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Digital Doppelgängers in the Workplace: Agentic AI, Impersonation and Emerging Employment Risks

Testing the Bounds of E-Discovery: How Courts Have Analyzed Employer Control Over Personal Devices

Cheeks vs Rule 68 in FLSA Mediations in the Second Circuit

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Section Officers

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Message From the Chair

Dear Labor and Employment Section Members,

It is an incredible honor to serve as chair of the Labor and Employment Law Section. I view this role first and foremost as one of service – service to our members, service to the New York State Bar Association, and ultimately, service to the individuals, organizations, and communities who rely on the work that each of us does every day. Thank you for entrusting me with this responsibility. It is truly a privilege to serve.

As I begin my term, I would like to share my vision that will guide our Section. At the heart of my vision are two words: community and cultivate.

Community

I believe the Labor and Employment Law Section is much more than just a CLE provider. It is a community. To me, community means seeing one another as more than just attorneys. We are connected by our shared interests, our commitment to the profession, and our desire to support one another. A strong community is a place where we celebrate successes, navigate challenges together, exchange ideas, seek advice, and build lasting professional relationships and friendships. It is where referrals are made, mentors are found, and colleagues become trusted friends. Strengthening our community is one of my priorities. To accomplish that, I hope to focus on two main areas.

Outreach. Our community must continue to grow, and that growth begins with law students and newer attorneys. They should see themselves as valued members of our profession from the very beginning of their careers. By creating meaningful opportunities to connect with students and emerging lawyers, we can help them develop relationships, build confidence, and discover the many benefits of active participation in the bar association.

Collaboration. Strong communities do not exist in isolation. They flourish through meaningful partnerships. This past spring, our joint meeting with the Dispute Resolution Section demonstrated the value of bringing different groups together. During my term, we will continue to collaborate with other NYSBA sections, committees, local bar associations, and affinity bar organizations to provide enriching programs and broaden our professional networks.

Cultivate

The second word that defines my vision is cultivate. We are all striving to become better attorneys – not only by staying current on developments in labor and employment law, but also by becoming stronger leaders, more effective communicators, better mentors, and more thoughtful colleagues. Professional growth extends well beyond legal knowledge.


Iyana Titus

Cultivating our section also means investing in people. We must intentionally create opportunities for new speakers, authors, committee leaders, and volunteers to contribute and develop their talents. One of my goals is to relaunch our mentorship program, a program that had a profound impact on my own professional journey especially in the bar association. I know firsthand the difference a mentor can make, and I want more members to experience that same support and encouragement.

In that same spirit, I have asked each of our committee chairs to identify at least two emerging leaders during my term – individuals who demonstrate the potential to become future leaders of our section. By investing in the next generation today, we strengthen the future of our profession.

The practice of labor and employment law is evolving at an extraordinary pace. From the rapid advancement of artificial intelligence to the changing legal landscape surrounding diversity, equity, and inclusion, it can sometimes feel as though the ground beneath us is constantly shifting. Our clients expect us to navigate these changes with confidence, and that requires us to remain informed, adaptable, and connected.

Throughout my career, the New York State Bar Association has been that constant for me. It has kept me grounded in the law while surrounding me with colleagues whose wisdom, generosity, and friendship have enriched both my professional and personal life. Because of this community, I have never had to navigate change alone.

My hope is that every member of this section experiences that same sense of belonging. I look forward to working alongside each of you as we strengthen our community, cultivate new leaders, and continue building a section that is welcoming, engaging, and forward-looking. Together, we will not only advance our profession but also support one another in meaningful and lasting ways.

My door is always open. I welcome your ideas, your feedback, and your involvement. Please do not hesitate to reach out to me on LinkedIn or by email at iyana.titus@parks.nyc.gov.


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Undergraduate Law Fellows Program

The Undergraduate Law Fellows Program within the Labor and Employment Law Section (LELS) of the New York State Bar Association (NYSBA) was created for undergraduate students to gain exposure to the legal field prior to law school. The program provides personalized pre-law support on Undergraduate Law Fellows' paths to becoming practicing attorneys. Undergraduate Law Fellows work with the LELS chair and gain access to networking and pre-professional events hosted by the LELS and broader NYSBA. The program pairs Undergraduate Law Fellows with a mentor within the section aligned with their unique interest in labor and employment law and allows Fellows the opportunity to write for the Labor and Employment Law Journal. Undergraduate Law Fellows are also given the opportunity to attend the annual fall LELS conference and learn from current lawyers, providing a well-rounded understanding of labor and employment law. Best of all, most, if not all, costs of attending events with the LELS are subsidized, ensuring that financial barriers do not limit participation and allowing Fellows to fully focus on learning and professional development. Conversations with past Fellows reveal that the program's sustained success over several years is rooted in an ethos centered on meaningful, holistic engagement with the legal field.

Former Undergraduate Law Fellow Spencer Thieme, Cornell ILR '24 and Harvard Law School '27, explained that the experience allowed her to network with a variety of New York State lawyers and attend presentations on topical issues in labor law. Not only did she gain a deeper understanding of labor and employment law, the field she is currently pursuing at Harvard Law, Thieme also widened her network for future mentors and support through connections with practicing attorneys, an opportunity for which she is especially grateful as she prepares to enter the profession.

Owen Spargo, Cornell ILR '26, is a current Undergraduate Law Fellow. Spargo and Thieme went to the LELS fall conference in Toronto together, and Spargo described what he learned from the conference as "surprising and invaluable." He explained that "to know that the field of labor law is ever changing made you more excited to go into this field when realizing that labor and employment law is not this stagnant thing but is ever evolving." Spargo emphasized the holistic approach of professional, academic, social, and personal development the program provides: pre-law networking with labor and employment law professors, publishing articles in the LEL Journal, attending social dinners and happy hours with the other Fellows within the section, and receiving personal mentorship from current section Fellows. Spargo will be working at Deloitte post-graduation with plans to head to law school afterward.

Chinaza Politis, Cornell ILR '26, is another current Undergraduate Law Fellow who echoed the other Fellows' sentiments on the success of the program. As someone who wanted both the perspective of day-to-day lawyers' processes and a deeper dive into labor and employment law, Politis found both with the program. She stressed that "actually knowing whether or not you want to live the realities of that career path … is difficult. …[D]oing a conference where you're talking about the actual practice field along with the lawyers' personal lives ... you get a very holistic view." She explained that the program is an unparalleled opportunity for undergraduates to explore the intersection of their academic interests with the professional realities of the field they're pursuing to better inform and prepare themselves for their law careers years before they begin practicing. Politis, who will be working in mergers and acquisitions at a firm in New York City post-graduation, described the learning, development and pre-law preparation the program provides as otherwise "nearly impossible" to obtain as an undergraduate, setting Undergraduate Law Fellows apart from their peers.

As the newest Undergraduate Law Fellow and Cornell ILR '27, I, Samantha Garner, have found both my mentors – former LELS chairs Timothy Taylor and Abby Levy – to be pivotal to my experience within the LELS. As someone interested in multiple areas of the law, I appreciate the opportunity to explore different sides of the law to better inform my future decisions. Currently, I am interested in careers in both alternative dispute resolution and labor and employment law litigation, and this mentorship has been instrumental in helping me engage with the realities of practicing in both fields. This mentorship also motivated me to seek and attain my internship at Baker Mckenzie LLP's Milan office while studying abroad during fall 2025. There, I worked within the employment and compensation team and gained exceptional experience as a U.S. liaison for multinational clients, comparing Italian labor and employment law with that of the U.S. As the only American and youngest member on the team, I successfully advocated for opportunities to work on complex cases involving nuanced Italian statutes and matters that genuinely interested me. My ability to seek out and advocate for challenging work was strengthened by the program's network and the confidence I built as a Fellow.

Beyond my internship, I also organized a happy hour networking and training event in Rochester, N.Y. – an event that also offered CLE credits for early-career attorneys – and contributed to the LEL Journal. I also assisted in planning and organizing the 50th anniversary LELS Fall Conference at Cornell University in fall 2026. Looking ahead, I plan to continue my research with the Cornell Scheinman Institute on Conflict Resolution. This past summer I researched intergenerational conflict at the workplace where a recurrent theme emerged: the role of AI in both causing and exacerbating conflicts, particularly across generations. I intend to further explore how AI impacts the likelihood of workplace grievances, and ways AI can be utilized as a solution rather than solely seen as a precursor to conflict. I will explore this topic with the other Fellows, learning from their unique perspectives on navigating AI use at the workplace.

As the program continues to grow, it is clear that the LELS Undergraduate Law Fellows Program will keep evolving to meet the needs and interests of future students. As Fellows go on to enter the profession, they will remain connected to the program, giving back to the community that played such a central role in shaping their success and guiding those who follow in their footsteps.

Samantha Garner
Undergraduate Law Fellow 2026-27

Digital Doppelgängers in the Workplace: Agentic AI, Impersonation, and Emerging Employment Law Risks

By Ivie A. Serioux and Jerry Zhang

Introduction

An employee opens her work email and finds a message, apparently from her supervisor, directing her to wire $100,000 to an unfamiliar account. The request is unusual as her supervisor has never asked her to wire money before. She clicks to expand the sender's address and immediately sees that the domain does not match. She reports the attempt to IT and wires nothing. The scheme she foiled is known as a business email compromise (BEC) scam, a form of spoofing in which fraudsters impersonate authority figures to trigger unauthorized financial transfers.[1] Most employers are aware of this type of scam and have policies designed to prevent it. Employers are generally prepared to address routine spoofing; however, artificial intelligence (AI) has significantly raised the stakes and introduced new risks.

Consider what happened in February 2024. A finance employee at a non-U.S.-based multinational engineering firm also received what appeared to be a suspicious email.[2] This time, however, the employee was persuaded to join a video conference call that appeared to include the company's chief financial officer (CFO) and other senior executives. The employee agreed to wire $25.6 million. Every participant on that call, except the victim, was an AI-generated deepfake. The faces and voices of real corporate officers, including the CFO, had been manufactured while on the video call. The deception was difficult to detect because the deepfakes on the video call looked and sounded real. According to the FBI's Internet Crime Complaint Center, in 2025 American businesses reported losses over $30 million to BEC scams involving AI alone.[3] This figure is solely based on American businesses that reported losses, with the understanding that many businesses may not report being subjected to a scam.

AI is reshaping not only how fraud is committed, but also key aspects of the employment relationship, including the rise of deepfakes in the workplace. Deepfakes are synthetic media, i.e., content created or manipulated using machine learning, particularly deep learning models trained on large datasets of images, voices, or videos, in an effort to create false (and typically malicious) information.[4] With minimal effort, bad actors can now impersonate coworkers, executives, or clients – making deepfakes a potent tool for fraud, impersonation, and harassment.

Courts are already grappling with the use of AI-enabled tools being deployed to harass, retaliate, humiliate, and impersonate within the workplace. In *Carranza v. City of Los Angeles*, a California appellate court affirmed a $4 million jury verdict for a police captain whose workplace was permeated with sexually explicit, fabricated images purporting to depict her, holding that the circulation of false sexual imagery could constitute unlawful harassment under California law. Although the court did not address AI-generated deepfake specifically, the decision underscores that employers may face liability where synthetic or falsified sexual content creates a hostile work environment, regardless of the method used to generate the imagery.[5]

A Washington State Patrol trooper is alleging claims of discrimination, retaliation and invasion of privacy against his employer. Specifically, he is alleging that his supervisor generated and disseminated a deepfake video showing the officer kissing a coworker.[6] Separately, a Nashville television meteorologist sued after she alleged her employer failed to address synthetic sexually explicit images circulating among staff.[7] These cases share a common thread: a human actor using AI tools to generate synthetic content aimed at harassing a coworker.

However, given the rise of agentic AI in the workplace, there is now a threat that misconduct may originate from an external actor or an AI system impersonating a workplace authority figure. Agentic AI refers to AI systems designed not merely to generate content or respond to prompts, but to independently pursue goals and take actions with limited human supervision.[8] Unlike traditional generative AI tools that wait for user input, agentic AI systems can plan, reason, and execute multistep tasks – often by interacting with other software systems, calling tools or APIs, and adjusting their behavior based on feedback and results.

These developments raise difficult questions for employers. Unlike traditional harassment cases, the alleged misconduct may not always be traceable to a human coworker or supervisor. This evolution tests the contours of liability under Title VII, the New York State Human Rights Law (NYSHRL), and the New York City Human Rights Law (NYCHRL), each of which was drafted with human misconduct in mind.

This article examines how AI-enabled impersonation challenges existing employmentlaw frameworks and outlines practical considerations for New York employers navigating this emerging risk.

From Fake Content to Fake Actors: Recent Data on AI Impersonation by the Numbers

Recent data confirms that AI-enabled impersonation is no longer a speculative risk. Deloitte reports that the proliferation of generative AI has dramatically reduced the technical barriers to identity replication, accelerating the spread of "digital doppelgängers" across workplace and social contexts.[9] Independent industry tracking shows a sharp rise in reported deepfake incidents in 2024 and early 2025, with first-quarter 2025 incidents exceeding all of 2024, indicating sustained growth rather than a temporary spike.[10]

The trend is especially pronounced for voice-based impersonation, which has direct implications for employment law risk. Industry reporting indicates that AI voice-cloning and voice-based fraud increased by more than 600% year over year in 2024, reflecting a shift away from static deepfakes toward real-time audio impersonation, including live phone calls and voice messages.[11] These tools often require only seconds of source audio, making them particularly effective in workplace settings where employees are accustomed to receiving verbal instructions from supervisors or human resources personnel. According to McAfee security researchers, voice cloning can now be generated from as little as three seconds of recorded audio, producing an 85% voice match to the original speaker.[12]

As discussed above, these technological trends are already manifesting in employment litigation. Furthermore, the EEOC's 2024-2028 Strategic Enforcement Plan emphasizes scrutiny of technology-driven discrimination and digital harassment.[13]

Deepfake Harassment: The Hostile Work Environment Framework

When deepfake or synthetic content overwhelmingly targets women with the foreseeable effect of altering working conditions, humiliating employees, chilling leadership participation, or undermining professional credibility, the conduct can translate into a hostile work environment claim under Title VII and its New York analogues. The operative question is not whether the content is synthetic, but whether it is severe or pervasive enough to affect the terms and conditions of employment. Synthetic origin does not insulate deepfakes from existing harassment law; it is simply the delivery mechanism for conduct those frameworks already prohibit.

Voice cloning further compounds this harm. A fabricated audio recording can be weaponized not only to harass, but to manufacture apparent proof of something an employee never said, authorized, or approved. In workplace investigations and disciplinary proceedings, that manufactured proof functions as a credibility issue. These incidents cause severe reputational and psychological harm to victims and place employers in difficult credibility determinations, particularly when relying on outdated policies and investigative procedures.[14]

Employers should also recognize that the gendered nature of many deepfake incidents does not define the outer limits of this risk. AIgenerated content can just as easily be used to target other protected characteristics, such as race, disability, religion, or national origin. For example, a deepfake can be used to alter a colleague's appearance or identity in ways intended to demean or ridicule. Title VII and its New York analogues prohibit harassment based on any protected class, regardless of the medium used. Deepfakes therefore fall squarely within these prohibitions when they target protected characteristics and contribute to a hostile work environment.

Agentic AI and the Absence of a Human Harasser

Agentic AI challenges a foundational assumption in workplace harassment law that misconduct can always be traced to a single human actor, but the absence of a human creator does not eliminate liability where human conduct amplifies the harm. Even if responsibility for the creation of AI-generated or synthetic content is unclear, human dissemination, commentary, and tolerance of such material in the workplace remain squarely within existing harassment frameworks. As illustrated by *Carranza v. City of Los Angeles*, courts focus less on how falsified sexual imagery originates and more on how employees circulate, discuss, and react to it, and on whether employers take prompt corrective action, underscoring that workplace liability may arise from human responses to AI-generated content regardless of the technology involved.[15]

In this setting, the threshold question is not simply whether an employer can be held liable when AI generates harassing or discriminatory outputs; instead, it is which theory of liability is applicable. Section 8-107(13) of the NYCHRL establishes three routes to employer liability for discriminatory conduct by an employee or agent: strict liability where the wrongdoer exercised managerial or supervisory responsibility; actual knowledge plus acquiescence or failure to take immediate corrective action; and constructive knowledge plus failure to exercise reasonable diligence. Separately, § 8-107(1) imposes direct liability on employers for their own discriminatory conduct.

Which theory applies to agentic AI depends on a question courts have not yet resolved: whether the functional authority conferred on an AI system – delivering disciplinary communications, directing employee conduct, operating with the apparent authority of HR – equates to managerial or supervisory status under § 8-107(13). If it does, strict liability attaches without any showing of notice. An AI system authorized to act with supervisory authority is not meaningfully distinguishable, in functional terms, from a supervisor acting within that same authority. Courts construing the NYCHRL broadly in favor of its remedial purposes may well adopt that analysis. However, the recommended practices for AI use in the workplace always include keeping a human in the loop. Accordingly, some may argue that an AI agent is never acting with supervisory authority.

If the agentic AI is viewed not as a supervisory but instead as a third-party agent, the relevant inquiry may become whether the employer exercised reasonable care in selecting, configuring, supervising, and constraining AI systems, and whether it acted promptly once harmful or discriminatory outputs became foreseeable. That framework mirrors longstanding principles governing third-party harassment, under which employers may be held accountable for misconduct by customers, vendors, or other nonemployees when they knew or should have known of the conduct and failed to take appropriate corrective action.[16]

Agentic AI fits uncomfortably but plausibly within both doctrines. The unresolved issue, therefore, is not whether liability is theoretically possible, but *whether an employer deploys AI in a way that permits it to act with supervisory authority, real or perceived, and where the line of foreseeability should be drawn when an autonomous system is capable of impersonation, decision-making, and unsupervised communication.* At what point does an employer's decision to deploy an autonomous system, capable of impersonation, decisionmaking, and unsupervised communication, carry with it a duty to anticipate and prevent the risk that the system itself may generate conduct contributing to a hostile work environment? There is currently no bright-line rule answering this question. Courts will have to grapple with how to classify agentic AI systems under the law.

Additional Implications for New York Employers: Liability, Investigations, and Risk Management

These issues are especially salient under New York law since the NYCHRL is construed broadly in favor of its remedial and deterrent purposes and imposes a more expansive conception of employer responsibility than its federal counterpart. The three-route structure of § 8-107(13) means that the scope of authority an employer confers on an AI system at deployment, not what the employer learns afterward, may be the decisive liability question. Where an agentic system is authorized to exercise supervisory or managerial functions, the strict liability track may apply and actual or constructive notice of discriminatory conduct is irrelevant. Where the system functions as a non-supervisory agent, liability turns on what the employer knew or should have known and whether it responded with reasonable diligence.[17] In either scenario, the employer's deployment decision may independently give rise to direct liability under § 8-107(1) for its own discriminatory conduct.

Accordingly, the liability analysis should focus on the AI system's authorized scope of function at deployment, the foreseeability of harmful outputs, and the adequacy of safeguards and response mechanisms. Where employers can demonstrate that AI systems were implemented for legitimate business purposes, subject to defined constraints, and monitored for misuse, those facts will bear on, though not necessarily eliminate, employer exposure.

AI impersonation also complicates internal investigations in ways that directly affect employer liability. Traditional investigations assume identifiable senders, authentic communications, and reliable documentary evidence. AI-generated content disrupts each of these assumptions. Employers may encounter spoofed phone numbers, fabricated audio recordings, or conflicting employee accounts where individuals genuinely believed they were interacting with supervisors or HR personnel. Effective investigations therefore require early coordination among human resources, legal, and information-technology teams, including careful assessment of authentication, metadata, and system access.[18] Failure to adapt investigative protocols may support claims that employers did not take reasonable steps to address known harassment risks, particularly after complaints are raised.[19]

While courts continue to grapple with these issues, employers can adopt a proactive, multidimensional approach to mitigate risk:

- **Update policies to address AI-enabled misconduct.** Antiharassment, misconduct, and acceptableuse policies should expressly cover AI-generated impersonation, deepfakes, and digital harassment, making clear that fabricated communications may constitute actionable misconduct regardless of whether a human actor is involved.
- **Document and limit the functional authority of AI systems.** Because NYCHRL liability may attach without notice where a system exercises managerial or supervisory functions, employers should clearly document what each AI system is capable of doing and authorized to do, at what level of authority it operates, and how its scope is constrained. Systems authorized to communicate disciplinary decisions, direct employee conduct, or represent HR should be treated as presumptively subject to strict liability analysis.
- **Prohibit unsanctioned impersonation of supervisors or HR personnel.** Employers should design and deploy AI systems with technical and policy-based constraints that prevent autonomous agents from impersonating supervisors, human resources personnel, or other individuals, or from communicating in ways that reasonably create a false impression of human or managerial authority. Where AI systems are deployed in HR-facing roles, employers should implement safeguards limiting which employer files or networks the system can access, limiting the system's communicative scope and provide clear disclosure that employees are interacting with an automated system rather than a human decision-maker.
- **Strengthen authentication and access controls.** Sensitive communications, particularly those involving discipline, payroll, benefits, or investigations – should be subject to enhanced verification, logging, and auditability to reduce the risk of spoofing or AIgenerated deception.
- **Train managers and HR to identify impersonation red flags.** Targeted training should focus on recognizing signs of voice cloning or AI misuse, such as unusual communication patterns, urgency that bypasses standard procedures, or requests inconsistent with established protocols.
- **Adapt investigation protocols for AIgenerated evidence.** Complaint response frameworks should include early escalation to IT and cybersecurity teams and incorporate procedures for assessing authenticity, metadata, system logs, and access credentials when AIenabled impersonation is suspected.
- **Reassess controls once risks become known.** Employers should periodically evaluate foreseeable misuse risks tied to agentic AI and update safeguards, training, and investigative practices – particularly after incidents or complaints – to demonstrate reasonable care and prompt remediation.

These measures addressing deepfakes and digital harassment remain critical as the technology evolves, and recent cases emphasize that employer investigation and intervention are central to assessing liability. Accordingly, employers should implement clear reporting mechanisms, conduct prompt and well-documented investigations into suspected synthetic or falsified content, and take immediate corrective action to halt dissemination and address employee conduct, even where the origin of the content is uncertain.

Conclusion

The employee who agreed to wire $25.6 million was not careless. He saw familiar faces and heard familiar voices. He did what anyone would do; he trusted them. That trust was the vulnerability, and the technology exploited it perfectly.

Agentic AI doesn't just replicate that threat. Instead, it embeds it in every employer's workflow that chooses to deploy agentic AI. When the system handling your HR calls, generating your performance records, and responding to employee complaints is also capable of impersonating the people who run those functions, the question of who is responsible for when things go wrong is no longer clear cut.

Existing employment law frameworks are flexible enough to adapt, but employers who rely on outdated assumptions about misconduct risk being unprepared. For New York employers operating under expansive human rights laws, AI-enabled impersonation should be understood not merely as a technological issue, but as an emerging employment law risk. Proactive policy development, training, and cross-disciplinary response mechanisms will be essential for employers to create clear boundaries that uphold trust, minimize liability and protect employees as courts and agencies confront the next phase of workplace misconduct.

Ivie A. Serioux is a shareholder in the New York office of Littler Mendelson, P.C. and is an advisor on employment law, artificial intelligence governance, and workplace equity. She counsels employers, executives, and HR leaders on complex workplace matters, including discrimination, retaliation, compliance, and risk management drawing from her litigation experience. She also advises organizations on the legal and ethical implications of AI, helping develop compliant, transparent, and effective AI strategies. A frequent speaker on AI, employment law, and the future of work, she is Co-Chair of the New York City Bar Association's Presidential Task Force Subcommittee on Artificial Intelligence in Labor and Employment.

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Endnotes

1. Federal Bureau of Investigation, *Business Email Compromise*, https://www.fbi.gov/how-we-can-help-you/scams-and-safety/common-frauds-and-scams/business-email-compromise (last visited Apr. 29, 2026).
2. Heather Chen & Kathleen Magramo, *Finance Worker Pays Out $25 Million After Video Call with Deepfake "Chief Financial Officer,"* CNN (Feb. 4, 2024), https://www.cnn.com/2024/02/04/asia/deepfake-cfo-scam-hong-kong-intl-hnk.
3. Federal Bureau of Investigation, Internet Crime Complaint Center, *2025 Internet Crime Report* (2026), https://www.ic3.gov/AnnualReport/Reports/2025_IC3Report.pdf.
4. Ivie Serioux and Jerry Zhang, *Deepfakes and Digital Harassment: What Employers Need to Know*, Littler ASAP (2025), https://www.littler.com/news-analysis/asap/deepfakes-and-digital-harassment-what-employers-need-know-2025.
5. *Carranza v. City of Los Angeles*, 111 Cal. App. 5th 388 (Cal. Ct. App. 2025).
6. *Id.*
7. Khorri Atkinson, *AI Deepfakes Spawn New Breed of Workplace Harassment Lawsuits*, Bloomberg L. (Daily Lab. Rep.) (Feb. 24, 2026), https://news.bloomberglaw.com/daily-labor-report/ai-deepfakes-spawn-new-breed-of-workplace-harassment-lawsuits.
8. Cole Stryker, *What Is Agentic AI?*, IBM (last visited May 4, 2026), https://www.ibm.com/think/topics/agentic-ai.
9. Deloitte, *Digital Doppelgängers: The Implications of AI-Driven Identity Replication in the Workplace*, (Dec. 2022), https://www.deloitte.com/global/en/issues/work/digital-doppelgangers.html.
10. Keepnet Labs, *Deepfake Statistics & Trends 2026: Growth, Risks, and Future Insights* (Mar. 12, 2026), https://keepnetlabs.com/blog/deepfake-statistics-and-trends.
11. Bright Defense, *150+ Deepfake Statistics* (Apr. 2026), https://www.brightdefense.com/resources/deepfake-statistics/.
12. *Scammers Use AI Voice Cloning Tools to Fuel New Scams*, McAfee (last visited May 4, 2026), https://www.mcafee.com/ai/news/ai-voice-scam.
13. U.S. Equal Emp. Opportunity Comm'n, *Strategic Enforcement Plan for Fiscal Years 2024–2028*, https://www.eeoc.gov/strategic-enforcement-plan-fiscal-years-2024-2028 (last visited May 4, 2026).
14. Jesse Dill, *AI and Deepfakes Complicate Evidence in Workplace Investigations*, Bloomberg Law (Feb. 27, 2024).
15. *See Carranza, supra* note 5.
16. *See, e.g., Summa v. Hofstra Univ.*, 708 F.3d 115, 124–25 (2d Cir. 2013). ("The United States Court of Appeals for the Second Circuit adopts the well-reasoned rules of … in imputing employer liability for harassment by non-employees according to the same standards for non-supervisory co-workers").
17. N.Y.C. Admin. Code § 8-107(13).
18. *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217–18 (S.D.N.Y. 2003) (recognizing employer obligations to preserve and evaluate electronic evidence once litigation risk becomes foreseeable).
19. *See Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 65 (2d Cir. 1998) (employer liability turns on reasonableness of response after notice of harassment).

Testing the Bounds of E-Discovery: How Courts Have Analyzed Employer Control Over Personal Devices

By William C. Martucci and Maddie Bechtel

As the modern workplace continues to evolve, many organizations are adopting bring-your-own-device (BYOD) policies, enabling employees to use personal smartphones, tablets, and laptops for work-related activities. These policies bring with them significant legal complexities – particularly in the context of employment litigation. Personal devices often contain a wealth of potentially relevant information, including text messages, emails, and other digital communications that, if subject to e-discovery, can make or break a claim. When claims like discrimination, wrongful termination, or retaliation arise, courts must assess the extent of an employer's control over its employees' personal devices to determine whether such data must be preserved and produced. As case law develops, courts are taking varied approaches to the discoverability of personal devices, prompting a closer examination of recent trends in different jurisdictions' legal standards on the matter.

ESI Preservation and Production Requirements Generally

Under the Federal Rules of Civil Procedure, parties engaged in litigation are under a clear and proactive duty to preserve and disclose electronically stored information (ESI) relevant to the case. Rule 26 imposes an affirmative obligation on parties to provide, without awaiting a discovery request, any ESI in their possession, custody, or control that may support their claims or defenses. Following these initial disclosures, Rule 34 enables parties to formally request the production of ESI that wasn't initially disclosed. Critically, Rule 37(e) addresses the consequences of failing to preserve ESI that should have been maintained in anticipation or during litigation. If such information is lost due to a party's failure to take reasonable steps, the court may impose sanctions, including adverse inference instructions or even dismissal of claims, depending on the severity of the prejudice caused.

In state courts, while procedural rules vary by jurisdiction, many have adopted discovery frameworks that closely mirror the Federal Rules of Civil Procedure, particularly regarding the scope of ESI within a party's possession, custody, or control. As in federal court, parties are generally expected to preserve ESI once litigation is anticipated and to engage in good-faith efforts to identify, retain, and produce such information during discovery.

The phrase "possession, custody, or control" is not explicitly defined in the Federal Rules of Civil Procedure, leaving its interpretation to the courts – and resulting in a patchwork of standards across and within jurisdictions. This divergence has created challenges in determining the scope of discovery obligations and a lack of reliable legal guidance on the matter.

Clear Cell Phone E-Discovery Outcomes at the Margins

While the legal standards governing possession, custody, or control vary across jurisdictions, certain scenarios yield predictable outcomes. At the margins – where facts are clear and usage patterns are well-defined – courts typically reach consensus.

When Personal Devices Are Clearly Discoverable

ESI from employee cell phones is readily discoverable when the devices are issued by the employer. In *Owens v. Board of*

Supervisors of Louisiana State University and Agricultural and Mechanical College,[1] the court stated that employers maintain constructive control over employment-related data stored on company-issued devices. When a device is employer-issued, the company can regulate device use, enforce data retention policies, and direct employees to preserve or produce relevant communications. As such, company-issued devices fall squarely within the scope of discoverable ESI under the Federal Rules of Civil Procedure.

When Personal Devices Are Clearly Not Discoverable

When employees' cell phones are not company-issued, and not used for business purposes, the outcome is similarly predictable. In *Muslims on Long Island, Inc. v. Town of Oyster Bay*,[2] the Eastern District of New York addressed a discovery dispute concerning the town's obligation to produce ESI from its advisory board's personal cell phones. The underlying litigation involved allegations by Muslims on Long Island, Inc. (MOLI) that the Town of Oyster Bay had discriminatorily denied its application to expand a mosque. During discovery, MOLI learned that the advisory board members did not use government-issued phones. MOLI sought requested access to the board members' personal devices, asserting the potential for relevant communications. The town refused, and MOLI moved to compel discovery.

The court denied the motion to compel, finding that MOLI had not met its burden to show that the personal devices were used for official business. The court emphasized that MOLI failed to identify any prior instances where the board members used personal phones for work-related communications. Additionally, declarations from board members stated that they did not have each other's phone numbers, did not maintain any board group texts, and had not exchanged any messages concerning MOLI's application.

This case demonstrates that the absence of work-issued devices or mere speculation of work-related use of personal devices is not enough to compel discovery. To make personal devices discoverable, a party must present specific, credible evidence that a personal device was used to conduct relevant business. Discovery must be targeted and grounded in factual support – not just possibility.

The Gray Area of Cell Phone E-Discovery

While some cases involving electronically stored information (ESI) on employees' personal devices present clear outcomes – either plainly discoverable or clearly outside the scope of discovery – many fall into a legal gray area. In these middle ground scenarios, courts have turned to a range of standards to determine whether such data falls within a party's "possession, custody, or control" under the Federal Rules of Civil

Procedure. These standards include the Legal Right Standard, the Legal Right Plus Notification Standard, the Practical Ability Standard, and a Multi-Factor Approach. Federal district courts within each circuit have historically applied multiple standards, illustrating the fragmented and evolving nature of this critical area of e-discovery law. Even within each standard, courts continue to interpret and apply these standards differently, contributing to the uncertainty that litigants must navigate.

Legal Right Standard

Under this approach, courts focus strictly on legal entitlement. If a party has a legal right to obtain the ESI in question, courts applying this standard hold that the data is within the party's "possession, custody, and control." This triggers the obligation to preserve, collect, search, and produce the ESI during discovery.

In *Weston v. Docusign, Inc.*,[3] the Northern District of California applied the legal right standard to determine whether a company had sufficient control over employees' personal devices to compel production of text messages. In the litigation, the plaintiffs alleged that Docusign misled investors and sought discovery of text messages between key executives related to the issue. The court found that Docusign's employment agreements and internal policies expressly authorized the company to access and retrieve business-related communications from employees' personal devices. Because Docusign had a contractual right to access the data via these agreements, the court held that the company had sufficient control under Rule 34.

Legal Right Plus Notification Standard

This standard builds on the legal right approach by adding a duty to inform. If the responding party has a legal right to obtain certain ESI, it must preserve and produce it. Additionally, if the party knows of additional relevant ESI that it cannot legally access – such as data held by a third party – it must notify the requesting party of the existence of that data and identify the third-party custodian.

There is not currently a notable case applying the legal right plus notification standard in the context of ESI and mobile devices, but this standard has been applied in other traditional discovery contexts where a dispute as to possession, custody, or control arises.

Practical Ability Standard

Here, the focus shifts from legal entitlement to practical access. Irrespective of a formal legal right to the data, a responding party is required to preserve and produce any ESI it can realistically obtain. Feasibility of access – rather than ownership or legal control – is the key consideration in determining whether the data falls within a party's discovery obligations.

In *Allergan v. Revance Therapeutics*,[4] the U.S. District Court for the Middle District of Tennessee applied this standard in an e-discovery dispute. Allergan, alleging trade secret misappropriation, sought communications among Revance employees from their personal devices. The court held that Revance did not have control over the devices, citing its BYOD policy and employee handbook, which did not grant the company the practical ability to search for, collect, and produce data from employees' personal devices. Moreover, Allegan failed to show that Revance had previously accessed such data in the ordinary course of business, or that employees were cooperating or had a financial stake in the litigation.

Although some courts continue to apply the practical ability standard, it has faced growing criticism from both courts and scholars for producing inconsistent and inequitable outcomes.[5] This criticism may signal a trend away from the standard's use in future cases.

Multi-Factor Approach

Federal courts are increasingly adopting a multi-factor approach to assess an employer's "possession, custody, and control" over employees' personal devices for purposes of e-discovery. This analysis considers various factors depending on the court and circumstances. Courts typically consider factors such as:

- The frequency and extent of business use of the device;
- The employer's legal or practical access to the data;
- The existence of company policies governing personal device use; and
- Whether the employer issued or subsidized the device.

This approach allows courts to focus on the contextual relationship between the employer, employee, and data, acknowledging the realities of modern work environments and increasing reliance on personal devices for professional communication.

In *Miramontes v. Peraton, Inc.*,[6] the Northern District of Texas applied this multi-factor analysis to assess whether Peraton had control over text messages exchanged on an employee's personal phone. The issue arose from an employment discrimination claim, where the plaintiff, Carlos Miramonte, alleged that his termination was based on age and race. After sending a litigation hold letter including relevant text messages, and directly informing Miramontes's director of his duty to preserve emails related to the claims, Miramontes later discovered that his supervisor had deleted text messages relating to his termination.

The court rejected the legal rights test, explaining that "the realities of modern business require a fact-specific approach." To determine whether Peraton had a duty to preserve the text messages from Miramontes's supervisor, the court considered four factors:

- Whether the employer issued the devices;
- How frequently the devices were used for business purposes;
- Whether the employer had a legal right to obtain communications from these devices; and
- Whether company policies address access to communications on personal devices.

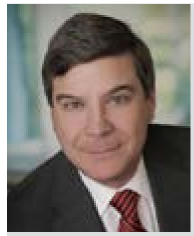
Although the messages were on a personal phone, the court found that Peraton had control over the ESI because its employees routinely conducted business on their personal phones.

Under the multi-factor approach, when employees use personal devices for work, and the employer is aware of this practice, courts are likely to find that the employer has sufficient control to trigger preservation duties.

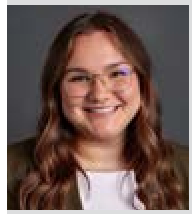
Mitigating E-Discovery Risks Within Your Organization

Given the evolving and often inconsistent legal standards governing e-discovery, employers should take proactive steps to reduce the risk of discovery disputes and sanctions. The following strategies can help organizations navigate this complex landscape more effectively:

- **Develop a comprehensive BYOD policy.** Clearly articulate the employer's right to access work-related content stored on employees' personal devices. The policy should outline expectations for cooperation during litigation.
- **Obtain employee consent.** Secure written consent from employees acknowledging the employer's right to access, preserve, and produce relevant data from personal devices in the event of litigation or investigation.
- **Revise litigation hold procedures.** Ensure that litigation hold notices explicitly instruct employees to preserve relevant communications and documents stored on personal devices, not just on company systems.
- **Regularly review and update policies.** Stay informed of the evolving legal standard and court sions around e-discovery. Periodically review and update the employer's e-discovery policies to ensure legally compliant practices.



Bill Martucci practices nationally in business and employment litigation in the Shook, Hardy & Bacon LLP's New York and Washington, D.C. offices. He focuses on complex class action as well as business to business litigation, business torts and unfair competition. His jury work has been featured in The National Law Journal. A graduate of Georgetown University, Bill serves on the firm's Executive Committee.



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Endnotes

1. *Owens v. Bd. of Supervisors of Louisiana State Univ. & Agric. & Mech. Coll.*, 695 F. Supp. 750 (M.D. La. 2023).
2. *Muslims on Long Island, Inc. v. Town of Oyster Bay*, No. 25-CV-00428, 2025 WL 1582250 (E.D.N.Y. June 4, 2025).
3. *Weston v. Docusign, Inc.*, No. 22-CV-00824-WHO, 2024 WL 3446924 (N.D. Cal. July 15, 2024).
4. *Allergan, Inc. v. Revance Therapeutics, Inc.*, No. 3:23-CV-00431, 2025 WL 984792 (M.D. Tenn. Mar. 17, 2025).
5. The Sedona Conference, Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control," 17 Sedona Conf. J 467, 528 (2016).
6. *Miramontes v. Peraton, Inc.*, No. 3:31-CV-3019-B, 2023 WL 3855603 (N.D. Tex. June 6, 2023).

From Modest to Rigorous Scrutiny: The FLSA Collective Action at a Crossroads

By Meredith R. Miller and Grace Ann Porter

Section 216(b) of the Fair Labor Standards Act (FLSA or the "Act") authorizes "similarly situated" employees to collectively sue employers for violations of the Act, but only if each additional employee opts in to the collective by affirmatively consenting in writing to join the action.[1] District courts play an "active and early role"[2] in collective actions, including authorizing the issuance of notice to potential plaintiffs, so that they are informed that they may submit consent forms to join the collective. The text of the FLSA does not provide meaningful guidance on the showing necessary for the court to authorize notice to potential collective members.[3] In that connection, as discussed below, different standards have emerged, leading to a widening circuit split. The opt-in structure of the FLSA collective has significant consequences for the scope, scale, and effectiveness of wage and hour enforcement, and the trigger for notice of the collective and the right to opt-in plays a central role.

Background: Lenient Two-Step Framework

Historically, before any discovery has occurred, courts have applied a relatively lenient, conditional approach to collective certification. For decades, most courts, including courts in the Second Circuit,[4] have followed the two-step framework derived from *Lusardi v. Xerox Corp.*[5] Under this approach, in the first step, plaintiffs can obtain "conditional certification" upon making only a "modest factual showing" that other employees are or were similarly situated.[6] Conditional certification triggers court-facilitated notice to potential opt-in plaintiffs.[7] Even though Section 216(b) of the Act does not require parties to obtain judicial approval before seeking to advise other similarly-situated persons of their FLSA rights, district courts routinely expedite and facilitate notice to potential opt-in plaintiffs by "conditionally certifying" the FLSA collective.[8] At the second stage, the district court will, on a fuller record, determine whether to "decertify" the collective if the record reveals that the opt-in plaintiffs are not similarly situated to the plaintiff.[9]

In the first stage, a number of cases have held that one affidavit from the named plaintiff that identifies similarly situated employees is sufficient to make out the modest burden.[10] At this stage, courts typically refrain from weighing competing evidence, instead deferring a more searching inquiry until the later, second stage after discovery, when defendants can move for "decertification."[11] This lenient standard, which had been the "near universal practice of the district courts"[12] facilitates broad notice and, in turn, potentially greater opt-in participation.

Rigorous and Intermediate Standards: Fifth and Sixth Circuits

In recent years, more stringent standards have emerged for assessing whether employees are "similarly situated." In *Swales v. KLLM Transport Servs., LLC*, the Fifth Circuit was the first to depart from the traditional two-step *Lusardi* framework.[13] In *Swales*, the Fifth Circuit adopted a one-step approach that requires district courts to "rigorously scrutinize" similarity *at the outset* of the litigation – before notice is sent to potential opt-in plaintiffs.[14] Under *Swales*, courts must consider all available evidence and resolve threshold factual disputes early, rather than allowing notice based on a preliminary and largely one-sided showing.[15] Acknowledging concerns of endorsing the merits before notice, the Fifth Circuit explained that "addressing these issues from the outset aids the district court in deciding whether notice is necessary" and "ensures notice sent is proper in scope."[16] Where a district court "ignores that it can decide merits issues when considering the scope of a collective, it ignores the 'similarly situated' analysis" and as a result is likely to lead to the solicitation of claims by sending notice to potential plaintiffs who are not similarly situated.[17] This Fifth Circuit approach requires courts to engage in a more substantive evaluation of similarity at the outset, increasing the evidentiary burden on plaintiffs seeking to proceed collectively.

The Sixth Circuit has likewise rejected the traditional two-step approach and has adopted a distinct and more demanding alternative. In *Clark v. A&L Home Care & Training Center, LLC*, the court held that the "plaintiffs must show a 'strong likelihood' that those employees are similarly situated to the plaintiffs themselves."[18] This intermediate standard "requires a showing greater than the one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance."[19] Similar to a preliminary injunction decision, under this strong likelihood standard "the movant [is required to] demonstrate to a certain degree of probability that she will prevail on the underlying issue when the court renders its final decision."[20]

In *Clark*, the Sixth Circuit considered the *Swales* standard but rejected the timing of a determination that employees were similarly situated at the outset of the case.[21] The Sixth Circuit held that such a determination at the outset of the case was too soon, because there is a need for factual determination to conclude who was similarly situated.[22] Likening similarly situated determinations to a preliminary injunction, the Sixth Circuit stated that "[b]oth decisions are provisional, in the sense that the court renders a final decision on the underlying issue (whether employees are 'similarly situated' here, success on the merits there) only after the record for that issue is fully developed."[23] This Sixth Circuit standard increases the evidentiary burden on plaintiffs seeking to proceed collectively. The Sixth Circuit acknowledged that a more demanding standard could result in fewer collectives of similarly situated employees, but it also suggested that the historically modest showing results in the solicitation of claims by the court.[24]

A Flexible Approach: Seventh Circuit

More recently, in *Richards v. Eli Lily & Company*, the Seventh Circuit added further complexity by rejecting both the traditional lenient standard and the heightened standards announced in the Fifth and Sixth Circuits.[25] Instead, the Seventh Circuit announced a flexible, case-specific approach that allows courts to weigh competing evidence – including employer rebuttal – before authorizing notice.[26] The Seventh Circuit held that "to secure notice, a plaintiff must first make a threshold showing that there is a material factual dispute as to whether the proposed collective is similarly situated."[27] Upon review, the Seventh Circuit addressed "a common weakness" shared by *Lusardi*, *Swales*, and *Clark*.[28] In its view, each of those approaches "impose an inflexible notice standard that all but eliminates judicial discretion."[29]

In analyzing *Lusardi*, the Seventh Circuit agreed with the Fifth and Sixth Circuits that "*Lusardi* inevitably conflicts with a district courts obligation to 'maintain neutrality and to shield against abuse of the collective device.'"[30] However, the agreement ended there. The Seventh Circuit stated that the *Swales* requirement that "plaintiffs [] prove their similarity by preponderance of the evidence to secure notice is unworkable[.]"[31] Additionally, the Seventh Circuit found the *Clark* "strong likelihood" standard failed because "when relevant evidence of similarity is in the hands of individuals who are not yet parties to the action, [the court] doubted plaintiffs will be able to show a strong likelihood of similarity before notice any more than they would be able to show it by a preponderance of the evidence."[32]

The Seventh Circuit concluded that to show such a material factual dispute, "a plaintiff must produce some evidence suggesting that they and the members of the proposed collective are victims of a common unlawful employment practice."[33] While this evidence is not required to be definite, the defendant may submit rebuttal evidence and plaintiffs may engage with that opposing evidence.[34] Under this standard, the district court decides whether notice will be sent based on "its assessment of the factual dispute before it."[35]

Adhering to the Lenient Two-Step Framework (Mostly): Second and Ninth Circuits

The Ninth Circuit has continued to adhere to the traditional two-step framework.[36] Although the Second Circuit has reviewed district courts' application of the two-step framework for abuse of discretion,[37] and has found the approach "sensible,"[38] "it has not formally adopted a specific test for conditional approval of an FLSA collective action."[39]

While the Second Circuit has not indicated an intent to abandon the two-step framework, at least one district court judge has indicated support for following the Sixth Circuit approach in *Clark*. In *Pineda v. Big City Realty Management, LLC*, Judge Cogan noted the "wisdom of the Sixth Circuit's approach" to determine whether to grant conditional certification.[40] The court reasoned that "just because the two-step approach is 'well tread,' does not make it well-suited to the goals of court facilitated notice of an FLSA collective action."[41] The decision expressed the concern that the modest factual showing of the first-step "may not be sufficiently targeted to provide notice to employees who are actually similarly situated to plaintiffs in a given case."[42] This raises the concern that conditional certification would put non-similarly situated employees on notice to bring their own claim.[43]

In *Pineda*, Judge Cogan justified departing from the lenient two-step framework and applying the Sixth Circuit "strong likelihood" standard because the parties had engaged in discovery.[44] This is a heightened standard that has not otherwise been applied in the Second Circuit. That said, it is does not depart too far from the heightened "modest plus" standard that a number of district courts have used where there has already been some discovery.[45] Under the "modest plus" standard, in cases "where 'parties have completed, or substantially completed conditional collective certification discovery,'"[46] "courts *will* look beyond the pleadings and the plaintiff's affidavits."[47] In essence, the "modest plus" standard expands upon the two-step approach, with courts reasoning that "the degree of scrutiny applied should increase in proportion to the discovery that has been conducted."[48] Thus, even though courts within the Second Circuit have rejected application of heightened standards announced in other circuits, they have employed a more searching inquiry where the parties have engaged in discovery.[49]

Conclusion

In the current landscape, multiple competing standards govern collective certification, with at least four distinct approaches now in use across the federal circuits. The Supreme Court has, so far, denied certiorari on this issue.[50] For now, before any discovery, this leaves the standard in the Second Circuit the lenient two-step approach.

This shift in conditional certification standards has significant implications for the future of wage and hour enforcement. Although framed as a dispute over case management and evidentiary standards, the emerging trend toward heightened scrutiny at the notice stage will likely have the practical effect of narrowing the availability of collective actions. By requiring plaintiffs to marshal more substantial evidence earlier in the litigation – often before meaningful discovery – these standards increase the likelihood that courts will deny or limit certification, thereby preventing notice from issuing to potential opt-in plaintiffs. Because the opt-in mechanism depends on notice to trigger participation, restrictions at the certification stage will likely translate into lower participation rates. Additionally, the lack of notice also has the circular effect of preventing a plaintiff from potentially uncovering further evidence from other employees that would help establish that they are similarly situated.

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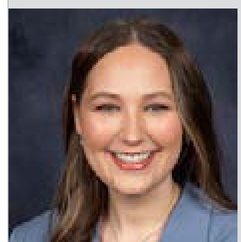

Grace Ann Porter graduated in May 2026 from Albany Law School. She graduated from the University of Alabama with a B.A. in political science in 2023.

Endnotes

1. 29 U.S.C. § 216(b).
2. *Richards v. Eli Lily*, 149 F.4th 901, 905 (7th Cir. 2025).
3. *Id.*
4. *Myers v. Hertz Corp.,* 624 F.3d 537, 554-55 (2d Cir. 2010); *see also Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 243 (3d Cir. 2013); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260 (11th Cir. 2008); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001).
5. *Lusardi v. Xerox Corp*, 118 F.R.D. 351, 359 (D. N.J. 1987).
6. *Myers*, 624 F.3d at 555.
7. *Id.*
8. *See, e.g., id. at 554; Jackson v. Bloomberg, L.P.*, 298 F.R.D. 152, 162 (S.D.N.Y. 2014); *Millin v. Brooklyn Born Chocolate, LLC*, No. 19-CV3346, 2020 WL 2198125, at *4 (E.D.N.Y. May 6, 2020); *Finnigan v. Metropolitan Transportation Authority*, No. 19-CV-00516, 2020 WL 1493597, at *5 (E.D.N.Y. Mar. 26, 2020).
9. *Myers*, 624 F.3d at 555.
10. *See Khalil v. Original Homestead Rest., Inc.*, No. 07 Civ. 695, 2007 U.S. Dist. LEXIS 70372, at *3 (S.D.N.Y. Aug. 9, 2007); *Zhao v. Benihana, Inc.*, No. 01 Civ. 1297, 2001 U.S. Dist. LEXIS 10676, at *2 (S.D.N.Y. May 7, 2001).
11. *Swales v. KLLM Transport Services, LLC.*, 985 F.3d 430, 436-7 (5th Cir. 2021).
12. *Id.* at 439.
13. *Id.*
14. *Id.* at 434.
15. *Id.* at 442.
16. *Id.*
17. *Id.*
18. 68 F.4th 1003, 1009 (6th Cir. 2023).
19. *Id.* at 1011.
20. *Id.*
21. *Id.* at 1010.
22. *Id.*
23. *Id.* at 1011 (stating that "a notice determination undisputedly shares … requirement that the movant demonstrate to a certain degree of

probability that she will prevail on the underlying issue when the court renders its final decision.”).

24. *Id.* at 1009-10.

25. *Richards*, 149 F.4th at 913.

26. *Id.*

27. *Id.* at 913–14.

28. *Id.* at 912.

29. *Id.*

30. *Id.* at 911 (*citing Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1050 (7th Cir. 2020)).

31. *Id.*

32. *Id.* at 911–12 (*citing Clark*, 68 F.4th at 1010–11).

33. *Id.* at 913.

34. *Id.*

35. *Id.*

36. *Harrington v. Cracker Barrel Old Country Store, Inc.*, 142 F.4th 678, 683 (9th Cir. 2025) (declining to adopt one-step approach announced by Fifth Circuit in Swales); *see also Campbell v. City of Los Angeles*, 903 F.3d 1090, 1108–10 (9th Cir. 2018).

37. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 540 (2d Cir. 2016); *see also Myers*, 624 F.3d at 555; *Scott v. Chipotle Mexican Grill*, 954 F.3d 502, 515 (2d Cir. 2020).

38. *Myers*, 624 F.3d at 552.

39. *Davella v. Ellis Hosp, Inc.*, No. 12-cv-726, 2024 WL 98352, at *5 (N.D.N.Y. Jan. 9, 2024) (citations omitted).

40. *Pineda v. Big City Realty Management, LLC*, No. 22-cv-5428, 2024 WL 5146068, at *7 (E.D.N.Y. Dec. 17, 2024).

41. *Id.* at 7 (*citing Tay v. New York Presbyterian Hospital*, No. 22-CV-8379, 2024 WL 4286226, at *5 (S.D.N.Y. Sept. 24, 2024)).

42. *Pineda*, 2024 WL 98352 at *6.

43. *Id.*

44. *Id.* at *3.

45. *See Tay*, 2024 WL 4286226, at *5; *Lee v. Sutherland Global Services, Inc.*, No. 6:23-CV-06549, 2025 WL 2426352, at *4 (W.D.N.Y. Aug. 22, 2025).

46. *Tay*, 2024 WL 4286226, at *4.

47. *Lee,* 2025 WL 2426352, at *4 (emphasis in original).

48. *Tay*, 2024 WL 4286226, at *6 (*quoting Sydney v. Time Warner Ent.-Advance/Newhouse P'ship*, No. 13-CV-286, 2022 WL 474146, at *6 (N.D.N.Y. Feb. 16, 2022)). There appears to be no “threshold amount of time that triggers ‘modest plus’ review”; however, courts generally “apply[] the standard after anywhere from six to nine months of discovery.” *Tay*, 2024 WL 4286226, at *6. (*citing Brown v. Barnes & Nobles, Inc.*, No. 16-CV-7333, 2019 WL 5188941, at *2 (S.D.N.Y. Oct. 15, 2019); *West v. LaserShip, Inc.*, No. 21 Civ. 5382, 2024 WL 1461403, at *6 (S.D.N.Y. Apr. 4, 2024)).

49. *Tay*, 2024 WL 4286226, at *7 (declining to adopt *Swales* or *Clark*); *Lee*, 2025 WL 2426352, at *3 (declining to adopt Sixth Circuit approach).

50. *Cracker Barrel Old Country Store, Inc. v. Harrington*, No. 25-559, 2026 U.S. Lexis 770, at *1 (U.S. Feb. 23, 2026); *Eli Lilly & Co. v. Richards,* No. 25-476, 2026 U.S. Lexis 196, at *1 (U.S. Jan. 12, 2026).

THE NEW YORK STATE BAR ASSOCIATION

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Labor and Employment Law Section attendees at the gala.

Danny De Voe and Scott Deluca

Evan Spelfogel announces the winners of the writing competition.

Evan Spelfogel with writing competition winners Milo Young and Kate Hancock.

Samantha Walsh, Samuel M. Kaynard Memorial Award winner.

Section Chair Iyana Titus with Sara Kula.

Section Chair Iyana Titus with panelists of off-site program from the NYC Commission on Human Rights, the NYS Division of Human Rights and the Equal Employment Opportunity Commission.

NYSBA Labor and Employment Section Off-Site

Meet the NLRB Regional Directors

By Karen P. Fernbach

On January 15, 2026, the American Arbitration Association hosted the annual Thursday night off-site event held by the NYSBA Labor and Employment Law Section, which was a huge success. That evening the National Labor Relations Board program was moderated by Karen P. Fernbach, former regional director of the NLRB, and our NLRB Committee co-chairs, Kimberly Lehmann, a partner at the Levy Ratner law firm and spokesperson for the union members of the section; and Peter Jones, a partner at the Bond Schoeneck & King law firm and spokesperson for the management members of the section.

The program was advertised as an informal gathering to "Meet the NLRB Regional Directors" from all three regions of New York State, and it lived up to its promise. In attendance was John Doyle, regional director of Region 2 (Manhattan Region), Linda M. Leslie, regional director of Region 3 (Buffalo Region) and Teresa Poor, regional director of Region 29 (Brooklyn Region). They each spoke about the current changes happening at the agency in view of the change in administration under President Trump. There was a larger than usual group of attendees anxious to hear about the effect of these changes at the regional level.

The directors spoke about the newly installed board members, Scott Mayer and James Murphy, who, along with board member Prouty, are now, after an 11-month hiatus, able to issue decisions as a quorum of three. They also noted the appointment of the new general counsel, Crystal Carey.

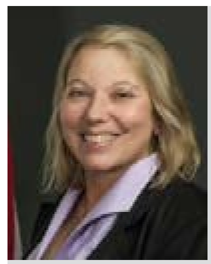
Although no substantive decisions had yet issued, the directors discussed several changes in procedural rules that were of great importance to the practicing labor attorneys in attendance, provoking lively discussion.

GC- 26-01 "New Agency Wide Docketing Protocol" issued by Acting General Counsel William B. Cowen on December 23, 2025, established new agency-wide docketing procedures for filing unfair labor practice charges. Specific evidentiary information is to be e-filed with the agency by the charging party within two weeks of the filing of the charge. The submission requires a timeline of events including names of witnesses with their contact information along with a summary of their testimony and submission of relevant documents. Failure to submit within the two weeks could result in dismissal of the charge for non-cooperation but the directors indicated that a reasonable request for an extension would be entertained by them. Further, the directors noted that the charge would not immediately be assigned to a board agent except for cases involving priority charges. There was a very large backlog of cases pending in the regions and with a limited budget and a reduced staff, delaying the assignment to an agent would make it easier for the region to triage cases and for the agents to more easily complete investigations of pending charges they are currently assigned to.

On January 28, 2026, after the offsite meeting, General Counsel Crystal Carey issued a press release entitled "Clarification Regarding Recent Coverage of the NLRB's Updated Docketing Protocol," further explaining the procedures and rationale for establishing the new docketing protocols.

Several other GC memos were of equal interest to those attending. In particular, GC Memo 25-06, "Seeking Remedial Relief in Settlement Agreements," provoked a lot of discussion. This memo outlined an emphasis on settling more pending cases to "both effectuate the Act and permit the Agency to concentrate its limited resources on other cases by avoiding costly litigation expenses." This approach was well received as it gives greater discretion to the regional directors to settle cases, by for example, permitting 80% of back pay, rather than the previously required 100% under former General Counsel Jennifer Abruzzo, by permitting the addition of non-admission clauses in settlement agreements and by carefully considering the issue of the expanded remedies set forth in the *Thryv, Inc.*, 372 NLRB No. 22 (2022). The directors discussed the impact of the *Thryv* decision at the regional level, which is currently the subject of litigation in several Circuit Courts of Appeals, some of which have denied enforcement. As the *Thryv* decision expanded the scope of remedies to include "all direct or foreseeable pecuniary harms suffered as a result of the respondent's unfair labor practices," the latest GC memo by Acting General Counsel Cowens limited this remedy only to cases where the causal link between the loss and the unfair labor practice was "sufficiently clear." This discussion, as with the earlier one, generated a healthy and informative debate on what types of pecuniary losses could be sought under the general counsel's view.

These are only a few of the areas that were discussed. Overall, the willingness of the directors to explain the new procedures and to entertain many questions by the attendees was greatly appreciated. Hearing directly from the directors in this intimate and informal setting is a yearly tradition in the Labor and Employment Law Section and one that will no doubt continue in the years ahead.



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NYSBA Labor and Employment Section Offsite

Anti-Discrimination Laws at the Federal, State, and City Level

By Charlotte Moriarty Pramer

The January 15, 2026 NYSBA Labor and Employment Section off-site featured a panel on the current state of anti-discrimination laws at the federal, state, and local levels, with representatives from the EEOC, the New York State Division of Human Rights (NYSDHR) and the New York City Commission on Human Rights (NYCCHR).

Federal Developments – EEOC

EEOC representatives discussed enforcement priorities under Chair Andrea Lucas, including antisemitism, religious discrimination, and exclusionary DEI initiatives. Regarding DEI, the agency emphasized that these initiatives are still in early stages and that additional time is needed to assess their implementation and broader effects.

In response to practitioner questions, the EEOC addressed several procedural points, noting that class cases are not mediated; mediation is discretionary and may occur prior to investigation or, in limited circumstances, during an investigation; and charges may be transferred among EEOC offices nationwide due to workload management and staffing needs.

New York State Developments – NYSDHR

NYSDHR representatives discussed recent statutory changes and operational developments affecting enforcement under the New York State Human Rights Law (NYSHRL).

Effective December 2025, New York codified disparate impact liability under the NYSHRL, formally incorporating into statute a theory of discrimination previously developed through case law. Under this framework, a complainant establishes a prima facie case by identifying a specific facially neutral policy that causes, or predictably causes, a disproportionate adverse impact on a protected class. The burden then shifts to the employer to demonstrate, with supporting evidence, that the practice is job-related and consistent with business necessity, after which a complainant may prevail by showing that a less discriminatory alternative was available.

Panelists emphasized that New York's approach is intentionally broader and more remedial than federal law, including recognition of a predictive impact theory, under which liability may attach where discriminatory effects are foreseeable or logically inevitable, even before long-term statistical harm has fully materialized.

Additional Statutory Updates

NYSDHR also highlighted several related statutory changes, including that requests for reasonable accommodation are now explicitly protected activity under state law, and that, effective April 2026, employers may no longer rely on credit history in employment decisions.

Agency Operations and Audit Response

Representatives addressed recent operational reforms following a 2025 state comptroller audit that identified delays and capacity issues in the agency's handling of discrimination complaints. In response, Governor Hochul significantly increased funding for NYSDHR by effectively doubling its budget and hiring approximately 100 additional investigators and staff, along with the creation of a centralized intake unit and modernization of case-management systems.

Representatives also noted a potential increase in filings at the state and local level involving gender identity and related protected categories, which practitioners attributed to the removal of certain federal protections by executive order in 2025.

New York City Developments – NYCCHR

The NYCCHR representative discussed several recent amendments to the New York City Human Rights Law with compliance implications for employers.

Domestic Violence and Economic Abuse

In 2025, New York City amended its definition of domestic violence to explicitly include economic abuse, such as unauthorized use of a partner's credit or coercive financial conduct. Employers may not discriminate against employees based on survivor status and must provide reasonable accommodations for the same.

Height and Weight Protections

Height and weight, or combined height and weight (defined as "body size"), were added as protected characteristics under the New Yok City Human Rights Law in 2024. This includes an affirmative obligation on the employer to provide “alternative actions” for employees based on their height or weight, or body size.

An alternative action is an adjustment that an employer or public accommodation can practicably make. An alternative action is practicable if it is achievable without requiring a structural modification, material change to operations, or imposing a significant cost on the covered entity.

In employment, an alternative action could be adjustments which allow an individual to perform a job (e.g., offering a chair that comfortably fits an employee so they can perform the core functions of their job). The guidelines make clear that this differs – and is a lower burden – than the traditional reasonable accommodations analysis (for disability, pregnancy, domestic violence, etc.).

While the Commission has received a high volume of employer inquiries, relatively few cases have reached adjudication to date.

Lactation Accommodations

New York City amended its lactation provisions in May 2025 to align with New York State law relating to paid lactation breaks. The city law adds notice obligations at the start of employment, through workplace postings, and online.

Pay Transparency and Pay Data Reporting

Panelists discussed developments in pay transparency and pay equity at both the city and state levels. New York City’s Salary Transparency Law, enacted in 2022, requires disclosure of minimum and maximum salary ranges in job postings for positions performed at least in part in New York City. This requirement closely mirrors New York State’s pay transparency law under the New York Labor Law, which mandates similar disclosures statewide.

Panelists noted that proposed amendments to the city law that would have required job descriptions, disclosure of non-wage compensation, and expanded recordkeeping obligations did not advance during the most recent legislative session.

However, the City Council enacted legislation authorizing the collection and analysis of EEO-1–style pay data, modeled on the former federal Component 2 framework. That legislation, initially vetoed by Mayor Eric Adams and subsequently enacted over veto, will require covered employers to submit anonymized pay data disaggregated by race, ethnicity, and gender once an implementing agency is designated and reporting procedures are established. As of now, there has not been an agency to enforce this legislation.

Panelists emphasized that this data-collection regime reflects a broader policy trend toward structural pay equity enforcement, with transparency serving as both a compliance tool and a foundation for disparate impact analysis.

General Observations

The EEOC panelist emphasized mediation as a no-cost but discretionary option. Across agencies, panelists acknowledged operational challenges stemming from increased filing volume and recent disruptions, and highlighted ongoing efforts to improve staffing, efficiency, and case processing. Speakers noted that New York’s state and local enforcement regimes remain comparatively expansive relative to many other jurisdictions.

Charlotte Moriarty Pramer is an employment associate at Meister Seelig & Schuster, where she represents employers in a broad range of labor and employment matters, including workplace disputes, employment counseling, and compliance-related issues. Charlotte is an editor of the New York State Bar Association *Labor and Employment Law Journal.*

What Law Applies in Multi-Jurisdictional Employer-Employee Relationships?

By Danielé De Voe

Introduction

The COVID-19 pandemic permanently altered the landscape of how and where work is performed. Prior to 2020, remote work was largely viewed as an accommodation granted sparingly and often reluctantly. Employers expressed concerns about data security, productivity and the erosion of collaborative culture as a basis to refuse remote work requests. The sudden and prolonged shutdown due to the COVID-19 pandemic forced organizations to adopt remote work infrastructures at unprecedented speed. As the return to office timeline repeatedly shifted, remote work became a functional necessity.

In the years since, remote and hybrid work arrangements have become deeply embedded in the employment relationship, with many employees demanding remote work as a condition of employment and many employers recognizing the financial benefits of reduced office space and expanded geographic hiring pools. Yet, this flexibility has produced a significant and often underappreciated legal consequence: the stark increase in multi-jurisdictional employment relationships.

Employees increasingly work from multiple states, sometimes with employer approval and other times without the employer's knowledge or consent. Some employees relocate to vacation homes for extended periods; others attend school in a different state while listing a family residence on onboarding documents; still others adopt a "work from anywhere" lifestyle, performing duties from various jurisdictions throughout the year. These arrangements can trigger the employment laws of multiple states, often without the employer's knowledge. When multiplied across a workforce, the result is a complex compliance environment in which employers must navigate overlapping and sometimes conflicting statutory regimes.

This article examines the emerging legal framework governing which jurisdiction's law applies when employees perform work across state lines. It synthesizes the pre- and post-COVID precedent addressing wage-and-hour statutes, discrimination laws, tort claims, and contractual choice of law provisions. While many principles predate the pandemic, the modern remotework environment has exposed gaps and inconsistencies that courts are only beginning to address.

The Two-Step Choice of Law Framework

Courts generally follow a twostep process when determining which state's law governs a multi-jurisdictional employment dispute.

Step One: Determine Whether a True Conflict Exists

As the Second Circuit has explained, "[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved."[1] If no conflict exists, the analysis ends and New York courts will simply apply New York law when it is one of the potentially applicable choices.[2] In practice, however, true harmony between state employment laws is rare. States vary widely in wage-and-hour protections such as the applicable minimum wage, paid leave mandates, discrimination statutes, and available remedies. As a result, the first step often reveals at least one material conflict, requiring courts to proceed to step two.

Step Two: Determine Whether the Statute Has Extraterritorial Reach

If a conflict exists, the courts next examine whether the relevant statute was intended to apply extraterritorially. It is a well-settled rule of New York statutory interpretation that *no* legislation is presumed to operate outside of the state absent language contained therein expressly stating otherwise.[3] This presumption is central to the analysis of New York's employment statutes.

The Extraterritorial Limits of the New York Labor Law

As the New York Labor Law (NYLL) is silent on extraterritorial application, New York courts have consistently held that the NYLL does *not* apply to work performed outside the State of New York.[4] Indeed, New York courts emphasize that Article 19 of the NYLL expressly identifies its purpose as protecting "persons employed … in the state of New York."[5] Thus, wage-and-hour claims for work performed elsewhere fall outside the statute and New York's Labor Laws will *not* apply.[6]

This territorial limitation of the NYLL applies even when other significant New York contacts exist. Indeed, in *In re Stage Presence Inc.*,[7] the Southern District held that statutory wage claims were governed by the laws of the District of Columbia, where plaintiffs performed their work, and not by the laws of the State of New York, despite the fact that wage payments were to be made in New York by a New York payroll entity using New York payroll processing accounts and New York bank accounts. There, the court emphasized that "conflict of laws interest analysis could not be used to give extraterritorial effect to the statute when the legislature did not provide that the statute would have such effect."[8]

The question becomes more complicated when an employee performs *some* work in New York and other work elsewhere. In these instances, New York courts examine where the *majority* of work occurred and then apply the laws of that jurisdiction.[9]

The Extraterritorial Limits of the New York WARN Act

In *Magnuson*,[10] the Southern District held that the New York WARN Act cannot be applied extraterritorially to an employee who performed work outside the State of New York for a New York company.

In a challenge to the holding in *Magnuson*, the plaintiff in *Coleman v. Optum Inc.*[11] argued that, in the current post-COVID remote work era, the decision in *Magnuson* should be reevaluated and reconsidered. The Southern District rejected this argument, noting that no court since the onset of the COVID-19 pandemic has explicitly addressed whether telework performed for a New York company is sufficient to state a claim under the WARN Act and that the statutory language and legislative history of the WARN Act does not appear to contemplate its application to remote work performed elsewhere.[12]

The Extraterritorial Limits of New York State Unemployment Laws

The Physical Presence Test

In *In re Allen*,[13] when analyzing an unemployment law claim filed by a Florida resident working remotely for a New York company, the New York Court of Appeals held that "physical presence determines localization for purposes of interpreting and applying section 511 to an interstate telecommuter." There, the Court of Appeals found that "physical presence is the most practicable indicium of localization for the interstate telecommuter who inhabits today's 'virtual' workplace linked by Internet connections and data exchanges."[14] The court noted that this approach serves the underlying purposes of the employment laws, which "are best served by tying localization to the state in which an interstate telecommuter is physically present."[15] There, the Court of Appeals held that "unemployment has the greatest economic impact on the community in which the unemployed individual resides."[16]

Discrimination Statutes and the New York Impact Requirement

The *Hoffman* Rule

In *Hoffman v. Parade Publications*,[17] the New York Court of Appeals held that the New York State and New York City human rights laws do not apply discriminatory acts occurring outside New York unless the plaintiff can show a discriminatory impact within the state. There, the Court found that it was insufficient that the discriminatory decisions emanated from New York to afford New York protections to an employee who worked and lived in Georgia.[18]

In a post-COVID challenge to *Hoffman*, the plaintiff, in *Paknait v. Moor*,[19] argued that the *Hoffman* decision should be reevaluated in light of the modern remote-work realities after the pandemic. The First Department rejected this argument, reaffirming that non-residents must show an impact within New York State before they will be afforded the protections offered by the New York anti-discrimination laws.[20] The First Department further rejected the plaintiff's argument that the New York forum selection clause contained in her underlying employment contract afforded her the protections of New York's anti-discrimination laws.[21]

However, there is an important distinction applied to *hiring-based* discrimination claims that deserves note. The Court of Appeals, in *Syeed v. Bloomberg L.P.*,[22] held that non-residents *may* bring discrimination claims arising from discriminatory hiring decisions made in New York State. In *Syeed*, the Court of Appeals stated that a discriminatory denial of a New York-based job directly affects New York's labor market, depriving the applicant of the chance to work and potentially live within the state or city, thus evidencing an impact "within" New York to afford the plaintiff with the protections of New York's anti-discrimination laws.[23]

Tort Claims and the Interest Analysis Framework

The Second Circuit stated in *Lazard Freres & Co. v. Protective Life Ins. Co.*[24] that "the relevant analytical approach to choice of law in tort actions" is the interest analysis, where "the law of the jurisdiction having the greatest interest in the litigation will be applied." However, the court emphasized that this approach "is distinct from the 'center of gravity' or 'grouping of contacts' test used in contract" cases. The interest analysis test examines which state has the greatest interest in having its laws apply to the dispute based on: (1) the location of the alleged tortious conduct; (2) the location of the injury; (3) the parties' domiciles; and (4) the state's policy interests.[25] Remote work cases increasingly require courts to determine where the "injury" occurred when conduct and impact span multiple jurisdictions. Thus, courts often apply one or more of the following tests to determine which state has the greatest interest in having their laws apply.

Primary Locus/Greatest Interest Test: Courts examine where the conduct giving rise to the claim primarily occurred (the "Primary Locus") and which state has the strongest interest in regulating it.[26]

Primary Workstation Test: Courts focus on the percentage of time the employee works in each location to determine in which jurisdiction the employee primarily works and thereafter applies the law of that jurisdiction.[27]

Center of Gravity Test: A holistic approach that evaluates the totality of the circumstances surrounding the entire employment relationship by looking at: (1) where the relationship was formed; (2) where duties were performed; (3) duration of assignments; (4) reporting structure; and (5) location of alleged misconduct.[28]

Predominant Job Situs Test: The test established by the United States Supreme Court in *Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*,[29] where the Court held that the location where work is actually performed is the central factor in determine which laws apply.

As noted by the Southern District in *Ong,*[30] the Second Circuit has neither established a clear test to be applied in the current remote work environment nor has it opined on whether this determination constitutes "a question of law, a question of fact, or a mixed question of fact and law," thus, resulting in inconsistent rulings by the courts.[31]

Contractual Choice of Law Provisions

Employment contracts containing choice of law provisions are generally enforceable under New York law if the chosen state has a substantial relationship with the parties or transaction.[32]

However, choice of law provisions may be overridden when they conflict with strong public policies of the state where work is performed. Specifically, in *Production Resource Group, L.L.C.,*[33] the Southern District applied California, rather than New York, law to a non-compete agreement despite a contractual New York choice of law clause. There, the court found that "California has a materially greater interest than New York in resolving the parties' dispute regarding the non-competition provision" because the employee was a California resident working primarily in California.[34]

When employment disputes involve mixed claims of tort and contract, for example, New York courts apply a unified approach. More specifically, *Lazard Freres & Co., supra*,[35] was a breach of contract claim where the defendant asserted affirmative defenses of fraud in the inducement, justifiable reliance and failure of a condition precedent. There, the Second Circuit held that "there is no authority for the proposition that New York courts would apply the law of one jurisdiction to a breach of contract claim and the law of another jurisdiction to an affirmative defense to that claim."[36] The court concluded that contract choice of law principles governed the entire dispute when the primary claim sounds in contract, even if defenses have tort-like characteristics.[37]

Contractual Employment Law Claims Absent a Choice of Law Provision

Absent a choice of law provision, New York courts and the Second Circuit will apply the "center of gravity" or "grouping of contacts" analysis to contract cases when determining which jurisdiction has the "spectrum of significant contacts" to warrant application of its laws, looking at such things as "the place of contracting, negotiation and performance; the location of the subject matter of the contract; and the domicile of the contracting parties."[38] Put more simply, the court "weighs the contacts each jurisdiction has to the transaction and the parties to determine which relationship is most significant."[39]

However, the United States Supreme Court has rejected the weighing of factors analysis in *Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO, supra*,[40] instead applying a "predominant job situs test" to the dispute. There, the Supreme Court rejected both place-of-hiring tests and comprehensive multi-factor balancing approaches in finding that "it is the employees' predominant job situs rather than a generalized weighing of factors or the place of hiring that triggers the operation" of federal labor law provisions.[41] The Court explained that "the center of the post-hiring relationship is the job situs, the place where the work that is the very raison d'être of the relationship is performed."[42]

This Supreme Court precedent coupled with the Second Circuit precedent set in *Lazard Freres & Co.*, *supra,* [43] also leads to the inference that one law, rather than the laws of multiple jurisdictions, should apply to a dispute regardless of whether that dispute is rooted in several different types of claims and involves multiple jurisdictions. This is an important point when considering the laws of states like California where it is intended for such laws to have extraterritorial reach even to minimal work performed within the state.

Conclusion

Prepandemic case law largely addressed *employer-driven* multistate work (e.g., travel for business). The rapid expansion of *employee-driven* multi-jurisdictional work has exposed significant gaps in traditional choice of law frameworks. While some courts continue to rely on longstanding principles, such as presumptions against extraterritoriality, interest analysis, job situs, and center of gravity tests, the modern workforce presents novel challenges that will require the courts and the legislature to clarify how employment laws will apply in a world where work is no longer tethered to a single physical location. As noted by the Southern District in *Ong*, *supra*, the Second Circuit needs to establish a clear test as to which laws apply to the current *employee driven* remote work environment both from a litigation standpoint and from an employer-advisory standpoint. Indeed, how can an employer be penalized for not complying with the labor laws when the courts have not established a clear test to determine what labor law applies?

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Endnotes

1. *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.,* 448 F.3d 573, 582-583 (2d Cir. 2006).
2. *Monbo v. Nathan*, 623 F.Supp.3d 56 (E.D.N.Y. 2022).
3. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256 (1991); *Warman v. Am. Nat'l Standards Inst.*, 2016 WL 3676681, at *2 (S.D.N.Y. 2016); *Magnuson v. Newman*, 2013 WL 5380387, at * 5 (S.D.N.Y. 2013); *Hammell v. Paribas*, 1993 WL 426844, at *1 (S.D.N.Y. 1993); *Goshen v. Mut. Life Ins. Co. of New York,* 286 A.D.2d 229, 230 (1st Dep't 2001), *aff'd*, 98 N.Y.2d 314 (2002*); see also* 73 Am. Jur.2d Statutes § 359 at 492; McKinney's Cons. Laws of N.Y., Book 1, Statutes §149 at 305; *see e.g. Morgan v. Bisorni*, 100 A.D.2d 956, 956-957 (2d Dep't 1984).
4. *See Dittes v. ChargeAfter USA, Inc.,* 2025 WL1984273 (S.D.N.Y. 2025*); Smith v. Vera Institute of Justice Inc.*, 2023 WL11879682 (E.D.N.Y. 2023*); Li v. SMJ Construction Inc.*, 2022 WL4463225 (S.D.N.Y. 2022); *Aminov v. EC Commodities Corp.*, 2017 WL 9511075 (E.D.N.Y. 2017); *Warman, supra* at *2*; O'Neill v. Mermaid Touring Inc.*, 968 F.Supp.2d 572, 578 (S.D.N.Y. 2013); *Magnuson, supra* at *5; *Hart v. Dresdner Kleinwort Wasserstein Sec., LLC*, 2006 WL 2356157, at *20 (S.D.N.Y. 2006); *Hammell, supra* at *1.
5. NYLL § 650.
6. *See e.g. O'Neill, supra* at 578-579; *Drozd v. U.S.A. Concepts of New York Corp.*, 2015 WL 13733713, at *11 (E.D.N.Y. 2015*); Hammell, supra* at *1; *see also Kassman v. KPMG LLP*, 925 F.Supp.2d 459, 469-470 (S.D.N.Y. 2013).
7. 559 B.R. 93, 98-99 (S.D.N.Y. 2016).
8. *Id.*
9. *See Pierre v. GTS Holdings, Inc.*, 2015 WL 7736552 (S.D.N.Y. 2015).
10. *Magnuson, supra* at *5.
11. 2023 WL 6390665, at *8 (S.D.N.Y. 2023).
12. *Id.* at *9.
13. 100 N.Y.2d 282 (2003).
14. *Id.* at 288.
15. *Id.*
16. *Id.*
17. 15 N.Y.3d 285 (2010).
18. *Id.* at 290-291.
19. 192 A.D.3d 596 (1st Dep't 2021).
20. *Id.* at 597-598; *see also Ong v. Deloitte Consulting LLP*, 2025 WL886947, *10 and 13-14 (S.D.N.Y. 2025) (finding that the ADA, NYSHRL and NYCHRL do not apply extraterritorially to a non-citizen employee who previously worked in New York but permanently relocated to London before the allegedly discriminatory and retaliatory conduct occurred).
21. *Id.* at 597-598.
22. 41 N.Y.3d 446 (2024).
23. *Id.* at 450-454.
24. 108 F.3d 1531 (2d Cir. 1997).
25. *See Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189 (1985).
26. *See White Plains Coat & Apron Co. v. Cintas Corp.*, 460 F.3d 281, 284 (2d Cir. 2006), *quoting Lazard Freres & Co., supra* at 1539*; Kim v. Family Bob Inc.,* 2021 WL 7906544, at *14 (E.D.N.Y. 2021), *citing Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 521-523 (1994); *see also Pierre, supra* at *2.
27. *See Boustany v. Xylem Inc.*, 235 F. Supp. 3d 486 (S.D.N.Y. 2017).
28. *See Torrico v. IBM*, 213 F. Supp. 2d 390 (S.D.N.Y. 2002).
29. 426 U.S. 407 (1976).
30. *See Ong, supra* at *14.
31. *Id.*; *see also Boustany, supra* note 27.
32. *See Stevens & Company LLC v. Espat*, 2025 WL950989 (S.D.N.Y. 2025); *McPhee v. Gen. Elec. Int'l, Inc.*, 736 F. Supp. 2d 676 (S.D.N.Y. 2010), *aff'd*, 426 Fed Appx 33 (2d Cir 2011).
33. 2003 WL 22350939 (S.D.N.Y. 2003).
34. *Id.* at 10.
35. *Lazard Freres & Co., supra.*
36. *Id.* at 1540-41.
37. *Id.*
38. *Beth Israel Med. Ctr., supra* at 582-83, *quoting In re Allstate Ins. Co. (Stolarz), supra* at 225-226; *see also* The Restatement (Second) of Conflict of Laws § 188 (1971); 135 Am. Jur. Trials § 1 (2014).
39. *Wausau Bus. Ins. Co. v. Horizon Admin. Servs. LLC*, 803 F.Supp.2d 209 (E.D.N.Y. 2011); *Haydu v. Hosp. for Joint Diseases Orthopedic Inst.*, 557 F.Supp. 577 (S.D.N.Y. 1983).
40. Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO, *supra.*
41. *Id.* at 407-408, 414-420.
42. *Id.* at 417.
43. *Lazard Freres & Co., supra.*

Is There a Second Bite at the Apple? Preclusion Doctrines in Employment Discrimination Law

By Barbara K. Hathaway

Introduction

Employment discrimination plaintiffs have usually been involved in other related proceedings before the matter gets to court. They have filed charges with federal or state administrative agencies and those agencies have conducted investigations and rendered findings. They may have filed complaints with their employer, which conducted an investigation and issued a determination. They may have applied for benefits such as Social Security Disability Insurance and made statements concerning their ability to perform the job in that application. In some situations the results of such proceedings may preclude employment discrimination claims under the doctrines of res judicata or collateral estoppel. Statements made by the plaintiff may judicially estop the plaintiff from taking an inconsistent position in court. At the very least, evidence from such proceedings may be admissible in the litigation. Thus, it is critical that attorneys representing both plaintiffs and defendants be aware of how these prior proceedings may impact the litigation and take appropriate steps to protect their clients' interests. This article will discuss how prior proceedings may impact employment discrimination actions.

Review of Employment Procedures

To put the following discussion in context, it is helpful to review the administrative and judicial procedures governing employment discrimination claims in federal and state forums in New York. With respect to federal claims such as those under Title VII, plaintiffs are required to first exhaust remedies before a state administrative agency, if the state has an anti-discrimination agency.[1] In New York, this is the New York State Division of Human Rights (DHR). A plaintiff must also file charges with the Equal Employment Opportunity Commission (EEOC). The EEOC must defer action on the charge for 60 days or until the termination of state or local proceedings.[2] In practice, the EEOC has work-sharing agreements with most states, including New York, under which a charge is deemed dually filed.[3] Thus, a plaintiff is not penalized by filing first with the EEOC. The EEOC is required to give substantial weight to the findings of state or local administrative agencies, but they are not binding or preclusive. A plaintiff may not file an action under federal statutes such as Title VII until it receives a right to sue letter from the EEOC. The determination of the EEOC is not preclusive; rather, a plaintiff is entitled to a de novo review of the claim in court.[4]

Procedures under New York State law differ. Unlike federal law, a plaintiff is not required to file administrative charges with DHR but has the option of filing a claim under New York's anti-discrimination statute directly in court without first exhausting administrative remedies.[5] As will be further discussed, whether administrative findings of DHR are given preclusive effect depends upon whether they have been judicially reviewed. If there has been no judicial review, preclusion does not apply. If a state court has reviewed the determination, preclusion applies. Under the election of remedies doctrine once a plaintiff files state or local charges with an administrative agency, they are generally precluded from asserting the claims again in a plenary action.

To review, the major preclusion doctrines are collateral estoppel or issue preclusion and res judicata or claim preclusion. Collateral estoppel applies if the issue sought to be precluded is identical to a material issue necessarily decided in the prior proceeding, and there was a full and fair opportunity to litigate the issue.[6] Res judicata bars relitigation of issues that were or could have been raised in a prior action. Under New York's "transactional approach," a claim is barred if it arises from the same factual grouping or transaction.[7]

Preclusive Effect of Administrative Proceedings

As noted, the determinations of the federal EEOC do not have preclusive effect in employment litigation in court. Title VII provides for a trial de novo of federal employment discrimination claims in federal court following federal and state administrative proceedings. Nonetheless, federal courts must give full faith and credit to the judgments of state courts.[8] Thus, determinations of administrative agencies such as DHR are not afforded preclusive effect, but if such determinations have been reviewed by a state court, they are preclusive.

Administrative determinations of DHR can be judicially reviewed in state court under Exec. Law § 298. Such review is extremely narrow and deferential to the administrative agency. Administrative determinations will be overturned only if they are arbitrary and capricious or are unsupported by substantial evidence; basically, this is a rational basis review.[9]

Where state administrative determinations have been reviewed, they are entitled to preclusive effect. In *Kremer v. Chemical Construction Corp.,*[10] the Court held that a federal district court was required to give preclusive effect to the state court's judgment affirming DHR's finding of no probable cause. Noting that in enacting Title VII Congress intended that states should play an important role in enforcing anti-discrimination laws, the court found no intent to repeal traditional preclusion doctrines. The Court found the requirements of preclusion satisfied, although the matter had been decided under state law, since the elements of a discrimination claim were virtually identical under Title VII and New York law. Moreover, the plaintiff had a full and fair opportunity to litigate the claim. The Court further noted that state proceedings "need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause."[11]

Thus, if the determination of the DHR is reviewed in state court, it is preclusive. Accordingly, where plaintiff presented the same issue and allegations to the federal court as she had to the DHR and the state court, the claims were barred under principles of collateral estoppel.[12] Res judicata will bar a claim if it arises from the same factual allegations or factual grouping underlying the administrative charge and state court proceeding, even if it is based on different legal theories.[13] Preclusion can apply even where there are variations in the facts, as long as they constitute the same factual grouping for purposes of res judicata.[14]

On the other hand, unreviewed state administrative proceedings do not have preclusive effect. In *University of Tennessee v. Elliott*,[15] the Court explained that the Full Faith and Credit Clause addressed the preclusive effect of decisions of state *courts*, but it was inapplicable to the determinations of state administrative agencies. Moreover, the statutory requirement that the EEOC give "substantial weight" to the findings of state authorities would make little sense and would be superfluous if those findings were preclusive.[16] Thus, consistent with the intent to afford Title VII plaintiffs the right to a trial de novo, administrative proceedings would not be given preclusive effect.[17] The Court extended this reasoning to the Age Discrimination in Employment Act[18] in *Astoria Federal Savings and Loan Ass'n v. Solimino*.[19] Because the ADEA similarly required pursuing claims before administrative agencies but provided for federal court review afterwards, the Court found that unreviewed administrative determinations were to be given no preclusive impact in ADEA cases. Federal proceedings would be "strictly *pro forma*" if preclusion applied, rendering the statutory provision for federal consideration de novo meaningless.[20]

While preclusion issues most often arise based on proceedings before the EEOC or state fair employment agencies, the findings of other administrative agencies may also have preclusive impact if the requirements of collateral estoppel are satisfied. In *Johnson v. Department of Education*,[21] a hearing was held on disciplinary charges against a teacher before the New York State Education Department. The hearing officer found no evidence of discrimination, and the plaintiff filed an action in state court. The Appellate Division held that the complaint was properly dismissed because the hearing officer's findings were entitled to collateral estoppel effect. In *Hudson v. Merrill Lynch & Co., Inc.*,[22] the plaintiffs had first filed a discrimination claim in federal court. The federal court granted summary judgment on the federal and state claims but declined to exercise supplemental jurisdiction over the city's Human Rights Law claims, which are subject to more liberal standards The state Appellate Division found the claims under the Human Rights Law precluded, based on factual issues that had been decided in the federal action.[23]

Election of Remedies

As noted, under New York's Human Rights Law, one has the option of filing an administrative complaint with DHR or filing a plenary action in state court. However, when one files with the agency, this leads to an election of remedies. Once New York State or city human rights claims have been brought before the administrative agency, they "may not be brought again as a plenary action in another court."[24] The only avenue for judicial review is the limited review in state court. There are two exceptions to this principle. When the plaintiff requests and receives a dismissal of the administrative complaint on the basis of administrative convenience from the agency, the election of remedies is annulled.[25] It also does not apply when a charge is filed first with the EEOC and is then automatically referred to DHR.[26] Thus, if one wishes to preserve a state or city claim for a plenary action after filing an administrative charge, one should request a dismissal for administrative convenience before a determination is rendered.

Statements in Other Proceedings May Judicially Estop Plaintiffs From Later Taking Inconsistent Positions

The doctrine of judicial estoppel prevents a party from asserting a factual position in a legal proceeding that is contrary to a position taken in a prior legal proceeding. Judicial estoppel applies when "(1) the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding and (2) that position was adopted by the first tribunal in some manner, such as by rendering a favorable judgment."[27] In the employment context, this has arisen most frequently when employees have applied for disability benefits, asserting they are unable to work, and also claim discrimination on the basis of disability, claiming they could fulfill the essential functions of the job with or without reasonable accommodation. In *Cleveland v. Policy Management Systems Corp.*,[28] the Court held that the application for and receipt of Social Security Disability Insurance (SSDI) does not automatically preclude the recipient from claiming disability discrimination, nor is there a presumption against an ADA claim. However, where the individual makes inconsistent assertions of fact, they may be required to explain the inconsistency. The Court explained that an SSDI and an ADA claim do not inherently conflict, given the nature of the inquiry under both. A determination of the Social Security Administration (SSA) on an SSDI claim does not take into account the possibility of someone being able to perform a job with a reasonable accommodation or determine whether a person could perform a job with reasonable accommodation, which is key to an ADA determination. Moreover, the SSA applies a set of standard presumptions that "grow out of the need to administer a large benefits system efficiently. But [these presumptions] inevitably simplify, eliminating consideration of many differences potentially relevant to an individual's ability to perform a particular job."[29] In *Cleveland*, the plaintiff had stated that she was "totally disabled" before the SSA, but claimed that she could perform the essential functions of her job in her ADA case. She explained that the statements before the SSA were made in a forum that does not consider the effect reasonable accommodations could have on one's ability to work and also that the statements made in the SSDI application were accurate as of the time they were made. The Court held that plaintiff was not estopped, and that the parties should have the opportunity to present or contest these explanations at trial.[30]

In determining whether a plaintiff is estopped the court must "undertake a fact-specific analysis" of whether the state-

ments, taken in context, are in conflict.[31] Even where there is a facial conflict, if a plaintiff offers an explanation that a reasonable jury could accept, they may not be precluded. Courts have accepted a variety of explanations as sufficient to defeat estoppel, such as that the statements referred to the reason a plaintiff was fired, or that they reflected the inability to work without accommodations. In *Parker*, the plaintiff responded to a question asking why he was unable to work by stating that he was unable to stand and walk for sustained periods and was still disabled. The court found that plaintiff was not precluded because a reasonable jury could find the statements were an explanation of the reasons for his termination and not a description of his physical ability to work with an accommodation.[32] Another court found that a statement that plaintiff was "totally disabled" in applications for SSDI and Long Term Disability Insurance did not estop plaintiff, where plaintiff explained that he could have performed his job with reasonable accommodations.[33]

However, where a plaintiff fails to provide an adequate explanation for any inconsistency, they may be estopped from making the required showing that they are qualified for the position. For example, a plaintiff may not simply disavow a prior statement. Thus, where a plaintiff stated to the SSA and in a deposition that she was fully disabled, and the only explanation for the conflict was that she was in fact able to work, the court precluded a Title VII claim for failure to show that she was qualified. The court stated that this explanation demonstrated only that her prior statements may have been false but did not explain the contradiction.[34] In *Kovaco*, a plaintiff stated in support of his application for SSDI that he was unable to work but also claimed in his lawsuit that he could have worked with the accommodation of using an electric cart. However, the evidence showed that he had been given access to a cart, "belying his explanation that he was only 'unable to work' because he lacked reasonable accommodation."[35] Thus, his claim that he was "qualified" for his position was clearly inconsistent with his earlier sworn statement to SSA, defeating his ADA, Title VII and ADEA claims.

Even where prior statements do not estop a plaintiff from pursuing a claim, however, they may come into evidence, and a jury may decide not to credit the explanation for the inconsistency.[36] Therefore, it is critical that attorneys be aware of statements made by plaintiffs in prior applications or proceedings, evaluate any potential inconsistencies and be prepared to explain them.

Findings of Administrative Agencies May Be Admissible in Evidence

Even if findings are not preclusive, they may be admissible. The findings of the EEOC or a state administrative agency are not per se admissible in a subsequent employment case; rather, the court has discretion whether to admit them.[37] Generally such findings will fall within the public records exception to the hearsay rule, but this does not mean that they are automatically admissible.[38] A variety of factors are relevant in determining admissibility, including whether the probative value is substantially outweighed by the danger of unfair prejudice under Fed. R. Evid. 403. A court may consider "the quality of the report, its potential impact on the jury, and the likelihood that the trial will deteriorate into a protracted and unproductive struggle over how the evidence admitted at trial compared to the evidence considered by the agency."[39] In *Paolitto*, the court found that the district court did not abuse its discretion in excluding the evidence on the ground that "the evidence Paolitto introduced at trial undercut many of the [agency's] factual findings and [defendant] had a full opportunity to present to the jury all the evidence it had submitted to the" agency.[40]

Administrative agency findings "generally are deemed to be reliable and probative evidence, especially where the agency conducts an investigation and makes findings of fact."[41] Thus, EEOC determinations have been admitted under the public records hearsay exception, but with a limiting instruction.[42] However, where the evidence to be offered at trial differs from that presented at the agency, the risk of confusion or distraction may result in denial of admission.[43] One court has denied admission of a probable cause finding on the ground that it would pose a danger of unfair prejudice to defendant by suggesting that the jury should reach the same conclusion, but admitted a second administrative complaint only for the fact of its filing as relevant to the motive in a retaliation claim.[44]

Conclusion

In conclusion, when handling an employment discrimination matter, one must be aware of prior administrative or judicial proceedings to which plaintiff has been a party, and of any statements made in those proceedings. Some may have preclusive effect. While administrative determinations will not bar Title VII or other federal claims, they may come into evidence. While administrative determinations of DHR on state claims will not have preclusive impact, if they are judicially reviewed they are preclusive. And, by filing an administrative complaint, a plaintiff will have elected their remedy and be barred from a plenary judicial proceeding on state claims. To avoid such an election of remedies, one must request a dismissal for administrative convenience from the agency. And statements made in applying for benefits such as SSDI concerning one's disability or ability to perform the job may judicially estop a later claim that one is qualified if not sufficiently explained. Thus, careful attention to any relevant prior proceedings and the potential impact on subsequent litigation is critical in order to properly protect the parties' rights in an employment discrimination case.

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Endnotes

1. 42 U.S.C. § 2000e-5(c).
2. 42 U.S.C. § 2000e-5(c), (d).
3. *Gabin v. Greenwich House, Inc*., 210 A.D.3d 497, 177 N.Y.S.3d 582 (1st Dep't 2022).
4. *Univ. of Tenn. v. Elliott,* 478 U.S. 788, 795 (1986).
5. New York Executive Law § 297(9).
6. *Hudson v. Merrill Lynch & Co., Inc*., 138 A.D.3d 511, 515, 31 N.Y.S.3d 3, 7 (1st Dep't 2016) (citations omitted).
7. *Sotolongo v. New York State Dep't of Motor Vehicles*, No. 19-CV-3282, 2020 WL 4261194, at *3 (E.D.N.Y. July 24, 2020) (citations omitted).
8. 28 U.S.C. §1738.
9. *Rensselaer Cnty. Sheriff's Dep't v. N.Y.S. Div. of Hum. Rts*., 131 A.D.3d 777, 15 N.Y.S.3d 227 (3d Dep't 2015).
10. 456 U.S. 461 (1982).
11. *Id*. at 479–82.
12. *Aumporn Wongkiatkachorn v. Capital One Bank*, No. 09 Civ. 9553, 2010 WL 3958764 (S.D.N.Y. Oct. 5, 2010).
13. *Gomez v. New York State Dep't of Transp*., No. 09-CV-05184, 2011 WL 2940623 (E.D.N.Y. July 19, 2011) (retaliation claim barred even though not raised in the administrative proceeding).
14. *Sotolongo v. New York State Dep't of Motor Vehicles*, No. 19-CV-3282, 2020 WL 4261194, at *3 (E.D.N.Y. July 24, 2020) (precluding claim where the additional instances of discrimination in the amended complaint share the same factual grouping).
15. 478 U.S. 788 (1986).
16. *Id*. at 795–97.
17. However, because there is no indication that Congress intended to create an exception to general principles of preclusion in enacting Reconstruction era statutes such as 42 U.S.C. § 1983, the findings of a state agency acting in a judicial capacity are given preclusive effect in such cases. *Id*. at 798–99.
18. 29 U.S.C. 621 *et seq.*
19. 501 U.S. 104 (1991).
20. *Id*. at 111–12.
21. 158 A.D.3d 744, 73 N.Y.S.3d 196 (2d Dep't 2018).
22. 138 A.D.3d 511, 31 N.Y.S.3d 3 (1st Dep't 2016).
23. *Id.* at 515, 31 N.Y.S.3d at 7-8.
24. *York v. Ass'n of the Bar of the City of New York*, 286 F.3d 122, 127 (2d Cir. 2002) (citing *Moodie v. Federal Reserve Bank of New York*, 58 F.3d 879, 882 (2d Cir. 1995).
25. *Whidbee v. Garzarelli Food Specialties, Inc*., 223 F.3d 62,75 (2d Cir. 2000); *Windley/Edwards v. NYC Dep't of Educ*., No. 24 Civ. 2875, 2025 WL 2615504, at * 10-11 (S.D.N.Y. July 15, 2025), R. & R. adopted, 2025 WL 2463542 (S.D.N.Y. Aug. 27, 2025).
26. *York*, 286 F.3d at 127 n. 2.
27. *Kovaco v. Rockbestos-Suprenant Cable Corp*., 834 F.3d 128, 137 (2d Cir. 2016).
28. 526 U.S. 795 (1999).
29. *Id.* at 804.
30. *Id*. at 807.
31. *Parker v. Columbia Pictures Indus*., 204 F.3d 326, 334 (2d Cir. 2000).
32. *Id. See also Buczakowski v. Crouse Health Hosp., Inc*., No 5:18-CV-0330, 2022 WL 356698, at * 8 (N.D.N.Y. Feb. 7, 2022).
33. *Nodelman v. Gruner & Jahr USA Publ'g*, No. 98 Civ. 1231, 2000 WL 502858, at * 8 (S.D.N.Y. Apr. 26, 2000).
34. *Robinson v. Concentra Health Servs., Inc*., 781 F.3d 42, 47 (2d Cir. 2015).
35. 834 F.3d at 140.
36. *DeRosa v. Nat'l Envelope Corp*., 595 F.3d 99, 104 (2d Cir. 2010).
37. *Paolitto v. John Brown E.&C., Inc*., 151 F.3d 60 (2d Cir. 1998).
38. *Id.* at 64.
39. *Id*. at 65.
40. *Id.*
41. *Puglisi v. Town of Hempstead Sanitary Dist. No. 2,* No. 11-CV-445, 2014 WL 12843521, at *5 (E.D.N.Y. Jan. 27, 2014).
42. *Watson v. E.S. Sutton, Inc.,* No. 02 Civ. 2739, 2005 WL 2170659, at * 21 (S.D.N.Y. Sept. 6, 2005), aff'd, 225 F. App'x 3 (2d Cir. 2006). *See also Chamblee v. Harris & Harris, Inc*., 154 F. Supp. 2d 670, 677-78 (S.D.N.Y. 2001) (admitting DHR probable cause finding with limiting instruction).
43. *Id.*
44. *Orsaio v. New York State Dep't of Corr. and Cmty. Supervision*, No. 6:17-cv-00685, 2022 WL 351827 (N.D.N.Y. Jan. 14, 2022), aff'd, No. 22-596, 2023 WL 3410554 (2d Cir. May 12, 2023).

Cheeks vs. Rule 68 in FLSA Mediations in the Second Circuit

By Darren P. B. Rumack

In Fair Labor Standard Act (FLSA) mediations, parties often spend hours negotiating over financial terms. Oftentimes, however, the parties neglect to discuss a critical issue: how to dispose of the case. In the Second Circuit, there are two options: submit the settlement to the Court for *Cheeks* review, or pursuant to Federal Rules of Civil Procedure, issue a Rule 68 Offer of Judgment.

The failure to discuss this issue early on in a mediation can create barriers to settling, even if the parties reach an agreement on financial terms, such as the scope of the release and confidentiality provisions. This article explores the ramifications of *Cheeks* and its intersection with Rule 68 Offers of Judgment and how this decision can impact the mediation process.

A Brief History of *Cheeks*

An August 2015 decision by the U.S. Court of Appeals for the Second Circuit, *Cheeks v. Freeport Pancake House*, 796 F.3d 199 (2d Cir. 2015), had a massive effect on FLSA settlements in the Second Circuit. In *Cheeks*, the Court effectively prohibits parties from voluntarily entering into private settlements of claims under the FLSA, holding that parties cannot enter into settlements of individual FLSA claims without either the approval of the district court or the Department of Labor.

The effect of *Cheeks* was threefold. First, *Cheeks* requires the parties to submit settlements for court approval (including both the gross amount and attorneys' fees), generally in the form of a letter motion. Some judges hold in-person or telephonic fairness hearings. First, *Cheeks* creates additional work for attorneys in preparing the approval papers or attending additional hearings; second, *Cheeks* adds delays for clients in finalizing their cases. Settlement checks cannot be distributed without the Court's approval of the settlement, and although some judges issue their rulings within days or weeks, other judges may take several months. Consequently, attorneys are unable to advise their clients when exactly the settlement would be finalized.

Third, following *Cheeks*, courts began limiting what terms could be included in settlement agreements. For example, courts have rejected overbroad general releases, approving only limited wage and hour releases. *Martinez v. Gulluoglu LLC*, 2016 WL 206474, at * 2 (SDNY, Jan. 15, 2016). Courts have also rejected overbroad confidentiality and non-disparagement clauses. *See, e.g., Weng v T&W Rest., Inc.,* 2016 WL 3566849, at *4 (SDNY June 22, 2016). Therefore, employers seeking confidential settlements of wage and hour claims were essentially out of luck under *Cheeks*, which can effect their settlement posture.

The Rule 68 Workaround

In a decision issued on December 6, 2019, a panel of the Second Circuit held that notwithstanding that Court's prior decision in *Cheeks*, judicial approval is not required when an FLSA case is settled pursuant to an offer of judgment under FRCP Rule 68(a). *See Yu v. Hasaki*, 944 F.3d 395 (2d Cir. 2019).

Like *Cheeks,* this decision had immediate applications to settlements of FLSA cases. By allowing for resolution of FLSA cases via Rule 68, parties can enter into side agreements not filed with the Court. These side agreements allow the parties to include general releases and confidentiality and non-disparagement clauses without court oversight. Perhaps most importantly, it allowed for speedier resolution of cases because the entry of a judgment takes mere days, whereas *Cheeks* approval could take substantially longer.

Applications in FLSA Mediations

FLSA mediations in both the Southern and Eastern Districts of New York are a significant percentage of each court's mediation programs. In October 2016, the S.D.N.Y. expanded the automatic mediation referral program to include FLSA and Section 1983 cases filed with certain judges.[1] In 2021, 1483 cases were referred to the S.D.N.Y.'s mediation program, nearly half (44%) of which were FLSA, employment discrimination and § 1983 claims. In 2022, 1,550 cases were referred to the SDNY's mediation program, 36% of which were FLSA, employment, and § 1983 claims.[2]

Similarly, in the Eastern District of New York (E.D.N.Y.) in 2023, cases filed under the FLSA constituted about 8% of the total civil filings in that district.[3] In 2023, 59% of all FLSA cases filed were referred to mediation. FLSA referrals made up 52% of the mediation referrals in 2023 and 65% of the FLSA matters referred to mediation during the period of this report were resolved before or as a result of a mediation session.

Unsurprisingly, most FLSA mediations tend to focus on financial terms, while not much attention is spent on how the parties will dismiss the case. However, parties and mediators can often get tripped up on this issue, if it is not raised in a timely fashion during the mediation.

In numerous FLSA mediations, I have seen the plaintiff's attorneys insist on settling via Rule 68 instead of via *Cheeks* review to speed up the process. If the defendant has no objection to issuing a Rule 68 offer of judgment, this is not an issue. However, there are occasions where the defendant is unwilling or unable to issue a Rule 68 offer of judgment. In those situations, it is critical to raise this issue early in the mediation to identify a potential sticking point.

Another scenario where *Cheeks* vs. Rule 68 comes into play is where the employer has raised inability to pay or financial limitations. For example, hypothetically, assume the parties agree to a $60,000 settlement, but the employer requires six installments to pay out the total. A typical settlement provision is that the first installment will be made within 30 days of settlement approval by the Court under *Cheeks*, or 30 days within entry of judgment by the clerk under Rule 68. If the parties agree to a Rule 68 Offer of Judgment, they can be reasonably sure of the time frame for the first payment. Conversely, if the parties agree to submit for *Cheeks* approval, it will be several weeks (at least) prior to the first installment being due.

Understanding early on whether there will be a Rule 68 judgment or *Cheeks* approval allows the mediator and the parties to get creative in structuring the payout plan. For example, the employer can potentially frontload the first installment payment (since the employer will have additional time to make the first payment because of *Cheeks*). Alternatively, if the parties elect to proceed via Rule 68, the mediator can help craft the contours of the settlement agreement, such as an agreement for a general release, or some form of confidentiality.

Conclusion

In mediating FLSA cases in the Second Circuit, the *Cheeks*/Rule 68 decision can provide unique opportunities and incentives to resolve cases. Failing to raise this issue early in the mediation, however, can ultimately derail a settlement. As a result, the parties and mediator should think about *Cheeks* and Rule 68 early in the mediation to allow this choice to play out effectively.

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Endnotes

1. FLSA Announcement and Order_0.pdf (uscourts.gov).
2. October 2023 Southern District of New York's Final Report of the Mediation Program (October 2023).
3. United States District Court Eastern District of New York (uscourts.gov).

North of the 45th: A New York Attorney's Guide to the Canadian Employment Wilderness

By Kevin MacNeill and Samantha Seabrook

For the New York practitioner, advising a client with operations in Canada can feel like a deceptive stroll through a familiar neighborhood. We share a language (mostly), a border, and a penchant for strong coffee. But when it comes to the law of the workplace, the similarities are superficial. Step across the 45th parallel, and you exit the land of "at-will" employment and enter a world governed by "reasonable notice," "statutory minimums," and the unique civil law landscape of Québec.

As Canadian employment law continues to evolve (accelerated by a post-pandemic shift toward greater employee protections) American counsel must navigate a complex patchwork of provincial regulations for provincially regulated employers, and federal laws for federally regulated employers, that can turn a routine termination or a standard non-compete into a cross-border liability nightmare.

'At-Will' Doesn't Exist Here: Welcome to the Notice Regime

There is no "at-will" employment in Canada. Unless you have "just cause" (a tough standard to meet, generally requiring serious willful misconduct or repeated poor performance despite progressive discipline) you owe the employee notice of termination, or pay in lieu of notice, both under statute and at common law. In Ontario, you may also owe severance pay (see further below).

Common Law Notice

In common law provinces (everywhere except Québec), if a contract does not clearly limit termination rights, courts generally determine termination notice entitlements based on the following non-exhaustive factors:

- **Character of Employment:** For example, senior executives get more notice than entry-level staff.
- **Length of Service:** Long-tenured employees are usually entitled to more protection.
- **Age:** Older employees, seen as having a harder time finding new work, receive longer notice periods.
- **Availability of Similar Employment:** If the market is thin, the notice period grows.

While the Ontario Employment Standards Act, 2000 (ESA) caps statutory notice at eight weeks, common law "reasonable notice" can reach 24 months (or more in rarer cases) for long-service employees.

Québec's Civil Code provides for similar factors to those considered at common law.

Termination Clauses

Because the common law is so generous, employers try to limit notice through written contracts. However, Canadian courts are notoriously paternalistic toward employees. If a termination clause even *potentially* dips below the statutory minimums of the ESA, the entire clause is voided, and the employee reverts to the much more expensive common law reasonable notice.

New York counsel should avoid "blue-penciling" hopes; Canadian courts generally will not fix bad drafting, instead choosing to just throw out the entire termination section of the contract.

Restrictive Covenants: A Border Closed to Non-Competes

If you are drafting a non-compete for an Ontario employee, stop. As of October 2021, Ontario has essentially banned non-compete agreements for everyone except C-suite executives or in the context of a business sale. Even where they are legal, they are presumptively unenforceable and must be surgically narrow in scope, duration and geography. Non-solicitation clauses remain your best bet for protecting customer relationships.

Non-competes are possible in other provinces, but they also have the same enforcement issues.

Statutory Severance and Benefits

In Ontario and the Canadian federal jurisdiction, "statutory severance" is a legal right for longer-service employees. In Ontario, if your payroll is $2.5 million or above, an employee with five-plus years of service is owed severance pay (up to 26 weeks) *in addition* to their notice pay. Furthermore, benefits (health, dental, pension) must continue throughout the statutory notice period; you cannot simply cut off the insurance on day one.

Human Rights and the Duty To Accommodate

Canadian human rights laws are robust and provincially anchored. The "duty to accommodate" requires employers to accommodate disability or family status to the point of "undue hardship." In Ontario, this might mean extending a leave of absence far beyond the statutory 17 weeks of pregnancy leave or 63 weeks of parental leave provided for under the ESA.

Navigating the Cross-Border Dispute

When the relationship sours, where do you fight? Canadian courts generally respect "forum selection" clauses, but they can be rebutted if an employee shows "strong cause." If you do not have a clause, the "real and substantial connection" test applies, meaning if the employee worked in Toronto, you are likely headed to an Ontario court, regardless of where the head office sits.

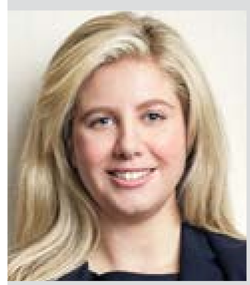
Recent Supreme Court of Canada decisions like *Heller v. Uber* remind us that unconscionable arbitration clauses (e.g., forcing a Canadian driver to arbitrate in the Netherlands at a cost of U.S. $14,500) will be struck down as a denial of access to justice.

Conclusion: A Proactive Approach

The Canadian workplace is a distinct legal ecosystem that prioritizes employee stability upon termination and statutory minimums, as well as employee mobility. For New York counsel, the "fun" of cross-border practice lies in the details: ensuring contracts are ESA-compliant and understanding the potential consequences of there being no at-will employment are key to avoiding significant potential client liabilities for employment claims in Canada.

This article is for informational purposes only and does not constitute legal advice.

Kevin McNeill is a partner at Ogletree Deakins in Montreal. He has worked for nearly 30 years helping employers solve human resource problems. He is a member of the bars of Ontario, Quebec and New York. McNeill is the author of *The Duty to Acccommodate in Employment* **.**



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