noon; Program 12:45–1:45 PM
Credits offered: 1 credit in professional practice

January 16, 2020
Dean's Hour: The Grievance Process
With the NCBA Grievance and Ethics Committees
Sign-in begins at noon; Program 12:45–1:45 PM
Credits offered: 1 credit in ethics

January 16, 2020
Common and Uncommon Title Problems
Sponsored by NCBA Corporate Partners Tradition Title Agency, Inc. and Dime Community Bank
With the NCBA Real Property Committee
Sign-in begins 5:00 PM; Program 5:30–7:30 PM
Credits offered: 2 credits in professional practice or skills

January 22, 2020
Hearing Hurdles and How to Clear Them
Sponsored by NCBA Corporate Partner Global Telecom Supply
With the NCBA Criminal Courts Law and Procedure Committee and the Assigned Counsel Defenders Plan, Inc. of Nassau County
Sign-in begins 5:00 PM; Program 5:30–8:30 PM
Credits offered: 3 credits in professional practice or skills

January 23, 2020
Champion Office Suites Lecture Series Presents: Dean's Hour: Presumptive ADR–Commercial Litigation, Real Estate, and Employment Law Focus
Sponsored by NCBA Corporate Partner Champion Office Suites
With the NCBA Alternative Dispute Resolution Committee
Sign-in begins at noon; Program 12:45–1:45 PM
Credits offered: 1 credit in professional practice

January 28, 2020
Dean's Hour: Deposition Preparation
Sign-in begins at noon; Program 12:45–1:45 PM
Credits offered: 1 credit in professional practice or skills

January 30, 2020
Champion Office Suites Lecture Series Presents: Dean's Hour: For Better or Worse–Ethical Pitfalls in Matrimonial Law
Sponsored by NCBA Corporate Partner Champion Office Suites
With the NCBA Matrimonial Law Committee
Sign-in begins at noon; Program 12:45–1:45 PM
Credits offered: 1 credit in ethics

Pre-registration is required for all Academy ease of registration or email academy@nass available for purchase through in-house cat

February 5, 2020
Criminal-Immigration Review: Best Practices When Defending Non-Criminals
With the NCBA Immigration Law Committee
Sign-in begins 5:00 PM; Program 5:30-7:30 PM
Credits offered: 2 credits in professional practice or skills

February 6, 2020
Dean's Hour: Gerrymandering and Its Impact on Communities of Color
With the NCBA Diversity and Inclusion Committee
Sign-in begins 12:00 PM; Program 12:45–1:45 PM
Credits offered: 1 credit in diversity, inclusion and elimination of bias

For a complete listing of upcoming programs, or to register online, please visit:
https://members.nassaubar.org/calendar.aspx

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Hon. Joseph Goldstein Bridge-the-Gap Weekend
Nassau Academy of Law

Saturday, March 14

8:30 AM - 9:20 AM
NEW LANDLORD TENANT LAWS
Jaime D. Ezratty, Esq., *Dean, Nassau Academy of Law;* Horing Welikson Rosen & Digrugilliers, P.C., Williston Park
1.0 professional practice

9:25 AM - 10:15 AM
SHE SHED—HE SHED: AN INTRODUCTION TO THE BOTH SIDES OF MATRIMONIAL LAW
Carolyn D. Kersch, Esq.; Alisa J. Geffner, Esq. Geffner Kersch, P.C., Garden City
1.0 skills

10:20 AM - 11:35 AM
YOUR FIRST MEDICAL MALPRACTICE CASE
Terrence Tarver Esq., *Assistant Dean, Nassau Academy of Law;* Tarver Law Firm, Garden City
1.5 skills

11:40 AM- 12:30 PM
SUPERHEROES AND THE LAW: ENTERTAINING YET SERIOUS LESSONS ABOUT THE LAW DRAWN FROM THE COMICS AND THE MOVIES
Anthony Michael Sabino, Esq., *Associate Dean, Nassau Academy of Law*
1.0 professional practice

12:35 PM – 1:15 PM
LUNCH

1:20 PM– 3:00 PM
CRIMINAL PROCEDURE —A REVOLUTION IN BAIL AND DISCOVERY
Joseph A. Gentile, Esq., Frankie & Gentile, Mineola; *Nassau Academy of Law Advisory Board;* William A. Petrillo, Esq., Sapone & Petrillo, LLP, Garden City
2.0 professional practice

3:05 PM- 4:45 PM
ETHICS GOES TO THE MOVIES
Matthew K. Flanagan, Esq., *Chair, NCBA Ethics Committee,* Catalano, Gallardo & Petropoulos, LLP, Jericho; Kevin T. Kearon, Esq., Barket Epstein Kearon Aldea & LoTurco, LLP, Garden City; Renton D. Persaud, Esq., Catalano, Gallardo & Petropoulos, LLP, Jericho
2.0 ethics

Sign-in begins at 8:00 AM each day. Breakfast and lunch will be provided for attendees. Kosher meal available with advance notice.

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Snow date: March 28 and 29, 2020

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Sunday, March 15

8:30 AM - 9:20 AM
LESSONS LEARNED FROM THE TEXAS LAW HAWK: SOCIAL MEDIA AND LEGAL ETHICS
Cory H. Morris, Esq., Dix Hills; Omid Zareh, Esq., *Nassau Academy of Law Advisory Board;* Weinberg Zareh Malkin Price LLP, New York
1.0 ethics

9:25 AM – 10:40 AM
SURVIVING THE PRACTICE OF LAW
Thomas J. Foley, Esq., Foley Griffin LLP, Garden City; *Past Dean, Nassau Academy of Law;* Chris G. McDonough, Esq., Foley Griffin LLP, Garden City
1.0 professional practice; .5 skills

10:45 AM - 11:35 AM
ABCs OF CBD: CANNABIS LAW PRIMER
Elizabeth Kase, Esq., Abrams Fensterman et al LLP, Lake Success
1.0 skills

11:40AM- 12:30PM
LEGAL MUSCLE: DEVELOPING A NICHE PRACTICE
Rick D. Collins, Esq., *President, Nassau County Bar Association;* Collins Gann McCloskey & Barry PLLC, Mineola
1.0 professional practice

12:35 PM- 1:15 PM
LUNCH

1:20 PM - 2:10 PM
THE GENERAL PUBLIC'S WIDESPREAD EXPOSURE: A HUMAN HEALTH CONCERN OF TOXIC PROPORTIONS
Nicholas C. Rigano, Esq., *Chair, NCBA Environmental Law Committee;* Rigano Law
1.0 professional practice

2:15 PM - 3:05 PM
MUNICIPAL LAW PRIMER
Steven G. Leventhal, Esq., Leventhal, Mullaney & Blinkoff LLP, Roslyn; *Past President, Nassau County Bar Association*
1.0 skills

3:10 PM – 4:00 PM
A VIEW FROM THE BENCH: PROTECTIVE ORDERS
Hon. Maxine S. Broderick, Nassau County District Court; *Chair, NCBA Diversity & Inclusion Committee*
1.0 skills

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Labor & Employment Law/Immigration Law

The Use of Mediation in Employment Matters

Recent years have brought greater use of Alternative Dispute Resolution as a mechanism for resolving disputes and moving matters in litigation forward, but while we call mediation and arbitration "alternative" dispute resolution, as alternatives to litigation, they really are nothing new at all. In fact, the use of ADR goes back roughly 4,000 years.[1]

As we enter a new age in New York's courts, with a mandate to implement Presumptive Mediation, it is useful to examine how mediation can be an effective tool in a variety of matters. With this article, we will examine the use of mediation in addressing employment cases.

A Brief Overview of the Mediation Process

It may be helpful to share a brief overview of the mediation process, both for those who have been through mediation and those for whom mediation is new. While different mediators approach the process in different ways, there are certain general expectations as you approach mediation.

There also are different styles for mediation. The mediation training undertaken most recently at the NCBA, in cooperation with the NYSBA, focused on facilitative mediation, the "original" style of mediation. The concept of facilitative mediation is for the mediator to facilitate discussion between the parties, identifying not just their positions but, more importantly, their underlying interests. Thus the mediator guides the parties to solutions that can reach a lasting solution to the matters that brought them to mediation.

Other types of mediation include evaluative mediation, transformative mediation, collaborative mediation, and combined processes such as "med-arb" (a combination of mediation and arbitration). Also, facilitative mediators may occasionally mix in some evaluative elements when they see the opportunity to guide the parties with knowledge they bring to the table. This most often will happen confidentially, in caucus, so the playing field of joint sessions remains level. This evaluative component may be part of the "reality testing" done as part of the process. This is distinct from a fully evaluative process, where the mediator is expected to bring prior legal (sometimes judicial) experience to bear, directly testing and challenging the parties' positions. This fully evaluative process may be seen as more akin to judicial settlement conferences.

Let's review the steps of a typical facilitative mediation process:

- Pre-mediation call, during which each party discusses with the mediator expectations and process
- Counsel submit mediation statements to the mediator so he/she is familiarized with the key elements of the case, including key agreed facts, facts in dispute, legal issues, counsel's overall evaluation of the case, and potential range/proposals for settlement
- At the first mediation session:
  - Introductory remarks by the mediator
  - Opening statements of each party, with a no-interruption rule
  - At this point, the parties may continue to discuss pluses and minuses of their cases—as well as potential paths to move forward—with the mediator, continuing to facilitate the discussion throughout
  - Depending upon the mediator's sense of the parties' positions, the mediator may ask to caucus with each party separately to probe for opportunities and examine the parties underlying interests (n.b., depending upon the mediator's approach and judgment of the most effective approach for the case at hand, the mediator may choose to caucus from the start, intermittently, or not at all)
- Mediator identification of common threads and opportunities for finding common ground
- Generating options
- Reaching agreement

This simplified overview may vary, and whether it reaches a complete settlement, settles only some issues, or fails to make any progress at all, a mediation can take hours or days, stretching over weeks or months, depending upon the complexity of the issues and the commitment of the parties to exploring opportunities for making progress.

The Emotional Component

Whenever parties attempt to resolve difficult employee-relations issues, emotions can run high on all sides. The employee/plaintiff feels they have given their best effort and are the subject of mistreatment by heartless bosses. Management, on the other hand, are fed up with an unappreciative employee who is, in their view, nothing but trouble and now has insulted them by claiming the entire situation amounts to persecution.

This is not unusual, even outside of employment matters. Even cases driven by seemingly black-and-white issues, such as a breach of contract, have an emotional component that can, at first, seem surprisingly intense. In a joint session during a mediation, the parties will discuss the alleged breach of a contract where a million dollars of damages is claimed. Who performed under the contract or did not? What were the obligations? It all seems straightforward enough, even if the parties disagree on factual issues. Then they move into caucus, and what seemed black-and-white suddenly gains the color of human emotion. "We did business for 17 years, and then he does this and goes to my competitor? How could he do this to me?" Not so black-and-white after all. While this is a common enough occurrence, it's almost a certainty in employment matters.

Jess A. Bunshaft

It is the nature of employment matters that they can be particularly loaded with emotion and underlying issues. These must be addressed if the parties are to find their way to a resolution of the case with which they can live. Long before most employment litigation reaches even the beginnings of a legal process, the eventual plaintiff has been processing emotions driven by the feeling that they have been victimized. They have spent months or years living with feelings of anger, sadness, abandonment, betrayal and a host of other emotions that have built up inside them. In order to successfully bring a matter fraught with so much emotion to a conclusion, those emotions best be addressed.

If we take a moment to think about it, this should not come as a surprise. It is apparent to any working adult that work is a major component of life. Some of us spend more time with our work colleagues than we do with our families. Today, as work morphs into new forms, some examinations of work-life balance have indicated that work has become even more blended into our *raison d'être.* Now, disrupt that work identity and see what that does to the employee. Their day-to-day life has been upended, and they feel devalued and disrespected. In order to move past that, the matters to be settled will transcend mere economics. They require some measure of healing. That is where mediation can play a role that litigation and the almost-inevitable court-based settlement cannot.

From the litigator's point of view, the power of mediation also brings an opportunity for the successful resolution of a matter at an earlier stage—and with a happier client—than a protracted litigation process. Furthermore, the confidential aspect of mediation, with the parties, counsel, and the mediator(s) themselves forbidden from using anything revealed in mediation in any subsequent legal proceeding, allows for the free flow of thoughts, concerns, and emotions in a way that litigation cannot.

Handling the emotional component of an employment matter is something that mediation is uniquely suited to do. In the initial joint session, the parties may state their positions, the facts as they see them, and the legal strengths of their case. Attorneys skilled at representing clients in mediation may also share concerns or concede legal weaknesses, whether openly in joint session or confidentially in caucus, while explaining why they do not see those as fatal issues. In so doing, they can use mediation to evaluate for themselves the overall posture they should take, as well as telegraphing their readiness to deal with all issues.

This may also be the time to begin addressing the damage done to a client beyond simple dollars and cents, whether that is a plaintiff's pain from feeling disrespect on the job or a defendant's upset over the disruption their workplace suffered, such as the long-term manager who feels wrongly accused.

As we move into caucus, the mediator may then be able to tease out what really drives each side's feelings and positions. What are their real interests that drive them, and may shine a light on the path to common ground?

A Negotiation Tool, and an Instrument of Healing

Before any matter can be brought to a negotiated end, counsel must satisfy his/her clients that the outcome is to their benefit. Whether that benefit involves minimizing risk, increasing return, mitigating uncertainty or simply finding peace of mind, no party will agree to resolve a matter unless they recognize "what's in it for me."

As experienced employment counsel can tell you, whether plaintiff's or defendant's counsel, clients can have unreasonable expectations. From the plaintiff who worked for their employer for two years at minimum wage and expects a ten-million-dollar payday, to the defendant who feels aggrieved by even having to deal with litigation and wants you to see them totally vindicated, the realities of these cases can be a wake-up call for clients, and many simply do not hear what you are telling them.

That is where a skillful mediator can help move things forward. By utilizing a neutral, the tenor of the discussion can be changed. Mike McKenna, an experienced employment litigator and mediator in the Eastern District for over twenty years, as well as multiple other venues, commented for this article that mediation provides a unique opportunity for counsel to manage the expectations of the client.

While the typical facilitative mediator is present to do what the name suggests, facilitating discussions between the parties, there is a point at which he or she, particularly during a caucus, may assist counsel in discussing the risks and opportunities with the parties. Even with the best counsel, clients sometimes do not hear what their attorney is trying to tell them. But with the input of a neutral, there can be an opportunity to break through and make sure they get it. In a wage and hour case, for example, it may be the mediator who can get the defendant to understand their exposure, even after their own attorney has been trying for months to make them understand their exposure because their recordkeeping clearly did not meet legal requirements.

In a discrimination case where the plaintiff has stars in their eyes, counting on a huge windfall, they may finally understand what they can reasonably expect when a respected third party helps talk them through it. While good neutrals stay neutral regarding the overall case and process, we often have an opportunity to engage in "reality testing" that can move things forward when parties had previously been unwilling to budge.

With this better focusing of expectations and an opportunity to vent feelings, progress becomes possible. The opportunity to allow this venting and bring better focus to clients' expectations is one of the great benefits of mediation. While our goal as mediators is to resolve matters, that is not always the outcome. The parties have to be willing to work through interests and issues, finding their way to common ground.

Even where that willingness is lacking, however, many attorneys have found great utility to the mediation process. Even where they walk away without resolving the case, they may resolve individual issues in the case, smoothing the way forward, or they may simply move their clients along in their thinking, so that working with them will be easier and everyone's understanding of the issues at hand is better. While this benefit to mediation applies in many types of cases, where the parties may be so personally bound up in the issues underlying the case, it is especially effective in employment litigation.

Jess Bunshaft is a mediator and arbitrator, and serves as Co-Chair with Hon. Marilyn Genoa of the NCBA Alternative Dispute Resolution Committee. They are partners in Synergist Mediation, an ADR practice providing mediation, arbitration and corporate ombuds services. www.synergistmediation.com.

1. "A History of Alternative Dispute Resolution" Barrett, Jerome T. (Association for Conflict Resolution.)

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WE CARE Grants $123,750 to Local Charitable Organizations

WE CARE, a part of the Nassau Bar Foundation, the charitable arm of the NCBA, distributed $123,750 to 23 local charitable organizations who serve our community. The following organizations received grants from the fall 2019 grant cycle:

- Bethany House
- Big Brothers Big Sisters
- Breast Cancer Comfort Foundation
- Child Abuse Prevention
- Christmas Dream
- ERASE Racism, Inc.
- Five Towns Community Center
- Girl Scouts of Nassau County
- Greenville Baker Boys & Girls Club
- Hicksville Boys & Girls Club
- The INN
- Island Harvest
- Long Beach Reach
- Long Island Council of Churches
- Long Island Sled Hockey, Inc.
- Maurer Foundation
- Momma's House
- P.E.A.C.E Program
- Port Washington Parent Resource Center
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- RotaCare
- Safe Center
- The Sarah Grace Foundation for Children with Cancer










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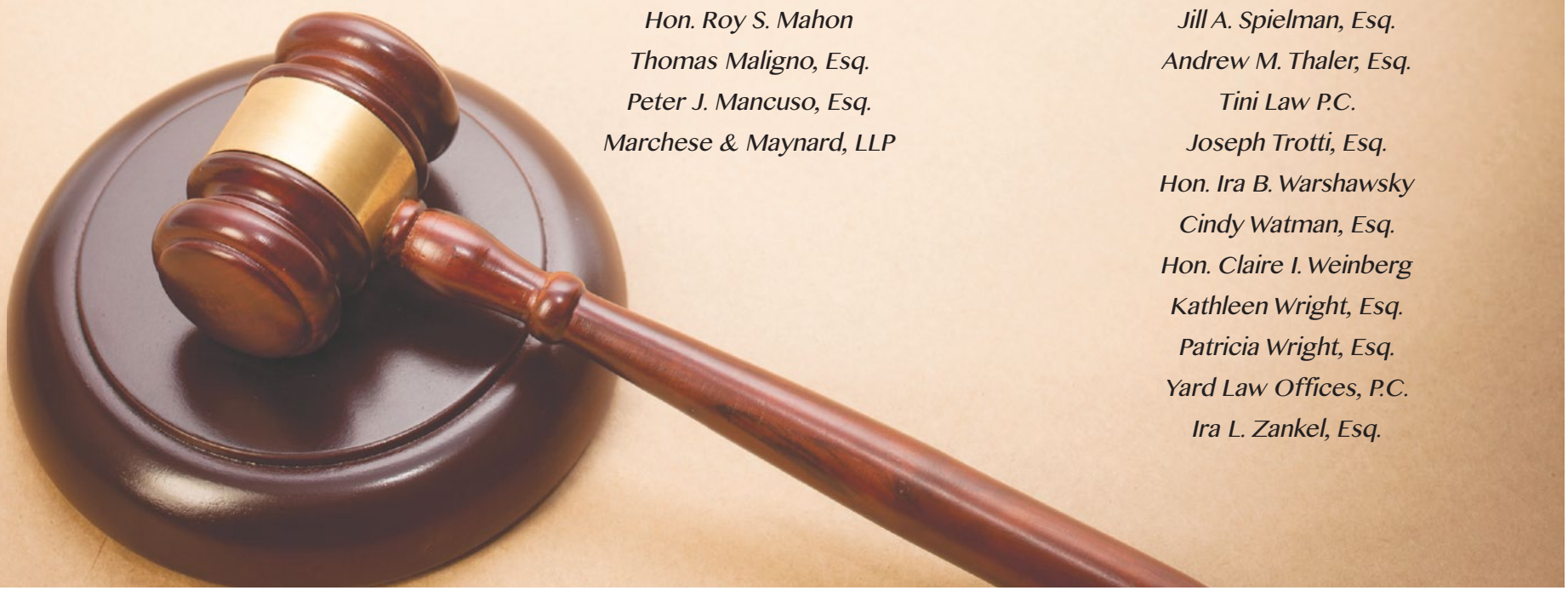

PAY PARITY ...

Continued From Page 3

unlawful for an employer to "inquire, whether in any form of application or otherwise, about a job applicant's wage or salary history."[16]

Statewide Legislation—New York Labor Law § 194-a

After the adoption of several local laws, the New York State Senate and Assembly enacted statewide legislation in June 2019, amending the New York Labor Law to institute a statewide salary history ban.[17] On July 10, 2019, the bill was signed by Governor Cuomo, bringing New York State one step closer to fulfilling his 2017 promise to prevent wage discrimination by precluding employers from asking questions about an applicant's salary and wage history.[18] The statewide prohibition will go into effect on January 6, 2020.[19]

The amendment to New York Labor Law § 194-a is substantially similar to the local laws enacted since 2017. Foremost, the amendment makes it unlawful for employers to "rely on the wage or salary history of an applicant in determining whether to offer employment to such individual or in determining the wages or salary for such individual."[20] Notably, unlike the New York City Administrative Code, this amendment not only protects applicants for employment, but it also protects current employees applying for promotions within the same organization.[21]

Additionally, the amendment to the New York Labor Law does not permit employers to inquire about an applicant's wage and salary history from either the applicant or the applicant's former or current employer.[22] However, an applicant may voluntarily disclose his or her salary history.[23] While the New York City and Westchester County amendments addressed the situation where an employee voluntarily offered his or her salary history, the Suffolk County amendment did not address such a scenario.[24] Similar to the New York City and Westchester County amendments, the New York State legislation allows employers to consider the applicant's prior salary in setting the current salary when the prior salary has been offered voluntarily.[25] Employers should exercise caution as direct questions about an applicant's salary history, even with the caveat that a response is voluntary, are not permitted. Rather, the disclosure must be unprompted.[26] In the event an applicant responds to an offer of employment and proposed salary by disclosing his or her salary history, the employer is permitted to verify the applicant's salary history.[27] It is worth noting that unlike the local laws in Albany and Westchester Counties, section 194-a is silent as to whether an employer must first obtain written authorization from an applicant before contacting a prior employer to verify salary history.[28]

Section 194-a also contains provisions precluding employers from retaliating against applicants on the grounds that the applicant did not disclose his or her wage history or filed a complaint alleging the employer violated the salary history prohibition.[29] If an applicant feels that an employer violated section 194-a, the applicant may bring a civil action seeking damages, injunctive relief, and attorneys' fees.[30] The amendment further provides a "public awareness outreach campaign" designed to educate and inform employers about the new requirements concerning the salary history prohibition.[31]

Future Legislation and Anticipated Impact

In addition to New York, several states have passed statewide legislation prohibiting questions about an applicant's salary history. Similarly, as with New York, prior to the passage of a statewide ban, countless local laws were passed in states where statewide legislation has yet to be enacted.

On January 30, 2019, the Paycheck Fairness Act (H.R.7) was introduced in the United States House of Representatives to reduce wage discrimination against women by amending the Fair Labor Standards Act.[32] H.R.7 proposes a new section titled "Requirements and Prohibitions Relating to Wage, Salary, and Benefit History," with language similar to New York Labor Law § 194-a.[33] The bill passed the House of Representatives on March 27, 2019 and was sent to the United States Senate, where it was placed on the legislative calendar in April 2019.[34]

Employers will face new obstacles with the passage of these laws. Foremost, in spite of the public awareness outreach campaign, numerous employers will remain unfamiliar with the restrictions set forth in section 194-a and continue to inquire about applicants' prior salary. However, once familiar with the new regulations, employers should ensure any disclosure of salary history is unprompted. In the event an applicant voluntarily discloses prior salary information, it is recommended employers obtain written authorization from the applicant before contacting prior employers, even though written authorization is not required under section 194-a, to preclude the applicant from later arguing that such disclosure was not unprompted or voluntary.

Applicants similarly will face new challenges. When faced with questions about their prior salary, applicants must weigh whether to advise an employer that such questions are impermissible and, thus, risk aggravating the employer, answer the questions by providing the applicant's prior salary, or avoid directly responding to the questions. Additionally, applicants will have to determine in what circumstances the voluntary disclosure of prior salary will be advantageous in negotiating a new salary and when it will be detrimental.

Michael A. Berger is an Associate at Forchelli Deegan Terrana LLP in Uniondale. He concentrates his practice in employment and labor law.

1. *Closing the Gender Wage Gap in New York State: Pay Equity and Advancement,* New York State Department of Labor (April 2018), https://on.ny.gov/36mDfwE.
2. *Id.* at 10. The 11-cent wage pay gap does not consider females who are classified as minorities. The New York State Department of Labor found that African-American women earn 64 cents for every dollar earned by white males, while the disparity for Hispanic women was even larger at 55 cents for every dollar earned by white males. *See id.*
3. *Id.* at 50.
4. *Id.* at 50-51.
5. *Id.* at 6. For African-American women, the study estimates pay parity by the year 2124 and for Hispanic women, by the year 2248. *See id.*
6. A Local Law to Help Address the Wage Gap Between Women and Men by Prohibiting Employers from Requiring Job Applicants to Provide Prior or Current Salary Information Before Offering Them Employment, Local Law No. P for 2016 (Albany County Legislature 2016) ("Wage Gap"), https://bit.ly/2rt3UcJ.
7. *See id.; see also* A Local Law Amending Section 700.03 of the Laws of Westchester County to Provide That it Shall, in Certain Circumstances, be an Unlawful Discriminatory Practices to Rely Upon, Request or Seek the Wage History of a Prospective Employee (Westchester County Legislature 2018) ("Section 700.3"), https://bit.ly/38qLWIt ; *see also* A Local Law to Restrict Information Regarding Salary and Earnings ("RISE Act") (Suffolk County Legislature 2018), https://bit.ly/2PGpiTA.
8. *See* Section 700.3, *supra* n.7; *see also* RISE Act, *supra* n.7 (wage disparity in Suffolk County is 78 cents for every dollar, significantly lower than NYS average).
9. Wage Gap, *supra* n.6.
10. N.Y.A.C. § 8-107(25)(b)(1).
11. N.Y.A.C. § 8-107(25)(b)(2).
12. Salary History Law: Frequently Asked Questions, NYC Human Rights, https://on.nyc.gov/2RKnprI.
13. *See* Section 700.03, *supra* n.7.
14. *See generally id.*
15. *See id.*
16. *See* A Local Law to Restrict Information Regarding Salary and Earnings ("RISE Act"), *supra* n.7.
17. *Senate Bill S6549,* The New York State Senate, https://bit.ly/36vrog5; *see also A05308 Summary,* New York State Assembly, https://bit.ly/35drPet On January 9, 2017, Governor Cuomo signed Executive Order No. 161, which prohibits State entities from asking applicants to disclose their wage history when applying for a job. See 9 NYCRR § 8.161.
18. *See* Senate Bill S6549, *supra* n.17; see also A05308 Summary, *supra* n.17.
19. Labor Law § 194-a.
20. Labor Law § 194-a(1)(a).
21. Labor Law § 194-a(1)(b); *see also* N.Y.A.C. § 8-107(25)(e).
22. Labor Law §§ 194-a(1)(b)- (1)(c).
23. Labor Law § 194-a(2).
24. *See* N.Y.C. Admin.Code § 8-107(25)(d); *see also* A Local Law Amending Section 700.03 of the Laws of Westchester County to Provide That it Shall, in Certain Circumstances, be an Unlawful Discriminatory Practices to Rely Upon, Request or Seek the Wage History of a Prospective Employee, *supra* n.7; *see also* A Local Law to Restrict Information Regarding Salary and Earnings ("RISE Act"), *supra* n.7.
25. Labor Law § 194-a(2).
26. Labor Law § 194-a(2).
27. Labor Law § 194-a(3).
28. *See* Wage Gap, *supra* n.6; *see also* Section 700.03, *supra* n.7.
29. Labor Law §§ 194-a(1)(d)- (1)(f).
30. Labor Law § 194-a(5).
31. Labor Law § 194-a(8).
32. *See H.R.7 – Paycheck Fairness Act,* Congress.gov, available at https://bit.ly/2rCw4Su.
33. Paycheck Fairness Act, H.R.7, 116th Cong. (2019).
34. See H.R.7 – Paycheck Fairness Act, *supra* n.32.

NEW RULES ...

Continued From Page 10

necessary in applications for permanent residence. Attorneys will have to do more thorough financial screenings of their clients, including a history of public benefits received. They will also have to take into account other factors which are now not considered under present regulations.

Check status on litigation that was pending at the time of submission as cases may be decided.

Linda G Nanos was admitted to practice in New York in 1981. She has her own bi-lingual immigration law practice in Hempstead. She is a member of the American Immigration Lawyers Association and the Nassau County Bar Association's Immigration Law Committee, for which she has previously served as Chair.

1. *See Make the Road New York v. Cuccinelli,* 19-cv-7993-GBD, 19-cv-7777-GBD (consolidated) (S.D.N.Y. Oct. 11, 2019) (nationwide injunction); *State of Washington v. U.S. Dept. Homeland Security,* 19-cv-5210-RMP (E.D. WA, Oct. 11, 2019) (same); *City and County of San Francisco v. U.S. Citizenship and Immigration Services,* 19-cv-04717-PJH, 19-cv-4980-PJH, 19-cv-4975PJH (consolidated) (N.D. Cal., Oct 11, 2019) (injunction as to San Francisco City or County, Santa Clara County, California, Oregon, the District of Columbia, Maine, and Pennsylvania).
2. 84 FR 41292.
3. 84 FR 54996.
4. *Doe v. Trump,* 3:19-cv-01743-SB (D. Oren, Nov. 2, 2019).

HIDDEN DANGER ...

Continued From Page 6

argument and instead held: "the term underpayment encompasses the instances where an employer violates the frequency requirements of section 191(1)(a) but pays all wages due before the commencement of an action."[11] Although an employer may assert the complete payment of wages as an affirmative defense, the Appellate Division explained that "payment does not eviscerate the employee's statutory remedies."[12] The Appellate Division further noted that the legislative history of the statute reflects that the imposition of liquidated damages is meant to compensate the employee for the loss of use of the money earned by the employee regardless of whether the employee was never paid, partially paid, or merely paid late.[13]

Practical Implications

Section 191(1)(a) of the Labor Law poses a serious danger for those employers who are not aware of the broad interpretation assigned to the term "manual workers." A local employer operating a pizzeria may assume that its employees can be paid bi-weekly as they are not manual workers in the traditional sense of a mechanic or assembly line worker. However, according the NYS DOL, pizzeria workers may be manual workers under Section 191(1)(a) if they spend more than 25% of their time working engaged in physical labor, including, but not limited to, lifting and moving bags/boxes of heavy ingredients and cleaning their workstations. Such a mistake would expose the employer to liquidated damages in the amount of 100% of delayed wages—the wages earned every other week that are paid one week late—even though the employer properly paid all wages earned and owed in accordance with all other statutory requirements (*e.g.* minimum wage, overtime wage and spread-of-hours compensation).

To demonstrate the gravity of these damages, assume that the aggrieved employee earned $15 per hour and worked an average of 35 hours per week. Since there are 52 weeks in one year, the employee's wages were paid late for approximately 26 weeks and would be subject to 100% liquidated damages. Calculated out: 35 hours x $15.00 x 26 weeks x 100% liquidated damages = $13,650.00 per year for as many years the employee worked within the statutory period under the Labor Law (*i.e.,* 6 years from date civil action is filed). If the aggrieved employee was a long-term employee who had worked the entire statutory period, the employee could be owed as much as $81,900.00 in statutory damages plus prejudgment interest and reasonable attorney's fees. Now imagine this claim on a class action basis at a warehouse with 40 or more employees; the damages easily reach into the millions. It seems unimaginable that any employer could survive such steep penalties for a violation involving the frequency of pay.

With the popularity of this claim seemingly on the rise within the plaintiffs' bar, it is imperative that all employers' attorneys advise their New York clients to review their pay practices in detail and be extra cautious of hidden dangers under the Labor Law, especially the frequency of pay statute.

Douglas Rowe is a Partner and Desiree Gargano is an Associate with Certilman Balin Adler & Hyman, LLP in the labor and employment law group.

1. No. 18-CV-0086(SJF)(AKT), 2019 WL 1559424 (E.D.N.Y. Apr. 9, 2019); No. 23559/16E, 2019 WL 4264384 (1st Dept. Sept. 10, 2019).
2. Labor Law § 191(1)(a).
3. Labor Law § 190(4).
4. NYSDOL, Frequency of Pay Frequently Asked Questions, available at https://on.ny.gov/2EyQ1wd. *See also* NYSDOL, Response Letter to Request for Opinion, RO-09-0066, May 21, 2009, available at https://on.ny.gov/2S4jDJR.
5. *See* NYSDOL, Response Letter to Request for Opinion, RO-09-0066 (May 21, 2009), available at https://on.ny.gov/2PzxrdD; NYSDOL, Response Letter to Request for Opinion, RO-08-0061 (Dec. 4, 2008), available at https://on.ny.gov/2Z2t7Xt.
6. Labor Law § 198(1–a).
7. *Scott,* 2019 WL 1559424 at *3.
8. *Id.* at *4.
9. *Id.*
10. 175 A.D.3d 1144 (1st Dept. 2019).
11. *Id.*
12. *Id.*
13. *Id.* n.2.

NCBA Committee Meeting Calendar
Jan. 13, 2020—Feb. 6, 2020

Questions? Contact Stephanie Pagano at (516) 747-4070 or spagano@nassaubar.org.
Please Note: Committee meetings are for NCBA Members.
Dates and times are subject to change.
Check www.nassaubar.org for updated information.

CRIMINAL COURT LAW & PROCEDURE
Monday, January 13
12:30 p.m.
Dennis P. O'Brien

COMMERCIAL LITIGATION
Monday, January 13
12:30 p.m.
Matthew F. Didora

PLAINTIFF'S PERSONAL INJURY
Tuesday, January 14
12:30 p.m.
Ira S. Slavit

LABOR & EMPLOYMENT
Tuesday, January 14
12:30 p.m.
Paul F. Millus

NEW LAWYERS
Tuesday, January 14
12:30 p.m.
Glenn R. Jersey, III/Steven V. Dalton

ASSOCIATION MEMBERSHIP
Wednesday, January 15
12:45 p.m.
Michael DiFalco

CIVIL RIGHTS
Thursday, January 16
12:30 p.m.
Robert L. Schonfeld

MUNICIPAL LAW
Thursday, January 16
12:30 p.m
John C. Farrell/Chris J. Coschignano

SURROGATE'S COURT ESTATES & TRUSTS
Tuesday, January 21
5:30 p.m.
Jennifer Hillman/Lawrence N. Berwitz

DEFENDANT'S PERSONAL INJURY
Tuesday, January 21
6:00 p.m.
Matthew A. Lampert

ANIMAL LAW
Tuesday, January 21
6:00 p.m.
Matthew A. Miller/Krisit L. DiPaolo

BANKRUPTCY LAW
Wednesday, January 22
12:30 p.m.
Neil H. Ackerman

DIVERSITY & INCLUSION
Thursday, January 23
6:00 p.m.
Hon. Maxine S. Broderick

LGTBQ
Friday, January 24
8:15 a.m.
Jospeh G. Milizio/Barrie E. Bazarsky

DISTRICT COURT
Friday, January 24
12:30 p.m.
Roberta D. Scoll/S. Robert Kroll

CIVIL RIGHTS/DIVERSITY & INCLUSION
Tuesday, January 28
12:30 p.m.
Robert L. Schonfeld / Hon. Maxine Broderick

WOMEN IN THE LAW
Wednesday, January 29
12:30 p.m.
Jennifer L. Koo/ Christie R. Jacobson

ETHICS
Monday, February 3
6:00 p.m.
Matthew K. Flanagan

GENERAL, SOLO AND SMALL LAW PRACTICE MANAGEMENT
Wednesday, February 5
12:30 p.m.
Scott J. Limmer

HOSPITAL & HEALTH LAW
Thursday, February 6
8:30 a.m.
Leonard M. Rosenberg

PUBLICATIONS
Thursday, February 6
12:45 p.m.
Christopher J. DelliCarpini/ Andrea M. DiGregorio

COMMUNITY RELATIONS & PUBLIC EDUCATION
Thursday, February 6
12:45 p.m.
Joshua D. Brookstein

In Brief

On November 21, 2019, Governor Andrew M. Cuomo appointed **Mili Makhijani**, Principal Law Clerk to the **Hon. Randy Sue Marber,** Justice of the Supreme Court, as Member and the Chair of the Council for State University of New York College at Old Westbury. As the newly appointed Council Chair, Ms. Makhijani will immediately embark on the campus presidential search process in accordance with the guidelines and procedures set forth in the Education Law and the SUNY Policy for Presidential Searches.

Allison C. Shields, President of Legal Ease Consulting, Inc. is proud to announce the publication of her new book, *"Make LinkedIn Work for You: A Practical Handbook for Lawyers and Other Legal Professionals,"* with co-author Dennis Kennedy. The book is a step-by-step guide for anyone in the legal profession about how best to maximize their LinkedIn profile, make use of their connections, and participate effectively on the platform. The book is available through Amazon in both e-book and paperback formats. Ms. Shields recently spoke for the New York State Bar Association's Solo Practitioner's Conference in New York City on the topic, "Using LinkedIn Ethically and Effectively." She was also honored by the American Bar Association Law Practice Division's Law Practice magazine with its award for best column for her column, "Simple Steps," available to members and non-members alike on the ABA's website.


Marian C. Rice

Thomas G. Sherwood and **James P. Truitt III** are pleased to announce that they have changed their firm name from Thomas G. Sherwood, LLC to Sherwood & Truitt Law Group, LLC. Sherwood and Truitt are also pleased to announce that the firm has moved to larger offices at 300 Garden City Plaza, Suite 136, Garden City, 11530, and has launched a new website, www.sherwoodtruitt.com. The firm concentrates its civil litigation practice in the areas of real estate and contract disputes.

Moritt Hock & Hamroff managing partner **Marc L. Hamroff** announced the firm has been ranked in the 2020 *U.S. News & World Report and Best Lawyers®* "Best Law Firms" list nationally in the practice area of Litigation—Tax and New York City region in the practice areas of Litigation—Tax and Tax Law. Two attorneys from Moritt Hock & Hamroff have been appointed by the Equipment Leasing and Finance Association (ELFA) to positions on two of its leadership committees. **Julia Gavrilov** was appointed to a two-year term on the ELFA's Service Providers Business Council Steering Committee and **Robert S. Cohen** was appointed to a two-year term on the ELFA Women's Council.

Ronald Fatoullah of Ronald Fatoullah & Associates was a featured speaker at the December meeting of the Interagency Council On Aging at Queens Borough Hall addressing over 100 seniors seeking important information regarding Medicare prescription plans, Medicare supplemental coverage, and legal and financial planning for long-term care.

Erica B. Garay of Garay ADR Services has been appointed to the EDNY ADR Advisory Council for a two-year term.

Russell I. Marnell of the Marnell Law Group, who concentrates his practice in complex custody, equitable distribution, child support, and maintenance issues, accepted the *Long Island Business News* Leadership in Law award at a special awards ceremony held on November 21, 2019.

Joanne Fanizza of Law Offices of Joanne Fanizza, P.A., was a co-presenter at a CLE program entitled "Issue Spotting for the New York Lawyer Whose Clients May be Considering a Change in Domicile to Florida" for out-of-state members of the Florida Bar in New York City on the topic of "Tax, Real Estate, and Ethical Considerations for NY/FL Snowbirds."

Karen Tenenbaum, tax attorney at Tenenbaum Law, P.C., and **Hana Boruchov** will be speaking at the NCCPAP Westchester Chapter on IRS and NYS Tax Collections. Karen will be part of the LIU Post Tax Controversy Forum. The Melville-based firm represents taxpayers in IRS and NYS tax matters.

PLEASE EMAIL YOUR SUBMISSIONS TO nassaulawyer@nassaubar.org with subject line: IN BRIEF

The *Nassau Lawyer* welcomes submissions to the IN BRIEF column announcing news, events, and recent accomplishments of its current members. Due to space limitations, submissions may be edited for length and content.

PLEASE NOTE: All submissions to the IN BRIEF column must be made as WORD DOCUMENTS.

The In Brief column is compiled by Marian C. Rice, a partner at the Garden City law firm L'Abbate Balkan Colavita & Contini, LLP where she chairs the Attorney Professional Liability Practice Group. In addition to representing attorneys for 35 years, Ms. Rice is a Past President of NCBA.

"GIG" ECONOMY ...

Continued From Page 7

considered an employee" unless the business can meet all three prongs of the rebuttal test, to wit:

- The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- The person performs work that is outside the usual course of the hiring entity's business; and,
- The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. [10]

Though some have questioned the impact AB5 will have on employee classification,[11] a recent study has found that sixty-four percent of California's current independent contractors would be deemed employees when the law takes effect.[12] Tech businesses have countered AB5 with a proposed statewide ballot referendum in 2020 that would roll back the reach of AB5[13]—an effort that demonstrates the stakes involved in employee classification considerations.

New York's Dependent Worker Act of 2019

New York's first legislative effort to address worker classification in the context of the gig economy was introduced in the New York State legislature in 2019 as the Dependent Worker Act ("2019 DWA").[14]

The 2019 DWA was not enacted into law in the 2019 legislative session but by all indications—including recent legislative hearings held by the Labor Committee of the New York State Senate[15]—the 2019 DWA will be reintroduced in the 2020 legislative session. The question for New York practitioners is what form the 2020 DWA will take as the legislature seeks to modify the 2019 DWA, especially in light of the passing of the California's AB5. During the most recent Senate hearings held on October 16, 2019, numerous public speakers discussed their desire for a clear-cut test similar to the Construction Industry's Fair Play Act that would result in the rebuttable presumption that all gig economy workers are employees in New York.

The 2019 DWA creates a new sub-definition of an employee called a "dependent worker." A dependent worker would be "an individual who provides personal services to a consumer of such personal services through a private sector third-party that: establishes the gross amounts earned by the individual; establishes the amounts charged to the consumer; collects payment from the consumer; pays the individual; or any combination of the preceding."[16] The 2019 DWA would explicitly extend some, but not all, protections associated with employment to dependent workers, including frequency of payment, mandated record-keeping, anti-gratuity theft, and the right to organize.[17] Noticeably absent are employee minimum wage, overtime and other wage-and-hour protections afforded to traditional employees under the New York State labor law.

Interestingly, the 2019 DWA delegates further discussion of labor rights for dependent workers to the commissioner of labor who "shall hold public meetings with representatives of businesses, employees and dependent workers to examine various state labor and related laws that regulate employment rights benefits to identify which provisions could be extended to provide dependent workers with the same, or similar, rights and benefits as employees…."[18] The rights and benefits that must be considered at such public hearings would include whether additional employee protections should be extended to dependent workers, including unemployment benefits, workers' compensation benefits, disability benefits, paid family leave benefits, WARN Act protections, health care continuation protections, anti-discrimination protections under the human rights law (Article 15 of the Human Rights Law), the Labor Law, and the Correction Law. As noted above, the 2019 DWA would not mandate the application of the state's minimum wage provisions (Article 19 of the Labor Law) or the full wage payment provisions (Article 6 of the Labor Law) to dependent workers. Instead, the commissioner of labor would be tasked with examining whether these basic employment protections should be afforded to dependent workers. This public hearing process, unlike the wage board process utilized in Article 19 of the Labor Law to address minimum wage thresholds,[19] does not mandate any further regulatory or legislative action, thereby effectively "kicking the can" for future expansions of employment rights to dependent workers to future legislative action.

Conclusion

The world of employment law is changing at a breakneck pace. As this article is being published, the legislature will likely be modifying the 2019 DWA to determine how, and if, New York will extend employment and labor law rights to the gig economy's dependent workforce. This legislation can have a profound impact on the new economy developing around app-based work opportunities in the transportation, food delivery, and other personal services sectors of the economy. But like California's AB5, the DWA could extensively impact workers outside the gig economy who have been classified as independent contractors. Practitioners should carefully watch this developing legislation to ensure clients are appropriately classifying their workers after the likely enactment of the DWA in 2020.

James W. Versocki is a partner in the Melville-based labor and employment firm of Archer, Byington, Glennon & Levine, LLP, a former member of the 2009 New York State Wage Board, and former New York State Assistant Attorney General.

1. Ileen A. DeVault, Maria Figueroa, Fred B. Kotler, Michael Maffie, and John Wu, *On-Demand Platform Workers in New York State: The Challenges for Public Policy*, Cornell University ILR Worker Institute, Research Studies and Reports, 2019, at 13, available at https://bit.ly/2Sas5r2.
2. *See Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 72 (2d Cir. 2003).
3. *See Carlson v. Am. Int'l Grp., Inc.*, 30 N.Y.3d 288, 301 (2017) (citations omitted).
4. Ileen A. DeVault, Maria Figueroa, Fred B. Kotler, Michael Maffie, and John Wu, *On-Demand Platform Workers in New York State: The Challenges for Public Policy*, Cornell University ILR Worker Institute, Research Studies and Reports, 2019, at 36-39 (citing varying agency standards for employment classification determinations), available at https://bit.ly/2Z3E6zY.
5. Linda H. Donahue, James Ryan Lamare and Fred B. Kotler, *The Cost of Worker Misclassification in New York State*, Cornell University ILR School, Research Studies and Reports, 2007, at 2, available at https://bit.ly/2tskVnI.
6. Labor Law §§ 861-861-G.
7. Labor Law § 861-C.
8. Labor Law § 861-A (citing policy considerations).
9. 4 Cal.5th 903 (2018).
10. Cal. Labor Code, § 2750.3 (2019) (bullets added).
11. Diane Mulcahy, California's New Gig Economy Law is All Bark No Bite, Forbes (Sept. 20, 2019), available at https://bit.ly/35GmH2T.
12. Sarah Thomason, Ken Jacobs and Sharon Jan, Estimating the Coverage of California's New AB 5 Law, UC Berkeley Labor Center, Nov. 12, 2019, at 2, available at https://bit.ly/38TZKet.
13. Protect App-Based Drivers & Services Coalition, available at https://bit.ly/35zzRyF.
14. S.6538, 2019-2020 Leg. (N.Y. 2019); Assem. 8343, 2019 Leg. (N.Y. 2019).
15. Examination of Gig Economy, Public Hearing on S. 6538 Before the S. Comm. On Internet and Technology, 2019-2020 Leg., transcripts and video available at https://bit.ly/36Qc65G.
16. S.6538, 2019-2020 Leg. (N.Y. 2019);Assem.8343 (2019 Leg. (N.Y. 2019).
17. Under the 2019 DWA, dependent workers would receive the protection of the following provisions of New York State Labor Law: 191, 192, 195, 196, 196-1, 196-d, 197, 198-a, 211, 213, 215, 218, 219 and 219-c.
18. S.6538, at 3 (N.Y. 2019).
19. Labor Law §§ 653-659.

COMMITTEE REPORTS

Plaintiff's Personal Injury

Meeting Date: 12/10/19
Chair: Ira Slavit

Michael J. Langer

Guest speaker Danielle Visvader delivered a lecture on the issue of guardianships in the context of representing plaintiffs in personal injury actions, explaining the different types of guardianships, and providing practical suggestions as to how each type can best serve the interests of clients and their cases.

The next meeting is scheduled for Tuesday, January 14, 2020 at 12:30 PM at which time guest presenter Kyle Schiedo is scheduled to deliver a presentation about how attorneys can use event data recorders (commonly known as "black boxes") to track information, including braking, steering, and speed, for use in motor vehicle accident litigation.

Construction Law Committee

Meeting Date: 12/16/19
Chair: Michael Ganz

Guest speaker Lloyd Ambinder delivered a CLE credit presentation entitled "Prevailing Wage Overview and Recent Trends," which addressed various topics, including prevailing wage issues, federal and state enforcement matters, federal and state litigation and administrative proceedings, and practical issues on how contractors attempt to avoid prevailing wage requirements.

The next meeting is scheduled for late January 2020.

The Committee Reports column is compiled by Michael J. Langer, a partner in the Law Offices of Michael J. Langer, P.C. Mr. Langer is a former law clerk in the United States Court of Appeals for the Second Circuit, and a former Deputy County Attorney in the Office of the Nassau County Attorney. Mr. Langer's practice focuses on matrimonial and family law, estate and commercial litigation, and criminal defense.

FAITHLESS ...

Continued From Page 9

the opportunity—meaning something much less tenable than ownership, but more certain than a desire or a hope."[16]

In *Veritas*, the side investment activities of the defendant employee did not deprive plaintiff employer of any business opportunity.[17] The court explained why the plaintiff had no "tangible expectancy" in these investment activities: "[Plaintiff employer] focus[ed] on investments in middle market companies in aerospace, automotive components, branded consumer products and metals, [and] defense and aerospace. There is nothing in the complaint or in opposition that Campbell's personal investment [activities] were in those industries."[18] The *Veritas* court also articulated a second alternative test for determining "whether a corporate opportunity has been diverted, [which] is whether the opportunity is the same as, necessary for, or essential to the line of plaintiff's business."[19] The necessity of establishing a tangible expectation in an employee's moonlighting activities was recently reaffirmed in *Bluebanana Group v. Sargent*.[20]

Faithless Servant Claims and Breach of Fiduciary Duty

Faithless servant claims are frequently joined with claims for breach of fiduciary duty against employees, predicated on identical allegations. Courts have rejected such repackaged breach of fiduciary duty claims when they are "bound up" with the primary faithless servant claim in the absence of allegations of competitive misconduct, usurpation of corporate opportunity, embezzlement, or kickbacks.[21]

In *Riom Corporation v. McLean*, the First Department applied the identical standards for faithless servant claims when affirming the dismissal of a breach of fiduciary duty claim against an employee: "The trial evidence did not establish that McLean acted in direct competition with plaintiff or diverted corporate assets so as to warrant forfeiture of his salary on a breach of fiduciary duty theory." [22]

Few causes of action carry the extraordinary disgorgement remedies of a faithless servant claim. It is a striking exception to the statutory rule prohibiting deductions or forfeiture of employee wages.[23] "In the absence of a special agreement, an employer may not recover back wages or equivalent drawings paid during a period of completed employment."[24] Because of the harsh forfeiture penalty, courts applying New York law continue to strictly limit faithless servant claims to employees who steal or divert employer funds or opportunities.

Mark E. Goidell is a litigation attorney in Garden City, and is a former NCBA Director. Mr. Goidell represented the defendant-respondent in the matter of *Bluebanana Group v. Sargent*.

1. *Visual Arts Foundation, Inc. v. Egnasko,* 91 A.D.3d 578, 579 (1st Dept. 2012), *quoting Lamdin v. Broadway Surface Advertising Corp.,* 272 N.Y. 133, 138 (1936).
2. *Veritas Capital Management LLC v. Campbell,* 82 A.D.3d 529, 530 (1st Dept. 2011), *lv dismissed,* 17 N.Y.3d 778 (2011).
3. *Soam Corporation v. Trane Company,* 202 A.D.2d 162 (1st Dept. 1994), *lv denied,* 83 N.Y.2d 758 (1994); *Bon Temps Agency Ltd. v. Greenfield,* 184 A.D.2d 280 (1st Dept. 1992), *lv dismissed* 81 N.Y.2d 759 (1992).
4. *CC Industries, Inc. v. Segal,* 286 A.D.2d 234 (1st Dept. 2001) (employee devised scheme whereby his employer paid over $750,000 in fraudulent invoices to entities established by the employee); *William Floyd UFSD v. Wright,* 61 A.D.3d 856 (2d Dept. 2009) (employees criminally convicted of embezzlement from their employer school district).
5. The facts are taken from the lower court decision, *Veritas Capital Management LLC v. Campbell,* 22 Misc.3d 1107(A), 2008 WL 5491146, at *2 (Sup. Ct., N.Y. Co. Nov. 24, 2008) *("Veritas I").*
6. *Id.*
7. *Id.* at *11. The employee's investment activities were in markets in which plaintiff employer was not engaged and therefore no corporate opportunities were implicated.
8. 82 A.D.3d at 530.
9. *Grewal v. Cuneo,* 2016 WL 308803, at *8 (S.D.N.Y. Jan. 25, 2016).
10. *Id.* (emphasis added).
11. *Epstein Engineering, P.C. v. Cataldo,* 150 A.D.3d 411, 411–12 (1st Dept. 2017).
12. 2016 WL 1171585 at *2 (E.D.N.Y. Mar. 23, 2016).
13. *Vanacore v. Expedite Video Conferencing Svcs.,* 2015 WL 10553221, at *2 (E.D.N.Y. Dec. 10, 2015).
14. *Id.* at *4.
15. *Vanacore,* 2016 WL 1171585 at *2 (emphasis added).
16. *Pawlowski v. Kitchen Expressions Inc.,* 2017 WL 10259773, at *3 (S.D.N.Y. Dec. 15, 2017) (quotations omitted) (denying motion to dismiss counterclaim for breach of the duty of loyalty brought against employee who installed kitchen fixtures for employer where employee installed kitchen fixtures on the side without the knowledge of his employer).
17. *Veritas I,* at *11.
18. *Id.*
19. *Id.*
20. 176 A.D.3d 408 (1st Dep't 2019)("Plaintiffs have not alleged that they were in any of the same businesses as Sargent. Plaintiffs do not claim any tangible expectancy in Sargent's alleged side business activity …")
21. *Vanacore*, 2016 WL 1171585, at *2; *Cerciello,* at 968 (dismissing breach of fiduciary duty claim premised on faithless servant allegations). After dismissing claims for breach of the duty of loyalty in *Veritas I, Grewal,* and *Bluebanana,* those courts also dismissed the companion breach of fiduciary duty claims on the same grounds. *Veritas I*, 2008 WL 5491146, at *11; *Grewal*, 2016 WL 308803, at *8; *Bluebanana*, 176 A.D.3d at 408.
22. 23 A.D.3d 298, 299 (1st Dept. 2005) (internal citation omitted).
23. Labor Law § 193.
24. *Cerciello v. Admiral Insurance Brokerage Corp.,* 90 A.D.3d 967, 969 (2d Dept. 2011) (quotations omitted).

NCBA Sustaining Members 2019-2020

The NCBA is grateful for these individuals who strongly value the NCBA's mission and its contributions to the legal profession.

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Jamie P. Alpern
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NCBA New Members

We welcome the following new members

Attorneys

Gregory S. Choi
Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP

Dina M. De Giorgio

Mitchell Craig Shapiro
MC Shapiro Law Group P.C.

Wade Christopher Wilkinson
Frazer & Feldman, LLP

In Memoriam

Stanley R. Kopilow

PUBLIC SECTOR ...

Continued From Page 5

unconstitutionally, or in excess of its jurisdiction.[23]

Recent Legal Developments

Fact-sensitive court decisions have interpreted the rights and obligations under New York State Civil Service Law and its amendments since its adoption.[24] Many sections have not been amended or even litigated in decades. Section 75 protection was extended to include not only the permanent competitive class, the non-competitive class with five or more years continuous service and a firefighter or veteran of a foreign war to also include the labor class with five or more years of continuous service.[25]

And a recent Executive Law amendment, however, exemplifies the current New York State Legislature's response to its constituents' concerns. Through that amendment, four sections of Civil Service Law have been amended[26] during the 2019 legislative session as a result of two new Executive Law definitions.[27] The definitions address the rights of military trauma and LGBT veterans "discharged less than honorably from military or naval service due to their sexual orientation or gender identify or expression."[28] This expands longstanding veterans' rights under the Civil Service Law, which extends extra credits to veterans under very specific provisions and conditions.[29]

In addition to New York State Civil Service Law (Civil Service Law), the Nassau County Rule Book and its appendices, which are now available on-line, govern NC Civil Service determinations.[1]

The Nassau County Rule Book and its appendices are now available on-line.[30]

Martha Krisel, Past President of the Nassau County Bar Association, is the Executive Director of the Nassau County Civil Service Commission. Deputy County Attorney Susan Tokarski is a member of the Nassau County Bar Association Labor & Employment Committee and is the Section Chief at the Labor Office of the Nassau County Attorney. With gratitude to Bayard Carmiencke, a rising 2L at Hofstra Law School.

1. https://on.ny.gov/2trVDGk.
2. Civ. Serv. Law § 2(9). The term "appointing authority" or "appointing officer" means the officer, commission or body having the power of appointment to subordinate positions.
3. https://bit.ly/2sFS3bg; https://bit.ly/38OpsRT.
4. Until that approval is voted upon by the NYS Commission, the titles are referred to as "Pending Jurisdictional Classification" (PJC).
5. Civ. Serv. Law § 20.
6. *Caslin v. Nassau Co. Civil Serv. Comm'n,* 104 A.D.3d 684 (2d Dept. 2013).
7. https://on.ny.gov/36PmJFI.
8. Civ. Serv. Law § 58[d][1]–[c][2]).
9. Civ. Serv. Law § 20.
10. https://bit.ly/2sEIkCc.
11. Civ. Serv. Law § 50(3). The application shall be subscribed by the applicant and shall contain an affirmation by him that the statements therein are true under the penalties of perjury.
12. Civ. Serv. Law § 50(4)(f). The state civil service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible (f) who has intentionally made a false statement of any material fact in his application; or (g) who has practiced, or attempted to practice, any deception or fraud in his application, in his examination, or in securing his eligibility or appointment.
13. Civ. Serv. Law § 50(4). Notwithstanding the provisions of this subdivision or any other law… the municipal commission may investigate the qualifications and background of an eligible after he has been appointed from the list, and upon finding facts which if known prior to appointment, would have warranted his disqualification, or upon a finding of illegality, irregularity or fraud of a substantial nature in his application, examination or appointment, may revoke such eligible's certification and appointment and direct that his employment be terminated, provided, however, that no such certification shall be revoked or appointment terminated more than three years after it is made, except in the case of fraud.
14. Civ. Serv. Law § 75(2) provides: Procedure. An employee who… appears to be a potential subject of disciplinary action shall have a right to representation… and shall be notified in advance, in writing, of such right…. If representation is requested a reasonable period of time shall be afforded to obtain such representation.
15. Civ. Serv. Law § 75(1). "A person described in [paragraph (a) through (e)] shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section."
16. *See Gillen v. Smithtown Library Board of Trustees,* 234 A.D.2d 368 (2d. Dept. 1996) *aff'd,* 94 N.Y.2d 776 (1999) (rejecting four out of six charges as not supported by substantial evidence, with Court of Appeals affirming that false reporting in violation of Civil Service Law charges, when proven, is a ground for termination of a post-probationary employee).
17. Civ. Serv. Law § 75(4). *But see, Snowden v. Village of Monticello,* 166 A.D.3d 1451 (3d Dept. 2018)(Hearing Officer determination adopted by appointing authority upheld because the limitations period does not apply to criminal conduct including endangering public health and criminal nuisance).
18. A probationary employee who could be dismissed "for almost any reason, or no reason at all," failed to allege facts that would establish that he was dismissed in bad faith or for an improper or impermissible reason. *Matter of Patterson v. City of New York,* 2019 NY Slip Op 04880 (1st Dept. 2019); *see also Matter of Castro v Schriro,* 140 A.D.3d 644, 647 (1st Dept. 2016), *aff'd,* 29 N.Y.3d 1005 (2017)).
19. Civ. Serv. Law § 76(2).
20. Civ. Serv. Law § 76(1)(limits the time frame to appeal to 20 days).
21. Civ. Serv. Law § 75(b), (c).
22. Civ. Serv. Law § 76(3).
23. *See, e.g., Matter of Campos v. New York City Department of Corrections,* 172 A.D.3d 1202 (2d Dept. 2019)(terminated corrections officer who elected to appeal to the NYC Civil Service Commission, was bound by its final and conclusive decision and could not obtain further review in court).
24. Laws 1909, c. 15, became a law February 17, 1909, with the approval of the Governor, having been passed by a majority vote, three-fifths being present. Laws 1958, c. 790, was entitled "An Act to amend generally and to recodify the civil service law" and became a law April 15, 1958 (effective April 1, 1959) with the approval of the Governor, having been passed by a majority vote, three-fifths being present.
25. Civ Serv. Law § 75(1)(c).
26. The amendment—effective November 2020 - impacts the executive law, the civil service law, the county law, the economic development law, the education law, the election law, the general construction law, the general municipal law, the military law, the correction law, the environmental conservation law, the general business law, the highway law, the insurance law, the judiciary law, the private housing finance law, the public health law, the public housing law, the public officers law, the real property tax law, the social services law, the tax law, the town law, the vehicle and traffic law, and the workers' compensation law, in relation to veterans with qualifying conditions and discharged LGBT veterans.
27. Exec. Law § 350; Civ. Serv. Law § 75(1)(b).
28. Exec. Law § 350(8), (9); Civ. Serv. Law § 75(1)(b).
29. Civ. Serv. Law § 85.
30. Civ Serv. Law § 75(c); https://bit.ly/2trWaYQ; https://bit.ly/34AEI1g.

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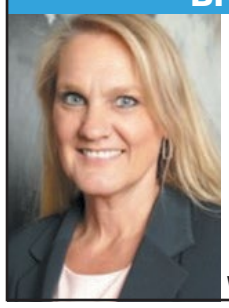

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