KLEIN ZELMAN ROTHERMEL JACOBS & SCHESS LLP

# NEW YORK STATE BAR ASSOCIATION
# BRIDGING THE GAP

# "EMPLOYMENT LAW 101"

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PRESENTED BY:

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***UNCONVENTIONALLY EFFECTIVE WORKPLACE COUNSEL***

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## ATTACHMENTS



*These materials are not intended, nor should they be used, as a substitute for legal advice or opinion which can be rendered only when related to specific fact situations.*



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# I. UNDERSTANDING THE FULL RANGE OF LAWS GOVERNING THE WORKPLACE

## A. EMPLOYMENT LAW "101"

1. EMPLOYMENT "AT WILL": Employment in New York is generally "at will" meaning that an employer may hire and fire for any reason or no reason with or without notice. *See Murphy v. Am. Home Prod. Corp.*, 58 N.Y.2d 293, 300, 448 N.E.2d 86, 89 (1983).

2. CONTRACTUAL OBLIGATIONS: A written, or sometimes oral, promise can destroy the flexibility and protection of employment "at will."

## B. HIGHLIGHTS OF FEDERAL, STATE AND LOCAL ANTI-DISCRIMINATION STATUTES GOVERNING THE WORKPLACE

1. FEDERAL ANTI-DISCRIMINATION STATUTES

a. *Title VII of the Civil Rights Act of 1964* prohibits discrimination in employment based on an individual's race, color, religion, sex (including pregnancy), genetic information and/or national origin. The law also prohibits harassment (*e.g.*, offensive or derogatory comments) on the basis of any protected characteristic. Title VII applies to employers with *15 or more employees*. 42 U.S.C. § 2000e et seq.

b. *Section 1981* prohibits racial and ethnic discrimination in the terms and conditions of employment and has a broader scope than *Title VII* because, among other things, (i) it applies to *all employers regardless of size*; (ii) claims need not be first filed with an administrative agency; (iii) there are no caps on damages; (iv) there may be personal liability; and (v) there is a longer statute of limitations (4 years). 42 U.S.C. § 1981.

c. *Age Discrimination in Employment Act ("ADEA")* prohibits discrimination in employment based on an individual's age (40 or older). The ADEA applies to employers *with 20 or more employees.* 29 U.S.C.A. § 621 et seq.

d. *Americans with Disabilities Act* prohibits discrimination in employment against qualified individuals with a disability (or perceived disability) who are able to perform the essential functions of their job with or without reasonable accommodations. The law governs the failure to make reasonable accommodations for an employee's functional limitations, unless accommodating



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the employee would pose an undue burden. The ADA applies to employers with *15 or more employees*. 42 U.S.C. § 12101 et seq.

e. *Equal Pay Act* requires that male and female employees receive equal pay for performing equal work. There is no requirement for a minimum number of employees. 29 U.S.C. § 206 et seq.

2. STATE AND LOCAL ANTI-DISCRIMINATION STATUTES[1]

a. *New York State Human Rights Law ("NYSHRL")* prohibits discrimination on the basis of race, color, sex, age, national origin, creed, disability, familial status, pre-disposing genetic characteristics, sexual orientation, military status, marital status, as well as a prior arrest or conviction record. With an exception noted below, the New York State Human Rights Law applies to employers with *4 or more employees*. New York Exec. Law § 290 et seq. In July 2014, the NYSHRL was amended to cover unpaid interns. Effective January 2016, the New York State Division of Human Rights adopted regulations that expand the definition of "sex" to include gender identity and transgender status. In addition, *the NYSHRL was amended in 2015 to cover employers of any size for sexual harassment claims*, and a "pregnancy-related condition" is now subject to the law's reasonable accommodation provisions.

b. *New York City Human Rights Law ("NYCHRL")* prohibits discrimination based on race, color, creed, age, national origin, disability, alienage or citizenship status, gender (including gender identity and sexual harassment), caregiver status, sexual orientation, marital status, partnership status and pregnancy, childbirth or a related medical condition. The law also protects against discrimination based on unemployment status, an arrest or conviction record, or a person's status as a victim of domestic violence, stalking and sex offenses. The New York City Human Rights Law applies to employers with *4 or more employees*. N.Y.C. Admin. Code § 8-107. *But see developments below.*

i. In December 2015, the New York City Commission on Human Rights issued enforcement guidance on gender-identity discrimination, stating that treating employees "less well" on the basis of gender identity and expression violates the NYCHRL.

[1] Other state laws prevent employers from, among other things, discriminating against military personnel, jurors, ex-convicts, and even certain types of off-duty conduct.



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c. *New York Labor Law Section 194*, like the federal Equal Pay Act, requires that male and female employees receive equal pay for performing equal work, and *all employers are covered regardless of size.*

i. Effective January 2016, Section 194 permits employees to discuss wages in the workplace (a right already granted to employees covered by the National Labor Relations Act).

d. *NYC Salary History Inquiry Ban* prohibits employers from asking an applicant about, or relying on, an applicant's salary history during the hiring process. This new law amended the New York City Human Rights Law and became effective on October 31, 2017. The law also prohibits employers from searching public records to learn about the applicant's prior earnings and benefits. Salary history includes the applicant's current or prior wages, benefits or other compensation. Employers may only discuss an applicant's salary history if that applicant "voluntarily and without prompting" discloses such information. The Salary History Inquiry Ban applies to *all employers hiring applicants in New York City*. N.Y.C. Admin. Code § 8-107 (25).

3. SUMMARY OF RETALIATION CLAIMS

a. Most anti-discrimination statutes also prohibit an employer from retaliating against an employee who opposed any discriminatory practice (*e.g.*, filed an internal complaint) or participated in an investigation or enforcement proceeding relating to a discrimination claim. The potency of a retaliation claim is that it may succeed even if the underlying discrimination claim fails. In 2006, the Supreme Court lowered the standard for proving retaliation by broadening the type of conduct that can be considered an adverse employment action. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 53, 126 S. Ct. 2405, 2406, 165 L. Ed. 2d 345 (2006). The Federal standard applies similarly to state law (NYHRL). *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 313, 819 N.E.2d 998, 1012 (2004).

b. Under local law (NYCHRL), "retaliation in any manner is prohibited, and '[t]he retaliation . . . need not result in an ultimate action with respect to employment . . . or in a materially adverse change in the terms and conditions of employment." This is a broader interpretation of retaliation than provided under federal and state law. *See Brightman v. Prison Health Serv., Inc.*, 108 A.D.3d 739, 740, 970 N.Y.S.2d 789, 791 (2013); *see also* (see Administrative Code of City of N.Y. § 8–107[7].



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## II. ETHICS OBLIGATIONS WITH RESPECT TO DISCRIMINATION AND HARASSMENT IN THE PROFESSION

### A. ABA MODEL RULE

1. Under ABA Model Rule 8.4(g), a lawyer commits professional misconduct by engaging "in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."

### B. NEW YORK RULES OF PROFESSIONAL CONDUCT

1. Rule 8.4 of the New York Rules of Professional Conduct states "A lawyer or law firm shall not: (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation.

## III. DEFINITIONS AND EXAMPLES OF DISCRIMINATION AND HARASSMENT

### A. GENERAL STATUTORY PROHIBITIONS

1. It is an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin. 42 U.S.C. §2000e-2(a).

2. Harassment does not violate anti-discrimination law unless it is based on a protected characteristic. Pronin v. Raffid Custom Photo Lab, Inc., 383 F. Supp. 2d 628, 634 (S.D.N.Y. 2005).

3. The anti-discrimination statutes are not a "general civility code." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998). The law does not prohibit simple teasing, offhand comments, or isolated incidents that are not extremely serious. See *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (2d Cir. 1998).

4. The law does prohibit conduct that is "so objectively offensive as to alter the 'conditions' of the victim's employment." The conditions of employment are only altered if the harassment culminated in a tangible employment action or was sufficiently severe or pervasive to create a hostile work environment. *Oncale*, 523 U.S. at 81.



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## B. SEXUAL HARASSMENT DEFINITION

1. Sexual harassment can include (1) unwelcome sexual advances, (2) requests for sexual favors, or (3) verbal comments, gestures, or physical actions of a sexual nature, under any of the following circumstances: (a) coercing an individual to submit to such conduct as a term or condition of employment; (b) using an individual employee's submission to or rejection of such conduct as the basis for an employment-related decision; or (c) unreasonably interfering with an individual employee's work performance or creating an intimidating, hostile, or offensive working environment, whether intentionally or not. 29 C.F.R. § 1604.11.

2. An employer is responsible for acts of hostile work environment sexual harassment in the workplace where the employer knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. 29 C.F.R. § 1604.11.

## C. AFFIRMATIVE DEFENSES

1. Under federal law, employers may use an affirmative defense which, if proven, supports dismissal of a harassment claim. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. Boca Raton*, 524 U.S. 775 (1998). The affirmative defense has been summarized as follows:

   a. Employers must have written policies that prohibit harassment at work.

   b. Those written policies must contain a complaint procedure.

   c. Complaints must be promptly and thoroughly investigated with appropriate remedial action taken.

   d. Employers must train managers and staff about the prohibitions of inappropriate conduct, the complaint procedure, as well as their obligations under the policy.

   e. Make sure to stay up to date on evolving interpretations of the NYCHRL, which challenge the applicability of the defense to claims under that law. *See Williams v. N.Y. City Hous. Auth.*, 61 A.D.3d 62 (1st Dep't 2009); *see also Zakrzewska v. The New School*, 598 F. Supp. 2d 426 (S.D.N.Y. 2009); *Zakrzewska v. New School*, 14 N.Y.3d 469 (N.Y. 2010); *Weiss v. JPMorgan Chase &Co.*, 2010 U.S. Dist. Lexis 2505 (S.D.N.Y. 2010).



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i. The New York City Administrative Code § 8-130 was amended in March 2016 to state that any "[e]xceptions and exemptions" to the NYCHRL should be "construed narrowly in order to maximize deterrence of discriminatory conduct." Further, the amendment states that "[c]ases that have correctly understood and analyzed the liberal construction requirement of [the NYCHRL] and that have developed legal doctrines accordingly that reflect the broad and remedial purposes of this title include *Albunio v. City of New York*, 16 N.Y.3d 472 (2011), *Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29 (1st Dep't 2011), and the majority opinion in *Williams v. New York City Housing Authority*, 61 A.D.3d 62 (1st Dep't 2009).

### D. OTHER FORMS OF HARASSMENT

1. Harassment based on other protected characteristics can include jokes or comments, a workplace display of offensive materials, the use of degrading language, the inappropriate use of e-mail, etc., including conduct based upon an individual's protected characteristics.

## IV. NEW DEVELOPMENTS WITH RESPECT TO SEXUAL HARASSMENT

### A. NEW YORK STATE BUDGET AMENDMENTS (ADOPTED APRIL 2018)

1. New workplace rules regarding policies and training with respect to workplace harassment

   a. The New York Labor Law will now require all employers to establish and provide to all employees a written sexual harassment prevention policy. Additionally, employers will be required to provide interactive sexual harassment prevention training to all employees on an annual basis. A model sexual harassment prevention policy and model sexual harassment prevention training program will be made available by the New York Department of Labor. Employers are free to use the NYDOL provided policy and training program or create their own so long as the employer's policy and program equal or exceed the minimum standards provided in the models. These provisions go into effect October 9, 2018.

2. The impact on arbitration agreements

   a. Civil Practice Law and Rules now prohibits mandatory arbitration clauses for sexual harassment claims. Specifically, any provision in an employment-related contract or agreement which requires



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parties to submit claims relating to sexual harassment to mandatory binding arbitration entered into after the effective date of the law is void. However, the inclusion of a prohibited clause in an agreement will not impact the enforceability of other provisions of the contract. This amendment does not impact the enforceability of a collective bargaining agreement provision requiring arbitration of sexual harassment claims. This provision went into effect July 11, 2018.

3. The validity of nondisclosure agreements

   a. General Obligations Law now prohibits employers from including provisions in settlement agreements involving sexual harassment claims that would prevent the complainant from disclosing the underlying facts and circumstances to the claim or action, unless the complainant prefers that such a provision be in place. Should a complainant wish to keep the underlying details of the sexual harassment confidential, he or she must have twenty-one days to consider such a confidentiality provision and the parties must sign an agreement memorializing the complainant's preference. Upon execution of an agreement with such a provision, the agreement is not effective for the first seven days after signing, during which the complainant is entitled to revoke the agreement. This provision went into effect July 11, 2018.

4. Expanded liability

   a. New York State Human Rights Law now creates a cause of action by certain non-employees against a company. Specifically, the new amendments prohibit employers from permitting sexual harassment against non-employees, such as contractors, subcontractors, vendors, consultants, or other persons providing services pursuant to a contract in the workplace. The extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of the harasser will be considered in determining liability. This provision is effective immediately.

## B. NYC STOP SEXUAL HARASSMENT ACT (ADOPTED MAY 2018)

1. New posting and distribution requirements

   a. All NYC employers will be required to post an anti-sexual harassment rights and responsibilities poster conspicuously at the place of work. Employers will be required to post both the English and Spanish version of the poster (both of which will be made



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available on the Commission's website). Additionally, upon hire, employers will be required to distribute an information sheet on sexual harassment to each new employee. The information sheet will include the same information as the anti-sexual harassment rights and responsibilities poster and will be made available in varying languages on the Commission's website. These provisions go into effect September 6, 2018.

2. New training requirements

   a. Private employers with fifteen or more employees will be required to conduct annual anti-sexual harassment trainings for all NYC employees, including supervisory and managerial employees. Employers will be permitted to utilize the online interactive training module that will be provided on the Commission's website to fulfill the training requirement. Otherwise, employers will be required to provide for a participatory training whereby the trainee is engaged in a trainer-trainee interaction, use of audio-visuals, computer or online training program or other participatory forms of training as determined by the Commission and which would include, at a minimum, the specific information provided for in the Act. This provision goes into effect April 1, 2019.

3. Expanded liability

   a. The Act amends the New York City Humans Rights Law to permit claims of gender-based harassment by all employees, *regardless of the size of the employer.*[2] Additionally, the statute of limitations for filing complaints with the Commission of claims of gender-based harassment under city law is extended from one year to three years after the alleged harassing conduct occurred. This provision is effective immediately.

## C. THE TAX CUTS AND JOBS ACT OF 2017: IMPLICATIONS FOR SEXUAL HARASSMENT SETTLEMENTS

1. In late December 2017, President Trump signed into law the Tax Cuts and Jobs Act of 2017 (the "Act") which included a provision that greatly changes how employers, and arguably employees, are taxed when settlement is reached in sexual harassment and sexual abuse cases.

2. Generally, Section 162 of the Tax Code permits businesses to deduct certain ordinary and necessary expenses paid or incurred during the year as part of running the business. Previously, this included deductions for

[2] Generally, the anti-discrimination provisions of the New York City Humans Rights Law apply only to employers with four or more employees.



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confidential settlements and for attorney's fees incurred in defense of sexual harassment claims.

3. Section 13307 of the Act, which amends Section 162, now prohibits tax deductions for sexual harassment settlements. Specifically, businesses may no longer receive a tax deduction for "(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) the attorney's fees related to such a settlement," incurred after December 22, 2017.

4. Therefore, where an employer requires an employee to sign a nondisclosure agreement as a condition of a sexual harassment settlement, or where the settlement agreement includes a confidentiality provision, the employer cannot claim the settlement payment or the associated attorneys' fees as business deductions. Arguably, the attorneys' fees have lost their deduction even without a confidentiality provision. In addition, plaintiff's attorneys' fees also seem to be in jeopardy.

## V. EMPLOYEE HANDBOOKS FOR EMPLOYERS

### A. A HANDBOOK SHOULD BE THE FOCAL POINT FOR LEGAL COMPLIANCE AND PRACTICAL OPERATION

1. A handbook should contain appropriate disclaimers.

2. Always protect the "at will" status of employment.

3. Include legally required or recommended policies.

4. Pay careful attention to the changing rules articulated by the National Labor Relations Board as to various employer policies. See Section VII below.

### B. CONSISTENTLY APPLY RULES

1. Discrimination claims arise from inconsistent application of rules.

### C. SOME IMPORTANT POLICIES FOR EVERY EMPLOYER

1. Employment at Will

2. Equal Employment Opportunity/Prohibition of Workplace Harassment

   a. Reasonable Accommodation for Disability and Religion

3. Vacation and Time Off Policies



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4. Time Keeping and Employee Classifications

   a. Safe Harbor Policy for Exempt Employees

5. Workplace Technology

## VI. TIME OFF REQUIREMENTS

### A. FAMILY AND MEDICAL LEAVE ACT

1. The Family and Medical Leave Act, 29 U.S.C.§ 2601 et seq. provides for up to 12 weeks of unpaid leave for certain medical and family situations encountered by an eligible employee.

2. Specifically, FMLA leave is available for (i) the birth of the employee's child; (ii) placement for adoption or foster care of a child with the employee; (iii) the care for an immediate family member (*e.g.*, spouse, child or parent) who has a serious health condition; (iv) the employee's own serious health condition; or (v) a qualifying exigency arising out of the active duty, or call to active duty, of a qualified military member.

3. Eligible employees may also request up to 26 weeks of unpaid leave to care for a family member or next of kin who is a covered member or veteran of the Armed Forces and has a serious injury or illness that was either suffered or aggravated in the line of duty.

4. The FMLA prohibits covered employers from discriminating against those employees who exercise their leave rights.

5. The FMLA applies to all employers with 50 or more employees within a 75-mile radius of the worksite. 29 U.S.C.§ 2611 et seq.

6. An employee is eligible for FMLA if he/she (a) has worked for the employer for at least 12 months; (b) has worked at least 1,250 hours during the past 12 months, and (c) works at a location where the company employs 50 or more employees within 75 miles. 29 C.F.R. § 825.110.

### B. ACCOMMODATING EMPLOYEES

1. Federal, state and local laws require that an employer provide a reasonable accommodation to qualified individuals with a disability who are able to perform the essential functions of the job. Time off can be a reasonable accommodation.

2. Determining what constitutes a "reasonable" accommodation is a fact intensive analysis. "Reasonable" in one setting may not be "reasonable"



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in another. A determination of "reasonable" requires a cost-benefit analysis comparing the cost of the accommodation to the benefit received.

3. Generally, an employee must request an accommodation; however, if the need for an accommodation is obvious, an employer who waits for a request does so at its peril.

4. An employer is not obligated to provide the employee's requested accommodation if the employer can provide an alternative, effective accommodation. For example, an employee with breathing problems requests reassignment to another job in a less dusty area. The employer is not required to agree to this request but can instead take measures to reduce dust in the work area. Similarly, there is no obligation to provide the best (most expensive) accommodation where another accommodation is effective.

5. An employer can request documentation of the disability. For example, consider an employee who claims that s/he cannot bend or lift, and requests that those tasks be assigned to someone else. The employer can request documentation to prove that the employee cannot perform the tasks and the extent of the limitation (*i.e.*, can the employee lift 25 pounds? 20 pounds? 10 pounds?).

6. Employers are not required to lower performance standards for a job as a reasonable accommodation. For example, if an employee is disciplined for absenteeism, and later identifies himself as disabled, the prior discipline need not be rescinded. Similarly, a mentally impaired employee can be disciplined for threatening or violent behavior even if it is caused by the impairment. An impaired employee can be held to the same performance standards as a non-impaired employee.

7. Undue Hardship

    a. Employers are not required to provide a reasonable accommodation that would be an undue hardship, generally one that would require significant difficulty or expense. The following factors are often considered in determining whether an "undue hardship" exists:

        i. Size and assets of the business;

        ii. Nature of its operation;

        iii. Number of employees;



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iv. Nature and net cost of accommodation; and

v. Impact of requested accommodation.

8. The Interactive Process

a. Once an employee requests an accommodation, the interactive process must commence. The goal is to involve all relevant parties to explore accommodations effective for the particular disability and limitations.

b. The employer and employee should meet to: analyze the particular job and determine its essential functions; determine the employee's exact limitations; and determine and discuss ways to accommodate the employee, sometimes with help from outside sources.

c. This process is the heart of the accommodation issue and will form the basis of the employer's defense to any challenge to decisions made during this process. Consequently, each request for an accommodation should be analyzed and a fluid strategy for approach developed early in the process.

d. Contemporaneous and complete documentation of the process is crucial.

## C. NEW YORK CITY EARNED SAFE AND SICK TIME ACT

1. Under the NYC Earned Safe and Sick Time Act, http://www1.nyc.gov/site/dca/about/paid-sick-leave-law.page, NYC private sector employers with 5 or more employees must provide paid time to employees that perform more than 80 hours of work in a calendar year; employers with fewer than 5 employees must provide unpaid sick time.

2. Whether paid or unpaid, employees earn one hour of leave for every 30 hours worked, capped at a maximum of 40 hours per calendar year. Employers may choose to "front load" earned time.

3. Unused time will carry over to the next calendar year unless the employer opts to pay out the unused time AND provides the employee with the amount of sick leave the employee had accrued by year's end on the first day of the subsequent calendar year.

4. If an employer already offers paid leave sufficient to meet the requirements of the Act, such as paid time off, paid vacation, or paid personal days, and employees can use such time for the purposes for



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which leave is permitted and under the same conditions, then additional time is not required.

a. Existing policies should be carefully reviewed for compliance with various requirements of the Act.

5. Sick leave may be used for three purposes:

a. The employee's own mental or physical illness, injury or health condition, or the employee's need to seek preventative care, medical diagnosis or treatment; or

b. To care for a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or who needs preventive medical care; or

c. If a public health emergency, as declared by a public health official, results in the closure of the employee's place of business or the employee's school or childcare provider.

6. Employees may also use accrued leave for "safe time purposes" defined by the Act if the employee or the employee's family member has been the victim of a family offense matter, sexual offense, stalking or human trafficking.

7. Notice

a. Employer Required Notice

i. Employers must provide a required notice to all employees at the commencement of their employment. The Department of Consumer Affairs ("DCA") has prepared the required notice which is available on the DCA's website. The notice must be in English and the employee's primary language, provided that the DCA has issued a notice in such language.

b. Notice from the Employee of the Need for Leave

i. If the leave is foreseeable, the employer can require the employee to provide up to 7 days advance notice.

ii. If the leave is unforeseeable, the employer can require the employee to provide as much notice as "practicable."



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### D. NEW YORK STATE PAID FAMILY LEAVE

1. Effective January 2018, New York's requirement that employers provide short-term disability benefits coverage to their employees has been expanded to include paid family leave benefits.

2. Attached is a summary of provisions of this new law.

## VII. NATIONAL LABOR RELATIONS BOARD EXPANDS ITS REACH

### A. NATIONAL LABOR RELATIONS ACT

1. The Act protects, among other things, employees' right to form, join or assist a labor organization, to bargain collectively and to engage in other concerted activities, including the right to discuss wages, hours and working conditions.

2. The Board had taken an increasingly expansive interpretation of this language and its reach. Through these decisions, the Board has held that policies or conduct that could potentially discourage or "chill" employees from exercising their rights under the Act is a violation.

3. In March 2015, the NLRB's Office of the General Counsel issued guidance on these decisions. In December 2017, however, the new General Counsel withdrew the March 2015 guidance.

4. In December 2017, the Board reassessed its approach to evaluating employer rules in its decision in *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017). In *Boeing*, the Board adopted a more employer-friendly standard for evaluating the lawfulness of workplace rules. The rule focuses on the balance between how the rule impacts an employee's ability to exercise rights under the NLRA and the employer's right to maintain its workplace. On June 6, 2018, the General Counsel issued a new Guidance Memorandum giving instruction on how regional offices should interpret this new rule.

5. These rules apply to the policies and conduct of both union and non-union employers.

## VIII. COMPLIANT PAY PRACTICES

Both federal and state law govern how employees are paid in the workplace. The federal Fair Labor Standards Act, 29 U.S.C.A. § 201 *et seq.*, addresses minimum wage and overtime. The New York State Labor Law, N.Y. Lab. Law § 1 *et seq.*, is much more expansive and includes numerous other regulatory requirements.



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## A. WAGE THEFT PREVENTION ACT

1. The New York State Wage Theft Prevention Act requires employers to provide a specific written Notice of Pay Rate including statutorily required information to each new hire. N.Y. Lab. Law § 195. Among other things, this notice must include:

    a. Rate(s) of pay, including any overtime;

    b. Regular pay day;

    c. How the employee is paid (e.g., hourly, weekly, salary, commission, etc.);

    d. Allowances taken as part of the minimum wage.

2. The notice must be provided in both English and in the employee's primary language, provided that the New York State Department of Labor ("NYSDOL") provides a notice template in that language.

3. The NYSDOL issued model notices and instructions to assist employers in maintaining the required records. The model notices can be found at http://www.labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm. The NYSDOL also provides FAQs and a Fact Sheet, which are available at http://labor.ny.gov/workerprotection/laborstandards/PDFs/wage-theft-prevention-act-faq.pdf and https://labor.ny.gov/formsdocs/wp/P715.pdf, respectively.

4. Employers may create their own notices so long as they contain all required information (*e.g.*, payday, pay rate, overtime rate, etc.).

5. Employees must sign the form and employers must maintain the new hire notice of pay records for at least 6 years.

6. Penalties for non-compliance include a monetary penalty of up to $5,000 per employee.

## B. MINIMUM WAGE INCREASES IN NEW YORK STATE

1. Minimum wage will increase to $15/hour over the next several years.

2. For the first time, minimum wage is now set by geographic location and size of employer. N.Y. Lab. Law § 652(1)(c). As of December 31, 2017, minimum wage is as follows:



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a. Employers in NYC with 11 or more employees: $13.00. N.Y. Lab. Law § 652(1)(a)(i);
b. Employers in NYC with 10 or fewer employees: $12.00. N.Y. Lab. Law § 652(1)(a)(ii);
c. Employers in Long Island and Westchester: $11.00. N.Y. Lab. Law § 652(1)(b);
d. The remainder of the state: $10.40.

3. Attached is a summary of the wage order increases applicable to general industry in New York State as of December 31, 2017. There are other wage orders specific to particular industries such as hospitality. *See* Misc. Industry Wage Order Summary.

## C. INDEPENDENT CONTRACTORS

1. Both federal and state law sets standards for determining whether an individual is appropriately classified as an independent contractor. These standards differ, sometimes in significant respects. Over the past few years, these rules have become more and more strict.

   a. The applicable standard under the federal Fair Labor Standards Act is in flux. The DOL had issued an Administrator's Interpretation in 2015 (Administrator's Interpretation 2015-1) applying an "economic realities" test. However, that Interpretation was withdrawn effective June 2017. Nonetheless, the DOL website states:

      > Removal of the . . . administrator interpretation[] does not change the legal responsibilities of employers under the Fair Labor Standards Act . . . , as reflected in the Department's long-standing regulations and case law.

   b. For unemployment insurance purposes, the New York State Department of Labor has issued its own guidance for evaluating whether an individual is an "employee" under the law. A copy is attached.

## D. OVERTIME OR NOT: EXEMPT OR NON-EXEMPT?

1. WHO IS ELIGIBLE FOR OVERTIME – EXEMPT AND NON-EXEMPT EMPLOYEES

   a. The default rule is that ***all*** employees are entitled to receive overtime pay (*i.e.*, time-and-a-half) for all hours worked in excess of 40 in a single workweek.



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b. Only particular types of workers are "exempt" from entitlement to overtime. The employer (not the employee) must demonstrate "exemption" from overtime under federal and state laws.

i. The employer must examine and determine that each employee performing the job in question satisfactorily fits within one of the federal and state overtime "exemptions."

ii. If the employee does not fit within one of the "exemptions," s/he is called a "non-exempt" employee and is, therefore, entitled to overtime pay.

(a) To fit within the Administrative, Executive or Professional Exemptions, an employee must generally meet (a) the salary basis test and (b) the "duties" test. *See* 29 C.F.R. § 541.

(b) Under the salary basis test, an employee must currently earn a minimum weekly salary of $455 under the FLSA and as high as $975 under the New York Labor Law during each week regardless of hours worked.[3]

c. Employers should not assume that a "white-collar" or "salaried" employee automatically is exempt from the overtime laws.

- *Common Trap*: Thinking that all employees paid an annual salary are "exempt" and that only "hourly" employees are entitled to overtime.

d. Effective December 1, 2016, among other things, changes to the salary thresholds under the FLSA were set to increase dramatically, from $455/week to $913/week. On November 22, 2016, the U.S. District Court for the Eastern District of Texas issued a preliminary injunction blocking the rules from taking effect. It is expected that the current administration will revisit increasing the salary threshold under federal law.

2. THE ADMINISTRATIVE EXEMPTION

Under the duties test, an employee must use independent discretion and judgment to be considered exempt under the administrative exemption. Additionally, the employee's primary duty ***cannot*** be sales.

[3] For the first time, New York has implemented varying salary thresholds depending upon the size and geographic location of the employer. As of December 31, 2017, New York City employers with 11 or more employees must pay $975/week. Smaller NYC employers must pay $900/week. Long Island and Westchester employers pay $825/week and the rest of the state must pay $780/week.



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3. THE EXECUTIVE EXEMPTION

Under the duties test, an employee qualifies for exemption under the executive exemption if (1) the employee's primary duty is the management of the business, or of a customarily recognized department or subdivision of the business in which the employee is employed; (ii) the employee "customarily and regularly" directs the work of two or more employees; and (iii) the employee has the authority to hire and fire, or the employee's suggestions and recommendations regarding hiring, firing, advancement, promotion or any other change in employment status are "given particular weight."

4. THE PROFESSIONAL EXEMPTION

a. The New York Labor Law does not apply the salary basis test to the professional exemption. N.Y. Min. Wage Order Misc. Industr. §142.2-14.

b. Under the FLSA, an employee with a license to practice law or medicine who is actually engaged in the practice of law or medicine is considered exempt without regard to the salary basis test. *See Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA)*, https://www.dol.gov/whd/overtime/fs17d_professional.pdf.

c. Under the duties test, an employee's primary duty must be the performance of work requiring "advanced knowledge," which is work primarily intellectual in character and includes work requiring the "consistent exercise of discretion and judgment." Knowledge customarily must be acquired by a prolonged course of specialized intellectual instruction. The profession of law falls into this category. This is ***not*** the same as the using independent discretion and judgment standard for the Administrative Exemption.

5. THE HIGHLY COMPENSATED EMPLOYEE EXEMPTION

Employees earning in excess of $100,000 may be exempt under the Administrative, Executive or Professional exemptions meeting a more relaxed duties test.

6. HOW IS OVERTIME CALCULATED?

a. In general, a "non-exempt" employee who is eligible for overtime must be paid his/her regular rate of pay for "all hours worked" up



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through 40 in a workweek and at 1½ times his/her regular rate for hours over 40 in a week.

b. With limited exception, all work time must be included such as:

   i. Time spent answering email on blackberry or home computers after hours;

   ii. Hours worked without company permission even in violation of a rule to the contrary;

   iii. Certain travel time.

c. When determining an employee's "regular rate," non-discretionary forms of compensation must be included.

   i. Commission paid must be included in calculating an employee's regular rate.

## E. WAGE VIOLATION RISKS

1. These statutes are enforced both through private lawsuits and the appropriate Departments of Labor. Lawsuits may be brought on an individual basis or in a class or collective fashion.

2. The statute of limitations for a claim under the New York Labor Law is six years. It is shorter under the FLSA. Two years, or three if the violation was willful.

3. An employee cannot privately waive/release claims under the FLSA.

4. Federal and state laws place the burden on the employer to demonstrate the hours worked by the employee. Otherwise, the employee testimony regarding hours is largely credited.

5. If an independent contractor has been misclassified, then he/she will be entitled to pay and benefits as if the relationship had been one of employment.

6. The law provides for double damages (liquidated) and attorneys' fees in these cases.

7. There can be individual liability.



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# Exhibit A

# Miscellaneous Industry

## BASIC MINIMUM HOURLY RATE (per hour)

| ...as of | 12/31/16 | 12/31/17 | 12/31/18 | 12/31/19 | 12/31/20 | 12/31/21 |
|---|---|---|---|---|---|---|
| **BASIC MINIMUM HOURLY RATE** | | | | | | |
| NYC - Large Employers (of 11 or more) | $11.00 | $13.00 | $15.00 | $15.00 | $15.00 | $15.00 |
| NYC - Small Employers (10 or less) | $10.50 | $12.00 | $13.50 | $15.00 | $15.00 | $15.00 |
| Long Island & Westchester | $10.00 | $11.00 | $12.00 | $13.00 | $14.00 | $15.00 |
| Remainder of New York State | $9.70 | $10.40 | $11.10 | $11.80 | $12.50 | TBD |

## TIPPED ALLOWANCES (per hour)

| ...as of | 12/31/16 | 12/31/17 | 12/31/18 | 12/31/19 | 12/31/20 | 12/31/21 |
|---|---|---|---|---|---|---|
| **TIP ALLOWANCE - LOW (tips averaging at least)** | | | | | | |
| NYC - Large Employers (of 11 or more) | $1.65 | $1.95 | $2.25 | $2.25 | $2.25 | $2.25 |
| NYC - Small Employers (10 or less) | $1.60 | $1.80 | $2.05 | $2.25 | $2.25 | $2.25 |
| Long Island & Westchester | $1.50 | $1.65 | $1.80 | $1.95 | $2.10 | $2.25 |
| Remainder of New York State | $1.45 | $1.55 | $1.65 | $1.75 | $1.90 | TBD |
| **TIP ALLOWANCE - HIGH (tips averaging at least)** | | | | | | |
| NYC - Large Employers (of 11 or more) | $2.70 | $3.20 | $3.65 | $3.65 | $3.65 | $3.65 |
| NYC - Small Employers (10 or less) | $2.55 | $2.95 | $3.30 | $3.65 | $3.65 | $3.65 |
| Long Island & Westchester | $2.45 | $2.70 | $2.95 | $3.20 | $3.40 | $3.65 |
| Remainder of New York State | $2.35 | $2.55 | $2.70 | $2.90 | $3.05 | TBD |

## UNIFORM MAINTENANCE ALLOWANCES (per week)

| ...as of | 12/31/16 | 12/31/17 | 12/31/18 | 12/31/19 | 12/31/20 | 12/31/21 |
|---|---|---|---|---|---|---|
| **LOW (20 or fewer weekly hours)** | | | | | | |
| NYC - Large Employers (of 11 or more) | $6.55 | $7.75 | $8.90 | $8.90 | $8.90 | $8.90 |
| NYC - Small Employers (10 or less) | $6.25 | $7.15 | $8.05 | $8.90 | $8.90 | $8.90 |
| Long Island & Westchester | $5.95 | $6.55 | $7.15 | $7.75 | $8.30 | $8.90 |
| Remainder of New York State | $5.75 | $6.20 | $6.60 | $7.00 | $7.45 | TBD |
| **MEDIUM (over 20 and up to 30 weekly hours)** | | | | | | |
| NYC - Large Employers (of 11 or more) | $10.80 | $12.80 | $14.75 | $14.75 | $14.75 | $14.75 |
| NYC - Small Employers (10 or less) | $10.35 | $11.80 | $13.30 | $14.75 | $14.75 | $14.75 |
| Long Island & Westchester | $9.85 | $10.80 | $11.80 | $12.80 | $13.75 | $14.75 |
| Remainder of New York State | $9.55 | $10.25 | $10.90 | $11.60 | $12.30 | TBD |
| **HIGH (over 30 weekly hours)** | | | | | | |
| NYC - Large Employers (of 11 or more) | $13.70 | $16.20 | $18.65 | $18.65 | $18.65 | $18.65 |
| NYC - Small Employers (10 or less) | $13.05 | $14.95 | $16.80 | $18.65 | $18.65 | $18.65 |
| Long Island & Westchester | $12.45 | $13.70 | $14.95 | $16.20 | $17.40 | $18.65 |
| Remainder of New York State | $12.05 | $12.95 | $13.80 | $14.70 | $15.55 | TBD |

# Miscellaneous Industry

## MEAL ALLOWANCE (per meal)

| ...as of | 12/31/16 | 12/31/17 | 12/31/18 | 12/31/19 | 12/31/20 | 12/31/21 |
|---|---|---|---|---|---|---|
| **MEAL ALLOWANCE** | | | | | | |
| NYC - Large Employers (of 11 or more) | $3.80 | $4.50 | $5.15 | $5.15 | $5.15 | $5.15 |
| NYC - Small Employers (10 or less) | $3.60 | $4.15 | $4.65 | $5.15 | $5.15 | $5.15 |
| Long Island & Westchester | $3.45 | $3.80 | $4.15 | $4.50 | $4.80 | $5.15 |
| Remainder of New York State | $3.35 | $3.60 | $3.80 | $4.05 | $4.30 | TBD |

## LODGING ALLOWANCES - EXCEPT NON-PROFITS (per day)

| ...as of | 12/31/16 | 12/31/17 | 12/31/18 | 12/31/19 | 12/31/20 | 12/31/21 |
|---|---|---|---|---|---|---|
| **LODGING** | | | | | | |
| NYC - Large Employers (of 11 or more) | $4.65 | $5.50 | $6.35 | $6.35 | $6.35 | $6.35 |
| NYC - Small Employers (10 or less) | $4.45 | $5.05 | $5.70 | $6.35 | $6.35 | $6.35 |
| Long Island & Westchester | $4.20 | $4.65 | $5.05 | $5.50 | $5.90 | $6.35 |
| Remainder of New York State | $4.10 | $4.40 | $4.70 | $5.00 | $5.30 | TBD |
| **HOUSE OR APARTMENT WITH UTILITIES** | | | | | | |
| NYC - Large Employers (of 11 or more) | $8.80 | $10.40 | $12.00 | $12.00 | $12.00 | $12.00 |
| NYC - Small Employers (10 or less) | $8.40 | $9.60 | $10.80 | $12.00 | $12.00 | $12.00 |
| Long Island & Westchester | $8.00 | $8.80 | $9.60 | $10.40 | $11.20 | $12.00 |
| Remainder of New York State | $7.75 | $8.30 | $8.90 | $9.45 | $10.00 | TBD |

## LODGING ALLOWANCES - NON-PROFITS

| ...as of | 12/31/16 | 12/31/17 | 12/31/18 | 12/31/19 | 12/31/20 | 12/31/21 |
|---|---|---|---|---|---|---|
| **LODGING (per day)** | | | | | | |
| NYC - Large Employers (of 11 or more) | $6.55 | $7.75 | $8.90 | $8.90 | $8.90 | $8.90 |
| NYC - Small Employers (10 or less) | $6.25 | $7.15 | $8.05 | $8.90 | $8.90 | $8.90 |
| Long Island & Westchester | $5.95 | $6.55 | $7.15 | $7.75 | $8.30 | $8.90 |
| Remainder of New York State | $5.75 | $6.20 | $6.60 | $7.00 | $7.45 | TBD |
| **HOUSE OR APARTMENT WITH UTILITIES (per day)** | | | | | | |
| NYC - Large Employers (of 11 or more) | $13.70 | $16.20 | $18.65 | $18.65 | $18.65 | $18.65 |
| NYC - Small Employers (10 or less) | $13.05 | $14.95 | $16.80 | $18.65 | $18.65 | $18.65 |
| Long Island & Westchester | $12.45 | $13.70 | $14.95 | $16.20 | $17.40 | $18.65 |
| Remainder of New York State | $12.05 | $12.95 | $13.80 | $14.70 | $15.55 | TBD |
| **NON-PROFITS CHILDREN'S CAMPS (per hour)** | | | | | | |
| NYC - Large Employers (of 11 or more) | $0.55 | $0.65 | $0.75 | $0.75 | $0.75 | $0.75 |
| NYC - Small Employers (10 or less) | $0.55 | $0.60 | $0.70 | $0.75 | $0.75 | $0.75 |
| Long Island & Westchester | $0.50 | $0.55 | $0.60 | $0.65 | $0.70 | $0.75 |
| Remainder of New York State | $0.50 | $0.50 | $0.55 | $0.60 | $0.65 | TBD |

## EXECUTIVE AND ADMINISTRATIVE EXEMPTION (per week)

| ...as of | 12/31/16 | 12/31/17 | 12/31/18 | 12/31/19 | 12/31/20 | 12/31/21 |
|---|---|---|---|---|---|---|
| MINIMUM SALARY REQUIRED | | | | | | |
| NYC - Large Employers (of 11 or more) | $825.00 | $975.00 | $1,125.00 | $1,125.00 | $1,125.00 | $1,125.00 |
| NYC - Small Employers (10 or less) | $787.50 | $900.00 | $1,012.50 | $1,125.00 | $1,125.00 | $1,125.00 |
| Long Island & Westchester | $750.00 | $825.00 | $900.00 | $975.00 | $1,050.00 | $1,125.00 |
| Remainder of New York State | $727.50 | $780.00 | $832.00 | $885.00 | $937.50 | TBD |

## NOTES

**TBD**. To be determined administratively prior to the dates indicated.

# Exhibit B

# *KZR "HOT TOPICS"*

# NEW YORK STATE PAID FAMILY LEAVE EFFECTIVE JANUARY 1, 2018

Effective January 1, 2018, private employees in New York State are entitled to take a job-protected, paid leave of absence funded through state-mandated insurance under circumstances covered by the new Paid Family Leave (PFL) law. PFL coverage is funded by employee payroll contributions and benefits are paid to employees while on leave by your short-term disability benefits insurance company (unless you are self-insured).

***Practice Note:*** Leave because of an employee's own health condition is not covered by this law but may be covered by others. New York employers covered by other leave laws, such as the Family and Medical Leave Act and/or the New York City Earned Sick Time Act need to make sure to carefully coordinate compliance with all of these laws.

## *WHO'S COVERED*

An employee is eligible for Paid Family Leave under the following circumstances:

- For employees regularly scheduled to work 20 hours or more per week, after that employee has worked for you for 26 consecutive weeks; or
- For employees with a regular schedule of less than 20 hours per week, after that employee has worked for you for 175 days which do not need to be consecutive.

***Practice Note:*** Employees may be eligible for a leave of absence on the first day the law goes into effect on January 1, 2018, if they met these criteria looking backwards.

## *WHAT'S COVERED*

Eligible employees may take a leave of absence under the law for any of the following reasons:

- To participate in providing care, physical or psychological, for a family member of the employee made necessary by a serious health condition of the family member; or





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- To bond with the employee's child during the first twelve months after the child's birth, or the first twelve months after the placement of the child for adoption or foster care with the employee; or

- Because of any "qualifying exigency" as interpreted under the Family and Medical Leave Act arising out of the fact that the employee's spouse, domestic partner, child or parent is (1) on active duty, or (2) has been notified of an impending call or order to active duty in the United States armed forces.

    - For example, a qualifying exigency could be a short notice deployment, attending military events and related activities, childcare and related activities, care of the military member's parent who is incapable of self-care, making financial or legal arrangements, counseling, rest and recuperation, or certain post-deployment activities.

Family Members

Who are considered an employee's "family members" for the purposes of Paid Family Leave?

- Child
- Parent
- Spouse
- Domestic partner
- Grandchild
- Grandparent
- Sibling
- Parent of spouse or domestic partner

***Practice Note:*** Be careful to pay attention to the definitions of these relationships under the regulations.

Serious Health Condition

A "serious health condition" includes an illness, injury, impairment or physical or mental condition that:

- Requires inpatient care in a hospital, hospice or residential health care facility; or
- Requires continuing treatment by a health care provider.

Child-bonding

Employees may take a Paid Family Leave at any point during the 12-month period following the birth or adoption of a child.





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***Practice Note:*** Paid Family Leave time for child-bonding *does not* run concurrently with a disability leave that a new mother may take to recover from child birth. Therefore, it is anticipated that these two leaves may be stacked together. For example, a new mother who takes an eight-week disability leave for her own medical condition to recover from a C-section may, at the end of that period, take an additional Paid Family Leave to bond with her new child.

## ***WHO DECIDES?***

Unless benefits are self-insured, eligibility for leave is determined entirely by an employer's short-term disability insurance carrier, who is responsible for paying the employee the benefit to which that employee is entitled while on leave (discussed further below).

The employee must complete and submit to the carrier a specific Request for Paid Family Leave Form (currently available here: https://www.ny.gov/new-york-state-paid-family-leave/paid-family-leave-employer-and-employee-forms-0), along with supporting documentation (and the employer section completed). Once the carrier receives a request, it must either pay or deny the claim within 18 days.

## ***NOTICE REQUIRED BY EMPLOYEE***

An employee must provide an employer at least thirty days' advance notice if the need for leave is foreseeable, *e.g.*, for the birth of a child or a planned medical procedure. However, if thirty days' notice is not "practicable," notice must be given as soon as practicable, typically the same day or next business day when the employee learns of the need for such leave.

## ***CONTRIBUTIONS AND BENEFITS***

### Contributions

All companies issuing short-term disability insurance policies in New York State are required to offer Paid Family Leave coverage as of January 1, 2018. Costs of the coverage are intended to be borne entirely by employee contributions made through payroll deductions. For 2018, the maximum employee contribution has been set by the state as 0.126% of an employee's weekly wage, capped at 0.126% of the annualized New York State Average Weekly Wage. The State Average Weekly Wage is currently $1,305.92.

Although the law did not go into effect until January 1, 2018, employers were allowed to begin to collect these deductions from employee paychecks starting July 1, 2017. This payroll deduction may only be used to provide Paid Family Leave benefits.

### Benefit Amount and Length of Leave

The weekly paid benefit that an employee may receive is calculated as a percentage of the employee's weekly wage, up to a maximum of that percentage of the State Average Weekly Wage.





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As of January 1, 2018, the employee may receive 50% of the employee's weekly wage while on leave, up to a maximum of $652.96. This percentage will increase over the next four years.

As of January 1, 2018, employees are eligible for up to 8 weeks of leave in a 52-week period. The 52-week period is judged on a rolling basis by looking back 52 weeks from the first date of leave to be taken. Leave must be taken in increments of at least one day. The maximum amount of leave time available to an employee will increase over the next four years.

The following chart shows how the maximum amount of leave and maximum benefit amount will increase through 2021:

| **Effective Date** | **Maximum amount of leave (in a 52-week period)** | **% of Weekly Salary (up to percentage of Statewide Average Weekly Salary)** |
|---|---|---|
| January 1, 2018 | 8 weeks | 50% |
| January 1, 2019 | 10 weeks | 55% |
| January 1, 2020 | 10 weeks | 60% |
| January 1, 2021 | 12 weeks | 67% |

## *EMPLOYER NOTICE REQUIREMENTS*

Employers must provide employees with information about Paid Family Leave in an employee handbook if one exists or other written policy. A model policy is available on the New York State website for Paid Family Leave. Employers that choose to utilize the model policy should be careful to correctly integrate its terms with the employers' other time off policies.

Employers must also display a poster regarding Paid Family Leave coverage in their place of business, similar to the one required for Workers' Compensation and Disability Benefits coverage. Your disability insurance company should provide you with a copy of this poster (if you are self-insured, New York State is expected to publish a poster that can be used).

## *INTERACTION WITH OTHER BENEFITS AND LAWS*

### Health Insurance

Employers must continue an employee's health insurance while that employee is on a Paid Family Leave. Employers may require their employees to continue to pay the employee's share of health insurance premiums during the Paid Family Leave.





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Use of Accrued Time

Employees *may not* be required to use accrued sick, vacation, or personal time while on a Paid Family Leave, unless such a leave also qualifies as a leave under the Family and Medical Leave Act ("FMLA") *and* an employer requires its employees to use accrued time while on an FMLA leave.

Employees may, however, be permitted to choose to use accrued time during all or a portion of the Paid Family Leave. Should the employee choose to do so, the employer may seek reimbursement from its insurance carrier for the paid benefit that the employee would have received while on leave for full days of accrued time used.

***Practice Note*:** Employers in New York City covered by the Earned Sick Time Act must be permitted to use accrued but unused Sick Leave for overlapping qualifying events

FMLA

For employers who are subject to the FMLA, the length of an employee's Paid Family Leave may be deducted from the amount of leave to which the employee is entitled under the FMLA if: (1) the leave meets the criteria of a leave under the FMLA; *and* (2) if the employer informs the employee in writing that it is designating the Paid Family Leave as a leave under the FMLA.

***Practice Note:*** There are many occasions where a leave of absence may be covered by either the FMLA or the New York State Paid Family Leave Law. Employers must be diligent to track an employee's use of leave under both statutes to be sure that they do not inadvertently deprive employees of any leave they may be entitled to under either law.

For example, a leave of absence to care for an employee's *own* serious health condition would qualify as an FMLA Leave but *not* as a Paid Family Leave under state law. Thus, an employee may take up to 12 weeks of leave under the FMLA for the employee's own condition and upon expiration of that leave still have 8 weeks (in 2018) of Paid Family Leave available.

Also, any leave taken before the Paid Family Leave Law went into effect on January 1, 2018 will not reduce the employee's entitlement of Paid Family Leave after January 1. For example, if an employee had a child in 2017 and took a leave of absence following the child's birth, the employee is entitled to up to 8 weeks of Paid Family Leave in 2018, so long as it is taken within 12 months of the birth or placement for adoption of that child.

There are also many examples of Paid Family Leaves that are not covered by the FMLA and therefore would not reduce an employee's allotment of leave time under the FMLA. The following are some examples:





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A Paid Family Leave taken between the first six and twelve months of employment (employees become eligible for PFL after six months but do not become eligible for FMLA leave until after twelve months of employment);

- A Paid Family Leave taken to care for a child over the age of 18 (unless the child over the age of 18 is incapable of self-care because of a disability);

- A Paid Family Leave to care for a domestic partner, grandchild, grandparent, sibling, or parent of spouse or domestic partner (since these relationships are covered under PFL but not covered under the FMLA).

Also, employers should be careful to understand which 12-month period they are using for FMLA purposes. Under the FMLA, an employer may select one of several options to establish the "single 12-month period" in which an employee is entitled to 12 weeks of leave. Only one option coincides with the PFL version. If an employer uses one of the other versions, then your employee's leave year for the purposes of FMLA and Paid Family Leave will not line up. For example, if you use a calendar year for FMLA purposes, and an employee takes eight weeks of leave in November and December, that employee is entitled to another 12 weeks of FMLA leave as of January 1, but will not be eligible for Paid Family Leave until November.

***Practice Note:*** If the FMLA applies to you and your current leave policy does not designate a rolling 12-month period looking back from the first date of the requested leave as the "single 12-month period" under the FMLA, you should consider updating your policies to do so.

New York City Earned Sick Time Act

New York City employers also must be sure to track the use of sick time guaranteed under the New York City Earned Sick Time Act. Full-time employees in New York City generally are entitled to a minimum of 40 hours of sick time each year (which hours are paid if employers have 5 or more employees) that they must be allowed to use for their own illnesses *or* to care for a family member with an illness.

***Practice Note:*** As employees may not be forced to use accrued sick time during a Paid Family Leave, be aware that an employee may still be entitled to additional days off to care for a family member after a Paid Family Leave if the employee still has accrued sick time available.

## ***REINSTATEMENT FOLLOWING PAID FAMILY LEAVE***

An employee returning from a Paid Family Leave must be reinstated to his or her position, or to a comparable position with comparable benefits, pay and other terms and conditions of employment.





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## *WAIVER OF PAID FAMILY LEAVE*

Employees who will not qualify for the minimum amount of time required for eligibility, *i.e.*, the employee will not work 26 consecutive weeks or will not work 175 days, must be provided the option of waiving Paid Family Leave coverage. The employee must be provided with a form (available here: https://www.ny.gov/sites/ny.gov/files/atoms/files/PFLWaiver.pdf) that will allow the employee to opt-out of Paid Family Leave benefits coverage and the required deductions. If an employee completes the waiver, the employer cannot take deductions from the employee's paycheck for Paid Family Leave coverage. However, any such waiver is automatically revoked if a change is made to that employee's schedule that would make the employee eligible for Paid Family Leave benefits.

## *WHAT IF I'M SELF-INSURED?*

The general rules also apply to self-insured employers. In addition to the obligations for employers set forth above, self-insured companies will also have the obligations that would otherwise be placed on the disability insurance carrier. For example, the self-ensured employer will be responsible for determining whether an employee is eligible for Paid Family Leave. The self-insured employer will also be responsible for paying out the appropriate amount of Paid Family Leave benefits to an employee.

## *ACTION ITEMS*

All New York employers should update their current leave policies to include the relevant provisions of the Paid Family Leave Law and notify their employees of such changes effective as of January 1, 2018.

Confirm with the employer's disability insurance providers and payroll companies that proper coverage has been obtained, and payroll deductions are being handled properly.

Managers and human resources staff should be trained with respect to the requirements of the new law.

New York employers should continue to stay abreast of developments under this new law.

*This "KZR Hot Topics" is not intended to provide a comprehensive review of all of the provisions, interpretations or implications of this legislation but instead to highlight in general terms some of the issues raised. Advice regarding the scope and application of any of the regulations referenced above can only be given in consultation with respect to a particular fact pattern.*





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# Exhibit C

NEW YORK STATE OF OPPORTUNITY. Department of Labor

Unemployment Insurance Division
Harriman State Office Campus
Albany, NY 12240

# Independent Contractors

The Unemployment Insurance Law excludes independent contractors from coverage.

Independent contractors:

- Are in business for themselves **and**
- Make their services available to the public

An independent contractor performs services free from:

- Supervision
- Direction **and**
- Control

The law does not define an independent contractor. Court decisions hold that we must apply the common law tests of master and servant to make a determination of whether services an individual provides are that of an employee or an independent contractor. Under the common law tests, we must consider all factors about the relationship between the two parties. We need to determine if the party who has the contract for the services provides, or has the right to provide, supervision, direction and control over the person who performs the services.

If an employer designates a worker as an independent contractor and the worker agrees, it does not mean the worker is an independent contractor under the law. A written agreement does not mean we do not examine the facts of the relationship. A contract term that outlines the right of control may establish an employment relationship even if the employer allows the individual significant freedom of action. If the employer provides, or has the right to provide, supervision, direction or control, an employer-employee relationship exists. It does not matter if the services are full time, part time, or on a casual basis.

In general, an officer of a corporation is an employee. The officer, who performs usual management activities, or services for the corporation, is not an independent contractor.

Based on court decisions, an **employer-employee relationship** exists when an employer:

- Requires full-time work
- Sets work hours
- Requires attendance at meetings and / or training
- Requires prior permission for absences
- Tells the individual when, where, and how to do the job
- Directly supervises the job
- Provides facilities, equipment, tools, or supplies
- Sets the rate of pay
- Provides compensation in the form of:
  - Salary
  - An hourly rate of pay **or**
  - A draw account against future commissions with no requirement to repay unearned commissions
- Provides reimbursement or allowance for business or travel expenses
- Provides fringe benefits
- Sets time, money, or territorial limits
- Requires services to be rendered personally
- Requires oral or written reports
- Makes the services an integral part of the business, particularly when performed on a continuing basis
- Furnishes business cards, or other identification of the individual as a representative of the employer
- **Does not** allow the individual to perform services for competitive businesses
- Reserves the right to end services on short notice
- Supervises unskilled labor (or is subject to supervision)

Based on court decisions an **independent contractor** has:

- An independent business:
  - Offers services to the public
  - Media advertising
  - Commercial telephone listing
  - Business cards, stationery and billheads
  - Carries business insurance
  - Maintains own establishment
- Significant investment in facilities (Hand tools and personal transportation are not significant)
- Risk of profit or loss in providing services
- Freedom to work own hours and to schedule own activities
- No requirement to:
  - Attend meetings or training sessions
  - Provide oral or written reports
- Freedom to provide services for other businesses (competitive or non-competitive)

The following persons are employees by law even though the circumstances under which they work may not meet the common law tests of an employer-employee relationship:

1. An agent or commission-driver who delivers:
   a. Meat, vegetables, fruit or bakery products
   b. Beverages (other than milk)
   c. Laundry or dry cleaning services

2. A full-time salesperson that solicits orders for merchandise for resale or supplies for use in the purchaser's business. The salesperson must work in a continuing relationship with an employer and perform all the work. The salesperson must have no substantial investment in the facilities used in the performance of the services, except the facilities for transportation.

3. Professional musicians or persons "engaged in the performing arts", who perform services for a television or radio station or network, a film production, theater, hotel, restaurant, night club or similar establishment unless, by written contract, such musicians or persons are employees of another employer.

   "Engaged in the Performing Arts" means performing services in connection with the production of, or performance in, any artistic endeavor that requires artistic or technical skill or expertise.

4. Professional models who model for, or who consent in writing to transfer use of their name or likeness for advertising or trade to, a person or entity that controls assignments, hours of work or performance location and that compensates them, in return for a waiver of their privacy rights, unless they perform services under a written contract that states the model is an employee of another covered employer.

5. Certain workers in the construction industry. Effective October 26, 2010 the New York State Construction Fair Play Act was enacted. The law creates a new standard to determine whether a worker is an employee or an independent contractor in the construction industry. Information about the Construction Fair Play Act can be found on form IA318.29 available on the department's web site at www.labor.ny.gov.

Employers can request a determination of the status of any individual. Write to the Liability and Determination Section and provide complete details of the relationship. Failure to report earnings and pay contributions due on the earnings of persons on the assumption that they are an independent contractor may result in additional assessments and interest if they are later determined to be employees.

# Exhibit D

# NANCY B. SCHESS, ESQ.
## PARTNER

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Nancy Schess is an attorney and partner in the law firm of Klein Zelman Rothermel Jacobs & Schess LLP. Klein Zelman is a boutique New York City firm representing management in all aspects of Labor, Employment and Benefits Law. For more than 30 years, Nancy has represented businesses, both locally and nationally, in diverse industries including professional services, hospitality, manufacturing, non-profit, banking/finance, entertainment and retail. She is a vocal advocate for her clients' needs striving to bring practical solutions to their legal issues.

Nancy's practice concentrates on workplace compliance issues and litigation including discrimination and harassment; wage and hour compliance, audit strategies and litigation; employee leave issues; and plant closing compliance. Nancy also counsels clients in enforceable means to protect their confidential and proprietary business assets. She also practices occupational safety and health law working with clients to prepare for and handle OSHA inspections and resolve citations.

***Practice Emphasis***

- Equal Employment Opportunity Compliance
- Employment Litigation (Individual and Class Claims)
- Wage/Hour Compliance
- Employment Contracts
- Trade Secret/Proprietary Information Protection
- Training & Development
- Audit Preparation & Defense
- Occupational Safety and Health Law

Working closely with clients, Nancy develops and implements preventative personnel policies and strategies to encourage a litigation-free workplace. She provides advice and counsel to help her clients successfully manage their personnel assets.

Nancy develops and presents customized training programs and presentations on various topics including *Prevention of Workplace Harassment, How to Conduct a Defensible Internal Investigation, Tips on Effective Performance Management, When OSHA Knocks, Wage and Hour Compliance* and *The Pros and Cons of Social Media in the Workplace*. While litigating labor and employment cases, Nancy has represented the firm's clients before federal, state and local courts and administrative agencies, including human rights agencies, various Departments of Labor and OSHA.

A sought after speaker, Nancy has appeared on television and radio and as a frequent speaker for professional associations and other groups. Nancy is quoted in the media, and has authored numerous publications, on a wide range of employment related topics.

Nancy was listed in the *NY Metro Super Lawyer 2011-17 in Employment Law* as well as a *NY Top Woman Lawyer for 2012-13 and 2015-16.*

Nancy is the co-founder of Gotham City Networking, Inc. (www.gothamnetworking.com) where she chairs the Women's Division. In 2015 and 2016, Nancy co-chaired the New York State Bar Association Annual Marketing Conference.

***Education***

B.A. 1982, State University of New York at Albany, summa cum laude

J.D. 1985, Boston University School of Law

*Ms. Schess is admitted to practice in New York,*
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# Exhibit E


*Klein Zelman Rothermel Jacobs & Schess LLP ("KZR") is a full-service law firm concentrating in all aspects of Labor and Employment Law representing management.*

*KZR has delivered strategic legal consulting and counsel, litigation and training to its clients for over thirty years. A boutique firm located in midtown Manhattan, KZR boasts a prestigious national practice with clients ranging from multi-national corporations to technology start-ups.*

**KZR is service obsessed**

Our clients call us because we get the job done. Period. Because a business crisis can occur at any time, we are available 24/7.

A client-focused law firm, we will make every possible effort to help you succeed in today's complex business environment and we will be available when you need us. Our goal is to provide superior legal representation and second-to-none client service on a cost-effective basis.

**About KZR's Labor and Employment Practice**

Our Labor and Employment practice represents management in all facets of labor and employment law, including employment discrimination claims and litigation; union organizing activity, labor negotiations and contract administration; wage and hour compliance and litigation; employment contract development and implementation; ERISA compliance issues and litigation; trade secret and proprietary information protection; FMLA and employee leave issues; NLRB and OSHA proceedings and general personnel matters. Our clients include companies in a wide variety of industries including retail, manufacturing, professional services, hospitality, banking/finance, technology, entertainment and non-profit. We regularly represent clients before all levels of courts and administrative agencies, including EEOC and state and local human rights agencies, the National Labor Relations Board and various Departments of Labor.

We also provide fair employment advice and strategies and assist our clients in developing effective personnel procedures and policies. Effective proactive procedures, which include handbooks and performance management procedures, are the best defense to minimize potential exposures. Additionally, our Training Division develops and presents customized training programs for our clients on topics including, "*Federal and State Wage and Hour Compliance,*" "*Prevention of Workplace Harassment,*" "*How to Conduct a Defensible Internal Investigation,*" "*Tips on Effective Performance Management,*" "*When the Union Knocks,*" "*When OSHA Knocks*" and other compliance issues.

**KZR's Approach to Litigation**

We recognize that litigation is a recurring reality in labor and employment law. In our litigation practice, KZR works aggressively to avoid or halt high-stakes, distracting litigation. Like larger firms, KZR handles the most complex litigation (including class actions), but is small enough to guarantee you cost-effective and personalized service. Our litigation attorneys believe that the first phases of a case set the tone for the litigation and we work to put our clients in a position of power and control from the outset. At each stage of a litigation, we are committed to defending you vigorously and aggressively, and to minimizing your costs, your exposure, and the disruption to your operations.

To learn more about our practice areas and the industries we serve, tour our Web site at www.kleinzelman.com, call us at 212-935-6020, or email us at kzr@kleinzelman.com.