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**RECENT DEVELOPMENTS IMPACTING NEW YORK WAGE
AND HOUR PRACTITIONERS**

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RECENT DEVELOPMENTS IMPACTING NEW YORK WAGE HOUR PRACTITIONERS

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In recent years, New York State has been active in passing new wage laws, including laws permitting a host of new deductions from employee wages and laws establishing wage notice and wage statement requirements. Additionally, the New York Department of Labor issued new regulations governing employee wages in the hospitality industry. Other important developments include an increased focus by state agencies on the misclassification of employees as independent contractors and case law developments, including new challenges filed on behalf of unpaid interns.

This article first provides a brief overview of New York wage laws. The article then focuses on recent developments impacting New York wage hour practitioners.

I. OVERVIEW OF NEW YORK STATE WAGE LAWS

The New York wage-and-hour laws are primarily found in Articles 6, Payment of Wages, N.Y. LAB. LAW §§ 190 et seq., and 19, Minimum Wage Law, N.Y. LAB. LAW §§ 660 et seq. of the New York Labor Law (“NYLL”). The Commissioner of the Department of Labor (the “Commissioner”) has also issued regulations and orders, which the Commissioner is empowered by statute to do both at the Commissioner’s discretion and the recommendation of the wage board. *See* N.Y. LAB. LAW § 655-56; 199. Unlike the federal Fair Labor Standards Act (“FLSA”), which provides a statute of limitations of three years, New York law has a six-year statute of limitations for a wage claim. N.Y. LAB. LAW § 198 (3).

A. Minimum Wage

The current minimum wage in New York is \$7.25 per hour. 12 N.Y. COMP. CODES R. AND REGS. § 142-2.1. New York’s Department of Labor (“NYSDOL”) has industry-specific wage orders that include rules on overtime and minimum wages. The industries include the Hospitality Industry, Building Service Industry, and miscellaneous industries. Most employers are covered by the wage order covering miscellaneous industries, so this section will discuss the regulations set forth under the order covering miscellaneous industries.

1. Credits and Allowances and Other Offsets for the Minimum Wage

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The regulations provide that employers may consider certain allowances for meals, lodging and tips as part of the minimum wage. 12 N.Y. COMP. CODES R. AND REGS. § 142-2.5. As of July 24, 2009, not more than \$2.50 per meal and not more than \$3.10 per day of lodging may be considered part of the minimum wage. *Id.* at § 142-2.5(a)(1). Tips and gratuities may be considered part of the minimum wage subject to certain conditions:

- Tips have customarily and usually constituted part of an employee's pay in the particular occupation.
- Substantial evidence is provided that the amount the employee received in tips is at least the amount of the allowance claimed. An example of such substantial evidence includes a statement signed by the employee that he actually received tips in the amount of the allowance claimed.
- The allowance claimed by the employer is recorded on a weekly basis as a separate item in the wage record.

Id. at § 142-2.5(b)(1). As of January 1, 2007, the allowance for tips shall not exceed \$1.10 an hour for an employee whose weekly average of tips received is between \$1.10 and \$1.75 per hour, and not more than \$1.75 per hour for an employee whose weekly average of tips received is \$1.75 per hour or more. *Id.* at § 142-2.5(b)(2). Pursuant to the regulations, there shall be no allowance for tips or gratuities where the employee's weekly average of tips is less than \$1.10 an hour. *Id.* The handling of tips and gratuities in the hospitality industry is discussed in more detail in the section of this paper on the recently passed Hospitality Industry Minimum Wage Order, which has separate requirements from those detailed here.

The regulations also provide that, as of July 24, 2009, when an employer furnishes a house or apartment and utilities, a fair and reasonable amount may be allowed not to exceed the lesser of either "the value of prevailing rentals in the locality for comparable facilities" or \$5.80 per day. 12 N.Y. COMP. CODES R. AND REGS. § 142-2.5(a)(2).

The regulations prohibit an allowance against the minimum wage for the supply, maintenance and/or laundering of required uniforms. 12 N.Y. COMP. CODES R. AND REGS. § 142-2.5(c). Furthermore, if the employee purchases a required uniform, the employer must reimburse the employee for the cost of the uniform by the next regularly scheduled pay date. *Id.* If the employer does not launder and maintain required uniforms, the employer must pay the employee between \$4.30 and \$9.00 per week, depending upon the amount of hours worked, for laundering and maintenance of the required uniform; such reimbursements are in addition to the mandatory minimum wage. *Id.* Separate requirements for handling uniforms are set forth in the section of this paper on the Hospitality Industry Minimum Wage Order.

B. General Rules on Overtime

Like the FLSA, New York law requires payment of overtime for any hours worked beyond forty hours per week. 12 N.Y. COMP. CODES R. AND REGS. § 142-2.2. "Hours worked" are defined as "the time an employee is permitted to work, or is required to be available for work

at a place prescribed by the employer.” 12 N.Y. COMP. CODES R. AND REGS. § 142-2.16(c)(4)(v). The regulations specify that hours worked “shall include time spent in traveling to the extent that such traveling is part of the duties of the employee,” but do not provide any other specific rules regarding what should be included in “hours worked.” 12 N.Y. COMP. CODES R. AND REGS. § 142-2.1.

New York’s overtime requirements expressly adopt the FLSA’s overtime provisions, stating “[a]n employer shall pay an employee for overtime at a wage rate of 1 ½ times the employee’s regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 U.S.C. 201 et seq., the Fair Labor Standards Act of 1938, as amended” 12 N.Y. COMP. CODES R. AND REGS. § 142-2.2. Accordingly, FLSA provisions governing hours worked apply under the New York Labor Law.

C. Overtime Exemptions

The New York State overtime regulations expressly adopt the exemptions set forth in sections 7 and 13 of the FLSA.² 12 N.Y. COMP. CODES R. AND REGS. § 142-2.2. Thus, New York has adopted the FLSA exemptions for, *inter alia*, executive employees, administrative employees, professional employees, computer employees, outside sales employees, and certain commissioned employees in retail and service establishments. *See* 29 U.S.C. § 213(a)(1) (providing exemptions for bona fide executive, administrative, professional, and outside sales employees); 29 U.S.C. § 213(a)(17) (exempting certain computer employees from overtime pay); 29 U.S.C. § 207(i) (exempting certain employees who are paid sufficient commissions in retail or service establishments). These exemptions are defined in detailed federal regulations. For example, federal regulations define the executive, administrative, and professional exemptions (the so-called “white collar exemptions”) by reference to a salary requirement and duties-based tests.

The federal regulations contain a special rule that exempts from overtime pay requirements certain highly compensated workers. A highly compensated employee is one who earns a total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary or fee basis *See* C.F.R. § 541.601(a); 541.601(b). An employee who is: (1) highly compensated, (2) whose primary duty includes performing office or non-manual work, and (3) who customarily and regularly performs one or more of the exempt duties or responsibilities associated with an exempt executive, administrative, or professional employee will be deemed exempt under § 213(a)(1) of the FLSA. *Id.* Because “highly compensated” employees only need to satisfy “one or more” of the exempt duties set forth in one of the white collar exemptions, rather than satisfying all of the duties requirements, this exemption is available for employees who otherwise would not satisfy the duties test for these exemptions.

² Although the Minimum Wage Order for Miscellaneous Industries and Occupations contains its own exemptions in § 142-2.14(c) that differ from the exemptions contained in the FLSA, it is clear that in determining eligibility for overtime pay, the Minimum Wage Order for Miscellaneous Industries and Occupations applies the exemptions set forth in the FLSA. The exemptions set forth in § 142-2.14(c) of the wage order more likely apply to §§ 142-2.3 and 142-2.4, which deal with call-in pay and split shift and spread of hours respectively.

While New York has not expressly adopted the highly compensated employee exemption, there exists strong support for the argument that it has been incorporated into the NYLL. As noted, the Minimum Wage Order for Miscellaneous Industries and Occupations expressly provides that New York's overtime requirement is "subject to the exemptions of sections 7 and 13 of 29 U.S.C. 201 *et seq.*, the Fair Labor Standards Act of 1938." 12 N.Y. COMP. CODES R. & REGS. § 142-2.2. Because the exemption for highly compensated employees was promulgated by the Secretary of Labor pursuant to its authority to define the white collar exemptions set forth in section 13 of the FLSA, and New York has adopted the exemptions in section 13 of the FLSA, New York should likewise adopt the exemption for highly compensated employees. There exists case law support for this proposition as well. In *Zubair v. Entech Eng'g, PC*, 808 F. Supp. 2d 592, 600 (S.D.N.Y. 2011), the Southern District addressed the applicability of the FLSA learned professional exemption and the highly compensated employee exemption to the plaintiff, Zubair. The court noted that "since NYSLL 'applies the same exemptions as the FLSA,' the Court's analysis under the FLSA is equally applicable to Zubair's NYSLL claim." Indeed, the Court found that NYSLL differs from the FLSA in only one respect: to qualify for an overtime exemption under NYSLL, an employer need not satisfy the salary test, only a duties test.

D. Remedies for Failure to Pay Minimum Wages/Overtime

Failing to pay overtime or abide by the minimum wage in accordance with New York law can subject employers to investigations by the New York or federal Department of Labor and/or private lawsuits.

An employee or the commissioner can bring a suit for failure to pay overtime and/or minimum wages, and an employee can recover the amount of any underpayments, attorney's fees, costs, prejudgment interest, and liquidated damages of 100% of the amount of underpayments found unless the employer can demonstrate a good faith basis for believing the underpayment was in compliance with the law. N.Y. LAB. LAW § 663. An employer, his or her agent or officer (in the case of a corporation, partnership, or LLC) who fails to pay overtime and/or minimum wages is guilty of a misdemeanor, and upon conviction shall pay a fine of greater than \$500 and less than \$20,000 and be imprisoned for up to one year. For the second offense within six years after the first, the entity would be guilty of a felony and subject to the same penalties. N.Y. LAB. LAW § 662. An employer can also be subject to additional civil penalties by the Commissioner if the violation is considered to be "egregious" or the employer has previously been in violation. N.Y. LAB. LAW § 218.

E. Additional Types of Pay Required by New York Law

The New York regulations impose three additional requirements not found in the federal statute: (a) call-in pay; (b) split-shift pay; and (c) spread of hours pay.

1. Call-In Pay

Whenever an employer requests or permits an employee to report to work, the employee is entitled to pay at the basic minimum hourly wage for the lesser of either (a) four hours pay, or (b) the number of hours in the regularly scheduled shift. 12 N.Y. COMP. CODES R. AND REGS. § 142-2.3.

2. Split-Shift Pay

Under the regulations, an employee is entitled to an additional hour's pay at the basic minimum hourly wage rate whenever there is a "split-shift," or when there is both a split-shift and the spread of hours exceeds 10 hours (defined below). 12 N.Y. COMP. CODES R. AND REGS. § 142-2.4. A "split-shift" is "a schedule of daily hours in which the working hours required or permitted are not consecutive," exclusive of meal periods of one hour or less. 12 N.Y. COMP. CODES R. AND REGS. § 142-2.17.

3. Spread of Hours Pay

The regulations provide that an employee is entitled to an additional hour's pay at the basic minimum hourly wage rate if the spread of hours exceeds 10 hours, or the spread of hours exceeds 10 hours and there is a split-shift (defined above). 12 N.Y. COMP. CODES R. AND REGS. § 142-2.4 The regulations define the "spread of hours" as "the interval between the beginning and end of an employee's workday," including working time, meal and other breaks periods. 12 N.Y. COMP. CODES R. AND REGS. § 142-2.18.

The NYSDOL issued a private party opinion letter stating:

If the weekly wages actually paid to an employee equal or exceed the total of: (i) 40 hours paid at the basic minimum wage rate; (ii) overtime paid at the particular employee's overtime rate; and (iii) one hour's basic minimum wage rate for each day the employee worked in excess of 10 hours, then no additional compensation is due.

This regulation was construed differently by the Southern District of New York in *Doo Nam Yang v. ACBL Corp.*, 427 F. Supp. 2d 327 (S.D.N.Y. 2005). The plaintiff in *Yang*, an employee of a jewelry company, brought suit for spread of hours pay, and the court found that the plaintiff had indeed worked a substantial number of days in excess of ten hours. The court rejected the defendant's reliance on the Department of Labor opinion letter, holding that the letter was an interpretation of law not entitled to deference, noting that the language of the regulations do not dictate this exception. *Id.* at 339-40.

The *Yang* court's interpretation is not without dispute. Other New York federal district courts have declined to follow the ruling in *Yang* and have given deference to the Department of Labor's interpretation. *See, e.g., Jenkins v. Hanac, Inc.*, 493 F. Supp. 2d 556 (E.D.N.Y. 2007) (collecting cases); *Almeida v. Aguinaga*, 500 F. Supp. 2d 366 (S.D.N.Y. 2007). Indeed, the New York Appellate Division, Second Department, has given deference to the Department of Labor's interpretation, finding that it is "neither unreasonable nor irrational, nor is it in conflict with the plain meaning of the promulgated language." *Seenaraine v. Securitas Sec. Servs. USA, Inc.*, 830 N.Y.S.2d 728, 729 (2d Dep't 2007).

F. Meal and Rest Breaks

One area where New York law substantially differs from federal law is in its requirements regarding pay for meal and rest breaks. New York law regarding hours of labor is

found at Article 5, Title 1 of the New York Labor Law. N.Y. LAB. LAW §§ 160 – 169A. Section 162 sets forth the following meal and rest break requirements:

- Every person employed in or in connection with a factory shall be allowed at least sixty minutes for the noonday meal.
- Every person employed in or in connection with all other establishments covered by the statute shall be allowed at least thirty minutes for the noonday meal.
- Every person employed for a period or shift starting before 11 a.m. and continuing later than 7 p.m. shall be allowed an additional meal period of at least twenty minutes between 5 and 7 p.m.
- Every person employed for a period or shift of more than six hours that starts between 1 p.m. and 6 a.m. shall be allowed a meal break midway between the beginning and end of the shift as follows:
 - At least sixty minutes for a meal period when employed in or in connection with a factory; or
 - Forty-five minutes for a meal period when employed in or in connection with all other establishments covered by the statute.

It is the position of the New York Department of Labor that these meal requirements apply to all categories of workers, including white collar management staff. *See* Division of Labor Standards Guidelines, Department of Labor, Meal Periods (1994).³ The Department of Labor will permit a shorter meal period – not less than 30 minutes – as a matter of course and without any special application by the employer. *Id.* A meal period of not less than 20 minutes may be granted by special permit after an investigation by the Department of Labor, but only in special or unusual circumstances. *Id.* An application for meal periods of less than thirty minutes is available at the New York Department of Labor website.⁴ The Department of Labor recognizes that in certain circumstances it may be customary for an employee to eat on the job without being relieved when the employee is the only person on duty or the only person in a specific occupation. However, the Department of Labor will consider such an arrangement a violation of the statute unless the employee voluntarily consents; an uninterrupted meal break must be afforded to every employee who requests one. *Id.*

New York law generally requires employers to give all employees at least 24 consecutive hours of rest in any calendar week, though there are exceptions. N.Y. LAB. LAW § 161. For a forty dollar fee, an employer may obtain a variation from this requirement where it imposes

³ The New York Department of Labor’s interpretation of Section 162 of the New York Labor law is available at <http://www.labor.state.ny.us/workerprotection/laborstandards/employer/meals.shtm>.

⁴ <http://www.labor.state.ny.us/formsdocs/wp/ls284.pdf#page=1>.

practical difficulties or unnecessary hardships, provided that the commissioner finds “the spirit of the act [will] be observed and substantial justice [will be] done” if the variation is granted. *Id.*

There is no private cause of action for failure to provide meal and rest breaks, but the Commissioner can bring actions against employers for such violations. Violations of these provisions, including the day-of-rest in seven provision, may be subject to criminal prosecution under N.Y. LAB. LAW § 213, with a maximum fine of \$100 for the first offense. According to N.Y. LAB. LAW § 218, which sets forth the damages for violations of Section 162,

In addition to directing payment of wages, benefits or wage supplements found to be due, and liquidated damages in the amount of one hundred percent of unpaid wages, such order, if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount not to exceed double the total amount of wages, benefits, or wage supplements found to be due.

Violations of the meal and rest break and day of rest provisions, N.Y. LAB. LAW §§ 161-162, are also subject to potential administrative fines of up to \$1,000 for the first offense, \$2,000 for the second offense, and \$3,000 for the third. *Id.*

G. Lactation Breaks

New York law also requires “[a]n employer...to provide reasonable unpaid break time or permit an employee to use paid break time or meal time each day to allow an employee to express breast milk for her nursing child for up to three years following child birth. The employer shall make reasonable efforts to provide a room or other location, in close proximity to the work area, where an employee can express milk in privacy.” N.Y. LAB. LAW § 206-C. Though the law does not specify the appropriate length of time for the breast-feeding break, the New York Department of Labor has issued guidelines that each break should be no shorter than 20 minutes, and up to 30 minutes if the break area is not in close proximity to the employee. The employee should be given a break to express milk at least once every three hours.

II. SIGNIFICANT NEW YORK STATE LEGISLATIVE AND REGULATORY DEVELOPMENTS

In recent years, New York State was active in passing new wage-hour legislation, including a host of new permissible wage deductions, enhanced penalties for violations of wage laws, heightened notice requirements, and greater protection for independent contractors in the construction industry. The NYSDOL has also been active in issuing new regulations for employees in the hospitality industry. Each of these changes will be described in more detail below.

A. Wage Deductions

1. Background

Effective November 6, 2012, amendments to the New York Labor Law Section 193 (“Section 193”) authorize a host of new permissible wage deductions from employee pay. Before these amendments, New York allowed only limited deductions from employee pay, which presented problems for both employers and employees. Many deductions that were restricted by the New York State Department of Labor (“NYSDOL”) before are now permissible under the amendments.

The newly amended Section 193 allows the following deductions:

(a) those made in accordance with the law or regulations, including deductions made in conjunction with an employer sponsored pre-tax contribution plan approved by the IRS or other taxing authority,

(b) those that are voluntarily made and expressly authorized in writing by the employee and that are for the benefit of the employee. Authorizations under this section may also be made pursuant to a collective bargaining agreement. N.Y. LAB. LAW § 193(1). Authorized deductions under this section are limited to:

- payments for insurance premiums;
- pension or health and welfare benefits;
- charitable contributions affiliated with the employer;
- payments for U.S. bonds;
- union dues;
- parking passes or mass transit vouchers;*⁵
- gym membership dues;*
- certain purchases made by the employee, such as cafeteria or vending machine purchases at the employer’s place of business;*
- pharmacy purchases at the place of business;*
- tuition, room and board fees;*
- day care expenses;*

⁵ Asterisked items are those that became permissible authorized deductions due to the amendments to §193.

- payments for housing provided at no more than market rates by non-profit hospitals;* and
- similar payments for the benefit of the employee.

(c) Deductions related to recovery of an overpayment of wages where the overpayment was due to a mathematical or other clerical error by the employer*.

(d) Deductions related to the repayment of advances of salary or wages made by the employer to the employee*.

2. Notice Requirements

Several notice requirements must be fulfilled prior to making any deductions from employee wages. Employers must provide employees with written notice of the terms and conditions of the payments and benefits and other relevant details pertaining to how deductions will be taken. Also, employees must provide their employer with a voluntary, written authorization. These written authorizations must be kept on the employer's premises throughout the employment relationship, and for an additional six years following conclusion of the relationship. If any substantial change to the payment occurs, the employer must notify the employee prior to the implementation of the change. Voluntary authorized deductions may be revoked in writing by the employee at any time, and the employer must comply as soon as practicable, and, in no event more than four pay periods or eight weeks after revocation. N.Y. LAB. LAW § 193(3)(c).

3. Limitations on Total Deductions

For deductions made as charitable contributions, cafeteria, vending machine, or pharmacy purchases made at the employer's place of business, and similar payments for the benefit of the employee, the total amount of deduction cannot exceed a maximum aggregate limit established by the employer for each pay period or the maximum aggregate limit established by the employee (limited to the maximum amount established by the employer). The employer may not permit any purchases by the employee that exceed the aggregate limit established by the employee or, in the absence of, set by the employer. The employer must provide access to the employee at the workplace to current account information detailing individual expenditures within these categories of deduction and provide a running total of the amount that will be deducted from the employee's pay during the next applicable pay period.

4. Additional Requirements

Wage deductions related to overpayments and repayments of wages must comply with additional forthcoming regulations promulgated by the NYSDOL, which have not yet been issued. These regulations will clarify the scope of compliance in regard to:

- the size of overpayments that may be covered by this section;
- the timing, frequency, duration, and method of such recovery;

- limitations on the periodic amount of such recovery;
- a requirement that notice be provided to the employee prior to the commencement of such recovery;
- a requirement that the employer implement a procedure for disputing the amount of such overpayment or seeking to delay commencement of such recovery; and
- the terms and content of such a procedure and a requirement that notice of the procedure for disputing the overpayment or seeking to delay commencement of such recovery be provided to the employee prior to the commencement of such recovery.

5. Expiration

If no further legislative action is taken, these amendments to the law will expire on November 6, 2015.

B. Wage Theft Prevention Act

Governor Paterson signed the Wage Theft Prevention Act (“WTPA”) into law on December 13, 2010, and it went into effect on April 9, 2011. Among other things, the Act’s key provisions require employers to provide information to employees about wages on a yearly basis, enhances penalties for violations of state wage law, and expands the scope of the retaliation provision of the wage law.

1. Content of Wage Notice to Employees

Before the WTPA was enacted, New York Labor Law § 195 provided that newly hired exempt and non-exempt employees must be provided with written notice of their rate of pay, regular pay date, and overtime rate of pay, if applicable. The WTPA will require the following additional information to be included in the notice:

- How the wage payment is calculated (i.e. hourly, salary, commission);
- Allowances claimed as part of the minimum wage, such as tip, meal or lodging;
- The employer’s name and any “doing business as” names;
- The address of the employer’s main office or principal place of business, and a mailing address, if different; and
- Any additional information deemed “material and necessary” by the Commissioner of Labor.
- For non-exempt employees, it must also contain the employee’s regular hourly rate and overtime rate.

Notice must be provided in English and the primary language of each employee. Notice must be provided on a stand-alone document. The notice can be electronic, but if so, an employer must have a system where an employee can acknowledge receipt of the Notice and print it out. *See* N.Y. LAB. LAW § 195.

2. Template Notices Issued by New York State Department of Labor

The NYSDOL has issued wage notification templates, available on its website, for the following groups of employees: (1) hourly rate employees; (2) multiple hourly rate employees; (3) employees paid a weekly rate or a salary for a fixed number of hours (40 or fewer in a week); (4) employees paid a salary for varying hours, day rate, piece rate, flat rate, or other non-hourly basis; (5) prevailing rate and other jobs; and (6) exempt employees. The template notices appear to require information beyond what is expressly prescribed by the Act. For example, in each template notice, employers must indicate whether the pay periods are weekly, bi-weekly, or other. Further, the form addressed to employees who earn prevailing wages requires employers to identify the applicable occupation and the non-prevailing pay rate for that occupation.

3. Frequency of Wage Notice

The Notice under the Act must be issued: (1) when an employee is hired; (2) on or before February 1 of every subsequent year; and (3) at least seven days prior to any changes to the information contained in the Notice, unless the changes are reflected in the wage statement the employer provides with each paycheck. *Id.*

4. Employee Acknowledgment of Receipt of Wage Notice

In addition to the requirement under current law that employers must obtain a signed and dated acknowledgment of receipt of Wage Notice, under the WTPA, employees must affirm that (1) they accurately identified their primary language to the employer; and (2) the employer provided the Notice in such language, or, if there is no template from the Commissioner of Labor available in that language, in English. *Id.* If an employee refuses to sign, the employer should note the employee's refusal on its copy of the notice.

5. Remedies for Failure to Provide Wage Notice

If an employer fails to provide the Wage Notice within 10 business days of an employee's date of hire, the employee and the Commissioner of Labor are authorized to bring an action against the employer. An employee can recover \$50 for each workweek where a violation occurred, up to a maximum of \$2,500, plus attorney's fees, costs and injunctive relief. The Commissioner can recover the \$50 per week with no cap on damages. *See* N.Y. LAB. LAW § 198-1b.

Under the WTPA, employers have two affirmative defenses: (1) if it can demonstrate it paid all wages legally required; or (2) it had a good faith, reasonable basis for not providing the Notice. *Id.*

6. Requirement of Wage Statements

In addition to the Wage Notices, employers are required to provide employees a mandatory statement with each payment of wages containing the following information: hours worked, gross wages, allowances claimed as part of minimum wage, deductions, net wages (which were all required by existing law), dates of work covered, name of employee, name, address and phone number of employer, rate or rates of pay and basis for pay (hourly, salary, commission), and gross deductions. Non-exempt employees must additionally be provided with information on their regular rate of pay, overtime rate of pay, number of regular hours worked, and number of overtime hours worked. These statements must be retained for six years. *See* N.Y. LAB. LAW § 195 (3).

In addition to the WTPA, the Commissioner has issued minimum wage orders for specific industries that also impose detailed recordkeeping requirements. *See, e.g.,* N.Y.C.R.R. § 142.-2.6 (detailing ten separate pieces of information to be included in payroll records, which every covered employer must maintain for at least six years). Thus, it behooves employers to confirm the recordkeeping requirements for their specific industry by reviewing the applicable Minimum Wage Order.

7. Remedies for Failure to Provide Wage Statement

Employees can bring civil actions against employers who do not provide Wage Statements, and can obtain \$100 in damages for each week the law is violated, up to \$2,500, plus attorney's fees, costs and injunctive relief. The Commissioner of Labor can also bring an action and obtain \$100 in damages per week, with no cap. Employers have the same affirmative defenses as they do for failing to provide Wage Notices. *See* N.Y. LAB. LAW § 198-1d.

8. Increased Damages for Failure to Pay Wages, Minimum Wages and/or Overtime

The prior law provided that employees could obtain 25% of unpaid wages as liquidated damages for failure to pay wages. The WTPA increases the liquidated damages to 100% of wages owed. Employees also may obtain prejudgment interest on unpaid wages. In addition to these remedies, employees can obtain attorney's fees and costs. N.Y. LAB. LAW § 198-1a; N.Y. LAB. LAW § 662. In *Ji v. Belle World Beauty, Inc.*, 2011 WL 5118170 (Sup. Ct. N.Y. Cnty. Aug. 28, 2011), the New York Supreme Court held that the liquidated damages provision applied retroactively. The court reasoned that the statute should be construed as retroactive since it is a remedial statute that does not impair vested rights or create new rights. However, federal courts have highly criticized the holding in the New York Supreme Court and have held that the presumption against retroactivity is not rebutted as there is no indication that the statute was intended to have retroactive effect. *See, e.g., McLean v. Garage Mgmt. Corp.*, WL 1358739, at *9–10 (S.D.N.Y. Apr. 19, 2012); *Benavidez v. Plaza Mexico Inc.*, 2012 WL 500428, at *8–9 (S.D.N.Y. Feb. 15, 2012); *Chenensky v. New York Life Ins. Co.*, 2012 WL 234374, at *2–3 (S.D.N.Y. Jan. 10, 2012); *Wicaksono v. XYZ 48 Corp.*, 2011 WL 2022644, at * 6 n. 2 (S.D.N.Y. May 2, 2011).

9. Expanded Retaliation Provision

The WTPA also expands the retaliation provision of New York’s wage statute. Under the previous version of the law, an employee may bring a claim for retaliation against an employer that “discharge[s], penalize[s], or in any other manner discriminate[s] or retaliate[s] against an employee” that complains to the employer or the Department of Labor “that the employer has violated any provision of” New York’s wage statute.

Under the WTPA, the provision is amended to prohibit retaliation against an employee (i) who complains to the employer, the Department of Labor, the New York Attorney General, “or any other person” that an employer “engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of” the New York wage statute or any order by the Commissioner of Labor, or (ii) “because such employer . . . believes that such employee has made a complaint to his or her employer, or to the [Commissioner of Labor], or to the attorney general . . ., or to any other person that the employer has violated any provision of this chapter, or any order issued by the” Commissioner of Labor. *See* N.Y. LAB. LAW § 215.

10. Additional Retaliation Remedies

Under the current law, an employee bringing a retaliation claim under the New York Labor Law can obtain lost compensation, damages, reinstatement, and reasonable attorney’s fees. Under the WTPA, an employee can also seek an order “enjoining the conduct of any person or employer,” liquidated damages of up to \$10,000, and an award of front pay as an alternative to reinstatement. *Id.*

11. Criminal Liability for Partnerships and LLCs

Officers of partnerships and Limited Liability Companies can now receive criminal penalties of up to one year in prison and a \$20,000 fine for a failure to keep or furnish proper records, or pay minimum wage or overtime compensation in accordance with the New York Labor Law. This penalty already applied to employers and officers of corporations under existing law. N.Y. LAB. LAW § 198-a.

12. Postings of Wage Violations

The Commissioner of Labor can now require employers to post a summary of their wage violations in the workplace. Willful violators can be required to affix the summary in an area visible to the general public. N.Y. LAB. LAW § 219-c.

13. Tolling of the Statute of Limitations

The six-year statute of limitations for wage violations under the New York Labor Law can be tolled from the earlier of the date an employee filed a complaint with the Department of Labor or the date the Commissioner commences an investigation. N.Y. LAB. LAW § 198.

14. Special Guidance for Temporary Help Firms

The NYSDOL has also issued specific Guidelines for Notice and Acknowledgment of Wage Rate(s) for Temporary Help Firms. Recognizing that temporary help firms may not be able to supply all of the information required by the Act “because wages and paydays may vary

by assignment,” the NYSDOL imposes more lenient notification requirements on temporary help firms. At the time of the initial hire, temporary help firms must provide employees with, among other things, a range of hourly wages likely to be earned. Moreover, once a temporary help firm assigns an employee to perform specific work for other organizations, the temporary help firm must notify the employee, either verbally or in writing, of “the specific designated payday for the particular assignment; the actual hourly rate of pay for the assignment; and the overtime rate of pay he or she will receive; or, if applicable, inform the employee that the position is exempt from additional overtime compensation and the basis for the overtime exemption.” Guidance is available at <http://www.labor.ny.gov/formsdocs/wp/LS50.pdf>.

C. New York State Construction Industry Fair Play Act

The NYSDOL has found that 14.8% of New York’s construction workers are misclassified as independent contractors at any one time. In response, on August 27, 2010, the Construction Industry Fair Play Act (“Fair Play Act”) was enacted, setting out a rebuttable presumption that construction workers are employees, rather than independent contractors, and tests to determine whether the presumption is met. *See* N.Y. LAB. LAW § 861, et seq. The Fair Play Act became effective on October 26, 2010.

1. Presumption of Employee Status

The Act set forth a new Article 25-B in the New York Labor Law that creates the presumption that a person hired by a contractor in the construction industry is an employee unless “three prescribed criteria” are established or it is a “separate business entity” as defined in the Fair Play Act. The three prescribed criteria are:

- The individual is free from the control and direction in performing the job, both under his or her contract and in fact;
- The service must be performed outside the usual course of business for which the service is performed; and
- The individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.

A person is a “separate business entity,” and can thus be an independent contractor, if the following criteria are met:

- The business entity is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor for whom the service is provided to specify the desired result;
- The business entity is not subject to cancellation or destruction upon severance of the relationship with the contractor;
- The business entity has a substantial investment or capital in the business entity beyond ordinary tools and equipment and a personal vehicle;

- The business entity owns the capital goods and gains the profits and bears the losses of the business entity;
- The business entity makes its services available to the general public or the business community on a continuing basis;
- The business entity includes services rendered on a Federal Income Tax Schedule as an independent business or profession;
- The business entity performs services for the contractor under the business entity's name;
- When the services being provided require a license or permit, the business entity obtains and pays for the license or permit in the business entity's name;
- The business entity furnishes the tools and equipment necessary to provide the service;
- If necessary, the business entity hires its own employees without contractor approval, pays the employees without the reimbursement from the contractor and reports the employees' income to the Internal Revenue Service;
- The contractor does not represent the business entity as an employee of the contractor to its customers; and
- The business entity has the right to perform similar services for others on whatever basis and whenever it chooses.

2. Posting Requirements

The Fair Play Act also requires contractors to conspicuously post an onsite notice (to be published by the Commissioner of Labor) that, among other things, “describes the responsibility of independent contractors to pay taxes required by state and federal law, the rights of employees to workers’ compensation, unemployment benefits, minimum wage, overtime and other federal and state workplace protections, and the protections against retaliation and the penalties in this article if the contractor fails to properly classify an individual as an employee.” The notice must also include contact information for individuals to file complaints or inquire with the Commissioner of Labor about classification status. A contractor who violates the posting requirement is subject to a penalty of up to \$1,500 for the first violation, and up to \$5,000 for a “subsequent violation within a five year period.”

3. Retaliation

The Fair Play Act prohibits retaliation against an individual who has made or threatens to make a complaint that rights have been violated under the article, for causing any proceeding to be brought under the article, or for testifying or providing information concerning a violation.

4. Penalties

The Fair Play Act imposes civil and criminal penalties on a contractor who “willfully fails to classify an individual as an employee.” Notably, the term “willfully violates” is defined as when “a contractor knew or should have known that his or her conduct was prohibited by this section.” The civil penalty for a first-time violation is \$2,500 per misclassified employee, and \$5,000 for each subsequent violation within a five year period, while criminal penalties are misdemeanors. A contractor convicted of a misdemeanor under this section can face debarment and lose the right to bid on certain government projects for one year from the date of any first misdemeanor conviction or five years from the date of a subsequent violation. More importantly, any officer of a corporation or shareholder owning more than 10% of the corporation who knowingly permits a violation of the Fair Play Act is subject to the same civil and criminal penalties as the employment entities.

D. Hospitality Industry Minimum Wage Order

On December 15, 2010, the New York State Department of Labor issued the Hospitality Industry Minimum Wage Order (“Order”), which consolidates and expands upon the requirements in the previously separate Restaurant Industry Minimum Wage Order and the Hotel Industry Minimum Wage Order. 12 N.Y.COMP. CODES R. AND REGS. § 146, *et seq.* It applies to both restaurants and hotels. The Hospitality Wage Order became effective on January 1, 2011, and by March 1, 2011, covered employers had to have made the necessary changes to fully comply with the new requirements. Below is a summary of the requirements set forth in the Order:

1. Covered Employees

The Order is applicable to non-exempt employees working in restaurants and hotels. The Order expressly excludes from its coverage those individuals who qualify under the executive, administrative, professional or outside sales person exemptions. 12 N.Y. COMP. CODES R. AND REGS. § 146-3.2. The Order defines these exemptions using a salaried basis (e.g., a weekly salary of at least \$543.75 for the executive, administrative and professional exemptions) and job duties test. It should be noted that the exemptions in this Order differ from those in the Minimum Wage Order for Miscellaneous Industries and Occupations, which adopts the exemptions listed in Sections 7 and 13 of the FLSA.

2. Tipped Employees

The sections of the Order that apply to tipped employees are applicable to “food service workers” and “service employees.” The Order defines a “food service worker” as someone “primarily engaged in the serving of food or beverages to guests, patrons or customers in the hospitality industry, including, but not limited to, wait staff, bartenders, captains and bussing personnel; and who regularly receive[] tips from such guests, patrons or customers,” specifically excluding delivery employees from this category. 12 N.Y. COMP. CODES R. AND REGS. § 146-3.4. A “service employee” is defined as a worker (other than a food service worker) who receives at least \$1.60 in tips per hour, and the Order places the burden on the employer to establish that the employee receives at least this amount in tips per hour. 12 N.Y. COMP. CODES R. AND REGS. § 146-3.3. The classification of an employee as a “food service worker” or a “service employee” is decided on a weekly basis. However, an employee will not be classified

as a food service worker or service employee on any day where the individual worked in an occupation where tips are not customarily received for the lesser of 2 hours or 20% of the shift. *Id.*

3. Reduction of Allowable Tip Credit and for Food Service Workers and Service Employees

Prior to the effective date of the Order, employers were permitted to apply a tip credit toward the minimum wage (currently \$7.25 per hour) in the amount of \$2.60 per hour for food service workers and \$2.30 per hour for service employees. Under the Hospitality Wage Order, the allowable tip credit is reduced to \$2.25 per hour for food service workers and \$1.60 per hour for service employees. 12 N.Y. COMP. CODES R. AND REGS. § 146-1.3.

4. Tip Credit Notification

As part of the Wage Notice required by the Wage Theft Prevention Act, employers are required to notify employees of “the amount of tip credit, if any, to be taken from the basic minimum hourly rate,” along with the other items required by the WTPA. 12 N.Y. COMP. CODES R. AND REGS. § 146-2.2. The Order also provides that the notice shall “state that extra pay is required if tips are insufficient to bring the employee up to the basic minimum hourly rate.” Prior to the enactment of the WTPA and the issuance of this Wage Order, employers were not required to notify employees in writing about the applicability of tip credits.

The Order places on the employer “the burden of proving compliance with the notification provisions” of the Order. However, “the employer will have met this burden by providing the employee with” a template notice contained within the Order, subject to changes to the minimum wage rates and the language and acknowledgment requirements of the Order. *Id.*

5. Elimination of Salary-Based Pay for Non-Exempt Employees

The Order changes current law by requiring that all employees subject to the Order (which only includes non-exempt employees by definition) may not be paid on a “on a daily, weekly, salary, piece rate or other non-hourly rate basis.” 12 N.Y. COMP. CODES R. AND REGS. § 146-2.5. Accordingly, it will no longer be permissible to pay non-exempt employees in the hospitality industry on any basis other than an hourly basis.

6. Addition of Employer-Mandated Tip Pooling

For years, New York law has allowed employers to mandate tip sharing—giving a portion of tips to another service employee or food service worker who helped provide service to customers (*e.g.*, sharing tips with a busboy). N.Y. LAB. LAW § 196-d. By contrast, New York law did not expressly address employer-mandated tip pooling—the practice by which the tip earnings of directly tipped employees are intermingled in a common pool and then redistributed among directly and indirectly tipped employees.

As of January 1, 2011, employers may require “food service workers to participate in a tip pool and may set the percentage to be distributed to each occupation from the tip pool,” provided that “only food service workers may receive distributions from the tip pool.” 12 N.Y.

COMP. CODES R. AND REGS. § 146-2.16. Under these new regulations, if employees mutually agree to pool their tips on a voluntary basis, the tips may be redistributed among both directly tipped employees and indirectly tipped employees who participated in providing the service but were not directly tipped by the customer. Thus, a voluntary tip pool is less restrictive than an employer-mandated tip pool wherein the distributions are limited to food service workers only, defined as employees (1) who are primarily engaged in serving food or beverages to customers and (2) who regularly receive tips from such customers. 12 N.Y. COMP. CODES R. AND REGS. § 146-3.4. Moreover, a food service worker cannot participate in an employer-mandated tip pool on days during which he or she works in an occupation in which tips are not customarily received for 2 or more hours or more than 20% of his or her shift, whichever is less. *See id.*

The Order gives the following examples of occupations eligible for tip sharing and tip pooling: wait staff, counter personnel who serve food or beverages to customers, bus persons, service bartenders, barbacks, food runners, captains who provide direct food service to customers, and hosts who greet and seat guests. 12 N.Y. COMP. CODES R. AND REGS. § 146-2.14(e).

Employers who operate tip sharing or tip pooling systems must establish and maintain for at least 6 years the following records: (1) a daily log of tips collected by each employee on each shift; (2) a list of occupations deemed eligible to receive tips through the tip sharing or tip pool system; (3) the shares of tips that each occupation receives; and (4) the amount in tips that each employee receives. Additionally, employers must allow tip sharing/pooling participants the opportunity to regularly review these records. 12 N.Y. COMP. CODES R. AND REGS. § 146-2.17.

Recently, the Second Circuit addressed the issue of tip pooling under both New York Labor Law § 196-d and the newly issued Hospitality Wage Order in *Barenboim v. Starbucks Corp.*, 698 F.3d 104 (2d Cir. 2012). However, the Court made no decisive rulings and instead certified two questions to the New York Court of Appeals for clarification: (1) what types of employees are eligible to participate in a tip-pooling arrangement, and what factors should inform a court's consideration of eligibility; (2) if an employee is eligible to receive tips, may an employer deny him tip pool distributions even though customers paid gratuities into the pool in compensation for his service. The Court was unable to make any decisive rulings in part because the New York Department of Labor promulgated the Hospitality Wage Order while this appeal was pending. That prompted questions regarding the lawfulness of the Hospitality Wage Order regulations and whether the Order applies retroactively where class claims arise before, as well as after, the Order's promulgation.

7. Rules Applicable to Service Charges and Gratuities

The Order implements the first regulations applicable to New York Labor Law § 196-d, which prohibits employers from “retain[ing] any part of a gratuity or of any charge purported to be a gratuity for an employee.” In *Samiento v. World Yacht, Inc.*, 10 N.Y. 3d 70 (2008), the New York Court of Appeals held that this prohibition extends to any mandatory service charge that a “reasonable customer” would believe is a gratuity. The Order creates “a rebuttable presumption that any charge in addition to charges for food, beverage, lodging, and other specified materials or services, including but not limited to any charge for ‘service or ‘food service,’ is a charge purported to be a gratuity” and requires that employers “who make charges purported to be

gratuities must establish, maintain and preserve for at least six years records of such charges and their dispositions.” 12 N.Y. COMP. CODES R. AND REGS. § 146-2.18.

Any charges “for the administration of a banquet, special function, or package deal” must be “clearly identified as such and customers shall be notified that the charge is not a gratuity or tip.” The Order further places on the employer “the burden of demonstrating, by clear and convincing evidence, that the notification was sufficient to ensure that a reasonable customer would understand that such charge was not purported to be a gratuity.” Further, under the Order, “[a]dequate notification shall include a statement in the contract with the customer, and on any menu and bill listing prices, that the administrative charge is for administration of the banquet, special function, or package deal, is not purported to be a gratuity, and will not be distributed as gratuities to the employees who provided service to the guests.” In addition, such notification must “use ordinary language readily understood and shall appear in a font size similar to surrounding text, but no smaller than a 12-point font.” 12 N.Y. COMP. CODES R. AND REGS. § 146-2.19.

The Order further specifies that a “combination charge,” part of which is for administration of a banquet or special function and part of which is to be distributed as gratuities, “must be broken down into specific percentages or portions, in writing to the customer, in accordance with the standards for notification” discussed in the previous paragraph. *Id.*

8. Tips Charged on Credit Cards

Under the Order, if tips are charged on credit cards, the employer is not required to pay the employee’s pro-rated share of the service charge taken by the credit card company for the processing of the tip. Instead, the employer “must return to the employee the full amount of the tip charged on the credit card, minus the pro-rated portion of the tip taken by the credit card company.” 12 N.Y. COMP. CODES R. AND REGS. § 146-2.20.

9. Elimination of Spread of Hours Set-Off

Like other employees, hospitality industry employees are entitled one additional hour of pay at the minimum wage rate on any day where their “spread of hours” is greater than ten. Prior to the Order, when an employee received wages in excess of the minimum wage of \$7.25/hour, a set-off applies toward this extra hour of pay at minimum wage requirement. Under the Order, the set-off is eliminated and covered employees are entitled to an additional hour of pay at the minimum hourly rate, regardless of whether their hourly wage exceeds the minimum wage. The Order, however, clarifies that “the additional hour of pay is not a payment for time worked or work performed and need not be included in the regular rate for the purpose of calculating overtime pay.” 12 N.Y. COMP. CODES R. AND REGS. § 146-1.6.

10. Call-in Pay Now at “Applicable Wage Rate” Rather Than “Minimum Wage Rate”

Under New York law, an employee who reports for duty by request or permission of the employer must be paid: (1) for the lesser of (x) at least three hours for one shift or (y) the number of hours in the regularly scheduled shift; (2) the lesser of (x) at least six hours for two shifts totaling six hours or less or (y) the number of hours in the regularly scheduled shift; and (3) the

lesser of (x) at least eight hours for three shifts totaling eight hours or less or (y) the number of hours in the regularly scheduled shift. 12 N.Y. COMP. CODES R. AND REGS. § 146-1.5. Prior to the Hospitality Wage Order, these payments were made at the minimum wage rate. Pursuant to the Order, the call-in pay must be paid at the “applicable wage rate.” Specifically, the “applicable wage rate” is: “(1) Payment for time of actual attendance calculated at the employee’s regular or overtime rate of pay, whichever is applicable, minus any customary and usual tip credit; (2) Payment for the balance of the period calculated at the basic minimum hourly rate with no tip credit subtracted.” The payment for the balance of the period (*e.g.*, the period the employee did not actually work) need not be included in the regular rate for the purpose of calculating overtime. *Id.*

11. Pay for Maintenance of Employee Uniforms

For some time, New York law applicable to this industry has required that, if an employer requires an employee to wear a uniform, that employer must launder or maintain the uniform or pay the employee a weekly cleaning allowance. The Order continues the existing allowance amounts, but provides a new “wash and wear exception” for uniform maintenance pay. Employers will no longer be required to pay for uniform maintenance where required uniforms: (1) are made of “wash and wear” materials; (2) may be routinely washed and dried with other personal garments; (3) do not require ironing, dry cleaning, daily washing, commercial laundering or other special treatment; and (4) are furnished to the employee in sufficient numbers, or the employee is reimbursed by the employer for the purchase of a sufficient number of uniforms, consistent with the average number of days per week worked by the employee. 12 N.Y. COMP. CODES R. AND REGS. § 146-1.7(b).

Similarly, the Order also provides an exemption from uniform maintenance pay when an employee chooses not to use the employer’s laundry service, where the employer (1) launders required uniforms free of charge and with reasonable frequency, (2) ensures the availability of an adequate supply of clean, properly-fitting uniforms, and (3) informs employees individually in writing of such service. 12 N.Y. COMP. CODES R. AND REGS. § 146-1.7(c).

12. Credits for Meals and Lodging

Currently, employers may take credits for meals and lodging. The Order sets forth specific monetary amounts that may be taken as a meal and lodging credit in restaurant and all-year hotels, and resort hotels. *See* 12 N.Y. COMP. CODES R. AND REGS. § 146-1.9. Pursuant to the Order, a “meal” for which credit is being taken must include “adequate portions of a variety of wholesome, nutritious foods” and must include at least one type of food from each of four food groups set forth in the Order. 12 N.Y. COMP. CODES R. AND REGS. § 146-3.7.

III. ENFORCEMENT INITIATIVES: FOCUS ON MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS

A. Enforcement Trends

Misclassifying employees as independent contractors can give rise to liability under various federal and state statutory schemes. Because businesses do not withhold or pay taxes on payments made to independent contractors, misclassification can result in substantial employer liability for unpaid state and federal income taxes as well as Social Security, Medicare, and Unemployment Insurance taxes. Moreover, because independent contractors are not covered by the FLSA or the New York Labor Laws (“NYLL”), misclassification of employees as independent contractors can also result in overtime liability under both.

1. Federal Efforts

The DOL, NYSDOL and legislative entities are focused intently on the misclassification of employees as independent contractors. President Obama set aside \$25 million for fiscal year 2011 to support the DOL objective of combating employee misclassification. This initiative provided for 100 extra enforcement personnel and grants to assist states address the issue. The DOL is paying close attention to misclassification cases, in part, through a database that WHD maintains to track these proceedings. *See* “Press Releases: Employee Misclassification as Independent Contractors,” *available at* <http://www.dol.gov/whd/workers/Misclassification/pressrelease.htm>. According to U.S. Solicitor of Labor Patricia Smith, the DOL will seek global settlements against companies charged with misclassification in multiple jurisdictions. *See* “Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention,” GAO-09-717 (Aug. 2009), *available at* <http://www.gao.gov/new.items/d09717.pdf>.

The United States Senate recently introduced a bill focused on this issue. On April 8, 2011, a bill called the Payroll Fraud Prevention Act, S. 770, was introduced. Amending the FLSA, the bill would require a notice regarding proper classification to be given to each covered individual, and if such a notice is not given, would create a presumption that the person is an employee. An earlier bill, the Employee Misclassification Prevention Act of 2010 (“EMPA”), or S. 3254, was introduced on April 22, 2010, which also sought to amend the FLSA. It would require companies to keep records of non-employees who perform labor or services and presumes employee status in cases when the company fails to maintain records or notify workers of their non-employee classification.

2. New York Efforts

New York State has also taken substantial steps to combat the misclassification of employees as independent contractors. In September 2007, the New York State Joint Enforcement Task Force on Employee Misclassification (“JETF”) was created to address the issue of employee misclassification. *See* NEW YORK STATE JOINT ENFORCEMENT TASK FORCE ON EMPLOYEE MISCLASSIFICATION, ANNUAL REPORT (Feb. 1, 2009), *available at* http://www.labor.state.ny.us/agencyinfo/PDFs/Misclassification_TaskForce_AnnualRpt_2008.pdf. Originally established in Executive Order No. 17 in 2007, Governor Andrew Cuomo renewed the JETF in Executive Order No. 2 on January 3, 2011. The JETF reports that it has made great progress in its first five years as a result of an unprecedented level of inter- and intra-agency coordination. To address the practice of employee misclassification, the JETF engages in joint enforcement sweeps, coordinates assignments among agency partners, makes systematic referrals to appropriate law enforcement agencies, and shares data between

agencies. As a result of these strategies, in 2011 the JETF identified over 19,600 instances of employee misclassification, discovered over \$412 million in unreported wages, and assessed over \$14.5 million in unemployment insurance taxes.

As discussed in the report, the level of coordination between the various agencies has become substantial:

In 2011, the JETF conducted 27 joint sweeps bringing the total number of sweeps conducted since the JETF began to 106 ... On nearly every sweep, the sweep teams have included investigators from the Department of Labor Unemployment Insurance and Labor Standards Divisions, the Department of Labor's Office of Special Investigations, the Workers' Compensation Board Bureau of Compliance, and the Workers' Compensation Board Office of the Fraud Inspector General. On sweeps involving public work construction projects and some private construction jobs, the Department of Labor, Bureau of Public Work or the New York City Comptroller's Office were also included. In 2011 the Department of Taxation and Finance took a more active role in the JETF including participating in unannounced inspections of businesses and assisting in the coordination of investigations. All completed sweep cases in which misclassification is found continue to be referred to the New York State Department of Taxation and Finance for assessment of state income tax owed. Completed unemployment audits are also sent to the United States Internal Revenue Service. *See* NEW YORK STATE JOINT ENFORCEMENT TASK FORCE ON EMPLOYEE MISCLASSIFICATION, ANNUAL REPORT (Feb. 1, 2012), *available at* <http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-3-2012.pdf>.

The report goes on to discuss coordinated assignments in the area of unemployment insurance fraud specifically:

Some of the most significant results of the JETF's work have been in the area of Unemployment Insurance (UI) fraud. The State's UI Trust Fund currently has a \$3.5 billion deficit that has been exacerbated by high unemployment. The JETF's efforts to secure proper employer payments into the UI Trust Fund help to restore solvency to the UI system. In 2011, there were 2,255 completed unemployment insurance audits and investigations that came from tips and referrals. The audits and investigations found \$13 million in additional unemployment insurance contributions due. The JETF's public efforts include a fraud hotline where many individuals, businesses, labor unions and community groups call and provide tips about misclassification ... Internally, the JETF continued to hold bi-weekly meetings with representatives of the Unemployment Insurance Division and brought the Labor Standards Division into the process to ensure that tips that come in to the hotline are properly screened for possible labor standards and workers' compensation issues, as well as possible underpayment of unemployment insurance contributions, and that cases containing potential violations in multiple areas are handled in a coordinated fashion. *See id.*

The JETF issues a new report to the Governor on February 1 of each year describing its record and accomplishments over the past year.

The recently passed Construction Industry Fair Play Act is another mechanism by which New York intends to curb the practice of employee misclassification. The construction industry has some of the highest incidents of employee misclassification, and the JETF has, and will continue to, focus attention on this industry. The JETF conducted 11 sweeps of construction sites in New York State in 2011, resulting in the initiation of 42 investigations. *See id.*

While efforts to address misclassification often target the construction, landscaping, and package delivery industries, recent litigation suggests that independent contractor misclassification is a rapidly growing concern for companies in various other industries. Defendants in recent misclassification suits include a major global investment banking and securities firm and a hospital. *See Bardouille v. Goldman Sachs & Co.*, No. 1:10-cv-04285-WHP (S.D.N.Y. May 27, 2010) (involving a class action lawsuit accusing Goldman Sachs of misclassifying IT workers); *see also Salamon v. Our Lady of Victory Hosp.*, 514 F.3d 217 (2d Cir. 2008) (holding issued by a Second Circuit panel, including Supreme Court Justice Sonia Sotomayor, that a doctor presented a genuine issue of material fact as to her employment status).

In addition to combating employee misclassification by engaging in inter and intra-agency coordination efforts in the state, New York has also partnered with the IRS, DOL, the National Association of State Workforce Agencies (“NASWA”), and the Federation of Tax Administrators (“FTA”) in the Questionable Employment Tax Practices (“QETP”) program. In fact, New York has engaged in data sharing with the IRS for 26 years. *See* Testimony of Colleen C. Gardner, “Leveling the Playing Field: Protecting Workers and Businesses affected by Misclassification” before the United States Senate Committee on Health, Education, Labor and Pensions” (June 17, 2010), *available at* <http://www.help.senate.gov/imo/media/doc/Gardner.pdf>. From 2007 through June of 2010, QETP data sharing assisted New York in discovering over 21,500 misclassified workers, over \$5 million in additional UI taxes due, and unreported wages exceeding \$389 million. *See id.* Furthermore, the JETF aids the U.S. government in its own tax collections by sending completed unemployment audits to the United States IRS. *See* NEW YORK STATE JOINT ENFORCEMENT TASK FORCE ON EMPLOYEE MISCLASSIFICATION, ANNUAL REPORT (Feb. 1, 2012).

B. Legal Standards for Employee Classification

In light of the increased enforcement by state and federal agencies, it is useful to review the factors that agencies and courts consider when determining whether an employee has been misclassified as an independent contractor. Although the tests used for employee status vary depending on the applicable legislative and regulatory scheme, the analysis typically focuses on the degree of control exerted by the alleged employer.

1. Overtime Liability

The “central inquiry” in determining employee status under the FLSA is “whether the alleged employer possessed the power to control the workers in question . . . with an eye to the ‘economic reality’ presented by the facts of each case.” *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33 (1961). New York courts have concluded that the same standard applies when determining who is an employee for purposes of overtime liability under the New York Labor Laws. *See Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 78 (2d Cir. 2003) (holding that “the

District Court dismissed plaintiffs' overtime compensation claim under N.Y. Comp. Codes []- which is analogous to the overtime compensation claim brought under 29 U.S.C. § 207--based on the 'same analysis it applied to the FLSA claims.'"); *see also Doo Nam Yang v. ACBL Corp.*, 427 F. Supp. 2d 327, 342-43 (S.D.N.Y. 2005) ("To be liable under the FLSA, one must be an 'employer,' which the statute broadly defines as 'any person acting directly or indirectly in the interest of an employer in relation to an employee.' The definition of employer is similarly expansive under New York law.").

In applying this "economic reality" test, New York courts have set forth many factors to consider including:

- The degree of supervision, direction, and control exercised by the worker and the employer over performance of the work,
- The worker's opportunity for profit or loss,
- The worker's investment in the business,
- The degree of skill and independent initiative required to perform the work,
- The permanence or duration of the working relationship, and
- The extent to which the work is an integral part of the employer's business. *See Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988); *see also Zheng v. Liberty Apparel Company, Inc.*, 355 F.3d 61, 68 (holding that joint employer cases rely on similar factors, but in such cases, courts also consider additional factors such as: whether responsibility under the contract with the putative joint employer passed "without material changes" from one group of potential joint employees to another and whether the workers had a "business organization" that could or did shift as a unit from one putative employer to another).

None of these factors is dispositive, and the list is not complete. Rather, these factors provide "a nonexclusive and overlapping set of factors to ensure that the economic realities test mandated by the Supreme Court is sufficiently comprehensive and flexible to give proper effect to the broad language of the FLSA . . . [Ultimately,] employment for FLSA purposes [is] a flexible concept [] determined on a case-by-case basis by review of the totality of the circumstances." *Barfield v. N.Y.C. Health and Hosps. Corp.*, 537 F.3d 132, 142-43 (2d Cir. 2008). Furthermore, it is well settled under New York case law that a contract which provides that the alleged employee is an independent contractor is not determinative since such a determination requires an examination of the actual course of conduct between the two parties. *See Matter of Webley*, 133 A.D.2d 885 (1987).

2. Liability Under the Unemployment Insurance Law

New York courts hold that "[w]hether an employment relationship exists within the meaning of unemployment insurance law is a question of fact, no one factor is determinative and

the determination of the [unemployment insurance] appeal board, if supported by substantial evidence in the record as a whole, is beyond further judicial review.” *Matter of Concourse Ophthalmology Assoc.*, 60 N.Y.2d 734, 736 (1983). Furthermore, it is well-settled that “[a]n employer-employee relationship exists when the evidence shows that the employer exercises control over the results produced or the means used to achieve the results.” *Matter of Empire State Towing & Recovery Assn.*, 15 N.Y.3d 433, 437 (2010). New York courts consistently conclude “control over the means is the more important factor to be considered.” *Matter of Ted Is Back Corp.*, 64 N.Y.2d 725, 726 (1984); see *Matter of Bedin*, 257 A.D.2d 809 (3d Dept 1999). Moreover, “[i]ncidental control over the results produced without further evidence of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship.” *Matter of Hertz Corp.*, 2 N.Y.3d 733, 735 (2004).

In cases involving professional services, the New York Court of Appeals has applied the “overall control” test where “substantial evidence of control over important aspects of the services performed other than results or means” is sufficient to establish an employer-employee relationship. *Matter of Concourse Ophthalmology Assoc.*, 60 N.Y.2d at 736. This test is applicable to services where the details of the work performed are difficult to control because of considerations such as professional and ethical responsibilities. See *Matter of Salamanca Nursing Home*, 68 N.Y.2d 901 (1986). This “overall control” test has typically been applied “in the context of professionals such as physicians and attorneys.” *Matter of Empire State Towing & Recovery Assn.*, 15 N.Y.3d 433 at 438.

Recent case law illustrates the fact-intensive nature of the inquiry. In *Matter of Holleran*, Mr. Holleran worked as an installer/repairman for Jez Enterprises, a company “engaged in the business of providing installation and repair services for sports equipment purchased by customers of its retail clients.” 98 A.D.3d 757, 758 (2012). Mr. Holleran “signed a written agreement designating him an independent contractor[,] ... [h]e received his work assignments via work orders that were emailed to him directly from Jez, and he, in turn, made appointments with the individual customers to deliver and assemble the equipment.” *Id.* Furthermore, “it was [Holleran’s] responsibility to contact the customer directly to schedule the work after receiving an emailed work order from Jez[,] ... [Holleran] was free to decline a work assignment[,] ... [a]lthough Jez provided [Holleran] with limited training during the first week, it did not do so thereafter, and claimant performed the work based on instructions contained in the manual that came with the equipment.” *Id.* After completing an assignment, Mr. Holleran had the customer sign a work order indicating that the work was completed in a satisfactory fashion. The court emphasized, however, that “Jez did not inspect claimant’s work or require him to work a particular schedule or a specified number of hours[,] ... Jez did not withhold taxes from claimant’s paycheck, reimburse him for expenses, or provide him with tools, transportation or any type of fringe benefits ... [and] claimant was permitted to work for competing companies.” *Id.* In light of the foregoing, the court held that “Jez did not exercise control over important aspects of claimant’s work so as to establish the existence of an employment relationship.” *Id.* at 759.

In *Matter of Lambert*, Mr. Lambert worked as a sales representative for Staubach Retail Services, “a company engaged in the business of soliciting and assisting commercial tenants in the location, lease and disposition of retail properties.” 794 N.Y.S.2d 742, 743 (2005). The court stressed: “[a]mong other things, the contract reserved for Staubach the right to review and

approve all proposed listing agreements or other contracts drafted by salespersons, directed that all such documents be issued in Staubach's name and remain its property." *Id.* Furthermore, "Staubach reserved the right to require its salespersons to attend periodic meetings for the purpose of coordinating sales efforts, directed them to enter into commission-splitting agreements amongst themselves and prohibited them from using company trade secrets or client information for the benefit of anyone but Staubach." *Id.* "Finally, Staubach's managing principal testified that Staubach provided its salespersons with their own company office space and equipment with which to conduct transactions." *Id.* In light of the above, the court held: "we find that substantial evidence supports the Board's decision that claimant and his fellow salespersons were Staubach's employees and we perceive no basis to disturb it." *Id.* at 744.

In each of the cases described above, the alleged employer made some effort to exert control over the quality of work performed by the claimant. Mr. Holleran was trained by Jez and was paid only after the customer signed a form indicating that his work was satisfactory. Mr. Lambert likewise was trained by Staubach. Mr. Lambert's activities were subject to arguably more rigid quality control in that Staubach could directly review his work (by reviewing proposed contracts or listings). This increased level of scrutiny likely resulted in the different outcomes in each matter. These cases illustrate that even slight differences in facts can drive completely different outcomes.

3. Liability Under the Tax Code

To determine whether an individual is an independent contractor or an employee, the IRS generally examines the degree of control and independence of the parties. Specifically, the IRS has determined that evidence of the foregoing falls into three main categories: behavioral control, financial control, and the type of relationship between the parties. Within these categories, the IRS has provided employers with eleven factors to consider. With regard to behavioral control, the IRS analyzes: 1. Instructions that the business gives to the worker and 2. Training that the business gives to the worker. *See I.R.S., Employer's Supplemental Tax Guide* (Supplement to Publication 15 (Circular E)), Jan. 31, 2012, *available at* <http://www.irs.gov/pub/irs-pdf/p15a.pdf>. With regard to financial control, the IRS examines: 3. The extent to which the worker has unreimbursed business expenses; 4. The extent of the worker's investment; 5. The extent to which the worker makes his or her services available to the relevant market; 6. How the business pays the worker; and 7. The extent to which the worker can realize a profit or loss. *See id.* With regard to the type of relationship, the IRS considers: 8. Written contracts describing the relationship the parties intended to create; 9. Whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay; 10. The permanency of the relationship; and 11. The extent to which services performed by the worker are a key aspect of the regular business of the company. *See id.* Thus, the IRS utilizes many of the same factors applied by New York agencies and courts, and as with the tests applied in New York, none one factor is dispositive. Furthermore, if an employer would like the IRS to determine whether or not a worker is an employee, the employer can file Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, with the IRS.

IV. OTHER AREAS OF INTEREST FOR NEW YORK WAGE HOUR PRACTITIONERS

A. The Fluctuating Workweek

1. Fluctuating Workweek Under FLSA

If an employer and employee share a clear mutual understanding that the employee's salary will provide base compensation for all hours worked – not simply the first 40 hours worked – the FLSA's Fluctuating Workweek ("FWW") calculation method is an available option for calculating overtime. Under the FWW method, there are two significant changes in the manner in which overtime is calculated. First, the employer determines the employee's regular rate for a week by dividing the salary by all hours worked because the salary provides all straight time pay. *See* 29 C.F.R. § 778.114(a). Second, the overtime pay due equals ½ this regular rate times the overtime hours because the employee has already received straight time pay for these hours from his/her salary. *Id.* Employers should note, however, that the FWW method is only available if the employee receives his or her full salary in any week that the employee performs any work. *See* C.F.R. § 778.114(a). Stated alternatively, employers who desire to use the FWW method are extremely limited in the ability to make deductions from employees' salaries for absences or other reasons.

For example, a non-exempt employee with a \$200 weekly salary works 50 hours in a particular workweek, but the employee's salary is intended to cover only a standard 40 hour workweek. The employee's regular rate is \$5.00 per hour (i.e., the \$200 weekly salary divided by standard 40 hour workweek). The employee's overtime pay for this 50 hour workweek is \$75 (i.e., \$5.00 regular rate times 1 ½ times 10 overtime hours). The employee's gross compensation is \$275. Under the FWW, the gross compensation is only \$220. The employee's regular rate is \$4.00 per hour (i.e., \$200 salary divided by 50 hours). The employee's overtime pay is \$20 (i.e., \$4.00 regular rate times ½ times 10). The difference will only increase as an employee works more overtime hours. If the employee worked 60 hours, his overtime pay under the first method would be \$150 (total compensation of \$350) and under the FWW it would be \$33 (total compensation of \$233).

2. Fluctuating Workweek and NYLL

While there is no direct provision or regulation under the NYLL stating so, New York does seem to recognize the fluctuating workweek as a method for calculating overtime. In an opinion letter issued on February 1, 2011, the New York State Department of Labor stated that "pursuant to 29 C.F.R. § 778.114, a federal regulation that this Department follows in interpreting the provisions of the State Minimum Wage Order, an employee may work for a fixed salary for a fluctuating number of hours pursuant to the clear and mutual understanding that the salary is intended to compensate him or her for the hours worked at his or her regular rate." *See* Request for Opinion Mortgage Loan Originators, Wage and Hour Counsel Opinion Letter, RO-10-0136 (NYS Dep't of Labor Feb. 1, 2011). The letter also approves the use of a fluctuating workweek for employees with a base salary who also receive commission pay. *Id.*

However, it should be noted that the fluctuating workweek method may not be available to employers in the hospitality industry. Section 146-2.5 of the Minimum Wage Order for the Hospitality Industry provides that nonexempt employees “other than commissioned salespersons, shall be paid hourly rates of pay. Employers may not pay employees on a daily, weekly, salary, piece rate or other non-hourly rate basis.” This likely means that employers in the hospitality industry cannot utilize the fluctuating workweek method of pay.

3. Retroactive Application of the Fluctuating Workweek in Cases of Misclassification

A question that many courts have wrangled with recently is whether to apply the fluctuating workweek method to calculate overtime owed when an employer has misclassified an employee as exempt from overtime under the FLSA. While New York courts have not yet addressed this issue, it has divided the federal courts. However, there exists a growing consensus among the federal circuit courts that a retroactive application of the fluctuating workweek method is appropriate in calculating back overtime due when there existed both a “‘clear mutual understanding’ between the employer and employee that the fixed wage will constitute the employee’s regular or straight-time pay for any and all hours worked in a given week *and* the separate payment of an overtime premium for any hours in excess of 40 that are worked in that week.” *Urnikis-Negro v. American Family Prop. Servs.*, 616 F.3d 665, 677 (7th Cir. 2009).

Circuit courts in the First, Fourth, Fifth, Seventh, and Tenth circuits have all upheld a retroactive application of the fluctuating workweek method. *See, e.g., Valerio v. Putnam Associates Inc.*, 173 F.3d 35, 39 (1st Cir. 1999); *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 357 (4th Cir. 2011); *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135 (5th Cir. 1988); *Urnikis–Negro v. Am. Family Prop. Servs.*, 616 F.3d 665, 681 (7th Cir. 2010); and *Clements v. Serco, Inc.*, 530 F.3d 1224, 1230-31 (10th Cir. 2008). Many courts have based their decisions on the United States Supreme Court ruling in *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942) (holding that an employer and employee could legally agree to a compensation arrangement where the employee is paid a flat weekly rate for fluctuating hours, provided that the agreement contained a provision for overtime pay and the wage was sufficient to satisfy minimum wage requirements and offer a premium of at least fifty percent for the hours actually worked over the statutory maximum).

Additionally, the Department of Labor has recently approved the use of the fluctuating workweek method to calculate unpaid overtime compensation in a mistaken exemption classification case. *See* Retroactive Payment of Overtime and the Fluctuating Workweek Method of Payment, Wage and Hour Opinion Letter, FLSA 2009-3 (Dep’t of Labor Jan. 14, 2009) (stating that “because the fixed salary covered whatever hours the employees were called upon to work in a workweek; the employees will be paid an additional one-half their actual regular rate for each overtime hour worked...and the employees received and accepted the salary knowing that it covered whatever hours they worked,” a retroactive payment of overtime using the fifty percent multiplier conforms with the FLSA requirements).

B. Unpaid Internships

1. Legal Standard as to the Scope of “Employ” and “Employee” Under the FLSA

Whether interns are entitled to be paid in accordance with the FLSA turns on whether they are “employees” as that term is defined under the FLSA. The United States Supreme Court addressed the definition of “employee” under the FLSA in a 1947 case involving trainees. In that case, the Court concluded that unpaid railroad trainees performing work during training were not “employees” for FLSA purposes. *See Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947). The Court held:

Section 3 (g) of the Act defines ‘employ’ as including ‘to suffer or permit to work’ and § 3 (e) defines ‘employee’ as ‘any individual employed by an employer.’ The definition ‘suffer or permit to work’ was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages. So also, such a construction would sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit. But there is no indication from the legislation now before us that Congress intended to outlaw such relationships as these. The Act’s purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage. The definitions of ‘employ’ and of ‘employee’ are broad enough to accomplish this. But, broad as they are, they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction . . . The Fair Labor Standards Act was not intended to penalize railroads for providing, free of charge, the same kind of instruction at a place and in a manner which would most greatly benefit the trainees. Accepting the unchallenged findings here that the railroads receive no ‘immediate advantage’ from any work done by the trainees, we hold that they are not employees within the Act’s meaning. *Id.* at 152-53.

The DOL and NYSDOL’s analyses and guidelines, both of which must be complied with by New York employers with unpaid interns, are based on the *Walling* case.

2. Federal Guidelines

In April of 2010, the DOL issued a “fact sheet” to help employers determine whether their unpaid internship programs comply with the FLSA. *See* U.S. Department of Labor, Wage and Hour Division, “Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act,” <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf> (last visited Dec. 18, 2012). This fact sheet provides that employers may offer unpaid internships if those internships meet all of the following six criteria:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship. *Id.*

The fact sheet also provides that “[i]f all of the above are met, an employment relationship does not exist under the FLSA, and the Act’s minimum wage and overtime provisions do not apply to the intern. This exclusion from the definition of employment is necessarily quite narrow because the FLSA’s definition of ‘employ’ is very broad.” *Id.* Furthermore, the fact sheet stresses that “the more an internship program is structured around a classroom or academic experience . . . the more likely the internship will be viewed as an extension of the individual’s educational experience.” *Id.* Thus, if the intern receives academic credit from a college or university, the more likely the internship will be considered educational training, rather than employment.

3. New York State Guidelines

In addition to the six criteria set forth by the DOL, the NYSDOL has issued a “fact sheet” that includes five additional criteria for “for-profit” employers to evaluate whether there is an employment relationship. *See* NYS Department of Labor, “Fact Sheet: Wage Requirements for Interns in For-Profit Businesses,” <http://www.labor.ny.gov/formsdocs/wp/P725.pdf> (last visited Dec. 18, 2012). These five additional criteria include:

- Any clinical training is performed under the supervision and direction of people who are knowledgeable and experienced in the activity;
- The trainees or students do not receive employee benefits;
- The training is general, and qualifies trainees or students to work in any similar business. It is not designed specifically for a job with the employer that offers the program;
- The screening process for the internship program is not the same as for employment, and does not appear to be for that purpose. The screening only uses criteria relevant for admission to an independent educational program;

- Advertisements, postings, or solicitations for the program clearly discuss education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.

For an employer to avoid violating New York labor laws, the unpaid internship must meet all eleven federal and state criteria.

4. Deference to DOL’s Guidelines

Courts differ on whether the DOL’s 6-factor test is entitled to controlling weight in determining employee status in a training context. Some courts have said that the test is entitled to “substantial deference.” *See, e.g., Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1128 (5th Cir. 1983). Furthermore, in *Archie v. Grand Central Partnership, Inc.*, then district court judge Sonia Sotomayor held: “Under *Portland Terminal* and the [DOL] test, the findings a court must make before reaching the legal question of whether trainees are employees are virtually identical. Neither approach relies exclusively on a single factor, but instead requires consideration of all the circumstances. The [DOL] test is therefore a reasonable application of the FLSA and *Portland Terminal* and entitled to deference by this court.” 997 F. Supp. 504, 532 (S.D.N.Y. 1998) (Sotomayor, J.) Other courts have rejected the test altogether. *See, e.g., McLaughlin v. Ensley*, 877 F.2d 1207, 1209-10 & n. 2 (4th Cir. 1989) (acknowledging the DOL 6-part test, but ultimately “did not rely” upon it because of the “clear precedent” of earlier 4th Circuit decisions applying *Walling v. Portland Terminal*). Still other courts strike a balance and consider the factors as relevant but not dispositive to the inquiry. *See, e.g., Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1027 (10th Cir. 1993) (finding that the DOL’s all-or-nothing approach is inconsistent with prior DOL interpretations and opinions endorsing a flexible approach); *see also Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1006-07 (C.D. Cal. 2010) (adopting a “looser application” of the DOL 6-part test after finding “nothing in *Portland Terminal* itself to support an all or nothing approach”).

New York courts have yet to directly address what degree of deference the NYSDOL’s additional five factors, espoused in the Dec. 18, 2010 fact sheet, are entitled to.

5. Recent Litigation Over Unpaid Internships

Having unpaid internships that do not comply with the criteria set forth by the DOL and NYSDOL may expose employers to litigation. In New York, former unpaid interns have recently filed lawsuits against their former employers for allegedly violating federal and state labor and wage laws. In *Wang v. The Hearst Corp.*, 2012 WL 2864524 (S.D.N.Y. July 12, 2012), the plaintiff alleges that she worked as an unpaid intern for several months, that she displaced entry-level employees, and that Hearst violated federal and state labor laws by not compensating her. On July 12, 2012, Judge Baer granted the plaintiff conditional certification under the FLSA, holding “[a]t this initial stage of action, the plaintiffs need only make a modest factual showing that they and potential opt-in plaintiffs together were victims of a common policy or plan that violated the law.” (Internal quotation marks omitted.) *Id.* The case is currently in the discovery phase. Similarly, in *Glatt, et al v. Fox Searchlight Pictures Inc.*, No. 12 CIV 6784 (S.D.N.Y. Sept. 28, 2011), former unpaid interns for the film studio during the production of *Black Swan* allege that they were denied compensation and all of the benefits of

employment. Plaintiffs' motion for class and collective certification were due by 1/18/2013. The plaintiffs in these cases seek unpaid minimum wages, overtime pay, attorneys' fees, interest, and liquidated damages.

V. SIGNIFICANT CASE DEVELOPMENTS IN NEW YORK

A. *Kuebel v. Black & Decker Inc.*, 2011 WL 1677737 (2d Cir. May 2, 2011)

In *Kuebel v. Black & Decker Inc.*, 2011 WL 1677737 (2d Cir. May 2, 2011), an employee sued under both the FLSA and the NYLL on behalf of himself and a class of employees with two claims at issue in the appeal before the Second Circuit: 1) whether the time spent he spent commuting between the job site and home was compensable and 2) whether he should have been paid for overtime hours worked that he did not record. Kuebel's job was a Retail Specialist, which involved managing products at six different store locations, while primarily working out of his home and the six stores. Black and Decker sought summary judgment on both claims, won, and Kuebel appealed.

The first claim, the commute time issue, rested on a theory that based on tasks Kuebel performed at home before and after commuting, the commuting was "integral and indispensable" to his principal job activities and thus should have been compensated. *Id.* at *5. The court found this argument to be "largely beside the point" since it was well-established in the law that normal home to job site travel time is not compensable. *Id.* at *6. The tasks he performed at home did not affect his home to job site travel, particularly as he was not bound to perform the home tasks immediately before or after his travel time. *Id.*

On the second claim, the court felt Kuebel's recollected estimates of the time he worked were sufficient to pass the burden of showing hours worked to the employer, and that there should not be a heightened standard just because Kuebel allegedly falsified his timesheets. *Id.* at *8-9. Further, despite the fact that there were written policies suggesting all time worked should be recorded, this was insufficient at the summary judgment stage where, as here, there was testimony that Kuebel was instructed not to record more than forty hours per week. *Id.* at *10. On the issue of employer knowledge of Kuebel working overtime, the fact Kuebel claimed he complained to his supervisor raised a sufficient material fact to avoid summary judgment. *Id.* at *11. The Court also overturned the district court's finding of a lack of willfulness, finding it premature. *Id.* at *11.

B. *In re Novartis Wage and Hour Litig.*, 611 F.3d 141 (2d Cir. 2010)

In *In re Novartis Wage and Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), the Second Circuit addressed whether pharmaceutical sales representatives are covered by the FLSA and NYLL's

outside sales and/or administrative employee exemptions. Circuit courts have generally been divided on this question.⁶

In deciding the outside sales exemption issue, the Court determined that the pharmaceutical sales representatives at Novartis promoted drugs to physicians, but did not “transfer ownership of any quantity of the drug in exchange for anything of value.” The outcome of the case thus turned on the construction of the word “sale” in the outside sales exemption regulations. The preamble to the regulations states that “[e]mployees have a primary duty of making sales if they obtain a commitment to buy from the customer and are credited with the sale.” Novartis argued that this means the word “sale” should be construed broadly. The Court disagreed, and held that the word “commitment” precluded a finding that the pharmaceutical sales representatives at issue had a primary duty of making sales, since they did not receive any commitment from doctors to buy or even prescribe the drugs. *Id.* at 153-54. Thus, the sales representatives did not meet the outside sales exemption.⁷

The Court further found that they did not constitute administrative employees because their primary duty did not relate to the employer’s “management or general business operations,” as they did not formulate policies, did not plan business objectives, or bind Novartis in any matters of substantial financial impact. *Id.* at 156-57. The Court found that the areas of discretion that Novartis sales representatives had were insufficient to show the level of discretion and independent judgment needed to satisfy the administrative exemption. *Id.*

C. *Myers v. Hertz Corp.*, 624 F.3d 537 (2d Cir. 2010)

The *Myers v. Hertz Corp.*, 624 F.3d 537 (2d Cir. 2010) case decided three issues, one being whether NYLL § 191, which governs the timing of wage payments, provides an independent, substantive right to unpaid wages. The Court found that § 191 “only involves the timeliness of wage payments, and does not appear to afford to plaintiffs any substantive entitlement to a particular wage.” *Id.* at 545. Since the NYLL provides substantive protection for overtime under a different set of statutes, the § 191 claim was “nothing more than an alternative method of seeking redress for an underlying FLSA violation.” *Id.* at 546. It did not create any new substantive rights.

⁶ The Court stated that its analysis applied with equal force to the NYLL claims because “the overtime wage requirements of New York law...are not meaningfully different from the requirements of the FLSA.” *Id.* at 157.

⁷ This part of the Court’s holding relating to the outside sales exemption was abrogated by the Supreme Court’s holding in *Christopher v. Smithkline Beecham Corp.*, 132 S.Ct. 2156 (2012). The Supreme Court declined to defer to the Department of Labor’s interpretation of the outside sales exemption and instead concluded that the statute’s expansive definition of “sales,” which extends to a “consignment for sale” or “other disposition,” requires a broad construction of the exemption which can “accommodate industry-by-industry variations in the methods of selling commodities.” *Id.* at 2171. The Court held that with respect to the pharmaceutical industry, what a pharmaceutical sales representative does, namely obtain a non-binding commitment from a physician to prescribe certain drugs, “comfortably falls within the catchall category of ‘other disposition.’” *Id.* at 2172. Thus, the Court found that pharmaceutical sales representatives do “qualify as outside salesmen under the most reasonable interpretation of the [Department of Labor]’s regulations. *Id.* at 2174.

The Court also addressed the classification of employees as exempt under the FLSA in the context of class certification guidelines. It found that individual inquiries regarding the application of the executive exemption predominated over common issues, making class certification inappropriate. In this case, the plaintiff's were station managers of Hertz Corp. classified as exempt from receiving overtime under the executive exemption. The Court held that the district court did not abuse its discretion in concluding that individual inquiries would predominate, noting the applicability of the exemption requires an analysis of the actual duties performed by each manager, "a complex, disputed issue" which turns on the application of detailed DOL regulations. The Court rejected plaintiffs' argument that simply because the employer promulgated a policy classifying all station managers as exempt, this alone demonstrated that common issues predominated. It held that "the existence of a blanket exemption policy standing alone, is not itself determinative." *Id.* at 549.