LABOR & EMPLOYMENT LAW

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INTRODUCTION

This *Survey* year was highlighted by several significant labor law developments. First, the Acting General Counsel for the National Labor Relations Board ("NLRB") issued three reports on cases involving discipline for social media activity and the lawfulness of social media policies. There were also several administrative law judge decisions issued on this topic. In addition to social media, President Obama made

three recess appointments to the NLRB, the NLRB modified the standard for determining the appropriate bargaining unit in non-acute health care facilities, the U.S. District Court for the District of Columbia invalidated the NLRB's "Quickie" Election rule, and the U.S. Court of Appeals for the D.C. Circuit granted an injunction preventing implementation of the NLRB's notice posting rule.

Similarly, there were several notable administrative developments during this *Survey* year. The Equal Employment Opportunity Commission ("EEOC") issued comprehensive guidance on the use of arrest and conviction records. The EEOC also determined that Title VII of the Civil Rights Act covers transgender employees. The U.S. Department of Labor released three fact sheets on retaliation under the Fair Labor Standards Act, the Family and Medical Leave Act, and the Migrant and Seasonal Agricultural Worker Protection Act. Lastly, the Occupational Safety and Health Administration published a directive on workplace violence.

In addition to the labor law and administrative developments, the U.S. Supreme Court and the Second Circuit both issued several notable employment decisions. The Supreme Court found that the ministerial exception could be used as a defense in employment discrimination cases. It also ruled that pharmaceutical sales representatives fall within the outside sales exemption under the Fair Labor Standards Act ("FLSA"). The Second Circuit refused to alter the single employer test in repeat violation cases under the Occupational Safety and Health Act and found that collective actions under the FLSA and collective actions under the New York Labor Law can be brought together in the same action.

The New York Court of Appeals also issued several important decisions on various employment law issues. It refused to extend the employment-at-will doctrine to cover the regulatory obligations of a hedge fund compliance officer, upheld an oral promise of a bonus to an at-will employee, and ruled that the Division of Human Rights lacked jurisdiction over discrimination and harassment complaints filed by public school students. The Court of Appeals also held that a public employer was not required to arbitrate the meaning of a "no-layoff" clause in a collective bargaining agreement and determined that the procedural safeguards of New York Civil Service Law section 72 apply to public employees that are prevented from returning to work following a voluntary medical leave of absence.

Lastly, there were also several notable developments under the New York City Human Rights Law ("NYCHRL") during this *Survey* year. The New York City Council amended the NYCHRL to impose a

higher burden on employers asserting the "undue hardship" defense in religious accommodation cases, the First Department addressed the standard for evaluating the sufficiency of evidence at the summary judgment stage of an employment discrimination case brought under the NYCHRL, and the Second Department found that the NYCHRL's Local Civil Rights Restoration Act applies retroactively.

I. EMPLOYMENT AT WILL

A. New York State Court of Appeals Refuses to Extend Employment-At-Will Exception

In *Sullivan v. Harnisch*, the New York Court of Appeals rejected an argument that the regulatory obligations of a hedge fund compliance officer justified expanding the common law exception to the employment-at-will doctrine.[1] The plaintiff in the case, Joseph Sullivan, acted as Chief Compliance Officer for Peconic, a hedge fund subject to the oversight of the United States Securities and Exchange Commission.[2]

Sullivan alleged that Peconic terminated his employment after he raised objections to improper stock sales by Peconic's majority owner.[3] Specifically, Sullivan contended that sales to the majority owner's personal account and accounts of his family members were "improper" and "manipulative and deceptive" because they were made in anticipation of transactions by the hedge fund's clients, a practice referred to as "front-running."[4] Sullivan argued that, although he was an at-will employee, the legal and ethical duties of a securities firm and its chief compliance officer justify recognizing a cause of action for a breach of implied contract when its compliance officer is fired for objecting to misconduct.[5] Sullivan also alleged that his dismissal violated the company's policy against retaliation; however, this contention was unsupported by Peconic's Code of Ethics or any specific statement of company policy.[6]

To support his claim, Sullivan attempted to liken himself to the plaintiff in *Wieder v. Skala*, in which the Court of Appeals recognized an exception to the at-will doctrine for an attorney who was terminated after taking steps to report another attorney's misconduct to a

1. *See* 19 N.Y.3d 259, 264-65, 969 N.E.2d 758, 761, 946 N.Y.S.2d 540, 543 (2012).
2. *Id.* at 261, 969 N.E.2d at 759, 946 N.Y.S.2d at 541.
3. *Id.* at 261-62, 969 N.E.2d at 759, 946 N.Y.S.2d at 541.
4. *Id.* (internal quotation marks omitted).
5. *Id.* at 262, 969 N.E.2d at 759, 946 N.Y.S.2d at 541.
6. *Sullivan*, 19 N.Y.3d at 262, 969 N.E.2d at 759, 946 N.Y.S.2d at 541.

disciplinary committee.[7] In *Wieder*, the Court reasoned that the self-regulating nature of the legal profession gave rise to an implied agreement that a law firm could not block an attorney's compliance with the ethical standards of the Bar.[8] The Court further reasoned that the lawyer's ethical obligations were so integral to the employment relationship between a lawyer and a law firm that they could not be separated.[9]

In *Sullivan*, the Court of Appeals affirmed the decision of the First Department and declined to expand the reasoning of *Wieder* to Sullivan's claim.[10] The Court distinguished *Wieder* because Sullivan was not a full-time compliance officer and because employees of a securities firm are not subject to the same duty of self-regulation as members of a law firm.[11] Moreover, the Court noted the existence of numerous laws regulating the securities industry, including whistleblower protections, finding that if Congress had wished to protect an employee like Sullivan, it would have done so.[12]

Despite numerous attempts, the Court of Appeals has consistently refused to expand the *Wieder* exception to the employment at-will doctrine.[13] Thus, in the absence of a contractual or statutory exception, the at-will doctrine continues to govern nearly all employment relationships in New York.

B. Court of Appeals Upholds Oral Promise of Bonus to At-Will Employee

In *Ryan v. Kellogg Partners Institutional Services*, the New York Court of Appeals upheld an award of $175,000 for unpaid wage claims and $205,000 in attorneys' fees because the jury found the plaintiff was promised, but never received, a guaranteed, non-discretionary $175,000 bonus.[14] Specifically, the defendant recruited the plaintiff in early 2003.[15] The plaintiff alleged that the defendant's managing partner offered him compensation consisting of a salary of $175,000 and a guaranteed bonus of $175,000 to be paid in late 2003 or early 2004.[16]

7. *Id.* at 263-64, 969 N.E.2d at 760, 946 N.Y.S.2d at 542 (quoting Wieder v. Skala, 80 N.Y.2d 628, 631, 609 N.E.2d 105, 106, 593 N.Y.S.2d 752, 753 (1992)).
8. *Wieder*, 80 N.Y.2d at 635-36, 609 N.E.2d at 108, 593 N.Y.S.2d at 755.
9. *Id.* at 635, 609 N.E.2d at 108, 593 N.Y.S.2d at 744.
10. *Sullivan*, 19 N.Y.3d at 264, 969 N.E.2d at 761, 946 N.Y.S.2d at 543.
11. *Id.*
12. *Id.* at 265, 969 N.E.2d at 761, 946 N.Y.S.2d at 543.
13. *Id.* at 262-63, 969 N.E.2d at 760, 946 N.Y.S.2d at 542.
14. *See generally* 19 N.Y.3d 1, 968 N.E.2d 947, 945 N.Y.S.2d 593 (2012).
15. *Id.* at 5, 968 N.E.2d at 948, 945 N.Y.S.2d at 594.
16. *Id.* at 6, 968 N.E.2d at 949, 945 N.Y.S.2d at 595.

After accepting the position, but before starting, the plaintiff completed an employment application that contained an employment-at-will acknowledgment, stating that "compensation and benefits are at will and can be terminated, with or without cause or notice, at any time."[17] Additionally, the plaintiff signed an employee handbook acknowledgment confirming his at-will status.[18] The defendant discharged the plaintiff after less than two years of employment and did not pay him the full bonus he had been promised.[19]

The Court of Appeals reasoned that the at-will policy and acknowledgments could not provide a defense to the plaintiff's claim because, while the policy and acknowledgments established that the plaintiff was not guaranteed employment for any period of time and that his compensation and benefits were subject to termination at any time, they did not establish that bonuses were discretionary or that the plaintiff was not entitled to the payment of compensation he was promised at the beginning of his employment.[20] Importantly, the Court found that the at-will policy could not preclude an employee from recovering wages earned before his employment ended.[21]

II. EMPLOYMENT DISCRIMINATION

A. U.S. Supreme Court Rules that Ministerial Exception is a Defense to Employment Discrimination Cases

On January 11, 2012, the Supreme Court, for the first time, recognized the existence of a "ministerial exception" grounded in the First Amendment that precludes application of employment discrimination laws to claims involving religious institutions and their ministers.[22] Specifically, the Court held that the Establishment Clause and Free Exercise Clause of the First Amendment bar employment discrimination lawsuits by ministers against their churches.[23]

Cheryl Perich was employed by the Hosanna-Tabor Evangelical Lutheran Church and School ("Hosanna-Tabor") as a "called" teacher and commissioned minister.[24] In this role, she taught students general

17. *Id.*
18. *Id.* at 6-7, 968 N.E.2d at 949, 945 N.Y.S.2d at 595.
19. *Ryan*, 19 N.Y.3d at 7, 968 N.E.2d at 949-50, 945 N.Y.S.2d at 595-96.
20. *Id.* at 12-13, 968 N.E.2d at 953-54, 945 N.Y.S.2d at 599-600 (citations omitted).
21. *Id.* (citation omitted).
22. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694, 705-06 (2012).
23. *Id.* at 696.
24. *Id.* at 700.

curriculum, as well as religious, classes.[25] She also led the students in prayer on a daily basis and led a weekly school-wide chapel service twice a year.[26]

In 2004, Perich was diagnosed with narcolepsy and went out of work on disability leave.[27] When Perich notified Hosanna-Tabor that she was capable of returning to work, Hosanna-Tabor informed her that it had contracted with a lay teacher to fill her position for the remainder of the school year.[28] A few days later, Hosanna-Tabor determined it was not likely Perich would be capable of returning to work that year or the following year and offered her a "peaceful release" from her call whereby it would pay a portion of her health insurance premiums in exchange for her resignation.[29] Perich refused to resign and produced a doctor's note stating that she would be able to return the following month.[30] On the day she was released to return to work, Perich arrived at work and was asked to leave.[31] Perich refused to leave without a note stating that she reported to work.[32] Later that day, Perich was told that she would likely be fired.[33] In response, Perich informed Hosanna-Tabor that she consulted with an attorney and was prepared to seek legal redress.[34] Hosanna-Tabor ultimately terminated Perich citing her "'insubordination and disruptive behavior,'" as well as "the damage she had done to her 'working relationship' with the school by 'threatening to take legal action.'"[35]

Perich filed a charge with the EEOC, claiming that Hosanna-Tabor terminated her employment because of her disability in violation of the Americans with Disabilities Act of 1990 ("ADA").[36] The EEOC subsequently brought suit against Hosanna-Tabor, alleging that it fired Perich in retaliation for threatening to assert her legal rights under the ADA, and Perich joined in the litigation.[37] Hosanna-Tabor moved for summary judgment and invoked the ministerial exception, claiming that Perich's lawsuit was barred by the First Amendment because the issue

25. *Id.*
26. *Id.*
27. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 700.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 700.
33. *Id.*
34. *Id.*
35. *Id.* (citation omitted).
36. *Id*. at 701.
37. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 701.

pertained to a religious organization and one of its ministers.[38] The district court agreed that the ministerial exception applied and granted summary judgment in favor of Hosanna-Tabor.[39] The Court of Appeals for the Sixth Circuit vacated the decision and remanded the case back to the district court.[40] While the Sixth Circuit agreed that the ministerial exception could bar certain employment discrimination claims against religious institutions, the court determined that Perich did not qualify as a minister.[41] The Supreme Court granted certiorari.[42]

The Supreme Court agreed with the lower courts that the ministerial exception bars employment discrimination suits brought by ministers against their churches because the Establishment Clause and Free Exercise Clause prohibit the government from interfering with the decision of a religious group to fire one of its ministers.[43] The Court, however, disagreed with the Sixth Circuit and found that Perich was a minister within the meaning of the ministerial exception despite the fact that the majority of her work day was devoted to teaching secular subjects and that lay teachers performed the same functions as Perich in her absence.[44] Accordingly, because the Court determined that Perich was a minister within the meaning of the exception, the Court dismissed Perich's employment discrimination suit.[45]

B. New York Court of Appeals Holds that the Division of Human Rights Lacks Jurisdiction over Discrimination and Harassment Complaints Filed by Public School Students

On June 12, 2012, the New York Court of Appeals held that the New York State Division of Human Rights ("Division") does not have jurisdiction over discrimination and harassment complaints filed by public school students under the New York Human Rights Law ("NYHRL").[46] The Court's decision addressed two cases that were

38. *Id*.
39. *Id*.
40. *Id*.
41. *Id*.
42. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 702.
43. *Id*. at 698. The Court specifically noted that "the Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id*. at 703.
44. *Id.* at 708
45. *Id.* at 709.
46. *See* N. Syracuse Cent. Sch. Dist. v. N.Y. Div. of Human Rights, 19 N.Y.3d 481, 488, 973 N.E.2d 162, 164, 950 N.Y.S.2d 67, 69 (2012).

consolidated on appeal against the Division.[47]

In those cases, public school students filed complaints with the Division, alleging that "their respective school districts engaged in an 'unlawful discriminatory practice'" under the NYHRL by permitting the students to be harassed on the basis of race and/or disability.[48] The NYHRL provides, in relevant part:

> It shall be an unlawful discriminatory practice for an education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law . . . to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status . . . .[49]

The school districts each commenced an action pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"), "seeking a writ of prohibition barring the [Division] from investigating the complaints on the ground that a public school district is not an 'education corporation or association' as contemplated by Executive Law § 296 (4)."[50] In the case against the Ithaca City School District ("ICSD"), the Supreme Court, Tompkins County, granted ICSD's appeal from the Division, finding that the District was not an "education corporation or association" under the NYHRL and that the Division, therefore, lacked jurisdiction over the complaint.[51] The Division appealed the decision to the Third Department, Appellate Division, which reversed and held that the term "education corporation or association" should be interpreted broadly to include public school districts such as ICSD.[52] The ICSD appealed the Third Department's decision to the New York Court of Appeals.[53]

In a 4-3 decision, the Court of Appeals reversed the Third Department, holding that a public school district is not an "education corporation or association" under the NYHRL and that the Division does not have jurisdiction over complaints filed by public school

47. *See generally* Ithaca Sch. Dist. v. N.Y. Div. of Human Rights, 87 A.D.3d 268, 926 N.Y.S.2d 686 (3d Dep't 2011); *see also* N. Syracuse Cent. Sch. Dist. v. N.Y. Div. of Human Rights, 83 A.D.3d 1472, 920 N.Y.S.2d 564 (4th Dep't 2011).

48. *N. Syracuse Cent. Sch. Dist.*, 19 N.Y.3d at 488, 973 N.E.2d at 164, 950 N.Y.S.2d at 69 (citing N.Y. EXEC. LAW § 296(4) (McKinney 2005)).

49. N.Y. EXEC. LAW § 296(4).

50. *N. Syracuse Cent. Sch. Dist*., 19 N.Y.3d at 488, 973 N.E.2d at 164, 950 N.Y.S.2d at 69.

51. *Id.* at 489, 973 N.E.2d at 164, 950 N.Y.S.2d at 69.

52. *Id.*

53. *Id.*

students for alleged discrimination or harassment.[54] This holding, however, does not "leave public school students without a remedy" if they are subjected to harassment.[55] As the Court explained, public school students can file a complaint with the Commissioner of Education under section 310 of the Education Law.[56]

III. DEVELOPMENTS UNDER THE NEW YORK CITY HUMAN RIGHTS LAW

A. First Department Addresses Summary Judgment Standard for Claims Under the New York City Human Rights Law

In two decisions, the First Department addressed the standard for evaluating the sufficiency of evidence at the summary judgment stage of an employment discrimination case brought under the NYCHRL. Writing on behalf of a unanimous five-member panel in *Bennett v. Health Management Systems*, Justice Acosta articulated that "no court has yet undertaken an examination of whether, and to what extent, the three-step burden-shifting approach set forth in *McDonnell Douglas* . . . must be modified for [NYCHRL] claims, particularly in the context of the adjudication of summary judgment motions."[57] At the outset, Justice Acosta explained that the Restoration Act required that "all aspects of the [NYCHRL] must be interpreted so as to accomplish the uniquely broad and remedial purposes of the law."[58]

With that principle in mind, Justice Acosta summarized the summary judgment framework for claims brought under the NYCHRL.[59] First, a court considering whether a *prima facie* case has been made should ask: "Do the initial facts described by the plaintiff, if not otherwise explained, give rise to the *McDonnell Douglas* inference of discrimination?"[60] Second,

> [w]here a defendant has put forward evidence of one or more nondiscriminatory motivations for its actions, however, a court should ordinarily avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out. Instead, it should turn to the question of whether the defendant has sufficiently met its burden, as the moving party, of

54. *Id.* at 493, 973 N.E.2d at 167, 950 N.Y.S.2d at 72.

55. *N. Syracuse Cent. Sch. Dist*., 19 N.Y.3d at 495, 973 N.E.2d at 168, 950 N.Y.S.2d at 73.

56. *Id.* (citing N.Y. EDUC. LAW § 310 (McKinney 2009)).

57. Bennett v. Health Mgmt. Sys., Inc., 92 A.D.3d 29, 34, 936 N.Y.S.2d 112, 116 (1st Dep't 2011) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973)).

58. *Bennett*, 92 A.D.3d at 34-35, 936 N.Y.S.2d at 116 (citation omitted).

59. *Id.* at 45, 936 N.Y.S.2d at 124 (internal quotation marks) (emphasis omitted).

60. *Id.*

> showing that, based on the evidence before the court and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under any of the evidentiary routes—*McDonnell Douglas*, mixed motive, 'direct' evidence, or some combination thereof.[61]

Third, "[i]f the plaintiff responds with some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete, a host of determinations properly made only by a jury come into play."[62] Consequently, Justice Acosta concluded that "such evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied."[63] Thus, the First Department's decision in *Bennett* dramatically expanded the power of a plaintiff's pretext evidence, essentially indicating that the existence of any pretext evidence—even where a plaintiff is unable to show any evidence of unlawful discrimination—would nevertheless dictate the denial of summary judgment.

In May of the following year, however, a different panel of the First Department articulated an approach must closer to the traditional standards applied in federal and state employment discrimination claims on summary judgment. In *Melman v. Montefiore Medical Center*, a 4-1 majority opinion, with Justice Acosta as the lone dissenter, held that a plaintiff bringing a claim under the NYCHRL must produce some actual evidence of discrimination in order to survive a motion for summary judgment where an employer has supplied a legitimate, non-discriminatory reason for its actions.[64] The First Department explained that its previous decision in *Bennett* required that an action brought under the NYCHRL "must, on a summary judgment motion, be analyzed both under the McDonnell Douglas framework and the somewhat different 'mixed-motive' framework recognized in certain federal cases."[65] Under the *McDonnell Douglas* framework, "the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating *both* that the stated reasons were false *and* that the discrimination was the real reason" for the adverse employment action.[66] Similarly, under the mixed-motive framework, once an employer proffers evidence of a legitimate reason for the challenged action, the "lesser burden" shifts to

61. *Id.*
62. *Id.*
63. *Bennett*, 92 A.D.3d at 45, 936 N.Y.S.2d at 124.
64. *See* 98 A.D.3d 107, 120, 132, 946 N.Y.S.2d 27, 36, 47 (1st Dep't 2012).
65. *Id.* at 113, 946 N.Y.S.2d at 30.
66. *Id.* at 114, 946 N.Y.S.2d at 30 (emphasis added) (quoting Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 305, 819 N.E.2d 998, 1007, 786 N.Y.S.2d 382, 391 (2004)).

the plaintiff to raise "an issue as to whether the action was 'motivated at least in part by . . . discrimination' or, stated otherwise, was 'more likely than not based in whole or in part on discrimination.'"[67]

B. Second Department Finds that the New York City Human Rights Law's Restoration Act Applies Retroactively

In 2003, four African-American women commenced a lawsuit against HSBC Bank ("HSBC"), alleging that the bank discriminated against them on the basis of race in violation of the NYHRL and the NYCHRL.[68] After HSBC was granted summary judgment on certain causes of action, the case went to trial on plaintiffs' disparate treatment and hostile work environment claims.[69] The jury found in favor of HSBC and the complaint was dismissed.[70] On appeal, the Second Department found that the NYCHRL Local Civil Rights Restoration Act ("Restoration Act") applied retroactively and remitted the case for a new trial on plaintiffs' hostile work environment claim under the NYCHRL.[71]

The New York City Council enacted the Restoration Act in 2005, two years after the instant lawsuit commenced.[72] The core of the Restoration Act was to revise the construction provision of the NYCHRL so that the NYCHRL would be construed liberally in favor of plaintiffs alleging discrimination.[73] The goal was to ensure that the protections afforded by the NYCHRL were not "limited by restrictive interpretations of similarly worded state and federal statutes."[74] Although the Restoration Act does not expressly state that its provisions are to be applied retroactively, the Second Department found that the remedial purpose of the Restoration Act would be undermined if it were applied only prospectively.[75] Accordingly, the court applied the Restoration Act's liberalized standards of construction retroactively.[76] In doing so, it adopted the standard for liability for sexual harassment that the First Department applied in *Williams v. New York City Housing*

67. *Melman*, 98 A.D.3d at 127, 946 N.Y.S.2d at 41 (internal citations omitted).

68. Nelson v. HSBC Bank USA, 87 A.D.3d 995, 995-96, 929 N.Y.S.2d 259, 261 (2d Dep't 2011) (citations omitted).

69. *Id.* at 996, 929 N.Y.S.2d at 261 (citation omitted).

70. *Id.*

71. *Id.* at 998, 1000, 929 N.Y.S.2d at 263, 264.

72. *Id.* at 996, 929 N.Y.S.2d at 261 (citation omitted).

73. *Nelson*, 87 A.D.3d at 996-97, 929 N.Y.S.2d at 262 (citations omitted).

74. *Id.* at 997, 929 N.Y.S.2d at 262 (citations omitted).

75. *Id.* at 998, 929 N.Y.S.2d at 263 (citations omitted).

76. *Id.* (citations omitted).

Authority.[77]

In *Williams*, the First Department, applying the Restoration Act's standards, rejected the "severe or pervasive" test for harassment used under state and federal law.[78] Instead, the First Department concluded that under the NYCHRL, a plaintiff asserting a harassment/hostile work environment claim merely has to prove that he or she was treated "less well" than other employees because of the relevant protected characteristic.[79] The defendant can avoid liability if it can establish as an affirmative defense that the conduct complained of consisted of mere "petty slights and trivial inconveniences."[80] The Second Department found the *Williams* analysis persuasive, adopted it as the standard for liability in hostile work environment claims under the NYCHRL, and remitted the matter for a new trial on the plaintiffs' hostile work environment claim.[81]

C. New York City Human Rights Law Amended to Impose Higher Burden on Employers Asserting Undue Hardship Defense in Religious Accommodation Cases

On August 17, 2011, the New York City Council amended the NYCHRL to impose a separate standard for determining whether accommodating an employee's religious observance or practice poses an "undue hardship" on an employer's business.[82] Mayor Bloomberg signed the bill into law on August 30, 2011, and it became effective immediately.[83] This new standard for determining undue hardship in religious accommodation cases is different from the undue hardship standard used in other types of reasonable accommodation cases.[84]

The amendment defines "undue hardship" in religious accommodation cases as "an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide

77. *Id*. at 999, 929 N.Y.S.2d at 264.

78. *Nelson*, 87 A.D.3d at 999, 929 N.Y.S.2d at 263-64 (citation omitted).

79. *Id.*, 929 N.Y.S.2d at 264.

80. *Id.* (citation omitted).

81. *Id*. at 999-1000, 929 N.Y.S.2d at 264.

82. N.Y.C., N.Y., Int. No. 632-A § 2(b) (Aug. 30, 2011); Subhash Viswanathan, *New York City Council Strengthens Religious Accommodation Law*, N.Y. LABOR & EMP. L. REP. (Aug. 24, 2011), http://www.nylaborandemploymentlawreport.com/2011/08/articles/employment-discrimination/nyc-council-strengthens-religious-accommodation-law.

83. N.Y.C., N.Y., Int. No. 632-A, *supra* note 82, § 2(b); Viswanathan, *supra* note 82.

84. N.Y.C., N.Y., Int. No. 632-A, *supra* note 82.

seniority system)."[85] The amendment also lists specific factors to be considered by employers when determining whether a certain accommodation poses an undue hardship.[86] The factors include, but are not limited to, the following:

> (i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer; (ii) the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and (iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.[87]

Although the employer has the burden of proof to demonstrate that a particular accommodation poses an undue hardship, the amendment makes clear that an accommodation that would result in an employee's inability to perform the essential functions of his or her position constitutes an undue hardship.[88]

IV. ADMINISTRATIVE DEVELOPMENTS

A. EEOC Issues Guidance on Use of Arrest and Conviction Records

On April 25, 2012, the EEOC issued an enforcement guidance ("Guidance") with respect to employers' use of arrest and conviction record information in connection with employment decisions under Title VII of the Civil Rights Act of 1964 ("Title VII").[89] While Title VII does not prohibit employers' use of criminal background checks, the Guidance reaffirms the EEOC's longstanding position that an employer using criminal background information improperly may violate Title VII's prohibition on race and national origin discrimination under either a disparate treatment or disparate impact theory.[90]

Under the disparate treatment theory, an employer violates Title VII when it treats individuals with similar criminal histories differently

85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *See generally* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm [hereinafter EEOC Enforcement Guidance].
90. *Id.* at 6-10.

because of legally protected characteristics, like race or national origin.[91] The Guidance provides, as an example, an employer who rejects an African-American applicant based on his criminal record, but hires a similarly situated White applicant with a comparable criminal record.[92]

Pursuant to the disparate impact theory, the Guidance explains that an employer violates Title VII when (1) "[a] plaintiff demonstrates that the employer's neutral [criminal record screening] policy or practice has the effect of disproportionately screening out a Title VII-protected group;" and (2) "the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity."[93] With respect to the second requirement, the Guidance emphasizes that an exclusion based only on the fact that an employee was arrested will not be "job-related" and "consistent with business necessity" because an arrest, by itself, does not establish that criminal conduct occurred.[94] While convictions will usually serve as sufficient evidence that a person engaged in particular conduct, the Guidance instructs employers to at least use a "targeted screen," weighing the factors set forth in the Eighth Circuit's decision in *Green v. Missouri Pacific Railroad Co.*[95] The factors discussed in *Green* are: (1) "[t]he nature and gravity of the offense or conduct;" (2) "[t]he time that has passed since the offense or conduct and/or completion of the sentence;" and (3) "[t]he nature of the job held or sought."[96] Additionally, the Guidance instructs employers to provide an "individualized assessment for [those] excluded by the screen to determine whether the policy or practice, as applied [to that individual], is job-related and consistent with business necessity."[97]

B. EEOC Determines that Title VII Covers Transgender Employees

On April 20, 2012, the EEOC found that an employee's complaint of discrimination based on "gender identity, change of sex, and/or transgender status is cognizable under Title VII."[98] In this case, Mia Macy, a police detective and transgender woman, applied for an open

91. *Id.* at 6.
92. *Id.*
93. *Id.* at 8.
94. EEOC Enforcement Guidance, *supra* note 89, at 12.
95. *Id.* (citing 549 F.2d 1158, 1160 (8th Cir. 1977)).
96. EEOC Enforcement Guidance, *supra* note 89, at 15; *see also Green*, 549 F.2d at 1160.
97. EEOC Enforcement Guidance, *supra* note 89, at 14.
98. Macy, E.E.O.C. Decision No. 0120120821, at 1 (Apr. 20, 2012).

position with Bureau of Alcohol, Tobacco, Firearms and Explosives ("Agency") in its Walnut Creek crime laboratory.[99] At the time she first discussed the position with the Director of the Walnut Creek lab ("Director"), she had not yet made the transition to being a female.[100] After the conversation, the Director informed Macy on two separate occasions that the position was hers subject to a standard background check.[101] Two months later, Macy informed the contractor responsible for filling the position that she was in the process of transitioning from male to female and the contractor, at Macy's request, notified the Agency of her name and gender change.[102] Five days later, Macy received an email from the contractor informing her that the position at Walnut Creek was no longer available due to federal budget restrictions.[103] As it turns out, the position had not been cut, but rather was filled by someone allegedly further along in the background process.[104]

Shortly thereafter, Macy filed a formal complaint with the EEOC, alleging that she was discriminated against "on the basis of [her] sex, gender identity (transgender woman), and on the basis of sex stereotyping."[105] The EEOC informed Macy that since her claim was discrimination on the basis of gender identity stereotyping, it could not be adjudicated before the EEOC and had to be processed according to Department of Justice policy.[106] The Department of Justice has a separate system for adjudicating claims of sex discrimination under Title VII, as well as a separate system for handling claims of sexual orientation and gender identify discrimination by its employees.[107] The process for handling claims of sexual orientation and gender identity discrimination does not include the same rights and remedies offered under Title VII.[108] Accordingly, Macy had an attorney contact the EEOC to explain that her claims had not been correctly identified by the EEOC.[109] In response, the EEOC changed its position and agreed to hear her claim of discrimination based on sex (female) under Title VII, but it refused to do so with respect to her claim based on gender identity

99. *Id.*
100. *Id.* at 1-2.
101. *Id.* at 2.
102. *Id.*
103. *Macy*, E.E.O.C. Decision No. 0120120821 at 2-3.
104. *Id.* at 3.
105. *Id.* (internal quotation marks omitted).
106. *Id.*
107. *Id.*
108. *Macy*, E.E.O.C. Decision No. 0120120821 at 4.
109. *Id.* at 4.

stereotyping.[110] Macy filed a notice of appeal to the EEOC asking that it adjudicate her claim in its entirety.[111]

The EEOC found that the Agency erred when it bifurcated Macy's complaint into two separate claims.[112] It recognized that the different formulations of her claim were simply two different ways of asserting a claim of discrimination based on sex—a claim which is covered by Title VII.[113] The EEOC reasoned

> [t]hat Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute's protections sweep far broader than that, in part because the term 'gender' encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.[114]

Accordingly, the EEOC held that discrimination against an individual because the individual is transgender violates Title VII.[115]

C. U.S. Department of Labor Issues Three Fact Sheets on Retaliation

In December of 2011, the U.S. Department of Labor's Wage and Hour Division released three new Fact Sheets on unlawful retaliation under the Fair Labor Standards Act ("FLSA"), the Family and Medical Leave Act ("FMLA"), and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"). The Fact Sheets summarize the scope of the anti-retaliation provisions in these three statutes.

Fact Sheet #77A, "Prohibiting Retaliation Under the FLSA," provides general information concerning the FLSA's prohibition of retaliating against any employee who has filed a complaint or cooperated in an investigation.[116] The Fact Sheet reminds employers that an employee who files a complaint under the FLSA is protected from retaliation regardless of whether the complaint was made orally or in writing.[117] The Fact Sheet also states that the anti-retaliation

110. *Id.*
111. *Id.*
112. *Id.* at 6.
113. *Macy*, E.E.O.C. Decision No. 0120120821 at 6.
114. *Id.* at 6.
115. *Id.* at 1.
116. *See generally* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET # 77A: PROHIBITING RETALIATION UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (Dec. 2011), http://www.dol.gov/whd/regs/compliance/whdfs77a.pdf.
117. *Id.* at 1.

provision of the FLSA applies even in situations where there is no current employment relationship; for example, former employees are also protected from retaliation.[118] The Fact Sheet further indicates that complaints made to the Wage and Hour Division are protected and that "most courts have ruled that internal complaints to an employer are also protected."[119]

Fact Sheet #77B, "Protection for Individuals under the FMLA," provides general information concerning the FMLA's prohibition of retaliation against an individual for exercising his or her rights protected under the FMLA.[120] The Fact Sheet provides examples of prohibited conduct, which include: discouraging an employee from using FMLA leave; manipulating an employee's work hours to avoid responsibilities under the FMLA; and counting FMLA leave as absences under "no fault" attendance policies.[121]

Fact Sheet #77C, "Prohibiting Retaliation Under the MSPA," provides general information concerning the MSPA's prohibition of discrimination against a migrant or seasonal agricultural worker who has filed a complaint or participated in any proceeding under the MSPA.[122] The MSPA applies to agricultural employers, agricultural associations, and farm labor contractors who engage in at least one of the following activities: furnishing, employing, soliciting, hiring, or transporting one or more migrant or seasonal agricultural workers.[123]

V. LABOR DEVELOPMENTS

A. Social Media and the National Labor Relations Act

Recently, the NLRB has taken a particularly aggressive and well-publicized interest in social media. Over a nine-month period, the Acting General Counsel ("AGC") of the NLRB issued three social media reports summarizing recent case developments in the context of social media. The reports address both employee discipline for social media activity and employers' social media policies. Additionally,

118. *Id.*

119. *Id.* (emphasis omitted).

120. *See generally* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET # 77B: PROTECTION FOR INDIVIDUALS UNDER THE FMLA (Dec. 2011), http://www.dol.gov/whd/regs/compliance/whdfs77b.pdf.

121. *Id.* at 1.

122. *See generally* U.S. DEP'T OF LABOR, WAGE & HOUR DIVISION, FACT SHEET # 77C: PROHIBITING RETALIATION UNDER THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA) (Dec. 2011), http://www.dol.gov/whd/regs/compliance/whdfs77c.pdf.

123. *Id.* at 1.

there have been a limited number of Administrative Law Judge ("ALJ") decisions addressing these same topics. The sections below, while clearly not exhaustive, provide certain highlights from both the AGC reports and the ALJ decisions.

1. Employee Discipline for Social Media Activity

The AGC reports and ALJ cases address whether an employee's particular use of social media involved protected and concerted activity under the National Labor Relations Act ("NLRA") and, if so, whether the employee's activity was so opprobrious and/or disparaging of the employer to lose the protection of the NLRA. In making these determinations, the reports and the cases examine: (1) whether the post(s) involved workplace concerns (i.e., related to terms and conditions of employment), and (2) whether the postings involved concerted activity as opposed to mere individual gripes, a distinction that is not always clear.

In a report issued in January of 2012, the AGC found to be protected an employee's Facebook post which criticized the employee's employer for mismanagement and promoting an unqualified candidate, and upon which other employees had commented in agreement.[124] Similarly, the AGC determined that an employee's post on a co-worker's Facebook wall about his supervisor's bad attitude and poor management style was also protected activity.[125] Surprisingly, in a report issued in August of 2011, the AGC found that an employee's Facebook posts in which she called her supervisor a "scumbag," a "dick," and a psychiatric patient constituted protected activity.[126]

In *Hispanics United of Buffalo, Inc.*, an ALJ determined that five employees were unlawfully terminated for posting about a co-worker who felt that those five workers did not do enough for their clients.[127]

124. Memorandum from Anne Purcell, Assoc. Gen. Counsel, Office of the Gen. Counsel, Nat'l Labor Relations Bd., Div. of Operations-Mgmt. to all Reg'l Dirs., Officers-in-Charge, and Resident Officers 20-21 (Jan. 24, 2012), *available at* http://www.nlrb.gov/reports-guidance/operations-management-memos [hereinafter AGC Memorandum III].

125. *Id.* at 22-25.

126. Memorandum from Anne Purcell, Assoc. Gen. Counsel, Office of the Gen. Counsel, Nat'l Labor Relations Bd., Div. of Operations-Mgmt. to all Reg'l Dirs., Officers-in-Charge, and Resident Officers 3 (Aug. 18, 2011), *available at* http://www.nlrb.gov/reports-guidance/operations-management-memos [hereinafter AGC Memorandum I]; *see also* Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Nat'l Labor Relations Bd., Div. of Advice, to Jonathan B. Kreisberg, Reg'l Dir., Region 34 3, 9-11 (Oct. 5, 2010), *available at* http://www.nlrb.gov/cases-decisions/advice-memos [hereinafter AGC Memorandum II].

127. 359 N.L.R.B. 37 (Dec. 14, 2012).

The employees were terminated after the co-worker reported the five employees to management.[128] The ALJ found that the employer unlawfully terminated the employees because they were taking a step towards taking group action to defend themselves against the accusations they reasonably thought the employee would make to management about their treatment of customers, which was protected activity.[129]

In another case, an ALJ found protected the profane comments of two restaurant employees who discovered they owed taxes because of their employer's calculation of their tax withholdings.[130] Notably, the ALJ declared that an employee's indication that she "liked" the commentary on Facebook was sufficiently meaningful to constitute concerted activity.[131]

In *Karl Knauz Motors, Inc.*, an employee was terminated after (1) posting photographs and sarcastic comments about the employer's refreshment table at a luxury car sales event, and (2) posting a photograph of an accident that occurred at another car dealership owned by the employee's employer.[132] The ALJ found that termination was unlawful to the extent it was based on comments about inadequate refreshments because the employee had previously raised concerns about the refreshments at a staff meeting and had previously discussed how the refreshments might negatively affect sales.[133] Nevertheless, the ALJ declared that the employee was lawfully terminated for posting the photograph regarding the accident at the employer's other car dealership.[134]

The AGC reports also discuss certain social media activity which has not been found to be protected by the NLRA. Such activities include a statement, to which no co-workers responded, that an employee was "a hair away from setting it off."[135] Another social media poster was found to be lawfully terminated for calling the employer's customers "rednecks" and posting that he "hoped they choked on glass as they drove home drunk."[136] Finally, the AGC determined that an employer properly discharged a crime and public

128. *Id.*
129. *Id.*
130. Triple Play Sports Bar & Grille, Case No. 34-CA-12915, 2012 N.L.R.B. Lexis 13, *6-8, *69 (Jan. 3, 2012).
131. *Id.* at *22.
132. Case No. 13-CA-46452, 2011 N.L.R.B. Lexis 554, *9, *13 (Sept. 28, 2011).
133. *Id.* at *22.
134. *Id.* at *25, *26-27.
135. AGC Memorandum III, *supra* note 124, at 34-35.
136. AGC Memorandum II, *supra* note 126, at 12.

safety beat reporter for inappropriate and unprofessional postings on Twitter, which included statements that the city of Tucson was slacking because there were no overnight homicides and suggesting that the new theme-song for Tucson should be let the bodies hit the floor.[137]

2. Employers' Social Media Policies

The vast majority of social media policies evaluated by the AGC have been found unlawful. A social media policy will be deemed unlawful if it explicitly restricts employees' section 7 rights under the NLRA, or if employees would reasonably construe the language to restrict their section 7 activity.[138]

The AGC reports indicate that provisions such as, "[d]on't release confidential guest, team member or company information," or "[n]ever discuss confidential information at home or in public areas," are unlawful.[139] Additionally, according to the AGC, policies which restrict employees from sending social media communications containing "offensive, demeaning, abusive or inappropriate remarks" are likely to be considered overbroad and unlawful.[140]

The AGC reports also indicate that policies which fail to provide specific examples of the type of conduct prohibited are more likely to run afoul of the NLRA. For example, a provision requiring "that social networking site communications be made in an honest, professional, and appropriate manner, without defamatory or inflammatory comments about the employer" was found to be overbroad where the terms "professional" and "appropriate" were left undefined.[141] Similarly, the AGC concluded that "[w]ithout further clarification of what [conduct is considered] 'objectionable or inflammatory,' employees would reasonably construe [such a] rule to prohibit robust but protected discussions about working conditions or unionism."[142] Additionally, a social media policy instructing employees to "[t]hink carefully about 'friending' co-workers" was also found to be unlawfully overbroad.[143]

137. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Nat'l Labor Relations Bd., Div. of Advice, to Cornele A. Overstreet, Reg'l Dir. Region 28, 5 (Apr. 21, 2011) *available at* http://www.nlrb.gov/cases-decisions/advice-memos.

138. *See, e.g.*, AGC Memorandum II, *supra* note 126, at 17-22.

139. Memorandum from Anne Purcell, Assoc. Gen. Counsel, Office of the Gen. Counsel, Div. of Operations-Mgmt., Nat'l Labor Relations Bd., to all Reg'l Dirs., Officers-in-Charge and Resident Officers, Report of the Acting General Counsel Concerning Social Media Case 4 (May 30, 2012) [hereinafter AGC Memorandum IV].

140. *Id.* at 8.

141. AGC Memorandum II, *supra* note 126, at 14-15.

142. AGC Memorandum IV, *supra* note 139, at 10.

143. *Id.* at 8-9 (internal quotation marks omitted) (alteration in original).

Finally, the AGC reports indicate that the inclusion of a disclaimer informing employees that the policy will not interfere, and is not intended to interfere, with employees' section 7 rights will not be sufficient, standing alone, to save an otherwise defective policy.[144]

The AGC reports focus primarily on policies and provisions which have been found to violate the NLRA; however, in the third report, the AGC finally provides the full text of a social media policy found to be lawful under the NLRA.[145] Additionally, while the AGC reports appear to present significant obstacles in drafting lawful social media policies, it should be noted that early ALJ cases have provided some indication that ALJs and the Board may not necessarily give deference to the AGC's guidance.[146]

B. D.C. Circuit Grants Injunction Preventing Implementation of NLRB's Notice-Posting Rule

On August 30, 2011, the NLRB issued a Final Rule requiring private sector employers to post a notice advising employees of their right to join a union and other rights under the NLRA.[147] Originally, the Rule was set to take effect on November 14, 2011.[148] However, in response to lawsuits filed in September 2011, the NLRB voluntarily postponed implementation of the Final Rule, first until January 31, 2012, and subsequently until April 30, 2012, in order to facilitate the resolution of the legal challenges.[149]

On March 2, 2012, the U.S. District Court for the District of Columbia held that the NLRB had the authority to require employers to

144. *Id.* at 12.

145. *Id.* at 22-24.

146. *See*, *e.g.*, Triple Play Sports Bar, Case No. 34-CA-12915, 2012 N.L.R.B. Lexis 13 (Jan. 3, 2013) (rejecting argument that social media policy prohibiting "inappropriate" communications was unlawful); G4S Secure Solutions Inc., Case No. 28-CA-23380, 2012 N.L.R.B. Lexis 161, *72-73 (Mar. 29, 2012) (finding parts of social media policy unlawful but upholding restriction on posting photographs of uniformed employees based on employer privacy concerns).

147. Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54006 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

148. *Id.*

149. *See* Subhash Viswanathan, *NLRB Postpones Effective Date of Notice-Posting Requirement*, N.Y. LABOR & EMP'T L. REP. (Dec. 23, 2011), http://www.nylaborandemploymentlawreport.com/2011/12/articles/national-labor-relations-board-1/nlrb-postpones-effective-date-of-noticeposting-requirement/. *See also* Erin Sylvester Torcello, *NRLB Postpones Implementation of Notice Posting Rule*, N.Y. LABOR & EMP'T L. REP. (Oct. 6, 2011), http://www.nylaborandemploymentlawreport.com/2011/10/articles/national-labor-relations-board-1/nlrb-postpones-implementation-of-notice-posting-rule/.

post the notice, but that certain enforcement provisions of the NLRB's Rule were invalid.[150] Specifically, the court held that the provisions of the Rule which deemed an employer's failure to post the notice an unfair labor practice and which tolled the statute of limitations against those employers violated the NLRA.[151]

The plaintiffs appealed the portion of the district court's decision upholding the Final Rule to the U.S. Court of Appeals for the D.C. Circuit.[152] On April 17, 2012, just two weeks before the Rule was to go into effect, the U.S. Court of Appeals for the D.C. Circuit issued an order granting an injunction that prevented implementation of the Rule until it had the opportunity to the merits of the appeal.[153]

C. U.S. District Court Invalidates NLRB's "Quickie" Election Rule

On June 22, 2011, the NLRB, invoking its rarely used rulemaking powers, issued a highly controversial notice of proposed rulemaking to institute new union representation election procedures.[154] Given the proposed rule's shorter timetable for representation elections, it has

150. Nat'l Ass'n of Mfrs. v. Nat'l Labor Relations Bd., 846 F.Supp. 34, 38 (D.C. Cir. 2012); *see also* Subhash Viswanathan, *U.S. District Court Upholds NLRB's Notice Posting Rule, but Holds Certain Enforcement Provisions to be Invalid*, N.Y. LABOR & EMP'T L. REP. (Mar. 4, 2012), http://www.nylaborandemploymentlawreport.com/2012/03/articles/labor-relations/us-district-court-upholds-nlrbs-notice-posting-rule-but-holds-certain-enforcement-provisions-to-be-invalid/.

151. *Nat'l Ass'n of Mfrs.*, 846 F.Supp. at 38. On April 13, 2012, the U.S. District Court for the District of South Carolina held, contrary to the District of Columbia District Court, that the NLRB's posting rule was invalid because the NLRB did not have the requisite authority to promulgate the rule. Chamber of Commerce v. NLRB, 856 F.Supp.2d 778, 780 (D.S.C. 2012); *see also* Subhash Viswanathan, *U.S. District Court for the District of South Carolina Holds that NLRB Notice Posting Rule is Invalid*, N.Y. LABOR & EMP'T L. REP. (Apr. 15, 2012), http://www.nylaborandemploymentlawreport.com/2012/04/articles/national-labor-relations-board-1/us-district-court-for-the-district-of-south-carolina-holds-that-nlrb-notice-posting-rule-is-invalid/.

152. *See* Subhash Viswanathan, *U.S. District Court Denies Request for Stay of NLRB Posting Requirement Pending Appeal*, N.Y. LABOR & EMP'T L. REP. (Mar. 12, 2012), http://www.nylaborandemploymentlawreport.com/2012/03/articles/labor-relations/us-district-court-denies-request-for-stay-of-nlrb-posting-requirement-pending-appeal/.

153. Nat'l Ass'n of Mfrs. v. Nat'l Labor Relations Bd., No. 12-5068, 2012 U.S. App. LEXIS 10768, at *4 (D.C. Cir. Apr. 17, 2012); *see also* Subhash Viswanathan, *D.C. Circuit Court of Appeals Grants Injunction Precluding Implementation of NLRB Notice Posting Rule*, N.Y. LABOR & EMP'T L. REP. (Apr. 17, 2012), http://www.nylaborandemploymentlawreport.com/2012/04/articles/labor-relations/dc-circuit-court-of-appeals-grants-injunction-precluding-implementation-of-nlrb-notice-posting-rule/; *see also Employee Rights Notice Posting*, NAT'L LABOR RELATIONS BD., http://www.nlrb.gov/poster (last visited Mar. 22, 2013).

154. Representation-Case Procedures, 76 Fed. Reg. 36,812 (proposed June 22, 2011) (to be codified at 29 C.F.R. pts. 101, 102, 103).

commonly been referred to as the "quickie" or "ambush" election rule.[155] On November 30, 2011, the majority of the NLRB voted to adopt portions of the proposed rule, while deferring action on the remaining elements.[156] In accordance with this vote, the NLRB published a Final Rule on December 22, 2011, which was set to go into effect on April 30, 2012.[157]

The Final Rule made significant changes to existing representation case procedures, including: (i) limiting evidence produced at the pre-election hearing to only that which is necessary to determine whether a question concerning representation exists; (ii) eliminating the automatic right to file briefs with the regional director after the pre-election hearing; (iii) eliminating a party's right to appeal the regional director's determinations to the NLRB prior to the election; (iv) providing for only a single appeal after the election when any such request can be consolidated with a request for review of any post-election rulings; (v) eliminating the recommendation that the regional director should ordinarily not schedule an election sooner than twenty-five days after the decision and direction of election; and (vi) limiting circumstances under which the Board will grant a party's request for special permission to appeal to the Board.[158] Furthermore, while the Final Rule did not establish a mandatory time for holding elections, it did require that the regional director set the election at the earliest date practicable.[159] In his dissent, Board Member Brian Hayes estimated that the changes would result in elections held between ten and twenty-one days from the date of the election request—far shorter than the current thirty-eight day median.[160]

155. *See* Tyler Hendry, *U.S. District Court Invalidates "Quickie" Election Rule*, N.Y. LABOR & EMP'T L. REP. (May 15, 2012), http://www.nylaborandemploymentlawreport.com/2012/05/articles/labor-relations/us-district-court-invalidates-quickie-election-rule/.

156. Board Resolution No. 2011-1, NAT'L LABOR RELATIONS BD. (November 30, 2011), *available at* http://nlrb.gov/sites/default/files/documents/3089/final_rule_resolution_11-28.pdf.

157. Representation-Case Procedures, 76 Fed. Reg. 80,138 (proposed Dec. 22, 2011) (to be codified at 29 C.F.R. pts. 101, 102).

158. Board Resolution No. 2011-1, NAT'L LABOR RELATIONS BD. (June 22, 2011), *available at* http://nlrb.gov/sites/default/files/documents/3089/final_rule_resolution_11-28.pdf; *see also* Representation-Case Procedures, 76 Fed. Reg. 80,141 (proposed Dec. 22, 2011) (to be codified at 29 C.F.R. pts. 101, 102).

159. Representation-Case Procedures, 76 Fed. Reg. 80,140 (proposed Dec. 22, 2011) (to be codified at 29 C.F.R. pts. 101, 102).

160. *Dissenting View of Member Brian E. Hayes* 77, NAT'L LABOR RELATIONS BD., http://www.nlrb.gov/sites/default/files/documents/525/dissent.pdf (last visited Mar. 24, 2013).

On December 20, 2011, the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace filed a lawsuit challenging the validity of the Final Rule in the U.S. District Court for the District of Columbia.[161] On May 14, 2012, the district court held the Rule to be invalid, finding that the NLRB lacked the statutorily-required three-member quorum when it purported to adopt the Final Rule.[162] Specifically, the district court found that because Board Member Hayes did not cast a vote, he did not participate in the decision to adopt the Final Rule and could not be counted toward establishing a quorum.[163] Because the court found that the NLRB failed to meet the quorum requirement, it did not address the merits of the plaintiffs' challenge to the Final Rule.[164]

On May 15, 2012, in response to the district court's decision, the NLRB announced that it was rescinding its previously-issued guidance regarding the Rule and that all representation elections would continue to be processed under the old rules.[165]

D. NLRB Modifies Standard for Determining Appropriate Bargaining Units in Non-Acute Healthcare Facilities

In *Specialty Healthcare and Rehabilitation Center of Mobile*, the NLRB overruled its long-standing precedent and modified the standard for determining appropriate bargaining units in non-acute healthcare facilities.[166] In that case, the union petitioned to be certified as the bargaining agent for a group of 53 certified nurse assistants ("CNAs").[167] The employer argued that the group of CNAs was not an appropriate unit by themselves and that, under the Board's *Park Manor Care Center, Inc.*[168] decision, the only appropriate unit was one that included all nonprofessional service and maintenance employees.[169]

For more than twenty years, the NLRB had applied *Park Manor Care Center*'s "'pragmatic or empirical community of interest'

161. Chamber of Commerce v. NLRB, 879 F.Supp.2d 18, 30 (D.D.C. 2012).

162. *Id.* at 20-21.

163. *Id.* at 21.

164. *Id.* at 30-31. The NLRB currently has an appeal pending before the D.C. Circuit of Appeals. *See* Brief for Petitioner, Chamber of Commerce v. NLRB, No. 12-5250 (D.C. Cir. 2012), *available at* www.nlrb.gov/sites/default/files/documents/3951/filed-appellant-brief.pdf.

165. *Election Procedure Rule Changes that Took Effect April 30 are Suspended*, NAT'L LABOR RELATIONS BD., http://www.nlrb.gov/node/3990 (last visited Mar. 24, 2013).

166. 357 N.L.R.B. No. 83, *2 (2011).

167. *Id.* at *6.

168. 305 N.L.R.B. 872, 873 (1991).

169. *Specialty Healthcare*, 357 N.L.R.B. No. 83 at *2.

approach" with respect to unit determination decisions in non-acute healthcare facilities.[170] Under this approach, the NLRB would exercise "its discretion to determine appropriate units" to avoid burdening healthcare facilities with many smaller units which could be represented by multiple unions, thereby making it more "'costly for the employer to deal with because of repetitious bargaining and/or frequent strikes, jurisdictional disputes and wage whipsawing.'"[171]

In *Specialty Healthcare*, the NLRB concluded that the *Park Manor* approach had "become obsolete" and was "not consistent with [the NLRB's] statutory charge."[172] The NLRB overruled *Park Manor* and determined that the "traditional community-of-interest" approach must be applied to non-acute healthcare facilities.[173] Under the traditional community-of-interest standard, the NLRB examines whether the employees in the proposed unit

> are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work . . . are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.[174]

The NLRB went on to reiterate and clarify the showing required when an employer asserts that the petitioned-for unit is not appropriate because another group of employees must also be included in the unit.[175] As the NLRB explained, "[b]ecause the proposed unit need only be *an* appropriate unit and not be the *only* [appropriate] or the most appropriate unit . . . demonstrating that another unit containing" additional employees is also "appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate."[176] Instead, the employer must show that the employees it seeks to include in the unit share an "overwhelming community of interest" with the employees in the proposed unit.[177]

170. *Id.* at *6. (quoting 305 N.L.R.B. at 875 n.16).

171. *Specialty Healthcare*, 357 N.L.R.B. No. 83 at *6 (quoting *Park Manor Care Center, Inc.*, 305 N.L.R.B. at 876).

172. *Specialty Healthcare*, 357 N.L.R.B. No. 83 at *2.

173. *Id.*

174. *Id.* at *41 (quoting United Operations, Inc., 338 N.L.R.B. 123, 123 (2002)).

175. *Specialty Healthcare*, 357 N.L.R.B. No. 83 at *41-54.

176. *Id.* at *46 (emphasis added).

177. *Id.* at *50.

E. President Obama Makes Three Recess Appointments to the NLRB

On January 4, 2012, President Barack Obama announced his intention to recess-appoint three new members to the NLRB.[178] President Obama's announcement came a day after the NLRB lost the quorum it had when Board Member Craig Becker's recess appointment expired on January 3, 2012.[179] Of the three recess appointees, two (Sharon Block and Richard F. Griffin, Jr.) are Democrats, and one (Terence Flynn) is a Republican.[180]

Previously, Ms. Block served as the Deputy Assistant Secretary for Congressional Affairs at the U.S. Department of Labor.[181] Mr. Griffin previously served as General Counsel for International Union of Operating Engineers.[182] Mr. Flynn previously served as Chief Counsel to Board Member Brian Hayes and former Board Member Peter Schaumber.[183] Mr. Flynn resigned from the NLRB on May 25, 2012.[184] While Mr. Flynn did not make his resignation effective until July 24, 2012, he immediately recused himself from all NLRB activities and requested that his nomination be withdrawn.[185]

VI. WAGE AND HOUR DEVELOPMENTS

A. U.S. Supreme Court Rules that Pharmaceutical Sales Representatives Fall Within the Outside Sales Exemption

On June 18, 2012, the U.S. Supreme Court affirmed a decision of the Ninth Circuit Court of Appeals finding that pharmaceutical sales representatives at GlaxoSmithKline fell within the outside sales

178. Subhash Viswanathan, *President Obama Announces Three Recess Appointments to NLRB*, N.Y. LABOR & EMP. L. REP. (Jan. 5, 2012), http://www.nylaborandemploymentlawreport.com/2012/01/articles/national-labor-relations-board-1/president-obama-announces-three-recess-appointments-to-nlrb/.

179. *Craig Becker*, NAT'L LABOR RELATIONS BD., http://nlrb.gov/who-we-are/board/craig-becker (last visited Mar. 25, 2013).

180. Viswanathan, *supra* note 178.

181. *Sharon Block*, NAT'L LABOR RELATIONS BD., http://www.nlrb.gov/who-we-are/board/sharon-block (last visited Mar. 24, 2013).

182. *Richard F. Griffin Jr.*, NAT'L LABOR RELATIONS BD., http://www.nlrb.gov/who-we-are/board/richard-griffin (last visited Mar. 24, 2013).

183. *Terence F. Flynn*, NAT'L LABOR RELATIONS BD., http://www.nlrb.gov/who-we-are/board/terence-f-flynn (last visited Mar. 24, 2013).

184. *Id.*; Aamer Madhani, *NLRB Official Accused of Leaking to Romney Adviser Resigns*, USA TODAY, May 28, 2012, http://content.usatoday.com/communities/theoval/post/2012/05/nlrb-flynn-resign-leak-to-romney-adviser/1.

185. Madhani, *supra* note 184.

exemption from the overtime pay requirements of the FLSA.[186] As reported in last year's *Survey* article, the Second Circuit Court of Appeals had reached the opposite conclusion in July of 2010, finding that pharmaceutical sales representatives employed by Novartis were not FLSA-exempt and that a class of more than 7,000 current and former employees in that position were entitled to pursue their overtime claims.[187] The Supreme Court's 5-4 decision resolved the split in the circuit courts on the scope of the FLSA's outside sales exemption and addressed the amount of deference owed to the Secretary of Labor's interpretation of the U.S. Department of Labor's regulations promulgated under the FLSA.[188]

In amicus briefs filed with both the Second and Ninth Circuits, the Secretary of Labor initially took the position that a "sale" as described in the regulations required a "consummated transaction directly involving the employee for whom the exemption is sought."[189] Because pharmaceutical sales representatives promote drugs to physicians in exchange for nonbinding commitments to prescribe the drugs in appropriate cases, the Secretary argued that they did not "make sales" and, accordingly, could not qualify for the outside sales exemption.[190] After the Supreme Court granted certiorari, however, the Secretary argued instead that an employee does not make a sale unless he "actually transfers title to the property at issue."[191]

Although an agency's interpretation of its own ambiguous regulations is normally entitled to deference, the majority found "strong reasons" for not deferring to the Secretary's interpretation in this instance.[192] Specifically, the majority found that the Secretary's current interpretation would potentially impose massive liability on employers without fair warning, especially given the U.S. Department of Labor's apparent acquiescence in the longstanding pharmaceutical industry practice of treating sales representatives as exempt.[193] In addition, the majority found that the Secretary's interpretation was not persuasive in its own right for a number of reasons, including that it was first

186. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2161 (2012).

187. Kerry W. Langan & Katherine Ritts Schafer, *Labor & Employment Law, 2010-11 Survey of New York Law*, 62 SYRACUSE L. REV. 709, 735-36 (2012).

188. *Christopher*, 132 S. Ct. at 2165.

189. *Id.* at 2165-66 (citations omitted).

190. Brief for the Secretary of Labor as Amicus Curiae Supporting Plaintiffs-Appellants at *10-11, Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012) (No. 10-15257).

191. *Christopher*, 132 S. Ct. at 2166 (citation omitted).

192. *Id.* at 2167.

193. *Id.* at 2167-69.

announced in a series of amicus briefs with no opportunity for public comment, that the Secretary's initial interpretation argued before the Second and Ninth Circuits had proven to be untenable, and that it was "flatly inconsistent" with the FLSA's definition of "sale."[194]

The majority held that the FLSA's statutory language regarding the outside sales exemption called for a functional inquiry, taking into consideration an employee's responsibilities in the context of the particular industry in which he or she works.[195] In light of the unique regulatory environment within which pharmaceutical companies operate, including the prohibition against dispensing certain drugs without a physician's prescription, the majority found that the sales representatives' promotional efforts to obtain non-binding commitments from physicians was "tantamount . . . to a paradigmatic sale of a commodity" within the pharmaceutical industry.[196]

The majority conclusion was further supported by the fact that the petitioners "bear all of the external indicia of salesmen," including that they worked away from the office with minimal supervision and received incentive compensation for their efforts.[197] The majority also concluded that their holding comported with the apparent purpose of the FLSA's exemption, because pharmaceutical sales representatives who typically earn over $70,000 per year are hardly the type of employees the FLSA was intended to protect.[198]

B. Second Circuit Finds that FLSA Collective Actions and Class Actions Under the New York Labor Law Can Be Brought in the Same Lawsuit

On September 26, 2011, the Second Circuit held that collective actions brought under the FLSA and class actions brought under the New York Labor Law ("NYLL") can be heard together in the same case despite the fact that the FLSA requires plaintiffs to affirmatively "opt in" to join the action and the NYLL allows plaintiffs to pursue a traditional "opt out" class action.[199] In this case, a group of plaintiffs who were employed by the defendant's restaurant as "front waiter/captain" filed suit against the restaurant under the FLSA and

194. *Id.* at 2169.
195. *Id.* at 2170.
196. *Christopher*, 132 S. Ct. at 2171-72.
197. *Id.* at 2172-73.
198. *Id.* at 2173.
199. Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234, 239 (2d Cir. 2011).

NYLL claiming its tip practices violated state and federal law.[200] The plaintiffs also claimed that the restaurant violated the NYLL "spread of hours" provision when it failed to pay them an extra hours pay on days when they worked more than ten hours.[201]

Shortly after the plaintiffs brought suit in the Southern District of New York, they filed a motion asking the court to certify the class as to their claims under the NYLL.[202] The district court granted the plaintiffs' motion and the restaurant appealed to the Second Circuit.[203] The Second Circuit affirmed the district court's decision on class certification and held that the district court properly exercised supplemental jurisdiction over plaintiffs' NYLL claims such that plaintiffs could bring both their class action and collective action in federal court.[204] In doing so, the Second Circuit rejected the restaurant's argument that the FLSA's requirement that employees affirmatively opt-in to a collective action would be undermined when employees bring actions alleging both an FLSA opt-in collective action and a NYLL opt-out class action.[205] The court reasoned that there was no inherent conflict between the opt-in and opt-out procedure, despite the fact that the number of employees in the opt-out class would likely be much higher than the number in the opt-in collective action, as both actions derived from the same common nucleus of operative facts (the restaurant's compensation policies and practices).[206] Furthermore, the court determined that there were no other factors present which would render the court's exercise of supplemental jurisdiction an abuse of discretion.[207]

VII. PUBLIC SECTOR EMPLOYMENT

A. "No Layoff" Clause in Public Employer's Collective Bargaining Agreement is Not Arbitrable

On November 17, 2011, the New York Court of Appeals determined that the Village of Johnson City ("Village") and the Johnson City Professional Fire Fighters, Local 921 IAFF ("Union") were not required to arbitrate the meaning of a "no-layoff" clause in their

200. *Id.*
201. *Id.*
202. *Id.* at 242.
203. *Id.* at 243.
204. *Shahriar*, 659 F.3d at 250, 253 (internal citations omitted).
205. *Id.* at 244.
206. *Id.* at 244-45 (citations omitted).
207. *Id.* at 246-50 (internal citations omitted).

collective bargaining agreement ("CBA").[208] The relevant portion of the "no-layoff" clause at issue in this case provided that "[t]he Village shall not lay-off any member of the bargaining unit during the term of this contract."[209] During the term of the contract, the Village abolished certain positions within the government, including six firefighter positions due to budgetary constraints.[210] The Union filed a grievance claiming the no-layoff clause in the CBA prevented this action.[211] When the Village denied the grievance, the Union served the Village with its notice of intent to arbitrate and brought suit in supreme court to enjoin the Village from terminating the firefighters until a determination had been reached at arbitration.[212] The Village brought a simultaneous proceeding to stay arbitration.[213]

The supreme court granted the Union's application to compel arbitration and the appellate division affirmed, finding that the CBA had a broad grievance and arbitration provision and the no-layoff clause was not subject to any prohibition against arbitration.[214] The Village appealed this decision to the Court of Appeals, which reversed the lower courts' determinations.[215] The Court of Appeals held that the no-layoff clause was not arbitrable because it was not explicit, unambiguous, and comprehensive.[216] In making its determination, the Court of Appeals relied on the long-standing principle that a job security provision, such as the one at issue here, "that is not explicit in its terms is violative of public policy, rendering it invalid and unenforceable."[217] In other words, a job security provision is enforceable "only if the provision is 'explicit,' the CBA extends for 'a reasonable period of time,' and the CBA 'was not negotiated in a period of legislatively declared financial emergency between parties of unequal bargaining power.'"[218] In this case, the no-layoff clause did not

208. Johnson City Prof'l Firefighters Local 921 v. Vill. of Johnson City, 18 N.Y.3d 32, 35-36, 958 N.E.2d 899, 900, 934 N.Y.S.2d 770, 771 (2011) (internal quotation marks omitted).

209. *Id.* at 36, 958 N.E.2d at 900, 934 N.Y.S.2d at 771.

210. *Id.*, 958 N.E.2d at 900, 934 N.Y.S.2d at 772.

211. *Id.*

212. *Id.*, 958 N.E.2d at 900-01, 934 N.Y.S.2d at 772.

213. *Johnson City Prof'l Firefighters Local 921*, 18 N.Y.3d at 36, 958 N.E.2d at 901, 934 N.Y.S.2d at 772.

214. *Id.*

215. *Id.*

216. *Id.* at 37, 958 N.E.2d at 901, 934 N.Y.S.2d at 773.

217. *Id.*, 958 N.E.2d at 901, 934 N.Y.S.2d at 772.

218. *Johnson City Prof'l Firefighters Local 921*, 18 N.Y.3d at 37, 958 N.E.2d at 901, 934 N.Y.S.2d at 772 (quoting Burke v. Bowen, 40 N.Y.S.2d 264, 267, 353 N.E.2d 567, 568, 386 N.Y.S.2d 654, 656 (1976)).

explicitly prohibit the Village from eliminating firefighter positions due to budgetary necessity, nor did it explicitly protect the firefighters from the elimination of their positions due to economic or budgetary constraints.[219] Furthermore, the term "layoff" was undefined in the CBA and subject to differing interpretations.[220] Accordingly, the Court held that because the no-layoff clause was "not explicit, unambiguous and comprehensive, there [could be] nothing for the Union to grieve or for an arbitrator to decide."[221]

B. New York Civil Service Law Section 72 Protections Apply to Public Employees Returning from Voluntary Medical Leave

In *Sheeran v. New York State Department of Transportation*,[222] the Court of Appeals held that the procedural safeguards of New York Civil Service Law section 72 apply to public employees who are prevented from returning from work following a voluntary absence.[223] That law—which historically had been applied only to public employees placed on an involuntary leave of absence—provides certain procedural protections to public employees, including the right to a hearing concerning the employer's decision to place the employee on leave.[224]

In *Sheeran*, two state employees attempted to return to work from voluntary leaves of absence and submitted the necessary certification from their personal physicians.[225] Their employers required each to first submit to a medical examination by a state-affiliated physician.[226] As a result, the employees were found unfit to return to work, placed on involuntary leave, and were eventually terminated following a continuous absence from work for one year pursuant to section 73 of the New York Civil Service Law.[227] Their requests for hearings were denied on the basis that section 72 "only applied to employees being removed from the work site."[228]

In separate decisions, the employees' petitions under Article 78

219. *Johnson City Prof'l Firefighters Local 921*, 18 N.Y.3d at 38, 958 N.E.2d at 902, 934 N.Y.S.2d at 773.

220. *Id.*

221. *Id.*

222. 18 N.Y.3d 61, 958 N.E.2d 1197, 935 N.Y.S.2d 281 (2011).

223. *Id.* at 63, 958 N.E.2d at 1197, 935 N.Y.S.2d at 282.

224. *See* N.Y. CIV. SERV. LAW § 72 (McKinney 2005).

225. *Sheeran*, 18 N.Y.3d at 63, 958 N.E.2d at 1197, 935 N.Y.S.2d at 282.

226. *Id.*

227. *Id.* at 63, 958 N.E.2d at 1198, 935 N.Y.S.2d at 282.

228. *Id.* at 63-64, 958 N.E.2d at 1198, 935 N.Y.S.2d at 282.

were denied by the Third Department.[229] The Court of Appeals reversed, finding "no indication that the Legislature intended to make a distinction between an employee who is placed on involuntary sick leave from the job site and one that is placed on such leave from a voluntary absence."[230] As the Court explained, the "remedial purpose [of section 72] applies equally here, where an employee is out on sick leave and then seeks to return to work but is prohibited based on a finding that he or she is unfit.[231] To read the statute otherwise," the Court reasoned, "would discourage employees from taking voluntary leave, since they would have greater rights if they remained on the job and waited to be involuntarily removed—a result the legislature surely did not intend."[232]

VIII. DEVELOPMENTS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT

A. Second Circuit Refuses to Alter Single Employer Test in Repeat Violation Case

In *Solis v. Loretto-Oswego Residential Healthcare Facility*, the Second Circuit held that certain citations issued to the Loretto-Oswego Residential Healthcare Facility ("Loretto-Oswego") did not qualify as "repeat" citations under the Occupational Safety and Health ("OSH") Act based on previous violations issued to an affiliate.[233] A violation of the OSH Act is characterized as a "repeat" violation, and carries a higher penalty, when that same employer has been previously cited for a substantially similar condition.[234]

In 2003, an ALJ upheld the U.S. Secretary of Labor's "repeated" designation of the citations, holding that the related entities operated as a single employer.[235] Loretto-Oswego appealed and the Occupational Safety and Health Review Commission ("Commission") reversed the ALJ in a decision issued in January of 2011.[236] In so holding, both the ALJ and the Commission had followed Commission precedent and

229. *See* Sheeran v. N.Y. Dep't of Transp., 68 A.D.3d 1199, 891 N.Y.S.2d 167 (3d Dep't 2009); Birnbaum v. N.Y. Dep't of Labor, 75 A.D.3d 707, 903 N.Y.S.2d 284 (3d Dep't 2010).

230. *Sheeran*, 18 N.Y.3d at 65, 958 N.E.2d at 1198, 935 N.Y.S.2d at 283.

231. *Id.* at 65-66, 958 N.E.2d at 1199, 935 N.Y.S.2d at 284.

232. *Id.* at 66, 958 N.E.2d at 1199, 935 N.Y.S.2d at 284.

233. 692 F.3d 65, 67 (2d Cir. 2012). All of the affiliated entities at issue were owned and operated by Loretto Management Corporation ("LMC"). *Id*. at 67-68.

234. 29 U.S.C. § 666(a) (2006).

235. *Solis*, 692 F.3d at 72 (citations omitted).

236. *Id.* (citations omitted).

applied the same three-factor "single employer" test.[237] Under that test, separate entities may be considered a single employer for purposes of determining whether violations are "repeated" where they: (1) share a common worksite such that employees of both have access to same hazardous conditions; (2) have interrelated and integrated operations; and (3) share common president, management and supervision or ownership.[238] Applying that test, the Commission found that while Loretto-Oswego and the affiliated entities shared the same president, chief executive officer, and chief financial officer, Loretto-Oswego did not share a common worksite with LMC or the other two affiliates, and LMC did not intervene or dictate policy to Loretto-Oswego, especially with respect to safety matters.[239] The U.S. Secretary of Labor ("Secretary") petitioned the Second Circuit for review of the Commission's decision.[240]

As an initial matter, the Second Circuit rejected the Secretary's assertion that she had "adopted a variant of the single employer test different from the one applied" by the Commission and the ALJ.[241] The Secretary's four-factor variant of the single employer test omits the common worksite prong, adds a centralized control of labor relations prong, and splits common management and common ownership into two separate prongs.[242] It is the same as the variant used by the NLRB in applying the National Labor Relations Act and by federal courts in applying statutes such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and the Fair Labor Standards Act of 1938.[243]

The Second Circuit rejected the Secretary's argument, concluding that it "need not entertain the Secretary's position where, as here, that position was not pressed to the Commission during the adjudicatory process from which the Secretary appeals."[244] However, the Second Circuit noted that if the Secretary wished to alter the Commission's approach to the single employer test, she could do so in subsequent cases before ALJs and, ultimately, the Commission, or she could issue a regulation on the matter.[245] As the Second Circuit explained, the

237. *Id.*
238. *Id.*
239. *Id.* at 72-73.
240. *Solis*, 692 F.3d at 73.
241. *See id.*
242. *Id.*
243. *Id.*
244. *Id.* at 74.
245. *Solis*, 692 F.3d at 75.

Secretary, and not the Commission, administers the OSH Act, and so her interpretation would receive the Second Circuit's deference, even if expressed solely as a litigation position and even in the face of contrary Commission interpretations.[246] The Second Circuit also concluded that the Commission's single employer holding was supported by substantial evidence.[247]

B. OSHA Issues Workplace Violence Directive

On September 8, 2011, the Occupational Safety and Health Administration ("OSHA") issued its first directive on workplace violence.[248] This directive establishes OSHA's general enforcement policies and procedures for field offices to apply when conducting an inspection or responding to incidents of workplace violence.[249] Among other things, the directive states that inspections will be conducted in response to complaints and referrals, as part of a fatality and/or catastrophe investigation, and where reasonable grounds exist after a review of the following criteria for initiating inspections: (a) certain risk factors exist (i.e., working alone in small numbers, working at night/early morning or in high-crime areas, working in community-based settings, delivering passengers, goods or services, etc.); (b) there is evidence of employer and/or industry recognition of the potential for workplace violence in certain high-risk industries; and (c) feasible abatement methods exist address the hazard.[250]

The directive also notes that employers may be found guilty under the OSH Act's general duty clause if they fail to reduce or eliminate serious recognized hazards.[251] Accordingly, the directive instructs inspectors to gather evidence to determine whether an employer recognized or should have recognized the existence of a potential workplace violence hazard and whether it was feasible for the employer to prevent or minimize the hazard.[252] With respect to potential abatement methods, the directive contains an appendix with general

246. *Id.*
247. *Id.* at 77-78.
248. *See generally* U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., DIRECTIVE NO. CPL-02-01052, ENFORCEMENT PROCEDURES FOR INVESTIGATING OR INSPECTING WORKPLACE VIOLENCE INCIDENTS (Sept. 8, 2011).
249. *Id.* at 1.
250. *Id.* at 8-9.
251. *Id.* at 3.
252. *Id.*

recommendations for all industries and workplaces.[253] These recommendations include conducting a workplace violence hazard analysis, training employees on workplace violence, developing a written workplace violence prevention program, implementing engineering controls (i.e., alarm systems, security devices, etc.), implementing administrative controls (i.e., developing liaisons with local police, requiring employees to report incidents, keeping logs of reports, etc.), and providing management support during emergencies.[254]

253. *See* U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., DIRECTIVE NO. CPL-02-01052, ENFORCEMENT PROCEDURES FOR INVESTIGATING OR INSPECTING WORKPLACE VIOLENCE INCIDENTS B-1, B-2 (Sept. 8, 2011).

254. *Id.*