

Legal and Not So Legal Developments in Labor Law – A Mash-Up

Warning: There will be a Quiz

1. Marijuana Drug Testing – “To test or not to test. That is the question.”
2. Definition of Independent Contractor – Who can it be now?
3. Public Employees and Tattoos – The PERB, The PERB, boss!
4. Executive Orders and impact in NYS – Panama!
5. Freedom of Information Law and Duty to Bargain – “Freedom!”
6. DCJS Criminal Record Re-disclosure November 2024 – “Careful out there!”
7. Impact of AI in the Workplace – Kill all the lawyers!
8. Sunset of COVID leave July 31, 2025– Good Riddance.
9. Military Law – National Guard – Leave – Proud to be an American!
10. Lactation at work; Labor Law § 206-c – Paid Lactation Breaks – Gimme shelter.
11. Employing Non-Citizens in the Public Sector – I come from land of ice and snow!
12. Unions discriminate too – That hypocrite smokes two packs a day!
13. Civil Service Law § 54 – Age & Educational Requirements – Here’s to you Ms. Robinson!
14. Civil Service Law § 72 – Leave for Ordinary Disabilities – Sanitarium, just leave me alone!
15. Civil Service Law § 75 (and proposed amendment)– Fire Fighters Get Greater Protections – My Hero

16. Civil Service Law § 80 – Reductions in Force – Manic Monday.
17. FLSA & Exempt Salary Threshold – I Gosta Get paid.
18. NYS Clean Slate Act – Secret, secret, I've got a secret.
19. Workers Compensation & Mental Health Injuries – “Bang Your Head, Wake The Dead!”
20. Severance ultimatums – Baby Please Don't Go.
21. S6108 – Public Employer - Wage and Hour Law – “Money, it's a drag.”
22. S5828 – Salary Expectations – “Ask me no questions, and I'll tell you no lies.”
23. S0515 – Allows parents and legal guardians to work from home.
Something So Strong!
24. S1193 – Requires public employers who opt out of paid family leave to provide parental leave. “Parents Just Don't Understand.”

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

CHRISTOPHER E. COLLINS,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Laws and Rules,

DECISION, ORDER
And JUDGMENT
Index No. 909786-23
(Lynch, J.)

-against-

NEW YORK STATE DIVISION OF STATE
POLICE and the NEW YORK STATE DIVISION
OF CRIMINAL JUSTICE SERVICES,¹

Respondents.

INTRODUCTION

This is an article 78 proceeding, in which Petitioner seeks reinstatement of his New York Police Officer Basic Training Certificate, issued on June 12, 2023, but rescinded on July 17, 2023.

By Decision and Order dated February 2, 2024, incorporated herein and made a part hereof by reference, this Court denied Respondent’s motion to dismiss the proceeding.² By Decision and Order dated March 18, 2024, incorporated herein and made a part hereof by reference, this Court denied Respondent’s motion to reargue.³

¹ Hereinafter referred to as NYSP and DCJS.

² NYSCEF Doc No. 31.

³ NYSCEF Doc No.38.

Clearly, as more fully appears below, Petitioner was subjected to drug testing in furtherance of an investigation prior to his resignation, and there was an indication of the presence of THC. Of course, such finding would be a violation of a Superintendent's directive prohibiting the presence of any THC in the person of a NYS Trooper. That does not, however, end the inquiry. The issue is whether there was an ongoing investigation of misconduct as defined in 9 NYCRR § 6056.2 (h) (1), necessary to sustain a removal for cause finding, when Petitioner resigned on October 28, 2022. There was not!

ADDITIONAL FINDINGS OF FACT

On November 15, 2021, Superintendent Bruen issued the following memorandum prohibiting the usage of THC, and a warning relative to the use of CBD products, to wit:

“Effective[ly] immediately, all sworn Members are prohibited from consuming or using any substance containing any amount of tetrahydrocannabinol (“THC”).”⁴ (Emphasis added)

Clearly, Petitioner was subject to the foregoing directive.

COMMENCEMENT OF AN INVESTIGATION

On July 1, 2022, Lieutenant Courtney Neilson interviewed Trooper Jamie Kasper, in furtherance of an investigation of Petitioner's conduct.⁵ Trooper Kasper was Petitioner's fiancé and had reported Petitioner's erratic behavior. She never saw Petitioner use marihuana nor did she smell marihuana on his person.⁶

⁴ NYSCEF Doc. No. 84.

⁵ NYSCEF Doc. No. 69.

⁶ NYSCEF Doc. No. 69 – Kasper Tr. p. 17.

DRUG TESTING

On June 13, 2022, Petitioner consented to undergo drug testing, and completed a Drug Screen Questionnaire.⁷ Question #6 on the Questionnaire provided:

“Have you been in physical contact with any controlled substance and/or marihuana within the last 72 hours?”

Petitioner identified several prescription medications but did not mention he had consumed gummies.⁸

INTERVIEWS OF PETITIONER

On August 8, 2022, Lieutenant Neilson interviewed Petitioner, who acknowledged he was aware of the pending investigation.⁹ He also admitted consuming Delta-8 gummies but made the following statement: “I did not think that Delta-8 or CBD had the same derivative in them as THC.”¹⁰ He also admitted taking a controlled substance, clonazepam pills, that his mother had a prescription for; Petitioner did not have a prescription.¹¹

On September 2, 2022, Petitioner underwent a second interview.¹² Petitioner claimed:

“The CBD that had the Delta-8 in it, that I also took. But I never smoked marihuana and there was no other way of me taking that THC.”¹³

He admitted:

Q. In your estimation, how many THC gummies have you ingested in the past year?
A. I believe 12.¹⁴

⁷ NYSCEF Doc. No. 58, 59, 65.

⁸ NYSCEF Doc. No. 65.

⁹ NYSCEF Doc. No. 76- Interview of Petitioner Collins.

¹⁰ NYSCEF Doc. No. 76- Interview of Petitioner Collins p. 30, line 38.

¹¹ NYSCEF Doc. No. 76- Interview of Petitioner Collins p. 21-22. In the Neilson report, it was noted Petitioner admitted consuming gummies “as well as his mother’s prescription Citalopram” – NYSCEF Doc. No. 54.

¹² NYSCEF Doc. No. 82 – Collins Interview.

¹³ NYSCEF Doc. No. 82 – Collins Interview p. 3, Line 37-38.

¹⁴ NYSCEF Doc. No. 82 – Collins Interview p. 6, Line 37-39.

There is no dispute that Trooper Collins had ingested Delta-8 gummies.

LT. NEILSON REPORT SEPTEMBER 26, 2022

The pending investigation was fully described in Lieutenant Neilson's report dated September 26, 2022.¹⁵ Lt. Neilson cited the Lab Test results as follows:

On Tuesday, June 21, 2022, Alere Toxicology Services, reported a positive Drug Test for sample # 213368602. The result of the urine analysis was positive for the presence of **Amphetamine**, with a quantitative result of 1392 ng/ml, and **THC (Tetrahydrocannabinol) Metabolite**, with a quantitative result of **1926 ng/ml**.¹⁶ (Emphasis added)

The report continued:

“On Wednesday, July 6, 2022, Omega Laboratories Director DAVID ENGELHART, Ph.D. was contacted to provide an analysis of the reported value of 3.01 pg/mg for the THC Metabolite. Dr. ENGELHART reported that the numeric value of the THC Metabolite is of limited information. THC Metabolite builds up in the body with time and use. Depending on the person, timeframe of the THC use, and how heavily the use is at any given time all influences the resulting value. Dr. ENGELHART did advise that the **THC Metabolite positive result is clearly indication of prior consumption of THC** and is not the result of secondhand exposure. Specifics such as someone being intoxicated, how they consumed the THC, or **any quantifiable use of the product cannot be determined**. He declined to provide a memorandum.”¹⁷

The report further indicated:

“On Wednesday, June 22, 2022, Doctor MCGURTY emailed his initial verification letter, dated June 22, 2022, regarding Trooper COLLINS. Doctor MCGURTY verified the positive hair and urine test for **Amphetamine as “negative therefore having a legitimate medical explanation.”** The explanation was Trooper COLLINS' valid prescription for Adderall. Doctor MCGURTY verified the positive hair and urine test for **THC Metabolite as**

¹⁵ NYSCEF Doc. No. 54 and 55– Neilson Investigation Report.

¹⁶ NYSCEF Doc. No. 54 – Neilson Investigation Report ¶ 7.

¹⁷ NYSCEF Doc. No. 54 – Neilson Investigation Report ¶ 11.

“positive with no legitimate alternative medical explanation despite the Earth CBD use.”¹⁸

Clearly, the record established that the presence of amphetamine was the result of the prescribed use of Adderall, and thus was negative for purposes of the investigation.

Lieutenant Neilson concluded:

“Regulation 8A8: A Member shall not: (1) Engage in misconduct. (2) Act in a manner tending to bring discredit to Division To Wit: Trooper COLLINS, by his conduct, intentionally used **CBD and THC based products specifically forbidden by Executive Memorandums # 20-38 and # 21-15. Additionally, Trooper COLLINS admitted consuming a prescription pill without a prescription. As such, he engaged in misconduct that violated New York State Police Regulation 8A8(1) and not consistent with the standards and behavior of a NYS Trooper. Trooper Collins habits regarding his **routine purchases and consumption of CBD products** were found to be concerning as it relates to his overall fitness for duty and the unregulated products are questionable as to their exact percentage of THC. It is recommended that this investigation be closed as **FOUNDED and that appropriate administrative action be taken.**”¹⁹ (Emphasis added)**

In fine, Lieutenant Nelson did not make any reference to any potential criminal charges for a serious offense. Rather, the report alleged “a violation of Regulation 8A3, (Failure to Obey a Lawful Order) and Regulation 8A8 (Engaging in Misconduct and Bringing Discredit to the Division)”, i.e., not misconduct as defined in 9 NYCRR § 6056.2 (h) (1).²⁰

LT. NEILSON AFFIDAVIT 4/2/2024²¹

Trooper Neilson identified several potential criminal acts arising out of the use of THC products, as follows:

¹⁸ NYSCEF Doc. No. 54 – Neilson Investigation Report ¶ 9; NYSCEF Doc. No. 89- Neilson Affidavit ¶ 10, 20; NYSCEF Doc. No.67 – Letter from Dr. McGurty.

¹⁹ NYSCEF Doc. No. 54.

²⁰ NYSCEF Doc. No. 91 – Denigris Affirmation¶ 12.

²¹ Nyscef Doc No. 89.

“In this case, Trooper Collins was under investigation for violating numerous laws based on his conduct. Here, Trooper Collin’s submission of the food sheet with omissions about using marihuana gummies, consuming marihuana gummies while possessing a firearm, and his statements under oath about consuming Delta 8 products and not Delta 9 products (which was inconsistent with evidence gathered from the Vape N Smoke receipt/staff) raise factual issues pertaining to whether Trooper Collins violated various state and federal laws. More specifically, Trooper Collins may have violated: 18 USC §922(g)(3) by possessing a firearm and consuming marihuana gummies; 18 USC §922(g)(3) by possessing a firearm and consuming other prescription drugs; Penal Law §265.01(9) by possessing a component of a firearm and consuming marihuana gummies; Penal Law §175.05 and Penal Law §175.30 by submitting the General 39-C without disclosing that he consumed marihuana gummies and provided a statement and falsely stated that he only consumed Delta 8 products.”²²

The alleged criminal acts were based on the use of marihuana, with no reference to amphetamine usage (which was negative as aforementioned), nor any reference to the one-time use of clonazepam.

Prior to Petitioner’s resignation on October 28, 2022, there was no disclosure of any such criminal investigation.²³

NYSP ACADIS PORTAL SUBMISSION TO DCJS 7/10/2023

On July 10, 2023, nine months after Petitioner submitted his resignation, Deputy Superintendent Darrin S. Pitkin elected to cite Petitioner’s resignation as removal for cause effective November 8, 2022. Such notice was stale to say the least!

Executive Law § 845 (2) (b) provides:

(b) Whenever officers have ceased to serve, each such head shall immediately transmit to the division, in a form and manner prescribed by the division, notification that any such officer has

²² NYSCEF Doc. No. 89- Neilson Affidavit ¶ 23.

²³ NYSCEF Doc. No. 91 – Denigris Affirmation; NYSCEF Doc. No. 92 – Johnston Affirmation

ceased to serve due to a leave of absence, resignation, removal, removal for cause, or removal during a probationary period.

It is manifest that NYSP's nine-month delay issuing the notification to DCJS does not comport with the statutory mandate to "immediately transmit" such notification.

GML §209-q (1) (b-1) provides:

"A **certificate** awarded under paragraph (b) of this subdivision may be **permanently invalidated** upon an officer's **removal for cause** in accordance with subdivisions two and three of section eight hundred forty-five of the executive law. An officer whose certificate is invalidated under this paragraph may be ineligible for any future certification.

Here, DCJS acted in accord with GML §209-q (1) (b-1) when it rescinded the certificate.

In the Acadis Portal submission, Deputy Superintendent Darrin S. Pitkin cited the basis for such determination as follows:

"Trooper Collins was compelled to provide a urine and hair sample due to concerns reported by another member. The urine and hair sample analysis detected the presence of **Amphetamine and THC Metabolite**."²⁴

That notification was a stunning misrepresentation of the record. In fact, the Neilson report confirmed the following:

"Doctor MCGURTY verified the **positive** hair and urine test for **Amphetamine** as "**negative** therefore having a legitimate medical explanation." The explanation was Trooper COLLINS' valid prescription for **Adderall**."²⁵

²⁴ NYSCEF Doc. No. 7.

²⁵ NYSCEF Doc. No. 54.

Since Deputy Superintendent Darrin S. Pitkin did not cite Petitioner's one-time use of his mother's prescribed clonazepam pill as a basis for the cause removal, the sole remaining basis for the cause removal was the alleged presence of THC Metabolite.

In Deputy Superintendent Darrin S. Pitkin's affidavit dated April 1, 2024, he stated:

"The removal for cause submission reflected my assessment that Trooper Collins engaged in misconduct, within the meaning of 9 NYCRR Part 6056, because he was under investigation in connection with allegations of misconduct - i.e., engaging in a serious offense based on his marihuana use and possession of a firearm as a NYS Trooper at the time he resigned. Trooper Collins resigned before Counsel's Office drafted the charges and specifications. Based on my experience, Division Counsel works collaboratively with the lead investigator assigned to the case regarding the charges and specifications. Here, however, Trooper Collins resigned before charges and specifications were drafted and served."²⁶(Emphasis added)

Pitkin also admitted any claim of criminal charges and untruthfulness only arose after the instant petition was filed, claiming:

"Here, after the filing of the instant petition, there are additional grounds to report Trooper Collins as a removal for cause per the DCJS decertification regulations that came to light. As noted in Lieutenant Nielson's affidavit, there was concern that Trooper Collins was untruthful during his compelled statements, which would be reportable pursuant to 9 NYCRR 6056.2(h)(1)(b) and 9 NYCRR 6056.2(h)(1)(a)(iv). Additionally, concerns about the false statements in the food submission form (Exhibit 14) would be reportable pursuant to 9 NYCRR 6056.2(h)(1)(b). Furthermore, Trooper Collins' use of marihuana products with other controlled substances, some without medical prescriptions, while possessing a firearm, would be reportable pursuant to 9 NYCRR 6056.2(h)(1)(e)(ii)."²⁷ (Emphasis added)

²⁶ NYSCEF Doc. No. 90 – Pitkin Affidavit ¶ 11; see also, NYSCEF Doc. No. 7. NYSCEF Doc. No. 22 - Doctor MCGURTY letter dated June 22, 2022, stating: "The positive urine and hair test for Amphetamine is verified as **negative** therefore having a legitimate medical explanation (prescription)." (Emphasis added)

²⁷ NYSCEF Doc. No. 90 – Pitkin Affidavit ¶ 15.

Since the record demonstrates Pitkin's notification to DCJS was blatantly false, the balance of his claim is suspect.

REMOVAL FOR CAUSE

Here, the investigation centered on Petitioner's alleged use of marihuana products containing THC. As of October 28, 2022, Petitioner's resignation date, there was nothing in the record to support a finding Petitioner resigned to avoid an investigation of misconduct as defined in 9 NYCRR § 6056.2 (h) (1).

9 NYCRR § 6056.2 (h) (1) provides, inter alia:

(h) Removal for cause of a full-time or part-time police officer or peace officer means when an officer has an **interruption in service** as defined in paragraph (2) of this subdivision subsequent to and in connection with **allegations of misconduct as defined in paragraph (1) of this subdivision** which are **known or should be known to the employer** or any officer or employee of the employer agency or is being **investigated** by another agency or entity.

(1) Misconduct, includes:

- (a) Criminal activity**, whether criminally charged or prosecuted, regardless of where the act took place if said conduct would constitute an offense in New York, which is defined as:
- (i) Any felony offense;**
 - (ii) Any sex offense or sexually violent offense** as defined in article 6-C of the Correction Law;
 - (iii) All serious offenses as defined in subdivision 17 of section 265 of the Penal Law;**
 - (iv) Crimes involving official misconduct and obstruction of public servants** as defined in article 195 of the Penal Law; crimes involving bribery of a public servant as defined in article 200 of the Penal Law; crimes involving perjury as defined in article 210 of the Penal Law; offenses relating to judicial proceedings as defined in article 215 of the Penal Law;
 - (v) Crimes involving forgery** as defined in article 170 of the Penal Law; crimes involving false written statements as defined in article 175 of the Penal Law; crimes involving fraud as defined in article 190 of the Penal Law; or

(vi) Crimes involving assault and menacing as defined in article 120 of the Penal Law; crimes involving obscenity as defined in article 235 of the Penal Law; crimes against public sensibilities as defined in article 245 of the Penal Law.

(b) Dishonesty which is defined as:

(i) False statements or conduct that subverts or attempts to subvert the:

(A) Employment application process; or

(B) State certification process defined in General Municipal Law section 209-q.

(ii) Conduct involving dishonesty, fraud, deceit, or misrepresentation.

(2) Interruption from service includes separation: ...

(b) by an employee's resignation or retirement... (Emphasis added)

As of the resignation date, there was no allegation that Petitioner was being investigated for a “felony”. With respect to the charges referenced in the Neilson and Pitkin affidavits, Penal Law §265.01(9), §175.05 and Penal Law §175.30 are each a misdemeanor.

SERIOUS OFFENSE

The record does not support a finding that there was a pending investigation of a “serious offense” under 9 NYCRR § 6056.2 (h) (1) (a) (iii) as of Petitioner’s resignation on October 28, 2022.

Penal Law §265.00(17) defines serious offense, inter alia, as follows:

“Serious offense” means [:]

(a) any of the following offenses defined in the current penal law and any offense in any jurisdiction or the former penal law that includes all of the essential elements of any of the following offenses: **illegally using, carrying or possessing a pistol or other dangerous weapon...** (Emphasis added)

Penal Law §265.01(9) (ii) provides:

A person is guilty of criminal possession of a weapon in the fourth degree when:

Such person possesses a major component of a firearm, rifle, or shotgun and **such person is prohibited** from possessing a shotgun or rifle pursuant to:

(ii) subsection (g) of section 922 of title 18 of the United States Code; or..."

18 USC §922(g) provides, inter alia:

(g) It shall be unlawful for any person—...

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. (Emphasis added)

There is no question Petitioner ingested a controlled substance, clonazepam, but that was not the basis for the removal for cause determination. The investigation focused on gummies but, as more fully appears below, they were not controlled substances within the meaning of 18 USC §922(g).

The AGRICULTURE IMPROVEMENT ACT OF 2018 (hereinafter referred to as the "Farm Act") was passed on December 20, 2018 (Public Law 115-334). The Farm Act defined Hemp as follows:

SEC. 10113. HEMP PRODUCTION. The Agricultural Marketing Act of 1946 (7 U.S.C. 1621 et seq.) is amended by adding at the end the following: "Subtitle G—Hemp Production "SEC. 297A. DEFINITIONS. "In this subtitle: "(1) HEMP.—The term 'hemp' means the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether

growing or not, with a delta 9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry...

In United States v. Brown, 47 F.4th 147, 150 [3rd Circuit Court of Appeals, 2022], the Court held,

“The Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, removed "hemp" from the definition of marijuana. 21 U.S.C. § 802(16)(B). As defined by the Act, hemp means "any part" and "all derivatives" of the cannabis plant "with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 1639o(1). The upshot is that federal law now distinguishes between illegal marijuana and legal hemp based on delta-9 THC concentration.”

(See also, AK Futures LLC v. Boyd St. Distro, LLC, 35 F.4th 682, 692 [9th Circuit Court of Appeals 2022], where the Court held,

“The Farm Act's definition of hemp does not limit its application according to the manner by which "derivatives, extracts, [and] cannabinoids" are produced. Rather, it expressly applies to "all" such downstream products so long as they do not cross the 0.3 percent delta-9 THC threshold.”)

Based on the subject Lab tests, there is no evidence that the gummies Collins ingested contained more than the 0.3 percent delta-9 THC threshold. Absent such evidence, there was no rational basis to charge Petitioner with a violation of Penal Law §265.01(9) (ii) based on gummy consumption. Thus, there was no rational basis to claim Petitioner was being investigated for misconduct as defined in 9 NYCRR § 6056.2 (h) (1) (a) (iii) as of his resignation date.

FALSE STATEMENTS

As aforementioned, Trooper Neilson opined, that Petitioner engaged in misconduct by submitting the General 39-C without disclosing that he consumed marihuana gummies, and falsely stated that he only consumed Delta 8 products.²⁸ Is there a rational basis to find Petitioner made false statements pursuant to 9 NYCRR § 6056.2 (h) (1) (b) (i)? No. Where, as here, there is no evidence that the gummies Petitioner consumed contained more than the 0.3 percent delta-9 THC threshold, there is no evidence the gummies consisted of a controlled substance or marihuana in the first instance, i.e., the omission of a reference to gummies was not a false statement.

AFTER THE FACT

Petitioner objects to Respondent's after the fact allegations of criminal conduct and false statements proffered in the April 2024 Neilson and Pitkin affidavits, to support removal for cause.²⁹ I agree. An after the fact description of the nature of the investigation is inherently unfair, akin to the unfairness of retroactive legislation (see e.g., Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal, 35 N.Y.3d 332, 370 [2020], where the court held,

"Retroactive legislation is viewed with "great suspicion". This "deeply rooted" presumption against retroactivity is based on "[e]lementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." (Citations omitted; emphasis added)

²⁸ NYSCEF Doc. No. 89- Neilson Affidavit ¶ 24; NYSCEF Doc. No. 65.

²⁹ NYSCEF Doc. No. 91 – DeNigris Affirmation ¶ 13-17.

Clearly, had Petitioner been advised he was under investigation for misconduct defined in 9 NYCRR § 6056.2 (h) (1) (b), he would have had the option to resign at his peril, or defend such claims through the administrative process. Frankly, he had not been so advised. Moreover, payment of his 240 hours annual leave ratified his good faith believe he was able to resign in good standing, without any threat of a subsequent for cause removal determination.³⁰

ARBITRARY AND CAPRICIOUS

CPLR §7803 (1) – (3) provides:

“The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a **duty** enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was **arbitrary and capricious or an abuse of discretion**, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or...” (Emphasis added)

An action is arbitrary and capricious “when it is taken without sound basis in reason or regard to the facts” (Matter of Southern Realty and Dev. LLC. v. Town of Hurley, 218 A.D.3d 900, 903 [3d Dept. 2023]). Let’s look at the big picture to assess whether Respondents acted in an arbitrary and capricious manner or abused their discretion.

In June 2022, Respondent NYSP responded to Jaime Kasper’s report of Petitioner’s erratic behavior. On June 13, 2022, Petitioner consented to undergo drug testing and went

³⁰ NYSCEF Doc. No. 3; Doc. No. 91 – DeNigris Affirmation ¶ 35, fn. 4; NYSCEF Doc. No. 91 – Johnston Affidavit ¶ 22, which included the following reference to the First Deputy superintendent: “We discussed Trooper Collins’ voluntary resignation from the Division of State Police. Again, and to the best of my recollection, there was no indication from the First Deputy Superintendent that once Trooper Collins voluntarily resigned he would be reported to the DCJS as “removed for cause.”

through an inpatient drug treatment program from June 13, 2022, to July 12, 2022.³¹ Petitioner subsequently participated in two interviews. Lt. Neilson issued a report on September 26, 2022, finding administrative violations, but not seeking felony or serious offense charges. On October 28, 2022, Petitioner submits his resignation. His 240 hours of annual leave is paid. All is well!

Petitioner was employed as a police officer by the Town of Saugerties on April 24, 2023.³² On June 12, 2023, DCJS issued an equivalency certificate to Petitioner in accordance with 9 NYCRR § 6020.8.6, claiming that NYSP had not previously reported removal for cause.³³ On or about July 10, 2023, the NYSP notified DCJS that Petitioner had been removed for Cause - 9 NYCRR § 6056.2(h)(2)(b) upon his retirement, effective November 8, 2022.³⁴ DCJS rescinded the certificate.

As set forth above, the for-cause removal notification cited only the presence of amphetamine and THC. Each reference fails, however, since amphetamine was attributed to prescribed Adderall and the gummies did not constitute marihuana under the Farm Act, i.e., no factual foundation to support a misconduct investigation in the first instance. Yet, the NYSP issued the notification to DCJS, which acted thereon. It is unnecessary to determine why NYSP acted in such an abrupt and untimely manner, albeit the reasoned inference is that it did so in a knee jerk reaction to DCJS's issuance of the equivalency certificate on June 12, 2023. In this Court's view, NYSP's for cause removal notification was issued without sound basis in reason and in disregard of the facts.

³¹ NYSCEF Doc. No. 1 – Petition ¶ 10.

³² NYSCEF Doc. No. 24 – Mahany Affidavit ¶ 17, Fn. 6.

³³ NYSCEF Doc. No. 24 – Mahany Affidavit ¶ 17, Fn. 6.

³⁴ NYSCEF Doc. No. 1 – Petition ¶ 30; NYSCEF Doc. No. 7; NYSCEF Doc. No. 24 – Mahany Affidavit ¶ 18.

RELIEF

DCJS deferred to the July 10, 2023, for-cause notification from NYSP when it rescinded the Basic Course for Police Officer Equivalency certification on June 12, 2023.³⁵ As set forth above, however, NYSP's election to issue the for-cause removal notification was arbitrary and capricious. Accordingly, the removal for cause notification issued on July 10, 2023, is vacated. Such vacatur does not, however, afford full relief.

It is well settled that mandamus relief is extraordinary (See Matter of Hussain v. Lynch, 215 A.D.3 [3d Dept. 2023], where the Court held,

"Mandamus to compel is an extraordinary remedy, commanding an officer or body to perform a specified ministerial act that is required by law to be performed. It does not lie to enforce a duty that is discretionary. A ministerial act is best described as one that is mandated by some rule, law or other standard and typically involves a compulsory result. Mandamus is not available to compel an officer or body to reach a particular outcome with respect to a decision that turns on the exercise of discretion or judgment. In other words, mandamus will lie to compel a body to perform a mandated duty, not how that duty shall be performed. A discretionary act involves the exercise of reasoned judgment which could typically produce different acceptable results [,] whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.")

Certainly, this Court did not have the authority to tell the NYSP what notification to issue upon Petitioner's resignation pursuant to Executive Law § 845 (2) (b) in the first instance, since that notification entailed discretion. Where, as here, however, it has been determined that the for-cause removal notification was arbitrary and capricious, and has been vacated, mandamus does lie to compel the NYSP to issue a new notification to DCJS in accord with this Court's order. In turn, DCJS has a duty reissue the Basic Course for Police Officer Equivalency certification to

³⁵ NYSCEF Doc. Nos. 8, 9, and 10.

Petitioner (See e.g., Matter of Herrick v. Town of Colonie, 211 A.D.3d 1146 [3d Dept. 2022];
Bass v. Goodman, 2024 N.Y. Misc. LEXIS 1393 [Albany Co. Sup Ct.]

CONCLUSION

For the reasons more fully stated above, the Petition is granted, and it is further,
ORDERED, ADJUDGED AND DEDCREED, that Respondent NYSP's determination
that Petitioner had been removed for cause is vacated, and it is further,

ORDERED, ADJUDGED AND DEDCREED, that upon resigning from NYSP on
October 28, 2028, Petitioner was in good standing, and it is further,

ORDERED, ADJUDGED AND DEDCREED, that Respondent NYSP is ordered to
correct its notification to DCJS to indicate that Petitioner voluntarily resigned in good standing,
and it is further,

ORDERED, ADJUDGED AND DECREED, that Respondent DCJS's rescission of the
Basic Course for Police Officer Equivalency certification issued to Petitioner on June 12, 2023,
is vacated, and Respondent DCJS's is ordered to reissue a Basic Course for Police Officer
Equivalency certification to Petitioner, and it is further,

ORDERED, ADJUDGED AND DECREED, that Petitioner is awarded costs,
disbursements, and attorney fees in accord with CPLR § 8601.³⁶

This memorandum constitutes the decision, order, and judgment of the Court.³⁷

Dated: Albany, New York
April 23, 2024


PETER A. LYNCH, J.S.C.


04/23/2024

³⁶ Petitioner is directed to submit its attorney fee application on notice to Respondent.

³⁷ Compliance with CPLR R 2220 is required.

PAPERS CONSIDERED:

All e-filed Pleadings and exhibits –
NYSCEF Doc. Nos. 1 to 92.

To: Stephen G. DeNigris, Esq.
The DeNigris Law Firm PLLC
Attorney for the Petitioner
P.O. Box 14643
Albany, NY 12212-4643

LETITIA JAMES
Attorney General, State of New York
By: Jennifer J. Corcoran Assistant Attorney General, of Counsel
Attorney for Respondents
The Capitol
Albany, New York 12224



**U.S Department of Labor
Wage and Hour Division**



May 1, 2025

Field Assistance Bulletin No. 2025-1

MEMORANDUM FOR: Regional Administrators
District Directors

FROM: Donald M. Harrison, III
Acting Administrator

SUBJECT: FLSA Independent Contractor Misclassification Enforcement Guidance

This Field Assistance Bulletin provides guidance to WHD field staff regarding the analysis to apply when determining employee or independent contractor status for purposes of enforcing the FLSA.

Background

A number of lawsuits are pending in federal courts challenging the legality of the rule entitled Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, (“2024 Rule”), which outlined the framework for determining employee or independent contractor status under the FLSA. The Department has taken the position in those lawsuits that it is reconsidering the 2024 Rule, including whether to rescind the regulation. Specifically, WHD is currently reviewing and developing the appropriate standard for determining FLSA employee versus independent contractor status.

Enforcement Guidance

Consistent with the Department’s position on the 2024 Rule expressed in the above-referenced litigation, WHD will no longer apply the 2024 Rule’s analysis when determining employee versus independent contractor status in FLSA investigations. WHD will enforce the FLSA in accordance with [Fact Sheet #13 \(July 2008\)](#)*, and as further informed by [Opinion Letter FLSA2019-6](#) with respect to any matters for which no payment has been made, directly to individuals or to DOL, for back wages and/or civil money penalties as of May 1, 2025.

The Department reserves its right to exercise its enforcement authority in specific matters explicitly deemed appropriate by the Administrator, or designee, as an appropriate allocation of resources.

The guidance in this FAB supersedes any contrary or conflicting guidance to field staff addressing this topic.

Until further action is taken, the 2024 Rule remains in effect for purposes of private litigation and nothing in this FAB changes the rights of employees or responsibilities of employers under the FLSA, see [Fact Sheet #13 \(March 2024\)](#).

***Fact Sheet #13 (July 2008)**

Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the meaning of "employment relationship" and the significance of that determination in applying provisions of the FLSA.

Characteristics

An employment relationship under the FLSA must be distinguished from a strictly contractual one. Such a relationship must exist for any provision of the FLSA to apply to any person engaged in work which may otherwise be subject to the Act. In the application of the FLSA an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts." It is not determined by the common law standards relating to master and servant.

The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

- 1) The extent to which the services rendered are an integral part of the principal's business.*
- 2) The permanency of the relationship.*
- 3) The amount of the alleged contractor's investment in facilities and equipment.*
- 4) The nature and degree of control by the principal.*
- 5) The alleged contractor's opportunities for profit and loss.*
- 6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.*

7) *The degree of independent business organization and operation.*

There are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.

Requirements

When it has been determined that an employer-employee relationship does exist, and the employee is engaged in work that is subject to the Act, it is required that the employee be paid at least the Federal minimum wage of \$5.85 per hour effective July 24, 2007; \$6.55 per hour effective July 24, 2008; and \$7.25 per hour effective July 24, 2009, and in most cases overtime at time and one-half his/her regular rate of pay for all hours worked in excess of 40 per week. The Act also has youth employment provisions which regulate the employment of minors under the age of eighteen, as well as record-keeping requirements.

Typical Problems

(1) One of the most common problems is in the construction industry where contractors hire so-called independent contractors, who in reality should be considered employees because they do not meet the tests for independence, as stated above. (2) Franchise arrangements can pose problems in this area as well. Depending on the level of control the franchisor has over the franchisee, employees of the latter may be considered to be employed by the franchisor. (3) A situation involving a person volunteering his or her services for another may also result in an employment relationship. For example, a person who is an employee cannot "volunteer" his/her services to the employer to perform the same type of service performed as an employee. Of course, individuals may volunteer or donate their services to religious, public service, and non-profit organizations, without contemplation of pay, and not be considered employees of such organization. (4) Trainees or students may also be employees, depending on the circumstances of their activities for the employer. (5) People who perform work at their own home are often improperly considered as independent contractors. The Act covers such homeworkers as employees, and they are entitled to all benefits of the law.

56 PERB P4543

New York Public Employment Relations Board

July 10, 2023

CASE NO. U-37659

New York Public Employment Relations Board

Reporter

56 PERB P4543

In the Matter of

**ONEIDA PAID FIREFIGHTERS ASSOCIATION, LOCAL 2692, IAFF, AFL-CIO,
Charging Party,**

- and -

CITY OF ONEIDA, ¹Respondent.

Core Terms

tattoo, negotiate, fire department, firefighters, discipline, unilaterally, police department, fire chief, direct dealing, bargaining, visible, shirt, wear, work rule, non-conforming, mandatorily, member of the public, new policy, disciplinary, paramilitary, compliance, clothing, mission, dress code, cross-examination, mission-related, mandatory, marine, vulgar

Counsel

BLITMAN & KING, LLP (NATHANIEL G. LAMBRIGHT of counsel), for Charging Party

COSTELLO, COONEY & FEARON, PLLC (CHRISTOPHER M. MILITELLO of counsel), for Respondent

Panel: Sarah M. Coligan, Administrative Law Judge

Opinion

DECISION OF ADMINISTRATIVE LAW JUDGE

2

On October 2, 2020, the Oneida Paid Firefighters Association, Local 2692, IAFF, AFL-CIO (Association) filed an improper practice charge alleging, as amended, that the City of Oneida (City) violated § 209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally implementing a **tattoo** policy without negotiation with the

¹ The caption on the transcript of the hearing prepared in this case identifies the Respondent as the "County of Oneida" in error. The correct title of the Respondent is the "City of Oneida." Any and all references to the Respondent herein refer to the City.

² This case was reassigned to me pursuant to § 212.4(a) of PERB's Rules of Procedure.

Association. The Association also alleged in its amended improper practice charge that the City engaged in direct dealing with two unit members over tattoo policy "waivers." The City filed an answer denying the material allegations of the charge and asserting several affirmative defenses including, *inter alia*, that the charge relates to a nonmandatory subject of bargaining, that the charge is untimely, and that the Association waived its right to file the charge.

A hearing was held on August 18, 2021, during which both parties appeared and were represented by counsel. Both parties have filed post-hearing briefs.

FACTS

The Association and City are parties to a collective bargaining agreement (CBA) for the term of January 1, 2019 to December 31, 2021. ³The Association is the exclusive bargaining agent for all permanent employees of the Oneida Fire Department except the Chief and Assistant Chief. There are 23 members of the Association.

In March 2016, the Fire Department issued a document identified as Best Practices Standard Operating Procedure / Guideline 1.3.8 Personal Hygiene & Facial Hair (the 2016 policy). ⁴Among other provisions, the 2016 policy set forth the following with respect to tattoos: "No vulgar, obscene or offensive body art, paint, designs or tattoos are allowed to be visible while on duty." ⁵The 2016 policy made no reference to disciplinary action.

On August 20, 2020, the Fire Department issued a document identified as Best Practices Standard Operating Procedure / Guideline 1.4.6 Tattoos (the 2020 policy). ⁶The 2020 policy, the primary subject of the instant charge, is a 17-page document setting forth a detailed policy which describes, through text and images, the size, type, content, and placement of authorized and prohibited tattoos.

It is undisputed that the CBA makes no references to tattoos.

John Wasicki testified on behalf of the Association. Wasicki has been employed for six years by the Fire Department and serves as the President of the Association. Prior to his three years as the President, he was the Vice President of the Association. ⁷

Wasicki testified that 12 members of Local 2692-approximately half of the membership-have tattoos on various parts of their bodies, including upper and lower arms, chests, backs, legs, and buttocks, but not on their faces or hands. ⁸According to Wasicki those tattoos are, for the most part, of personal significance to the bearers and reflective of their families and involvement in firefighting. ⁹

As an example, Wasicki described tattoos on the person of Lieutenant Scott Burbidge, photos of which were admitted into the record. ¹⁰Wasicki pointed out the religious nature of the Maltese cross; the

³ Joint Ex 1.

⁴ Joint Ex 2, at 1.

⁵ Joint Ex 2, at 3.

⁶ Joint Ex 3, at 1.

⁷ Tr, at 17.

⁸ Tr, at 18-19.

⁹ Tr, at 19.

¹⁰ Charging Party Ex 1; Tr, at 28.

letter "FD" in reference to "fire department"; the number 343, a reference to the number of firefighters who died in the September 11, 2001, attacks; the letters "IAFF," in reference to the International Association of Fire Fighters; and flames and colors in reference to the September 11, 2001 attack on the World Trade Center.

¹¹Wasicki testified that the photos reflected Lieutenant Burbidge's tattoos as they appeared when the 2020 policy was issued and at the time the hearing took place. ¹²

Wasicki first learned of the 2020 policy-issued August 20, 2020-when it was disseminated and employees were told to familiarize themselves with it. ¹³The union members "weren't happy about" the new policy and a union meeting was held to discuss it. ¹⁴According to Wasicki, the Association consulted with legal counsel and participated in a few labor management meetings with the City regarding the 2020 policy, although those meetings did not result in any changes to the policy. ¹⁵The Association then filed the instant improper practice charge.

The 2016 policy predated Wasicki's tenure as a member of the Association's leadership, and he did not know whether that policy was negotiated with the union. ¹⁶Wasicki testified that he would normally negotiate with the City over policies and collective bargaining agreements on behalf of the Association, but the August 2020 tattoo policy was not negotiated prior to issuance. ¹⁷

To Wasicki's knowledge, no member of the bargaining unit had a tattoo that ran afoul of the 2016 policy. ¹⁸However, two members' tattoos violated the August 2020 policy: those of Lieutenant Relyea and Lieutenant Burbidge. ¹⁹According to Wasicki, Lt. Relyea had the tattoo in question for about eight years, and Lt. Burbidge had his for approximately fifteen years, during which time he was employed by the City as a member of the fire department. ²⁰

Wasicki described the City of Oneida as diverse, and said that he was not aware of any member of the public ever complaining to the City or to Association members about unit members' tattoos. ²¹Nor did the City disclose any complaints from members of the public when meeting with the Association about the 2020 policy.

²²Wasicki explained that the City of Oneida fire department responds to all types of emergencies, including fires, car accidents, and medical emergencies. Wasicki testified that Association members' tattoos-including Lieutenant Relyea's and Lieutenant Burbidge's, specifically-do not impact their ability to provide "lifesaving assistance" in responding to emergencies that include fires, car accidents, and medical emergencies. ²³

11 Tr, at 32.
12 Tr, at 26.
13 Tr, at 21.
14 Tr, at 23.
15 *Id.*
16 Tr, at 35.
17 Tr, at 22.
18 Tr, at 20-21.
19 Tr, at 22.
20 Tr, at 22-23.
21 Tr, at 19-24.
22 Tr, at 23.
23 Tr, at 24.

Shortly after the 2020 policy was implemented, Lieutenant Burbidge and Lieutenant Relyea each signed a document titled "Fire Chief Acknowledgement of Existing Tattoos." ²⁴The two documents contain the following identical wording, save for the employees' names:

I Dennis J Fields Jr, Fire Chief acknowledge that Lieutenant Scott E. Burbidge has an existing tattoo that does not meet the requirements of the City of Oneida Fire Department Best Practices Standard Operating Procedures / Guideline 1.4.6 "Tattoos" (8/20/2020) and is hereby considered grandfathered from this policy. Any new tattoos shall comply with the requirements of the City of Oneida Fire Department Best Practices Standard Operating Procedures / Guidelines 1.4.6. ²⁵

Wasicki testified that he learned of the documents-which he and witnesses for the Respondent referred to as "waivers"-when they were presented by the City to Lieutenants Burbidge and Relyea to sign. ²⁶He testified further that the waivers were not discussed with the Association before being given to the two Lieutenants. ²⁷Wasicki was not aware of any tattooed employees being "grandfathered" relative to the 2016 policy. ²⁸

When asked to describe his understanding of the 2020 policy, Wasicki explained that it restricts the size of allowable tattoos on an individual's arms, and restricts visible tattoos on other parts of body, including chest, back, neck, face, and hands. ²⁹The policy gives the Chief discretion to impose discipline for noncompliance, a provision Wasicki specifically noted was not discussed with the Association. ³⁰

According to Wasicki, the Association filed the improper practice charge challenging the implementation of the 2020 policy because the members

felt very strongly about . . . not being able to represent themselves with tattoos, and specifically art that is very personal to them and/or religious [T]hey want to be able to show their pride in the fire service or just in what they believe in if they so choose to tattoo it on their body. ³¹

He also noted the members' desire to have bodily autonomy when it comes to tattoos, and he was aware of multiple employees who were prevented from starting new tattoos or adding to existing tattoos because of the 2020 policy. ³²

On cross-examination, Wasicki testified that the Fire Department has many policies, possibly more than a hundred, and that he did not know how many of those policies were negotiated, although the at-issue tattoo policy was the first policy he had personally "fought to negotiate." ³³With respect to the 2016 policy,

²⁴ Charging Party Ex 4.
²⁵ Joint Ex 4.
²⁶ Tr, at 29, 51-52.
²⁷ Tr, at 29-30.
²⁸ Tr, at 30.
²⁹ Tr, at 31.
³⁰ *Id.*
³¹ Tr, at 33.
³² Tr, at 30, 33.

specifically, Wasicki did not know if the Association asserted a right to negotiate that policy at the time it was implemented. ³⁴

Dennis James Fields, Jr., testified on behalf of the City. Fields has been the Fire Chief for the City of Oneida Fire Department for about three years, and has been employed by the Fire Department for almost twenty-five years, starting as a firefighter and working his way up through the ranks. ³⁵Fields reports to the Public Safety Commissioner, Kevin Salerno, who directs the Fire Department and the Police Department.

With respect to the 2016 policy, Fields testified that no portion of the policy-including the portion covering tattoos-was negotiated with the Association prior to implementation. ³⁶Fields stated that his understanding of the March 2016 policy was to "regulate" some tattoos such that vulgar or obscene tattoos were not visible on duty. ³⁷He also stated that 2020 policy provides a remedy, of sorts, for non-conforming tattoos in the sense that firefighters can cover any non-conforming tattoos that would be visible while they are working. ³⁸

Fields testified that he was directed by Public Safety Commissioner Salerno to implement the 2020 policy "so that the policies of the police department and the fire department were identical." ³⁹Upon receiving the 2020 policy from Salerno, Fields advised command staff, deputy chiefs, and lieutenants of the new policy and distributed copies. He testified that this was the same process he would follow in implementing any new or updated policy. Fields implemented the policy on August 20, 2020.

Fields stated that he was not aware of the Association's concerns with the 2020 policy until after he informed a few members of the policy and created the waiver. He asked Lieutenant Burbidge and Lieutenant Relyea to sign waivers in order to "protect them from any future fire chief . . . disciplining them for a tattoo that didn't meet the new tattoo policy." ⁴⁰Fields testified that Lieutenant Burbidge's and Lieutenant Relyea's tattoos did not violate the 2016 policy, but did violate the size and placement restrictions contained in the 2020 policy.

⁴¹Fields testified further that he offered the waivers to Lieutenant Burbidge and Lieutenant Relyea "to be in compliance with [the] grandfather clause of the policy[.]" ⁴²

Fields denied instructing Lieutenants Burbidge and Relyea not to discuss the waivers with union members or leadership. ⁴³He also denied any intent to get Lieutenants Burbidge and Relyea to relinquish rights they had under the CBA or from any other source. ⁴⁴On cross-examination, Fields stated

³³ Tr, at 36.

³⁴ Tr, at 37.

³⁵ Tr, at 45-46.

³⁶ Tr, at 48.

³⁷ Tr, at 48-49.

³⁸ Tr, at 61. The 2020 policy states, under the heading "Questionable Tattoos," that "[c]overing the tattoo will suffice as a remedy for compliance." Joint Ex 3, at 6.

³⁹ Tr, at 49.

⁴⁰ Tr, at 52.

⁴¹ Fields did not explain why, if covering tattoos constitutes compliance with the policy, it was necessary to offer the two Lieutenants waivers.

⁴² Tr, at 62; Joint Ex 3, at 6.

⁴³ Tr, at 52.

that nothing in the waiver would prevent a future chief from disregarding the waiver and applying the **tattoo** policy to the firefighters who signed the waivers.

⁴⁵Fields testified that no other firefighters received the waivers and that he did not discuss the waivers with the Association president prior to having them signed.

⁴⁶Although he is aware of other firefighters who may have non-conforming **tattoos**, Fields indicated that those individuals were not offered waivers because of the charge filed by the union; the Chief stopped offering waivers until the matter was resolved.

Fields agreed, on cross-examination, that the 2020 policy is much more detailed than the 2016 policy in its restrictions on **tattoos**.

⁴⁸He also agreed that violation of the 2020 policy could subject a firefighter to discipline, up to and including termination.

⁴⁹He denied having any input on the 2020 policy, and merely formatted the new policy document and implemented it.

Fields denied knowledge of any complaints by members of the public about firefighters' **tattoos**.

⁵¹He also denied knowledge of firefighters' **tattoos** interfering with the professional performance of their duties.

Kevin Anthony Salerno testified on behalf of the Respondent. Salerno is employed as the Public Safety Commissioner for the City of Oneida.

⁵³The Public Safety Commissioner is the highest-level supervisor of the police and fire departments, to whom both the Police Chief and Fire Chief report.

⁵⁴Prior to his tenure as the Public Safety Commissioner, Salerno worked for the City of Oneida Fire Department for twenty-eight years, retiring from the Department with the rank of chief.

Salerno testified that when he became the Commissioner in January 2020, one of his first priorities was to "jump start" dialogues with the police and fire unions, because labor management meetings had not been held in years.

⁵⁶He testified that the police union raised an issue with their **tattoo** policy in March or April 2020, finding it to be too restrictive and desiring a less stringent policy. Salerno testified that, in response, he reviewed the Police Department's current policy and researched other police agency policies, including, *inter alia*, policies of the NYS Troopers, NYS DEC, State University Police, and Rochester Police Department.

⁵⁷He testified further that the polices he reviewed were similar to the Police Department's policy at the time-no visible **tattoos** were permitted.

⁵⁸Although the Mayor disfavored changing the Police Department's policy,

44 Tr, at 52-53.

45 Tr, at 56.

46 Tr, at 55-56.

47 Tr, at 62.

48 Tr, at 53.

49 Tr, at 56-57.

50 Tr, at 55.

51 Tr, at 57.

52 Tr, at 57-58.

53 Tr, at 64.

54 Tr, at 65.

55 *Id.*

56 Tr, at 66.

57 Tr, at 67.

Salerno explained that requiring military veterans to cover all their tattoos did not sit well with him, and so he researched military policies related to tattoos.⁵⁹

After reviewing the Army, Air Force, Navy, and Marine Corps tattoos policies, Salerno chose the Marine Corps policy. He testified that he believed that the Marine Corps policy best eliminated the potential "administrative nightmare" of interpreting the meaning of employees' tattoos.⁶⁰

Salerno testified that, having decided to implement the Marine Corps policy for the Police Department, he did not engage in further discussion with the police union about the policy, but simply implemented the completed policy.⁶¹ Salerno testified that he adopted the Marine policy in its entirety, other than removing material unrelated to fire and police departments.⁶²

Salerno described the policy he implemented thus: "The policy doesn't prohibit any person from getting any type of tattoo they want other than on their face or their hands. They can do what they want. They just had to be covered. That's it."⁶³

Salerno described his effort, when he took over as Fire Chief, to compile the various individual policies governing the fire department into one Standard Operating Procedure for "liability purposes."⁶⁴ He noted the lack of uniformity within the fire department and across the four shifts.⁶⁵ The hundred-plus policies he compiled into the SOP-the majority of which deal with emergency response-were not, to his knowledge, negotiated.

Salerno implemented the same tattoo policy for the fire department that he implemented for the police department.⁶⁶ He provided Chief Fields with the police department policy, and asked him to put it in the appropriate fire department format and implement it.⁶⁷ Salerno testified that he was aware of the 2016 policy because he wrote it in conjunction with a deputy chief.⁶⁸ He testified that he did not negotiate the 2016 policy with the Association.⁶⁹ Salerno testified that he was not aware of any objection from the union to the prior policy being implemented without negotiation.⁷⁰

Salerno testified that he did not believe, in 2020, that the 2016 policy was sufficiently detailed to address issues that might arise, and that it left tattoos open to interpretation of what was or was not "vulgar" or "offensive."

58 *Id.*
59 Tr, at 67-68.
60 Tr, at 68-69.
61 Tr, at 69.
62 Tr, at 88.
63 Tr, at 69.
64 Tr, at 70.
65 Tr, at 71.
66 Tr, at 72.
67 *Id.*
68 *Id.*
69 *Id.*
70 Tr, at 73.

⁷¹With respect to the waivers, Salerno said that he had no objection to Chief Fields grandfathering certain firefighters in by way of waivers. ⁷²Salerno explained that the firefighters, as uniformed members of a paramilitary organization, command or elicit a certain amount of respect from the public, and that it is important that they do so. ⁷³

When asked on cross-examination if he reviewed any fire department policies in his research, he was not certain, but said he attempted to. ⁷⁴He noted most of the fire department policies he came across pertained to volunteer departments, which he did not feel were relevant to the City's paid professional department. ⁷⁵

With respect to discipline, Salerno indicated that, based on the wording of the 2020 policy, an employee could be disciplined for violating it. ⁷⁶He testified that an employee could have been disciplined for violating the 2016 policy, as well, or any other department policy. ⁷⁷He noted that an employee could have a good reason for violating a policy and still be disciplined. ⁷⁸

Salerno described the firefighters' uniform as consisting of dark blue pants or shorts and a dark blue shirt for firefighters. ⁷⁹Lieutenants wear the same uniform bottoms with a light blue shirt, and deputies wear the same uniform bottoms with a white shirt. ⁸⁰Salerno noted, however, with respect to firefighters, that the shirt might be a uniform shirt, a t-shirt, or sweatshirt so long as the items are authorized uniform pieces. ⁸¹

Sam Fresina testified for the Association as a rebuttal witness. Fresina was a professional firefighter in the City of Albany for about twenty years. He is the current president and past secretary-treasurer of the New York State Professional Firefighters' Association (NYSPFA). ⁸²NYSPFA represents over 100 professional fire departments throughout the state, including the City of Oneida, and approximately 18,000 individual members. NYSPFA assists affiliates with legal and public relations issues, and with contract negotiations. Fresina regularly meets with firefighters throughout the state, and estimated that more than half of them have **tattoos**, "[e]verywhere except for their face[s]." ⁸³

Fresina indicated that the City of Oneida's 2020 policy is unique among the fire departments where NYSPFA has members, although he conceded that he would not necessarily have seen such a policy if it was not annexed to a

⁷¹ Tr, at 75.

⁷² Tr, at 76.

⁷³ Tr, at 77.

⁷⁴ Tr, at 82.

⁷⁵ *Id.*

⁷⁶ Tr, at 92.

⁷⁷ Tr, at 94-95.

⁷⁸ Tr, at 96.

⁷⁹ Tr, at 92.

⁸⁰ Tr, at 93.

⁸¹ *Id.*

⁸² Tr, at 98.

⁸³ Tr, at 100.

collective bargaining agreement.

⁸⁴However, he testified that he sent requests to all of NYSPPFA's locals inquiring about the existence of similar policies to the City of Oneida's 2020 policy, and received only replies in the negative.

When asked about whether, in his experience, the public has any less respect for firefighters with tattoos, Fresina answered in the negative.

⁸⁵He noted that NYSPPFA member firefighters-many of whom have tattoos-are involved in a variety of volunteer activities and are "widely respected by the public[.]
⁸⁶" Fresina could not identify any reason that having visible tattoos would impact a firefighter's job performance.

87

Fresina agreed on cross-examination that responsibility flows upward in a paramilitary organization, but distinguished between paramilitary and military organizations on the basis that in the military, members do not have the same rights that unionized members of a fire department have.

88

DISCUSSION

At the outset, I reject the City's timeliness defense. Pursuant to § 204.1(a)(1) of PERB's Rules of Procedure, a charge must be filed within four months of when a charging party knew, or should have known, of the action which is challenged. While the City pled, as an affirmative defense, that "[t]he Charge is untimely," no evidence supports this assertion, and the City did not put forth an argument as to timeliness in its post-hearing brief. The amended charge alleges that the City violated the Act when it unilaterally implemented a tattoo policy in August of 2020 and engaged in direct dealing with two unit members shortly thereafter. The charge was filed with PERB on October 2, 2020, and the amended charge was filed with PERB on October 26, 2020, well within four months of the implementation of the 2020 policy. Accordingly, respondent's timeliness defense is contradicted by the record and is hereby dismissed.

Turning to the merits, I will first address the allegation that the adoption and implementation of the 2020 policy was a unilateral implementation of a policy pertaining to a mandatory subject of negotiation in violation of § 209-a.1(d) of the Act.

As a preliminary matter, I find that the 2020 policy constitutes a work rule. A "work rule" is "a determination or pronouncement made by an employer . . . which affects the employees' delivery of employment services and carries with it the explicit or implicit threat of discipline or other employment consequence for noncompliance."

⁸⁹The 2020 policy explicitly states that "[t]he Chief will determine . . . appropriate administrative or disciplinary actions when members obtain tattoos that are not in compliance with this SOP / SOG."

⁹⁰Therefore, the 2020 policy is a work rule.

Additionally, implementation of the 2020 policy clearly constituted either a new policy or a meaningful change in policy. Where the 2016 policy covered a variety of personal appearance topics and, on the subject of tattoos, only restricted the display of "vulgar, obscene, or offensive" tattoos, the 2020 policy was a stand alone tattoo policy, 17 pages in length, providing precise restrictions on the size, type, location, and grouping of permissible tattoos.

84 Tr, at 100, 105.

85 Tr, at 103.

86 Tr, at 103-04.

87 Tr, at 104.

88 Tr, at 108-09.

89 *State of New York (Div for Youth)*, 31 PERB P 3052, 3109 (1998).

90 Joint Ex 3 at 6.

⁹¹The new restrictions in the 2020 policy were greater than what the City had previously imposed, and therefore the 2020 policy constitutes a change in terms and conditions of employment. ⁹²

It is undisputed that the 2020 policy was implemented unilaterally. The parties agree that no negotiation took place prior to the implementation of the 2020 policy.

Having determined that the 2020 policy was a unilateral change to a work rule, the inquiry turns to whether the City was obligated to negotiate the 2020 policy with the Association, or whether its unilateral implementation of the policy was permissible.

PERB has not had prior occasion to decide the negotiability of a **tattoo** policy in any setting. Among the PERB caselaw concerning policies that involve an employee's appearance, some analogies are more closely drawn than others, though none are a perfect match.

Where it is not already apparent whether a subject is mandatorily negotiable, the Board applies a balancing test, as follows:

[W]e examine the record to determine whether there is preponderance of credible evidence to demonstrate that the employer's need for a particular mission-related work rule outweighs the effect that the rule has on the employees' terms and conditions of employment. The mere fact that a work rule has a relationship to an employer's mission does not permit an employer to act unilaterally in any manner it deems appropriate. Rather, an employer can unilaterally impose a work rule only to the extent that the unilateral action does not significantly or unnecessarily intrude on the protected interests of bargaining unit employees under the Act. Therefore, under the balancing test the burden rests with the employer to demonstrate that the new work rule does not go beyond what is necessary to further its mission. ⁹³

Although the application of the balancing test is not appropriate in every case, it is appropriate in order to determine the negotiability of a novel issue. ⁹⁴The City argues that the balancing test should not be applied here because the case law is well-settled as to the negotiability of identifying clothing or insignia in paramilitary settings. **Tattoo** policies, however, have never been considered by PERB.

It is well established that a general dress code is a mandatory subject of negotiation. ⁹⁵An exception to that general rule is a dress code in the context of a paramilitary organization, where "management concerns have been determined to be preeminent." ⁹⁶**Tattoos**, however, are fundamentally different from clothing or uniform insignia, both in physical form and in permanence. Restricting, or in the case of

⁹¹ Joint Ex 2; Joint Ex 3.

⁹² *State of New York (Dept of Taxation and Finance)*, 30 PERB P 3028, 3068 (1997). See also, *Wantagh Public Library*, 43 PERB P 4523, 4592 (2010) (holding that a new dress code memorandum listing additional prohibited clothing items which were not previously prohibited was a unilateral change, not merely a clarification of an existing policy).

⁹³ *City of Albany*, 42 PERB P 3005, 3007 (2009) (citations omitted).

⁹⁴ *County of Suffolk*, 39 PERB P 4603, 4729 (2006), citing *State of New York (Dept of Transportation)*, 27 PERB P 3056, 3131 (1994).

⁹⁵ *State of New York (Dept of Taxation and Finance)*, 30 PERB P 3028, at 3068.

⁹⁶ *City of Buffalo*, 23 PERB P 4559, 4635 (1990). See *County of Onondaga*, 14 PERB P 3029, 3050 (1981) ("the issuance of the unique badge to deputy sheriffs in the Criminal Division was not a mandatory subject of negotiation"); *City of Buffalo*, 15 PERB P 3027 (1982) (holding that a hatband is comparable to a badge in that its purpose is to identify the wearer as a police officer, and a change in its style or composition is similarly a managerial prerogative).

uniforms or uniform insignia, requiring, what an employee wears to work still allows the employee freedom to wear what they choose during non-work hours. The considerations with respect to tattoos are different. A stringent restriction on visible tattoos-which cannot simply be taken off or left on the hanger-might impact the employee's decision to be tattooed or obligate them to take additional measures to cover those tattoos every day. In the present case, the tattoo policy is separate and apart from the uniform policy; Commissioner Salerno described the permissible uniform, but the tattoo policy imposes additional restrictions beyond any clothing or insignia required of a Fire Department employee.

I reject, therefore, the City's contention that PERB's dress code cases represent the appropriate comparator or control the outcome in the present case. ⁹⁷

Another comparator would be policies related to personal grooming and hygiene. In determining whether policies are mandatorily negotiable, PERB has generally distinguished uniform and dress code policies, which do not impact on employees' physical comfort, from grooming policies that do, finding the latter to be mandatorily negotiable. ⁹⁸

The City offered, through testimony and in its post-hearing brief, two basic reasons for why the 2020 tattoo policy is necessary to its mission: the respect or confidence of the public, and uniformity of appearance.

Commissioner Salerno testified that "[b]eing paramilitary, and the fact that they wear uniforms, and they're groomed the way they are . . . they tend to-I don't want to use the word 'command', but elicit a lot more respect from the public. And so, I think that's really important." ⁹⁹It is not clear why the respect of the public, cited by Commissioner Salerno, is critical to the mission of the Fire Department. Common sense suggests that public *confidence* in the Fire Department is important, but it is not obvious that there is a relationship, positive or inverse, between public confidence and the presence or absence of tattoos. The City has not offered any proof that bearing visible tattoos negatively impacts the level of respect or confidence in which the public holds members of the Fire Department. ¹⁰⁰The Association's assertion that the public holds its members in high regard in spite of their tattoos was un rebutted. ¹⁰¹

The second mission-related argument is that employees of the Fire Department need to present a uniform appearance. Commissioner Salerno gave the most detailed description of the uniform worn by employees of the Fire Department. Firefighters, for instance, are required to wear a uniform consisting of dark blue pieces, a bottom and a top. Although employees are obligated to wear Department-approved pieces, firefighters have some choice in what pieces makeup their uniforms on a given day. They may wear pants or shorts, uniform shirts, t-shirts, or sweatshirts. Assuming this is a complete list, which may not be the case, it would nevertheless provide firefighters with at least six combinations of clothing: two lower body and three upper body options. Therefore, at any given time, members of the public could conceivably see firefighters in six different versions of the approved uniform. I am not persuaded that the mission-related interest of a uniform appearance necessitates the 2020 policy when there is already so much sanctioned variation in appearance. If the mission-related concern with uniformity is that a member

⁹⁷ Respondent's Brief, at 4-6.

⁹⁸ *State of New York (Dept of Taxation and Finance)*, 30 PERB P 3028; *City of Buffalo*, 15 PERB P 3027; *County of Suffolk*, 39 PERB P 4603; *Village of Waverly*, 21 PERB P 4560 (1988); *County of Onondaga*, 14 PERB P 3029.

⁹⁹ Tr, at 77.

¹⁰⁰ This argument would perhaps be more persuasive as to vulgar, obscene, or offensive tattoos. The presence of such tattoos might reasonably engender in members of the public distrust for employees of the Fire Department. However, the Department's policy with respect to tattoos already prohibited the display of such tattoos; the 2020 policy did not change that.

¹⁰¹ Tr, at 103-04.

of the public can identify a member of the Fire Department, surely the sanctioned uniforms are a better indicator of their role than the presence or absence of **tattoos**. Critically, witnesses for both parties testified that having **tattoos** does not impact an employee's ability to perform their job.

It is the City's burden to show that the 2020 policy "does not go beyond what is necessary to further its mission."

¹⁰²Nonetheless, a discussion of the employee interests is warranted in order to balance the two concerns. The Association argues that "**tattoos** are part of an employee's personal appearance" and, as a form of self-expression, impact their comfort and well-being.

¹⁰³President Wasicki testified about his members' **tattoos** generally, and about Lieutenant Burbidge's **tattoos** in particular, that they reflect matters of importance to those who bear them, including their firefighting service, their families, and their religious beliefs.

¹⁰⁴He also testified that some employees halted their acquisition of **tattoos** that were in-progress or refrained from getting new **tattoos** as a result of the 2020 policy.

¹⁰⁵Although the 2020 policy allows employees with otherwise non-conforming **tattoos** to remain in compliance if the **tattoos** are covered, it is not apparent how feasible or comfortable it would be for employees to cover certain **tattoos**.

¹⁰⁶For instance, a non-conforming leg or arm **tattoo** could be covered with pants or a long-sleeve shirt, although the employee might prefer shorts or a short-sleeve shirt in warm weather. However, it might not be feasible to cover a wrist or neck **tattoo** with clothing.

¹⁰⁷The 2020 policy, requiring employees to either refrain from obtaining or proactively cover non-conforming **tattoos**, impacts employees' self-expression and physical comfort.

In weighing the employer's stated mission-related need to implement the policy and the employees' interests, I do not find that the City has met its burden of showing that the 2020 policy is necessary to its mission and infringes on employee interests no further than necessary. Accordingly, I find that the 2020 policy was mandatorily negotiable.

The Association argues that the disciplinary component of the 2020 policy makes the policy mandatorily negotiable.

¹⁰⁸Generally speaking, grounds for the imposition of discipline are a mandatory subject of negotiation.

¹⁰⁹In *City of Buffalo (Police Department)*, when addressing changes the City made to its police department rules, the Board held that "[w]hen the City changed those rules, it necessarily changed the bases for the imposition of discipline against an employee, and thereby subjected itself to a duty to bargain."

¹¹⁰In the present case, although the 2016 policy did not explicitly contain a disciplinary component, Commissioner Salerno testified that non-compliance with the policy could have resulted in disciplinary action.

¹¹¹The 2020 policy both expanded the restrictions on **tattoos** and made the disciplinary

¹⁰² *City of Albany*, 42 PERB P 3005, at 3007.

¹⁰³ Charging Party's Brief, at 4.

¹⁰⁴ Tr, at 19, 28, 32-33.

¹⁰⁵ Tr, at 31.

¹⁰⁶ Joint Ex 3, at 6.

¹⁰⁷ I note that, although the 2020 policy indicates that covering a **tattoo** would constitute compliance with the policy, Commissioner Salerno testified that face and hand **tattoos** are never permitted; whether that is because they cannot be covered or for some other reason is unclear. Tr, at 69.

¹⁰⁸ Charging Party's Brief, at 5.

¹⁰⁹ See, e.g., [Binghamton Civil Service Forum v. City of Binghamton](#), 44 N.Y.2d 23, 11 PERB P 7508 (1978). See also, *Patchogue-Medford Union Free Sch Dist*, 30 PERB P 3041, 3094 (1997) ("... employer procedures requiring an employee to participate in an investigatory meeting from which the employee is subject to discipline are unquestionably mandatory subjects of negotiation, as are the grounds for the imposition of discipline.") (emphasis added)

¹¹⁰ *City of Buffalo (Police Dept)*, 23 PERB P 3050, 3106 (1990).

component of the policy explicit. The significant new restrictions on **tattoos** in the 2020 policy constitute new grounds for discipline, and for this additional reason, I find that the 2020 policy was mandatorily negotiable.

The City argues that even if the 2020 policy were mandatorily negotiable, the Association has waived its right to negotiate by virtue of its failure to challenge the 2016 policy. The City characterizes the 2020 policy as a mere revision of the 2016 policy.

The significant differences between the 2016 and 2020 policies, both in breadth and depth, belie the argument that there was no meaningful change in the policy. Even so, "failure to file a charge regarding a potential prior violation of the Act does not bar the subsequent assertion of rights where new action is taken".

¹¹²The Association is not now claiming a violation of the Act arising from the 2016 policy implementation. I do not find that the Charging Party has waived its right to negotiate the 2020 policy.

Finally, I will address the Association's allegation that the "waivers" presented by Chief Fields and signed by Lieutenants Burbidge and Relyea constitute direct dealing.

The Board has held that "[d]irect dealing occurs when an employer impermissibly bypasses the employee organization for the purpose of negotiating or attempting to negotiate with an employee or a group of employees aimed at reaching an agreement on the subject under discussion."¹¹³

In *County of Albany and Albany County Sheriff*, an ALJ determined that the employer did not engage in direct dealing when it met with employees, without union representatives, to inform the employees of a new policy.

¹¹⁴The employer in that case was not attempting to reach an agreement with the employees, and therefore was not engaged in direct dealing.¹¹⁵

Although the waivers are signed by the employees to whom they were presented, the documents are otherwise devoid of any components that would indicate an agreement.¹¹⁶First, the documents are titled

"Fire Chief Acknowledgement of Existing **Tattoos**."¹¹⁷Second, the text of the documents begins with an acknowledgement by the Fire Chief that the employees had non-conforming **tattoos**.

¹¹⁸The documents go on to state that new **tattoos** will comply with the 2020 policy.¹¹⁹There is no language in the waivers indicating any type of promise, acknowledgement, or indeed waiver of right by the employee signing the document.¹²⁰Indeed, the only promise or acknowledgement made in the

¹¹¹ Tr, at 94-95.

¹¹² *Wantagh Public Library*, 43 PERB P 4523, at 4592, citing *Auburn Enlarged City Sch Dist*, 25 PERB P 3055 (1992).

¹¹³ *Pleasantville Union Free Sch Dist*, 51 PERB P 3024, 3104 (2018). See also *Dutchess Comm Coll*, 41 PERB P 3029 (2008); *CUNY*, 38 PERB P 3011 (2005); *City of Schenectady*, 26 PERB P 3047 (1993); *Town of Huntington*, 26 PERB P 3034 (1993).

¹¹⁴ *County of Albany and Albany County Sheriff*, 52 PERB P 4573, 4871 (2019).

¹¹⁵ *Id.*

¹¹⁶ Joint Ex 4.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Joint Ex 4.

waivers is by the Chief. That Lieutenants Burbidge and Relyea signed the waivers does not seem to be materially different than if they had signed an acknowledgement of receipt of a new policy manual. Neither lieutenant was called to testify in this matter. The only other individual present when the waivers were presented and signed appears to be Chief Fields, who testified that he had no intent to obtain from either lieutenant a waiver of rights, but rather sought to protect them prospectively. 121

On the face of the waivers that form the basis of the direct dealing allegation, and absent any evidence to the contrary, I do not find that the presentation of the waivers was an attempt by Chief Fields to reach an agreement with the employees in question. Accordingly, the Association has failed to establish direct dealing in violation of § 209-a.1(d) of the Act.

In light of the above, I find that the City violated § 209-a.1(d) of the Act when it unilaterally implemented the 2020 **tattoo** policy, and dismiss the alleged violation of § 209-a.1(d) on the basis of direct dealing.

Therefore, the City is hereby ordered to:

1. Rescind the 2020 **tattoo** policy and return to the **tattoo** policy in effect prior to August 20, 2020;
2. Rescind the documents issued to Lieutenants Burbidge and Relyea titled "Fire Chief Acknowledgement of Existing **Tattoos**";
3. Expunge from its files any documents relating to any unit employee's failure to comply with the 2020 **tattoo** policy;
4. Sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

Dated at Albany, New York this 10th day of July, 2023

New York Public Employment Relations Board

End of Document

Understanding the Impact of President Trump's Executive Order Regarding DEI on Workplace Protections in New York

By admin / January 24, 2025

On January 21, 2025, President Donald Trump signed an executive order titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." This order rescinded Executive Order 11246, which had been in place since 1965 and was initially signed by President Lyndon B. Johnson. Executive Order 11246 required federal contractors to implement affirmative action programs and prohibited discrimination based on race, color, religion, sex, sexual orientation, gender identity, or national origin. The repeal of this order represents a significant shift in federal policy, raising questions about its implications for anti-discrimination efforts, particularly in states and localities like New York, which have robust protections against workplace discrimination.

The repeal of Executive Order 11246 eliminates the requirement for federal contractors to establish affirmative action programs to promote diversity and equal employment opportunities. However, it is important to note that other federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964, remain in effect. These laws continue to prohibit discrimination based on race, color, religion, sex, and national origin, ensuring that federal contractors must still comply with basic anti-discrimination standards.

New York State's anti-discrimination laws, particularly the New York State Human Rights Law (NYSHRL), provide broader protections than federal laws and remain unaffected by the federal rollback. The NYSHRL prohibits employment discrimination on a wide range of bases, including age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, disability, marital status, familial status, and domestic violence victim status. New York employers must comply with these comprehensive protections regardless of changes at the federal level.

Notably, the NYSHRL has been expanded in recent years to include protections against harassment and discrimination that do not rise to the level of being "severe or pervasive," making it easier for employees to bring claims. This underscores the state's commitment to maintaining equitable workplaces and holding employers accountable for discriminatory practices.

The New York City Human Rights Law (NYCHRL) is even more expansive than the NYSHRL and is widely regarded as one of the strongest anti-discrimination laws in the country. It prohibits discrimination in employment, housing, and public accommodations on an extensive list of protected characteristics, including race, gender, gender identity or expression, sexual orientation, immigration or citizenship status, and criminal history under the Fair Chance Act, among others.

Unlike federal laws, the NYCHRL explicitly mandates a "liberal construction" to fulfill its remedial purposes. This means that courts and agencies are required to interpret the law in a way that provides the maximum level of protection for employees. The NYCHRL also imposes obligations on employers to take affirmative steps to prevent discrimination and harassment, such as conducting annual sexual harassment training and accommodating employees' religious practices and disabilities.

Eliminating federal affirmative action requirements may have a chilling effect on corporate diversity, equity, and inclusion (DEI) initiatives, particularly among federal contractors. However, employers in New York City and State must tread carefully. Any reduction in DEI programs or diversity-focused hiring practices could lead to claims of systemic discrimination or disparate impact under the NYSHRL or NYCHRL. For instance, scaling back diversity initiatives might be seen as evidence of bias, mainly if it adversely affects underrepresented groups.

Additionally, New York City's Pay Transparency Law, which requires employers to disclose salary ranges in job postings, aligns closely with affirmative action goals by promoting transparency and addressing pay inequities. While federal rollbacks may lessen the emphasis on workplace equity nationwide, New York's legal framework continues to push for greater fairness and accountability in employment practices.

The repeal of federal affirmative action requirements highlights the importance of leveraging state and local laws to protect workers. The NYSHRL and NYCHRL provide robust tools for addressing discrimination and harassment, offering broader protections than federal laws and enabling attorneys to pursue claims that might not succeed under federal statutes.

Any reduction in DEI efforts or other workplace equity programs could provide grounds for legal action if they result in disparate treatment or adverse impacts on protected groups. Moreover, the NYCHRL's focus on eliminating even subtle forms of bias ensures that employees have a strong foundation for addressing systemic inequities.

While President Trump's executive order marks a significant change in federal policy, it does not alter the comprehensive anti-discrimination protections provided by New York State and New York City laws. Employers in these jurisdictions remain subject to stringent legal requirements to promote workplace equity and prevent discrimination. This serves as a reminder of state and local laws' critical role in safeguarding employee rights and ensuring accountability for discriminatory practices. By leveraging the protections offered under the NYSHRL and NYCHRL, there is still an avenue for employees to ensure fairness and inclusion in the workplace.

For anyone who has been a target of workplace discrimination in New York, working with a qualified and knowledgeable attorney is often the best course of action for effectively addressing these issues. At Risman & Risman, we offer adept legal help for those facing workplace discrimination. Our team can provide you with specialized legal services for your issues. Call us today at 212-233-6400 to schedule a free initial consultation with our team.

[← Previous Post](#)

[Next Post →](#)

With over three decades combined experience in negotiating and litigating complex employment discrimination and employee rights claims and cases in New York City, the employment attorneys of Risman & Risman, P.C., have zealously and successfully represented their clients.

Quick Links

[HOME](#)
[TESTIMONIALS](#)
[ATTORNEYS](#)
[CONTACT US](#)
[PRACTICE AREAS](#)
[OUR NEWS](#)
[BLOG](#)

Reach Us

NEW YORK
233 BROADWAY, SUITE 2707
NEW YORK, NEW YORK 10279
T: 212-233-6400
F: 212-233-6400

NEW JERSEY
50 HARRISON ST. PH-449
HOBOKEN, NJ 07030
T: 201-375-0700
F: 212-233-6400
(BY APPOINTMENT ONLY)

E: INFO@RISMAN-LAW.COM



In the Matter of
UNIFORMED PATROLMEN'S ASSOCIATION OF THE TOWN OF GREECE
POLICE DEPARTMENT, Charging Party,
-and-
TOWN OF GREECE, Respondent

New York Public Employment Relations Board

April 4, 2023

Case No. U-37914

New York Public Employment Relations Board

In the Matter of
UNIFORMED PATROLMEN'S ASSOCIATION OF THE TOWN OF GREECE
POLICE DEPARTMENT, Charging Party,
-and-
TOWN OF GREECE, Respondent

Notice:

NOTICE TO ALL EMPLOYEES

PURSUANT TO THE DECISION AND ORDER OF THE
NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD
and in order to effectuate the policies of the
NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

We hereby notify all employees of the Town of Greece in the unit represented by the Uniformed Patrolmen's Association of the Town of Greece Police Department (Association) that the Town will:

Bargain with the Association regarding pre-disclosure procedures related to FOIL demands for police officer discipline records.

Dated

By

on behalf of the **TOWN OF GREECE**

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Core Terms

bargain, foil, mandatory, disclosure, privacy, police officer, reputation, negotiate, terms and conditions, preempt, right to privacy, pre-disclosure, discipline, employment condition, notice, continued employment, disciplinary record, statutory mandate, drug testing, due process, compliance, collective bargaining, personal privacy, public employee, mandatorily, unwarranted

Counsel

TREVETT CRISTO (DANIEL P. DE BOLT of counsel), for Charging Party

BOLAÑOS LOWE PLLC (WILLIAM Q. LOWE of counsel), for Respondent

Panel: MARY THOMAS SCOTT, Administrative Law Judge

Opinion

DECISION OF ADMINISTRATIVE LAW JUDGE

On April 19, 2021, the Uniformed Patrolmen's Association of the Town of Greece Police Department (Association) filed an improper practice charge ¹alleging that the Town of Greece (Town) violated § 209-a.1(d) of the Public Employees' Fair Employment Act (Act) when the Town refused, following a demand by the Association, to negotiate a procedure related to the release of police officer disciplinary records pursuant to demands under [NY Public Officers Law, §§ 84-90](#), commonly known as the **Freedom of Information Law** (FOIL). The Town filed an answer ²denying the material allegations of the charge and asserting, by way of affirmative defenses, that the charge fails to state a claim upon which relief can be granted, that the subject of the demand does not constitute a mandatory subject of bargaining, that the parties' collective bargaining agreement (CBA) mandates that the demand to bargain is subject to the parties' grievance procedure, and that the matter is covered by the statutory repeal of New York State Civil Rights Law (CRL), § 50-a.

A pre-hearing conference was held on July 7, 2021. During the conference, the parties agreed that the underlying issue was a matter of law, and that the matter could be adjudicated on a stipulated record. The parties prepared and executed a Stipulation of Facts on September 13, 2021. ³Both parties were represented by counsel, and both the Town ⁴and the Association ⁵filed briefs.

FACTS

The parties stipulated to the following facts and exhibits:

1. The Uniformed Patrolmen's Association of the Town of Greece Police Department ("Union" or "UPA") is the recognized exclusive bargaining representative for a bargaining unit consisting of all police officers of the Police Department of the Town of Greece, with the exception of the Chief of Police and employees represented by any other collective bargaining agent.

¹ Administrative Law Judge (ALJ) Ex 1.

² ALJ Ex 2.

³ Joint Ex A.

⁴ ALJ Ex 3.

⁵ ALJ Ex 4.

2. A separate union, the Gold Badge Club, represents officers holding the rank of Sergeant and above, and thus such officers are not included in the bargaining unit represented by the UPA.

3. The Town of Greece ("Town") and the UPA are parties to a collective bargaining agreement, with effective dates of January 1, 2019 through December 31, 2023. See Joint Exhibit A.

Joint Exhibits Submitted by the Parties:

1. Collective Bargaining Agreement (January 1, 2019 - December 31, 2023). 6
2. Draft Memorandum of Agreement: "Proposed Procedures for Release of Police Disciplinary Records Pursuant to a FOIL Request." 7
3. December 23, 2020 Email exchange between Dan DeBolt and Karlee Bolaños (4 total emails) which, in relevant part, includes the demand to bargain over the Town's procedure for compliance with the changes to the [NY Public Officers' Law, §§ 84-90](#), and the repeal of [Civil Rights Law, § 50-a](#). 8
4. March 29, 2021 Email from Dan DeBolt to Karlee Bolaños, which includes, in relevant part, a renewed demand to bargain a MOA relative to procedures for release of disciplinary and personnel files of police officers. 9
5. April 5, 2021 and April 7, 2021 Email exchange between Bill Lowe and Dan DeBolt in which, in relevant part, the Town declines the demand to bargain a MOA. 10
6. April 14, 2021 Email from Dan DeBolt to Bill Lowe in which, in relevant part, the PBA states that not all provisions of the proposed MOA are mandatory subjects of bargaining, and it renews its demand to bargain. 11
7. April 29, 2021 Email from Bill Lowe to Dan DeBolt in which, in relevant part, the Town declines to negotiate an MOA and states its opinion that the issue is not mandatorily negotiable, but that it is willing to discuss it. 12

DISCUSSION

The questions raised in improper practice charges alleging a unilateral change in violation of § 209-a.1(d) of the Act always include whether an employer is required to bargain with a labor organization regarding its decisions that affect employees. In addition, the issues presented can include either: 1) whether the employer is required to bargain regarding the policies or procedures necessary to implement its decisions; or 2) whether the employer has failed to bargain over the impact of its decisions affecting employees' terms and conditions of employment. When policies or procedures are in issue, *i.e.*, when intervening actions by an employer are necessary in order to effectuate its decisions, the employer engages in a series of "separate implementation decisions"¹³ resulting in procedures that support the enactment of that decision. However, not all managerial decisions require

6 Joint Ex 1.
7 Joint Ex 2.
8 Joint Ex 3.
9 Joint Ex 4.
10 Joint Ex 5.
11 Joint Ex 6.
12 Joint Ex 7.

procedures to implement them, but impact bargaining still may be required. In those cases, the decision does not require any further action or decisions on the part of the employer in order for the decision to be effectuated.

¹⁴In impact bargaining, the effects which are sought to be bargained simply flow from the employer's managerial decision that may impact terms and conditions of employment. 15

This case will not review whether the Town's decision to comply with FOIL requires bargaining over the statutory mandate to release police officer discipline records pursuant to a valid FOIL request. The Town contends that it is under no obligation to bargain regarding compliance with FOIL, 16and the Association does not dispute this position. 17Nor will this decision assess impact bargaining, since the Town's decision to comply with the FOIL statute requires intervening decisions to satisfy its duty.

This decision will address only whether procedures, *i.e.*, the discrete and incremental decisions made by the Town that implement its decision to comply with FOIL disclosures, are mandatorily negotiable. In this case, compliance with a FOIL request, *i.e.*, the final physical act of production of FOIL records, can occur only after the employer engages in actions that flow as a result of many other decisions. 18The intervening decisions made by the Town regarding the procedures integral to its satisfying its FOIL obligations may be subject to decisional bargaining.

Furthermore, although the Association's proposal is attached as an Exhibit, this decision will not review whether the Association's proposed bargaining position itself is lawful, inasmuch as that issue was not pled, and no affirmative defense regarding the legality of the proposal has been raised by the Town. The sole issue before me is whether the Association's demand to bargain a proposal regarding procedures triggered by changes to [NY CRL § 50-a](#) is a mandatory subject of bargaining. The issue as presented here is not whether the Town will comply with demands for documents pursuant to [NY Public Officers Law, §§ 84-89](#) (hereinafter FOIL), or which documents are to be produced but, rather, whether the Town has a duty to bargain over the decisions it makes regarding the procedures to be employed as the Town satisfies its FOIL obligation. 19

Preemption and Conflict of Laws

Under the Taylor Law, the obligation to bargain as to all terms and conditions of employment is a broad and unqualified one. 20In a conflict of law matter, the Board consistently upholds the mandate of

Board of Education of the Union Free School District of the Town of Huntington (hereinafter *Huntington*)

²¹that there is no reason why the mandatory provision of the Act should be limited in any way, except in cases

¹³ *County of Nassau*, 27 PERB P 3054, 3119 (1994).

¹⁴ *Id.*, at 3120-21 (1994).

¹⁵ *Id.*, at 3121, citing to *Town of Oyster Bay*, 12 PERB P 3086 (1979), in which the Board noted that, *e.g.*, an employer's decision to supplement its scope of services may result in a longer workday, and there is no independent decision to extend the workday. It simply is a byproduct of the managerial decision.

¹⁶ Town's brief, at 6.

¹⁷ Association's brief, at 11.

¹⁸ *County of Nassau*, 27 PERB P 3054.

¹⁹ Although, as pointed out by the charging party (charging party's brief, at 4), there have been a number of court proceedings challenging whether a FOIL demand is to be applied retroactively, and whether such a demand includes access to unsubstantiated claims of officer misconduct since the repeal of NY Civil Rights Law (CSL) § 50-a on June 20, 2020, those issues are not before me.

²⁰ [Bd of Educ v Assoc Teachers of Huntington](#), 30 NY2d 122, 5 PERB P 7505 (1972).

where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment. ²²

In such cases, determining whether a bargaining obligation exists is a matter of pure statutory construction dependent only on accurate apprehension of legislative intent. ²³Although both parties agree that the Taylor Law reflects the "strong and sweeping" public policy favoring collective bargaining over public employees' terms and conditions of employment, the Board confirmed in *Huntington* ²⁴that bargaining may be foreclosed when a statute directs that a certain action be taken by an employer, or where the legislative intent to remove the issue from mandatory bargaining, as clarified in the case of *Syracuse City School District* (hereinafter *Syracuse CSD*), is "plain and clear." ²⁵

Here, the parties do not dispute the Town's decision to comply with the FOIL mandates. The Town's decision whether to release records subject to a valid FOIL request is preempted by statute and is nonmandatory.

Next, I dismiss the Town's argument that the procedures for compliance with FOIL are incorporated in the FOIL statute. In *Cleveland Board of Education v Loudermill* (hereinafter *Loudermill*), ²⁶where the issue was grounded in due process procedures related to pre-termination actions, the United States Supreme Court squarely rejected the "bitter with the sweet" reasoning of the lower court -- *i.e.*, that the statutory grant of a substantive right (in that case, termination from employment) is inextricably intertwined with the limitations on the procedures that are to be employed in determining that right. ²⁷In that case, an employer alleged that the employee provided false information on his employment application, and the employee summarily was terminated without an opportunity to respond to the charge of dishonesty. There, the Court made clear that "the categories of substance and procedure are distinct." ²⁸Thus, while a statutory mandate prohibiting or permitting an employer's decision-making authority may be preempted by the express language of the statute in question, the procedures that implement the decision may not be preempted and, instead, may require bargaining.

Since *Loudermill*, ²⁹the obligation to bargain over procedures when an employer either exercises a statutory requirement or secures statutory relief is grounded solidly in PERB precedent. ³⁰For example, in *Prue v Hunt* (hereinafter *Prue*), ³¹when an employer moved, pursuant to its

²¹ *Id.*

²² *Newburgh Enlarged City Sch Dist*, 21 PERB P 3036 (1988), citing to [Huntington, 30 NY2d 122](#), 5 PERB P 7505.

²³ [City of Long Beach v New York State Pub Empl Relations Bd, 39 NY3d 17, 22](#), 55 PERB P 7014 (2022).

²⁴ [30 NY2d 122](#), 5 PERB P 7505.

²⁵ [35 NY2d 743](#), 7 PERB P 7513 (1974) ("One should construe the language in *Board of Educ, Huntington v Teachers* to mean that collective bargaining under the Taylor Law has a broad scope with respect to the terms and conditions of employment limited by plain and clear, rather than express, prohibitions in the statute or decisional law.")

²⁶ [470 U.S. 532 \(1985\)](#).

²⁷ *Id.*, at 540.

²⁸ *Id.*, at 541.

²⁹ [470 U.S. 532](#).

authority under New York Civil Service Law (CSL) § 73, to terminate the employment of a police officer who was absent for more than one year by reason of disability, the Court of Appeals upheld procedural safeguards as mandatorily negotiable, and held that due process standards require that the employee receive, prior to his or her discharge, in accordance with *Loudermill*,³² notice and some opportunity to respond. In *City of Auburn*,³³ where an employer refused to negotiate over proposals that would modify the disciplinary procedures of CSL § 75, the New York Court of Appeals held that bargaining over alternative disciplinary procedures were not preempted by the statute or a prohibited subject of bargaining. In *County of Nassau*,³⁴ where an employer's right to implement drug testing procedures was in issue, the Board found a clear distinction between an employer's decision to drug test employees and the procedures used to implement that decision, including the consequences of the testing.³⁵ In those cases, the holdings in *Huntington* and *Syracuse CSD -- i.e.*, that the public policy favoring collective bargaining will prevail unless the statute plainly and clearly preempts the subject matter from negotiation -- mandated bargaining over the procedures.

Procedures affecting unit employees are not contained in the statute and are not preempted

In the FOIL statute at issue in this case, the legislature declares that "a free society is maintained when government is responsive and responsible to the public."³⁶ Therein, it directs the governing body of each public corporation to promulgate uniform rules and regulations pertaining to the administration of the statute,³⁷ and the availability of records and procedures to be followed.³⁸ A review of the statute, confirming that procedures affecting employees' terms and conditions of employment are not defined in the statute, follows.

First, the statute contains rules of procedure relating to the agency's interface with the public in *POL* §§ 87(1)(b)(i-iii).³⁹ This section addresses procedures that manage the mechanics of the transaction between the agency and the entity seeking the FOIL records. Second, *POL* § 87(2) identifies procedures related to records

³⁰ See, e.g., PERB decisions relating to the right to bargain over procedures including *Civil Service Law, § 75* (*PBA of the City of New York*, 35 PERB P 3034 (2002), *affd* 36 PERB P 7014 (2003), *affd* [13 AD3d 879](#), 37 PERB P 7012 (2004), *affd* [6 NY3d 563](#), 39 PERB P 7006 (2006)); *Civil Service Law, § 71* (*City of Long Beach v New York State Pub Empl Relations Bd*, 39 NY3d 17; and *Civil Service Law, § 73* (*Prue v Hunt*, 78 NY2d 364, 24 PERB P 7540 (1991)). See also PERB decisions related to employers' enforcement of drug policies and testing procedures: *City of New York*, [14 NY3d 46](#), 42 PERB P 7511 (2009).

³¹ [78 NY2d 364](#), 24 PERB P 7540.

³² [470 U.S. 532](#).

³³ 10 PERB P 3045 (1977), *revd* [91 Misc2d 909](#), 10 PERB P 7016 (Sup Ct Albany County 1977), *affd* [62 AD2d 12](#), 11 PERB P 7003 (3rd Dept 1978), *affd* [46 NY2d 1034](#), 12 PERB P 7006 (1979).

³⁴ 27 PERB P 3054 (1994).

³⁵ *Id.*, at 3119.

³⁶ [NY POL, § 84](#).

³⁷ *Id.*, at § 87.1(a).

³⁸ *Id.*, at § 87(1)(b)

³⁹ Per the statute, ". . . pertaining to the availability of records and procedures to be followed, including but not limited to: i) the time and places such records are available; ii) the persons from whom such records may be obtained; and iii) the fees for copies of records"

that an agency *may* deny to the petitioner. ⁴⁰The records addressed in this section are department administrative records that do not relate to individual employees or to terms and conditions of employment.

More specifically, *POL § 89(3)* provides that, in the absence of guidelines from the Committee on Open Government regarding deletion of identifying details, or the withholding of records, the agency *may* delete certain identifying details that reveal an unwarranted invasion of personal privacy. The statute defines this type of information to include, *inter alia*, employees' employment, medical or credit histories, personal references, information that, if disclosed, would result in economic or personal hardship, and such information is not relevant to the work of the agency maintaining it, information of a personal nature reported in confidence and not relevant to the ordinary work of the agency; workers' compensation records, and electronic contact information. *POL § 89.2-a* provides that nothing in the article shall permit disclosure that constitutes an unwarranted invasion of personal privacy, and *POL § 89.2-b* directs that the law enforcement agency redact items involving medical history, home addresses, and contact information, but not work-related, publicly available information, social security numbers, or use of employee assistance programs or substance abuse services. *POL § 89.2-c* permits the redaction of records pertaining to technical infractions.

Each of the provisos, above, relate to the disclosure interface between the agency and the entity making the FOIL request, or to the content of the record. However, the statute is silent with regard to any internal procedures that interface with the bargaining unit employees or relate to their terms and conditions of employment. There are no guidelines, let alone mandates, addressing employees' notice or review, or redaction, or exclusion of prohibited information.

Applying the *Huntington* analysis to the Town's duty pursuant to a FOIL demand, there is nothing in the FOIL statute that suggests that the Legislature intended to remove bargaining over internal, pre-disclosure procedures that interface with unit employees from the realm of collective bargaining. Therefore, based on a review of the FOIL statute and the mandate of *Loudermill* ⁴¹and its progeny, I reject the Town's argument that the decision to comply with a FOIL request is inseparable from procedures that are enacted to satisfy the FOIL mandate. While, as the Town argues, it is under "no obligation to bargain regarding compliance with FOIL," ⁴²the Town's claim that regulations of the Committee for Open Government and its Advisory Opinions "collectively . . . establish the procedure" ⁴³for compliance is unsupported and insufficient to remove the Town's bargaining obligation over implementation procedures. In sum, although bargaining *to prevent* the delivery of the disciplinary records arguably is preempted by the repeal of [CRL § 50-a](#) and is a prohibited subject of bargaining, I find that procedures for implementation of the employer's duty pursuant to a FOIL request are not removed, on the basis of preemption, from the Town's overall duty to bargain.

Mandatory subject of bargaining

However, although I find that a demand to bargain FOIL pre-disclosure procedures is not preempted by the statute, the issue that remains, as argued by the Town, ⁴⁴is whether pre-disclosure procedures in this case - related to FOIL demands for police officer discipline records - are a mandatory subject of bargaining.

⁴⁰ Cited examples of such records include, *inter alia*, records, or portions thereof that: 1) are specifically exempted from disclosure by state or federal statute; 2) if disclosed would impair present or imminent contract awards or collective bargaining negotiations; 3) are trade secrets; 4) reveal criminal investigations; and 5) intra-agency or inter-agency materials.

⁴¹ [470 U.S. 532](#).

⁴² Town's brief, at 6.

⁴³ *Id.*

⁴⁴ ALJ Ex 2, Answer; ALJ Ex 3, Town's brief, at 5.

In the Matter of UNIFORMED PATROLMEN'S ASSOCIATION OF THE TOWN OF GREECE POLICE DEPARTMENT, Charging Party, -and- TOWN OF GREECE, Respondent, Case No.

Procedures related to statutory mandates are not mandatory subjects of bargaining in all cases. For example, statutes that require an employer to submit employees' income tax withholdings to the state typically do not compel bargaining over procedures. Although the employer's obligation to submit withholding is preempted, bargaining over procedures would not be required unless an argument could be made that the statutory obligation requires additional action by the employer to satisfy that obligation that affects employees directly, or impacts employees' terms and conditions of employment. Here, bargaining will be mandatory only if the Town's release of records pursuant to a FOIL demand affects unit employees.

It is well-settled that employers must bargain over procedures when the employer's right to act is based on a statutory mandate that could jeopardize employees' future employment, e.g., when such action results in a risk of separation due to disability,⁴⁵ drug testing,⁴⁶ or discipline.

⁴⁷In those cases, the employer's right to act directly affects employees' continued employment. PERB has long held that procedures related to separation from employment in connection with an employer's exercise of a statutory mandate or relief constitutes a mandatory subject of bargaining.⁴⁸

However, when an employer's statutory authority to act does *not* affect continued employment, there is little PERB guidance with regard to an employer's duty to bargain over procedures. Unlike the cases involving pre-separation procedures, where the consequences of managerial decisions and prerogative directly affect employees' continued employment, here, there is no risk to continued employment in the case before me.

Thus, the duty to bargain procedures only will attach if the employer's exercise of its statutory right under FOIL affects unit employees. The issue in this case is whether there is a nexus between the FOIL disclosure of a police officer's past discipline records and the officer's current or future terms and conditions of employment.

Right to privacy is a term and condition of employment

The Association argues that an employee's right to privacy compels bargaining over procedures that ensure the prevention of the release of unauthorized records following a FOIL request. Even the FOIL statute prohibits unwarranted intrusion into employees' privacy and unauthorized disclosures.⁴⁹

⁴⁵ [City of Watertown, 95 NY2d 73](#), 33 PERB P 7007 (2000). There, the Court of Appeals affirmed PERB's finding that the statute provided no procedural framework for resolving disputes, and because eligibility determinations affect terms and conditions of employment, i.e., the right to continued employment - a demand for a dispute resolution or appeal process procedure was mandatorily negotiable.

⁴⁶ *County of Nassau*, 27 PERB P 3054 (1994). In a case of first impression, the Board reviewed whether, and to what extent, procedures incident to a decision to subject employees to drug testing are mandatory subjects of negotiation.

⁴⁷ *City of Auburn*, 10 PERB P 3045, *revd* [91 Misc2d 909](#), 10 PERB P 7016, *affd* [62 AD2d 12](#), 11 PERB P 7003, *affd* [46 NY2d 1034](#), 12 PERB P 7006.

⁴⁸ [Village of Pelham \(Economico\), 50 NYS2d 120](#), 13 PERB P 7528 (1980).

⁴⁹ **POL § 87(2):**

Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except those records or portions thereof that may be withheld pursuant to the exceptions of rights of access appearing in this subdivision. A denial of access shall not be based solely on the category or type of such record and shall be valid only when there is a particularized and specific justification for such denial. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article; . . .

As an initial matter, it is without question that public policy in New York State confirms that public employees enjoy rights of privacy. ⁵⁰Moreover, cases raising employees' claims to privacy rights regularly have come before PERB in decisional bargaining cases involving, *inter alia*, drug testing ⁵¹and video surveillance. ⁵²In *Arlington Central School District*, a drug testing case, the Board recognized employees' interests in "personal privacy, reputation, and job security, interests which we have held can trigger a bargaining obligation." ⁵³Similarly, in *Nanuet Union Free School District*, the Board held that video surveillance of employees ". . . intrudes upon employee interests including job security, privacy and personal reputation." ⁵⁴

However, in this case, unlike *Arlington* and *Nanuet*, the initial decision to comply with the statutory mandate of FOIL is nonmandatory -- bargaining over that decision is preempted by the repeal of [CRL § 50-a](#) and is not challenged by the Association. It is the repeal of § 50-a that eviscerates any claim to absolute privacy that may be raised by a police officer whose disciplinary records are the subject of a FOIL request, and negates any obligation to bargain about whether proper documents can be disclosed. ⁵⁵Thus, there is no privacy right, *per se*, that would prevent the disclosure of *bona fide* records that are the subject of a FOIL request. The point of law that remains is whether the police officer's right to privacy includes protection of reputation in the community, or a right to protection against the release of *unauthorized information* leading to an unwarranted invasion of privacy, constitutes a term and condition of employment subject to mandatory bargaining.

Reputation and due process

I find precedent in PERB case law to support a finding that employees enjoy a right to privacy, including reputation, sufficient to constitute a term and condition of employment subject to mandatory bargaining. In *County*

⁵⁰ [LaRocca v Bd of Educ of Jericho Union Free Sch Dist, 159 Misc2d 90, 93 \(1993\)](#), *affd LaRocca v Bd of Educ of Jericho Union Free Sch Dist, 220 AD2d 424 (1995)*. ("The Legislature, when it established the FOIL inspection scheme, intended to eliminate *in camera* governance, not to remove the right to privacy that protects municipal employees as well as private citizens.")

⁵¹ *County of Nassau*, 27 PERB P 3054.

⁵² *Nanuet Union Free Sch Dist*, 45 PERB P 3007 (2012).

⁵³ *Arlington Cent Sch Dist*, 25 PERB P 3001, 3004 (1992), citing generally to [Bd of Educ of the City Sch Dist of the City of New York v PERB, 75 NY2d 660](#), 23 PERB P 7012 (1990).

⁵⁴ *Nanuet Union Free Sch Dist*, 45 PERB P 3007, 45 PERB P 3007, at 3013:

We conclude that, in general, the decision by an employer to engage in videotape surveillance of a workplace for monitoring and investigating employees is mandatorily negotiable under the Act because it "bears a direct and significant relationship to working conditions," it requires employees to be video-surveillance participants, and it intrudes upon employee interests including job security, privacy and personal reputation.

⁵⁵ Even before its repeal, police officers whose discipline records confirm misconduct had no basis for an expectation of absolute privacy regarding their conduct. [McKenzie v Jackson, as Commissioner of the Westchester County Dept of Correction, 152 AD2d 1, 1](#), 23 PERB P 7501, 7503 (2d Dept 1989). ("Public employees have some diminished expectations of privacy in respect to inquiries . . . and the privacy expectations of correction officers must be regarded as even further diminished by virtue of their membership in a paramilitary force, the integrity of which is a recognized and important state concern.") *See also County of Nassau*, 36 PERB P 4537 (2003).

of *Nassau*, in a case of first impression, the Board reviewed whether, and to what extent, procedures incident to a decision to subject employees to drug testing are mandatory subjects of negotiation.⁵⁶ As in the case here, the County argued that implementation of its decision to test is inseparable from the decision to test and therefore was nonmandatory. There, finding that the implementation of the County policy "embraces mandatory subjects of bargaining," the Board balanced the employer's interest "in detecting and preventing impairment of its police officers, which can jeopardize safety and compromise delivery of police services" against officers' "personal privacy issues of constitutional dimension . . . that may affect the employee's reputation irrevocably."⁵⁷

In *Hunter v City of New York*, when striking down a local law that compelled personal financial disclosures by public employees, the Appellate Court declared:

In this legislation, there is, then, insensitivity to rights of privacy, and disregard of claims of irrelevancy. Evaluation of the legislation inescapably impels the conclusion that "[t]here has not been the 'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized⁵⁸ as the very essence of due process."⁵⁹

A year after *Hunter*, in *Rapp v Carey*, the New York Court of Appeals held that the test in privacy cases "is whether there has been protection of the individual against arbitrary action."⁶⁰ In that case, a local law required detailed disclosure by public employees of financial information to the City Clerk, to be made available to the public. There, the New York Court of Appeals held that "it is not only deprivation of life and property, but also liberty, which is entitled to protection of due process under the Fourteenth Amendment. Privacy, a right within the concept of liberty, has its claims on the due process clause."⁶¹ There, the Court went on to affirm that public employees do not, by virtue of their public employment, surrender their constitutional right to due process.⁶²

Thus, having established a right to protection of reputation and having reviewed the facts, statutes, and case law, I find the release of police officer discipline records pursuant to a FOIL demand affects a police officer's privacy and reputation, and constitutes a term and condition of employment requiring mandatory bargaining over pre-disclosure procedures, for the following reasons.

First, as the Association argues,⁶³ *inter alia*, officer safety in the context of protection against the erroneous disclosure of precluded, confidential information, is a basis for requiring bargaining over pre-disclosure safeguards. In *Prue v Hunt*, where the Court of Appeals noted the potential for "an erroneous discharge or an inappropriate exercise of the discretion,"⁶⁴ the release of unauthorized or erroneous

⁵⁶ *County of Nassau*, 27 PERB P 3054.

⁵⁷ *Id.*, at 3119.

⁵⁸ [*Ohio Bell Telephone Co v Pub Utilities Commission of Ohio*, 301 U.S. 292, 302 \(1937\).](#)

⁵⁹ [*58 AD2d 136, 141 \(1st Dept 1977\).*](#)

⁶⁰ [*Rapp v Carey*, 44 NY2d 157, 162 \(1978\).](#)

⁶¹ *Id.*, citing [*Hunter v City of New York*, 58 AD2d 136, 40-41.](#)

⁶² [*Id.*, at 41.](#)

⁶³ ALJ Ex 4; Association's brief, at 14.

information may lead to irreparable harm to the officer's reputation. In this case, the privacy right that vests in a police officer is Mr. Justice Cardozo's "protection against arbitrary treatment," including the disclosure of misleading or erroneous information, and its effect on officer's safety and reputation as the officer engages in policing.

In addition to protection against erroneous disclosure, I find a safety concern on behalf of officers when engaging with the public within the community following the *proper* disclosure of discipline records. In cases when the community may be aware of a responding officer's disciplinary records, but the responding officer has not been alerted to their disclosure, there may be a heightened risk of confrontation. For the reasons cited, I find officers' right to privacy, as it relates to reputation, to be an on-going term and condition of employment.

Therefore, I find that, similar to the mandatory bargaining over procedures in cases involving expectations of continued employment in *County of Nassau*,⁶⁵ and *City of Auburn*,⁶⁶ the protection of privacy and reputation in the employment relationship renders pre-disclosure procedures of disciplinary records released by the Town pursuant to a FOIL affecting a term and condition of employment to be a mandatory subject of bargaining. The exercise of the Town's legislative duties pursuant to a FOIL demand is subject to the minimum standards of procedural due process considerations, at the very least -- "to notice and the opportunity to respond."⁶⁷ This decision does not define how much process is due. That matter is left to the parties' negotiations.

Thus, I find that the Town's refusal to bargain over pre-disclosure procedures in connection with its decision to comply with its FOIL obligation to be a violation of § 209-a.1(d) of the Act.

THEREFORE, IT IS HEREBY ORDERED that the Town:

1. Bargain with the Association regarding pre-disclosure procedures related to FOIL demands for police officer discipline records.
2. Sign and post the attached notice at all locations customarily used by it to post notices to unit employees.

Dated at Buffalo, New York this 4th day of April, 2023

Mary Thomas Scott

Administrative Law Judge

New York Public Employment Relations Board

End of Document

⁶⁴ [78 NY2d 364, at 371.](#)

⁶⁵ 27 PERB P 3054.

⁶⁶ 10 PERB P 3045 (citations omitted).

⁶⁷ [Prue v Hunt, 78 NY2d 364, at 370.](#)

STATE OF NEW YORK

940

2023-2024 Regular Sessions

IN SENATE

January 9, 2023

Introduced by Sens. BAILEY, MYRIE -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations

AN ACT to amend the executive law and the education law, in relation to prohibiting mandatory disclosure of a criminal history record in certain circumstances

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivision 15 of section 296 of the executive law, as
2 amended by chapter 534 of the laws of 2008, is amended to read as
3 follows:
4 15. It shall be an unlawful discriminatory practice for any person,
5 agency, bureau, corporation or association, including the state and any
6 political subdivision thereof, to deny any license or employment to any
7 individual by reason of his or her having been convicted of one or more
8 criminal offenses, or by reason of a finding of a lack of "good moral
9 character" which is based upon his or her having been convicted of one
10 or more criminal offenses, when such denial is in violation of the
11 provisions of article twenty-three-A of the correction law. Further,
12 there shall be a rebuttable presumption in favor of excluding from
13 evidence the prior incarceration or conviction of any person, in a case
14 alleging that the employer has been negligent in hiring or retaining an
15 applicant or employee, or supervising a hiring manager, if after learn-
16 ing about an applicant or employee's past criminal conviction history,
17 such employer has evaluated the factors set forth in section seven
18 hundred fifty-two of the correction law, and made a reasonable, good
19 faith determination that such factors militate in favor of hire or
20 retention of that applicant or employee. No person, agency, bureau,
21 corporation, association, the state or any political subdivision there-
22 of, shall require an individual to provide a copy of his or her criminal

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD02489-01-3

1 history record that he or she obtained pursuant to the rules and regu-
2 lations of the division of criminal justice services.

3 § 2. Subdivision 3 of section 313 of the education law is amended by
4 adding a new paragraph (f) to read as follows:

5 (f) No educational institution shall require an individual to provide
6 a copy of his or her criminal history record that he or she obtained
7 pursuant to the rules and regulations of the division of criminal
8 justice services.

9 § 3. This act shall take effect on the one hundred twentieth day after
10 it shall have become a law.

State L&E Laws: Artificial Intelligence (AI)

CALIFORNIA	
Coverage	<i>Effective Jan. 1, 2025:</i> All persons (as defined in Cal. Lab. Code § 18).
Requirements	<p>Digital Replicas: <i>Effective Jan. 1, 2025:</i> Employer agreements that allow for new creation and use of an employee's digital replica (as defined in Cal. Lab. Code § 927) for personal or professional services on or after January 1, 2025 are unenforceable if the agreement meets all of the following conditions: the digital replica would be used in place of work the individual would have otherwise performed in person, the agreement does not include a reasonably specific description of the replica's intended use, and the individual was not represented by legal counsel or a labor union representative when making the agreement.</p> <p>Employment Discrimination by AI: Employers in California are violating the state's Fair Employment and Housing Act (FEHA) if their use of artificial intelligence results in discrimination against employees based on protected classes.</p>
Enforcement	<p>Digital Replicas: This law doesn't have an enforcement mechanism.</p> <p>Employment Discrimination by AI: This law is enforced by the California Civil Rights Department as a violation of the state's equal employment opportunity law. For more information on California's EEO enforcement, see California EEO Enforcement.</p>
References	Cal. Lab. Code § 927 (A.B. 2602), Legal Advisory on the Application of Existing California Laws to Artificial Intelligence
COLORADO	
Coverage	<i>Effective Feb. 1, 2026:</i> Employers that do business in Colorado and use a high-risk artificial intelligence system (as defined in Colo. Rev. Stat. § 6-1-1701) to make significant employment decisions.
Requirements	<p>Standard of Care: <i>Effective Feb. 1, 2026:</i> Employers must use reasonable care to protect Colorado residents from any known or reasonably foreseeable risks of “algorithmic discrimination” (as defined in Colo. Rev. Stat. § 6-1-1701).</p> <p>Risk Management/Impact Assessment: Employers must review each high-risk AI system that they use to ensure the system is not causing algorithmic discrimination on or before February 1, 2026, and at least annually.</p> <p><i>Effective Feb. 1, 2026:</i> Employers must implement a risk management policy and program to govern their use of high-risk AI systems, as required by Colo. Rev. Stat. § 6-1-1703(2). Employers must conduct an impact assessment of the systems at least annually and within 90 days of substantially modifying</p>

	<p>them, as required by Colo. Rev. Stat. § 6-1-1703(3).</p> <p>Significant Employment Decisions: If an employer uses a high-risk AI system to make a significant employment decision that adversely impacts Colorado residents, it must give them the reason for the decision and an opportunity to make corrections and appeal the decision, as required by Colo. Rev. Stat. §6-1-1703(4).</p> <p>Disclosure Requirements: <i>Effective Feb. 1, 2026:</i> Employers must comply with the disclosure requirements in Colo. Rev. Stat. §§ 6-1-1703 to 6-1-1704.</p>
Enforcement	<p><i>Effective Feb. 1, 2026:</i> The Colorado attorney general's office enforces this law. A violation of the law's requirements constitutes an unfair trade practice under Colo. Rev. Stat. § 6-1-105(1)(hhhh).</p>
References	<p>Colo. Rev. Stat. §§ 6-1-1701, 6-1-1703 to 6-1-1706</p>
ILLINOIS	
Coverage	<p>Employers are subject to the use of artificial intelligence (AI) in hiring laws under 820 ILCS 42/5 if they ask applicants to record video interviews and use an artificial intelligence (AI) analysis of the applicant-submitted videos.</p> <p>Employers are subject to the artificial intelligence (AI) in employment discrimination law under 775 ILCS 5/2-102 if they employ one or more employees in Illinois during 20 or more weeks of the calendar year or preceding an alleged violation.</p> <p>Employers are subject to the Digital Voice and Likeness Act if they enter agreements with an individual for the creation and use of a digital replica of their voice and likeness for personal or professional services.</p>
Requirements	<p>Applicant Consent/Disclosure Requirements: Employers need applicants' consent to use AI in hiring. Before using AI to evaluate applicants, an employer must follow the notification requirements outlined in 820 ILCS 42/5.</p> <p>Applicant Privacy: Employers that use AI analysis of applicant videos must not share the videos, except with people whose expertise is necessary to evaluate an applicant's fitness for position. Within 30 days after receiving a request from the applicant, employers must delete an applicant's interviews and instruct any other person who received a copy of the video to also delete them, including all backup copies.</p> <p>Employment Discrimination by AI: <i>(Effective Jan. 1, 2026):</i> Employers are committing a civil rights violation if they use artificial intelligence that has the effect of subjecting employees to discrimination based on protected classes, or zip codes as a proxy for protected classes, under the Illinois Human Rights Act (775 ICLS 5). Employers are also committing a civil rights violation if they fail to provide notice to an employee that the employer is using AI to make significant employment decisions.</p> <p>Digital Voice and Likeness Act: Employers can enter agreements with individuals that allow for the creation and use of a digital replica of an their</p>

Employment, Comparison Table - State L&E Laws: Artificial Intelligence (AI)

	voice or likeness in a place of work that the individual would otherwise have performed in person if: the agreement describes the intended uses of the replica, the individual is represented by legal counsel or a labor union, and the terms of such use are covered in a written agreement.
Enforcement	The AI in hiring law doesn't have an enforcement mechanism. <i>(Effective Jan. 1, 2026):</i> The employment discrimination by AI law is enforced by the Illinois Department of Human Rights and the Illinois Human Rights Commission. The Digital Voice and Likeness Act doesn't have an enforcement mechanism.
References	820 Ill. Comp. Stat. 42/5 to 42/20, 775 Ill. Comp. Stat. § 5/2-101, 5/2-102 (H.B. 3773), 2024 Ill. Laws 103-830 (H.B. 4762)
MARYLAND	
Coverage	All employers.
Employer Requirements	Applicant Consent: Employers can't use facial recognition services for the purpose of creating a facial template during an applicant's interview for employment unless an applicant consents under Md. Code, Lab. & Empl. § 3-717(c).
Enforcement	The Maryland Division of Labor and Industry enforces this law.
References	Md. Code, Lab. & Empl. §§ 3-101, 3-103, 3-717
NEW JERSEY	
Coverage	All employers.
Employer Requirements	Employment Discrimination by AI: Employers in New Jersey are violating the state's Law Against Discrimination (EEO) if their use of artificial intelligence results in discrimination against employees based on protected classes.
Enforcement	Employment discrimination by AI is enforced by the New Jersey Division on Civil Rights as a violation of the state's equal employment opportunity law. For more information on New Jersey's EEO enforcement, see New Jersey EEO Enforcement.
References	Guidance on Algorithmic Discrimination and the New Jersey Law Against Discrimination – January 2025

2025 N.Y. SB 822

Chaptered, February 14, 2025

Reporter

2025 N.Y. ALS 96; 2025 N.Y. Laws 96; 2025 N.Y. Ch. 96; 2025 N.Y. SB 822

NEW YORK ADVANCE LEGISLATIVE SERVICE > NEW YORK 248TH ANNUAL LEGISLATIVE SESSION > CHAPTER 96 > SENATE BILL 822

Notice

Added: Text highlighted in green

Deleted: ~~Red text with a strikethrough~~

Synopsis

AN ACT to amend the state technology law and the civil service law, in relation to the disclosure of automated employment decision-making tools and maintaining an artificial intelligence inventory; to amend a chapter of the laws of 2024 amending the state technology law relating to automated decision-making by state agencies, as proposed in legislative bills numbers S. 7543-B and A. 9430-B, in relation to the effectiveness thereof; to repeal sections 1 and 3 of a chapter of the laws of 2024 amending the state technology law relating to automated decision-making by state agencies, as proposed in legislative bills numbers S. 7543-B and A. 9430-B, in relation to the short title and disclosure; to repeal sections 403 and 404 of the state technology law relating to impact assessments and submission of certain reports; and providing for the repeal of certain provisions upon expiration thereof

Became a law February 14, 2025, with the approval of the Governor.

Passed by a majority vote, three-fifths being present.

Text

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections 1 and 3 of a chapter of the laws of 2024 amending the state technology law relating to automated decision-making by state agencies, as proposed in legislative bills numbers S. 7543-B and A. 9430-B, are REPEALED.

Section 2. Sections 403 and 404 of the state technology law, as added by a chapter of the laws of 2024 amending the state technology law relating to automated decision-making

by state agencies, as proposed in legislative bills numbers S. B, are REPEALED.

7543-B and A. 9430-

Section 3. The article heading of article 4 and sections 401 and 402 of the state technology law, as added by a chapter of the laws of 2024 amending the state technology law relating to automated decision-making by state agencies, as proposed in legislative bills numbers S. 7543-B and A. 9430-B, are amended to read as follows:

AUTOMATED EMPLOYMENT DECISION-MAKING IN STATE GOVERNMENT

§ 401. Definitions.

For the purpose of this article:

1. “Automated employment decision-making systemtool” shall mean any software that uses algorithms, computational models, or artificial intelligence techniques, or a combination thereof, to materially automate, support, or replace human decision-making ~~and shall include, without limitation, systems that process data, and apply predefined rules or machine learning algorithms to analyze such data, and generate conclusions, recommendations, outcomes, assumptions, projections, or predictions without meaningful human discretion~~ regarding employment, including but not limited to wages and other compensation, hiring, selection for recruitment, discipline, promotion, and termination. “Automated employment decision-making systemtool” shall not include any software used primarily for basic computerized processes, such as calculators, spellcheck tools, autocorrect functions, spreadsheets, electronic communications, or any tool that relates only to internal management affairs such as ordering office supplies or processing payments, and that do not materially affect the rights, liberties, benefits, safety or welfare of any individual within the state.
2. ~~“Meaningful human review” means review, oversight and control of the automated decision-making process by one or more individuals who understand the risks, limitations, and functionality of, and are trained to use, the automated decision-making system and who have the authority to intervene or alter the decision under review, including but not limited to the ability to approve, deny, or modify any decision recommended or made by the automated system.~~
3. “State agency” shall mean any department, public authority, board, bureau, commission, division, office, council, committee or officer of the state. Such terms shall not include the legislature or judiciary.
4. ~~“Public assistance benefit” shall mean any service or program within the control of the state, or benefit provided by the state to individuals or households, including~~

~~but not limited to public assistance, cash assistance, grants, child care assistance, housing assistance, unemployment benefits, transportation benefits, education assistance, domestic violence services, and any other assistance or benefit within the authority of the state to grant to individuals within the state. This shall not include any federal program that is administered by the federal government or the state.~~

§ 402. Use of automated employment decision-making systems by agencies.

~~1. No state agency, or any entity acting on behalf of such agency, which utilizes or applies any automated decision-making system, directly or indirectly, in performing any function that: (a) is related to the delivery of any public assistance benefit; (b) will have a material impact on the rights, civil liberties, safety or welfare of any individual within the state; or (c) affects any statutorily or constitutionally provided right of an individual, shall utilize such automated decision-making system, unless such automated decision-making system is subject to continued and operational meaningful human review.~~

~~2. No state agency shall authorize any procurement, purchase or acquisition of any service or system utilizing, or relying on, automated decision-making systems in performing any function that is: (a) related to the delivery of any public assistance benefit; (b) will have a material impact on the rights, civil liberties, safety or welfare of any individual within the state; or (c) affects any statutorily or constitutionally provided right of an individual unless such automated decision-making system is subject to continued and operational meaningful human review.~~

~~3. The use of an automated decision-making system shall not affect (a) the existing rights of employees pursuant to an existing collective bargaining agreement, or (b) the existing representational relationships among employee organizations or the bargaining relationships between the employer and an employee organization. The use of an automated decision-making system shall not result in the: (1) discharge, displacement or loss of position, including partial displacement such as a reduction in the hours of non-overtime work, wages, or employment benefits, or result in the impairment of existing collective bargaining agreements; (2) transfer of existing duties and functions currently performed by employees of the state or any agency or public authority thereof to an automated decision-making system; or (3) transfer of future duties and functions ordinarily performed by employees of the state or any agency or public authority. The use of an automated decision-making system shall not alter the rights or benefits, and privileges, including but not limited to terms and conditions of employment, civil service status, and collective bargaining unit membership status of all existing employees of the state or any agency or public authority thereof shall be preserved and protected.~~ Any state agency that utilizes an automated employment decision-making tool, as defined in section four hundred one of this article, shall

publish a list of such automated employment decision-making tools on such state agency's website no later than the thirtieth of December next succeeding the date on which the amendments made to this section by a chapter of the laws of two thousand twenty-four take effect, and annually thereafter. Such disclosure shall include:

1. a description of the automated employment decision-making tool utilized by such state agency;
2. the date that the state agency use of such automated employment decision-making tool began;
3. a summary of the purpose and use of such automated employment decision-making tool; and
4. any other information deemed relevant by the agency.

Section 4. The state technology law is amended by adding a new section [103-e](#) to read as follows:

§ 103-e. Artificial intelligence (AI) inventory.

1. The office shall maintain an inventory of state agency artificial intelligence systems. The office shall issue guidance to state agencies identifying the data elements to be collected and submitted to the office for such inventory, including but not limited to the purpose and uses of the artificial intelligence systems. The inventory shall be posted on the New York state open data website on the thirtieth of December next succeeding the date this section takes effect, and annually thereafter. State agencies shall submit information required by the office at least sixty days in advance of the annual publication date. The office may withhold certain information if it determines disclosure of this information would jeopardize the security of information technology assets, or as prescribed by article six of the public officers law.
2. For purposes of this section, "artificial intelligence system" shall mean a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments that, when used, may "directly impact the public". Artificial intelligence systems use machine and human-based inputs to perceive real and virtual environments, abstract such perceptions into models through analysis in an automated manner, and use model inference to formulate options for information or action. "Artificial intelligence system" includes but is not limited to systems that use machine learning, large language model, natural language processing, and computer vision technologies,

including generative artificial intelligence. “Artificial intelligence system” shall not include basic calculations, basic automation, or pre-recorded rule-based conditional logic response systems with predefined triggers that automatically initiate predetermined actions, such as If This Then That (IFTT) systems.

3. For purposes of this section, “directly impact the public” shall mean when the use of an artificial intelligence system would control, have a material impact on, or meaningfully influence the outcome of activities that impact the safety, welfare, or rights of the public. Such activities include but are not limited to assessments or decisions about individuals including in law enforcement, housing, hiring and employment, financial, educational, or healthcare contexts, decisions regarding access to or eligibility for government benefits or about child welfare, or the functioning of emergency services or critical infrastructure.
4. The office may ask and shall receive from any state agency any information or assistance necessary to carry out its powers and duties under this section.
5. The office shall submit a copy of the artificial intelligence inventory to the governor, the temporary president of the senate, and the speaker of the assembly.

Section 5. Section 80 of the civil service law is amended by adding a new subdivision 10 to read as follows:

10.

- (a) The use of artificial intelligence systems as defined by section one hundred three-e of the state technology law shall not affect (i) the existing rights of employees pursuant to an existing collective bargaining agreement, or (ii) the existing representational relationships among employee organizations or the bargaining relationships between the employer and an employee organization.
- (b) The use of such artificial intelligence systems shall not result in the: (i) discharge, displacement or loss of position, including partial displacement such as a reduction in the hours of non-overtime work, wages, or employment benefits, or result in the impairment of existing collective bargaining agreements; or
- (ii) transfer of existing duties and functions currently performed by employees of the state or any agency or public authority thereof to an artificial intelligence system.
- (c) The use of an artificial intelligence system shall not alter the rights or benefits, and privileges, including but not limited to terms and conditions of employment, civil service status, and collective bargaining unit membership status of all existing employees of the state or any agency or public authority thereof shall be preserved and protected.

Section 6. Section 4 of a chapter of the laws of 2024 amending the state technology law relating to automated decision-making by state agencies, as proposed in legislative bills numbers S. 7543-B and A. 9430-B, is amended to read as follows:

Section 4.

This act shall take effect ~~immediately, provided that section two of this act shall take effect one year after it shall have become a law~~ July 1, 2025.

Section 7.

This act shall take effect immediately; provided, however, that sections one, two, three, four and five of this act shall take effect on the same date and in the same manner as a chapter of the laws of 2024 amending the state technology law relating to automated decision-making by state agencies, as proposed in legislative bills numbers S. 7543-B and A. 9430-B, takes effect; and provided, further, that section five of this act shall expire and be deemed repealed July 1, 2028.

History

Approved by the Governor February 14, 2025

Effective date: effect immediately; provided, however, that sections one, two, three, four and five of this act shall take effect on the same date and in the same manner as a chapter of the laws of 2024 amending the state technology law relating to automated decision-making by state agencies, as proposed in legislative bills numbers S. 7543-B and A. 9430-B, takes effect; and provided, further, that section five of this act shall expire and be deemed repealed July 1, 2028.

Sponsor

Gonzalez

NEW YORK ADVANCE LEGISLATIVE SERVICE
Copyright © 2025 LexisNexis. All rights reserved.

STATE OF NEW YORK

5441

2023-2024 Regular Sessions

IN SENATE

March 6, 2023

Introduced by Sen. SCARCELLA-SPANTON -- read twice and ordered printed,
and when printed to be committed to the Committee on Veterans, Home-
land Security and Military Affairs

AN ACT to amend the military law, in relation to employment protections
during the performance of state active duty by members of the national
guard

The People of the State of New York, represented in Senate and Assem-
bly, do enact as follows:

1 Section 1. Subdivision 1 of section 301 of the military law, as
2 amended by chapter 574 of the laws of 1959, is amended to read as
3 follows:

4 1. The term "military service" means duty by a person, male or female,
5 in the active military service of the United States as defined in
6 section one of this chapter [~~and~~]; active duty in the military service
7 of the state pursuant to an order of the governor issued pursuant to
8 section six or seven of this chapter; and state active duty by members
9 of the national guard who are activated pursuant to a call of the gover-
10 nor of this state or of any other state as provided for by law.

11 § 2. Section 317 of the military law, as added by chapter 728 of the
12 laws of 1951, subdivision 1 as amended by chapter 136 of the laws of
13 1952, subdivisions 2, 2-a and 3 as amended by chapter 312 of the laws of
14 1993, and subdivision 4 as amended by chapter 509 of the laws of 1956,
15 is amended to read as follows:

16 § 317. Reemployment in private industry. 1. In the case of any person
17 who, in order to perform military service, has left or leaves a posi-
18 tion, other than a temporary position, in the employ of any employer,
19 and who

20 (a) receives a certificate of completion of military service duly
21 executed by an officer of the applicable force of the armed forces of
22 the United States or by an officer of the applicable force of the organ-
23 ized militia of this state or of any other state as provided for by law;

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD07848-01-3

1 (b) is still qualified to perform the duties of such position; and

2 (c) makes application for reemployment within ninety days after he or
3 she is relieved from such service, if such position was in the employ of
4 a private employer, such employer shall restore such person to such
5 position, or to a position of like seniority, status and pay, unless the
6 employer's circumstances have so changed as to make it impossible or
7 unreasonable to do so.

8 2. The benefits, rights and privileges granted to persons in the mili-
9 tary service by this section shall be extended to and be applicable to
10 any person who, in order to participate in assemblies for drill or other
11 equivalent training, reserve duty training, instruction or duties, or
12 annual full-time training duty, active duty for training or other annual
13 training pursuant to any law of the United States or section forty-six
14 of this chapter or the regulations issued thereunder, or in order to
15 attend service schools conducted by the armed forces of the United
16 States, temporarily leaves or has left his or her position, other than a
17 temporary position, in the employ of any employer and who, being quali-
18 fied to perform the duties of such position, makes application for reem-
19 ployment within ten days after completion of such temporary period of
20 service.

21 2-a. The benefits, rights and privileges granted to persons in the
22 military service by this section shall be extended to and be applicable
23 to any person who, in order to perform initial full-time training duty
24 or initial active duty for training with or in an armed force of the
25 United States under the provisions of this chapter or the laws of the
26 United States or both, temporarily leaves or has left his or her posi-
27 tion, other than a temporary position, in the employ of any employer and
28 who, being qualified to perform the duties of such position, makes
29 application for re-employment within sixty days after completion of such
30 period of full-time training duty or active duty for training.

31 3. The benefits, rights and privileges granted to persons in the mili-
32 tary service by this section shall be extended to and be applicable to
33 any person who is or becomes a member of the organized militia of this
34 state or of any other state as provided for by law, or of a reserve
35 component of the armed forces of the United States and who, because of
36 such membership is discharged by his or her employer or whose employment
37 is suspended by his or her employer because of such membership and who,
38 being qualified to perform the duties of such position, makes applica-
39 tion for reemployment or termination of the period of his or her suspen-
40 sion within ten days after such discharge or suspension. These benefits,
41 rights and privileges are not applicable to persons participating in
42 routine reserve officer training corps training except when performing
43 advanced training duty as a member of a reserve component of the armed
44 forces.

45 4. Any person who is restored to a position in accordance with the
46 provisions of this section shall be considered as having been on
47 furlough or leave of absence during his or her period of military
48 service, temporary service under subdivision two or subdivision two-a
49 [~~hereof~~] of this section, or of discharge or suspension under subdivi-
50 sion three [~~hereof~~] of this section, shall be so restored without loss
51 of seniority, shall be entitled to participate in insurance or other
52 benefits offered by the employer pursuant to established rules and prac-
53 tices relating to employees on furlough or leave of absence in effect
54 with the employer at the time such person entered the military service
55 or commenced such temporary service or was so discharged or suspended,

1 and shall not be discharged from such position without cause, within one
2 year after such restoration.

3 5. In case any private employer fails or refuses to comply with the
4 provisions of this section, the supreme court of the state within the
5 county in which such private employer maintains a place of business,
6 shall have the power, upon the filing of a motion, petition or other
7 appropriate pleading, by the person entitled to the benefits of such
8 provisions, to specifically require such employer to comply with such
9 provisions, and may, as an incident thereto, compensate such person for
10 any loss of wages or benefits suffered by reason of such employer's
11 unlawful action. The court shall order a speedy hearing in any such
12 case, and shall advance it on the calendar. Any person claiming to be
13 entitled to the benefits of the provisions of this section may appear
14 and be represented by counsel, or, upon application to the attorney
15 general of the state, may request that the attorney general appear and
16 act on his or her behalf. If the attorney general is reasonably satis-
17 fied that the person so applying is entitled to such benefits, he or she
18 shall appear and act as attorney for such person in the amicable adjust-
19 ment of the claim, or in the filing of any motion, petition or other
20 appropriate pleading and the prosecution thereof. In the hearing and
21 determination of such applications under this section no fees or court
22 costs shall be assessed against a person so applying for such benefits.

23 § 3. This act shall take effect immediately.

STATE OF NEW YORK

3318

2025-2026 Regular Sessions

IN SENATE

January 24, 2025

Introduced by Sen. SCARCELLA-SPANTON -- read twice and ordered printed,
and when printed to be committed to the Committee on Veterans, Home-
land Security and Military Affairs

AN ACT to amend the military law, in relation to authorizing additional
paid leave for public employees who are absent on military duty

The People of the State of New York, represented in Senate and Assem-
bly, do enact as follows:

1 Section 1. Paragraph (a) of subdivision 5 of section 242 of the mili-
2 tary law, as amended by chapter 406 of the laws of 2017, is amended to
3 read as follows:

4 (a) Every public officer or employee shall be paid [~~his or her~~] their
5 salary or other compensation as such public officer or employee for any
6 and all periods of absence while engaged in the performance of ordered
7 military duty, and while going to and returning from such duty, not
8 exceeding a total of [~~thirty~~] sixty days or [~~twenty-two~~] fifty-two work-
9 ing days, whichever is greater, in any one calendar year and not exceed-
10 ing [~~thirty~~] sixty days or [~~twenty-two~~] fifty-two working days, whichev-
11 er is greater, in any one continuous period of such absence.

12 § 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD07300-01-5

WE ARE YOUR DOL



Department
of Labor

LACTATION

INFORMATION FOR EMPLOYERS

Rights Of Nursing Employees To Pump Breast Milk At Work

EMPLOYEES HAVE THE RIGHT TO PUMP BREAST MILK AT WORK

New York State Labor Law Section 206-c guarantees employees paid break time to pump breast milk at work.

BUSINESSES COVERED

This law applies to all public and private employers in New York State, regardless of the size or nature of the business.

EMPLOYER NOTICE REQUIREMENT

All employers are required to inform all employees about the right to take paid leave for the purpose of pumping breast milk. Employees must be informed when they are hired, and once a year thereafter. Employers must also remind every employee returning to work following the birth of a child of these rights. As an employer, you can inform your employees of this right by providing them with the New York State Department of Labor's (NYSDOL) policy through email or printed copy. The policy is available here on.ny.gov/breastmilkexpression. Employers must also notify all employees when a space has been designated for breast milk expression.

EMPLOYEE NOTICE REQUIREMENT

Employees who want to pump breast milk at work must notify their employers in advance – preferably before they return to work from maternity leave. Employees must notify employers in writing. This request can be sent through email, text message, written correspondence or any chat-based app regularly used by the organization for correspondence that allows for the retention of messages. Employers should advise employees to include the following information in their written notification: anticipated return date, details regarding how many breaks they anticipate needing during the work day, and potential preferred times to express breast milk. Upon receiving a request, employers must respond in writing within five (5) days to the employee.

DURATION OF THE RIGHT TO PUMP BREAST MILK

An employee may take break time to pump breast milk at work for up to three years following the birth of a child.

LENGTH OF BREAKS

Employers must give their employees a 30 minute paid break when the employee has a need to express breast milk. Employees may take shorter breaks if they choose. This paid time is in addition to any regularly scheduled break time or meal time. Employees may use their regularly scheduled break times or meal time for milk expression should they need additional time in excess of 30 minutes.

FREQUENCY AND SCHEDULING OF BREAKS DURING THE WORKDAY

Employers must allow employees to take breaks as often as they reasonably need to express breast milk. Each employee is different, and employers must accommodate employees based on each individual's needs.

EFFECT OF BREAKS ON OTHER BREAK TIME

As an employer, you cannot deduct paid break time for breast milk expression from the employee's regular paid break or meal time. The paid time for breast milk expression is in addition to any regularly paid break or meal time. Employees can also choose to take breast milk expression breaks right before or after their regularly scheduled paid break or meal periods.

MAKING UP BREAK TIME PROHIBITED

An employee is not required to make up the time spent expressing breast milk. You cannot require an employee to stay beyond their regularly scheduled work hours because they used paid break time to pump at work.

BREAKS OF 30 MINUTES OR LESS MUST BE PAID

Employers must pay employees for up to 30 minutes of break time to pump breast milk. Employees also have the option of using their regular paid break or meal time to pump breast milk, but they are not required to do so. Employers must continue to pay any customarily paid regular break time for an employee who pumps breast milk. Employers cannot require an employee to complete work tasks while expressing breast milk, however, an employee may voluntarily decide to do so.

PROVIDING A PLACE TO PUMP BREAST MILK

Employers are required to provide employees with a private room or other location close to the employees' work area where they can pump breast milk. If the employer can't provide a dedicated lactation room, a temporarily vacant room may be used instead. As a last resort, a cubicle can be used, but it must be fully enclosed with walls at least seven feet tall. Please review the NYSDOL's breast milk expression policy for more details regarding specific space requirements [on.ny.gov/breastmilkexpression](https://www.ny.gov/breastmilkexpression). You should consult with NYSDOL's Division of Labor Standards if you believe you cannot provide any place for an employee to pump breast milk.

BATHROOMS PROHIBITED

The room for location provided by an employer to pump breast milk cannot be a restroom or toilet stall.

LACTATION ROOM REQUIREMENTS

The place where employees pump breast milk must contain a chair and small table or other flat surface, an electrical outlet (if the workplace has electricity), good natural or artificial light, and access to a clean water supply. If there is a refrigerator, employees must be allowed to use the space to store pumped milk.

PRIVACY OF THE LACTATION ROOM

The room or place provided by the employer cannot be open to other employees, customers, or members of the public while an employee is pumping breast milk. It should have a door with a functional lock, or, in the case of a cubicle, a sign warning the location is in use and not accessible to others. If the space has windows, those windows must be covered.

DISCRIMINATION AND RETALIATION PROHIBITED

Employers may not discriminate or retaliate in any way against any employee who chooses to pump breast milk in the workplace or who files a complaint with the NYSDOL. The Department takes allegations of retaliation very seriously and will investigate promptly.

COMPLAINT PROCESS

Any party may file a confidential complaint with NYSDOL's Division of Labor Standards alleging non-compliance with this law.

SIMILAR FEDERAL LAW

Recent amendments to the Fair Labor Standards Act also protect the rights of nursing mothers to pump breast milk at work. For more information, contact the Wage and Hour Division of the U.S. Department of Labor at **1-866-4USWAGE**. The federal PUMP Act went into effect in 2023, expanding protections for almost all employees pumping breast milk at work. Under the PUMP Act, any covered workers not provided with breaks and adequate space for up to a year after the birth of a child are able to file a complaint with the U.S. Department of Labor or file a lawsuit against their employers. For more information please visit dol.gov/agencies/whd/pump-at-work.

ADDITIONAL INFORMATION

NYSDOL has issued a policy on the rights of employees to express breast milk in the workplace. The policy, which employers must provide to all employees, is available online at [on.ny.gov/breastmilkexpression](https://www.ny.gov/breastmilkexpression). In addition, you may call NYSDOL at **1-888-52-LABOR**, email NYSDOL at LSAsk@labor.ny.gov, or come in to the nearest Division of Labor Standards office for more information. A list of offices is available at [labor.ny.gov/workerprotection/laborstandards/workprot/lstdists.shtm](https://www.labor.ny.gov/workerprotection/laborstandards/workprot/lstdists.shtm).

[NY CLS Civ S § 53](#)

Current through 2025 released Chapters 1-49, 61-126

*New York Consolidated Laws Service > Civil Service Law (Arts. I — XIV) > Article IV
Recruitment of Personnel (Titles A — B) > Title A Examinations and Eligible Lists (§§ 50 — 59-d)*

§ 53. Noncitizen status.

Except as otherwise provided by law, no noncitizen lawfully admitted for permanent residence in the United States shall be denied appointment to a position in the competitive class of civil service for reasons of noncitizen status.

History

Add, L 1982, ch 133, § 4, eff June 1, 1982; [L 2022, ch 669, § 15](#), effective December 9, 2022.

Annotations

Notes

Prior Law:

Former § 53, add, L 1958, ch 790, § 1, with substance transferred in part from former § 10; amd, L 1959, ch 382, L 1963, ch 283, L 1969, ch 77, L 1970, ch 380; repealed, L 1982, ch 133, § 4, eff June 1, 1982.

Prior § 53, add, L 1947, ch 841, with substance transferred from § 56; repealed, L 1955, ch 687, eff July 1, 1956, with substance transferred to [Retire & SS L § 14](#).

Previous § 53, add, L 1920, ch 741; amd, L 1939, ch 748, L 1940, ch 392, L 1940, ch 401, L 1941, ch 394, L 1941, ch 395, L 1941, ch 399, L 1942, ch 596, L 1942, ch 857, L 1943, ch 339, L 1946, ch 793, L 1946, ch 828, L 1947, ch 416, L 1947, ch 773 L 1948, ch 503; repealed, L 1947, ch 841, eff July 1, 1948 with substance transferred to §§ 54, 60.

Editor's Notes

[Laws 2022, ch 669, § 1](#), eff December 9, 2022, provides:

§ 1. Currently, under the United States Immigration and Nationality Act, [8 U.S.C. Section 1101\(a\)\(3\)](#), the commonly used term “alien” refers to any person who is not a citizen or national of the United States. Although hundreds of years of migration has contributed to the social, economic, and political foundations of the United States, a divide between “us” and

“them” has remained crucial to the restriction of people’s migration into the United States and immigrant inclusion within the United States. This divide is expressed, among other ways, through language. The literal words used by our government through laws and regulations influence social discourse and immigration policies. Scholars and politicians alike have criticized the connotations associated with the term “alien” in federal and state laws and regulations, as synonymizing foreign-born people with criminals and outsiders. Not only do these connotations dehumanize the immigrants that elevate our cultural, civic, and economic life, but they hold power in the creation of xenophobic laws and rules resulting from legislation and judicial decisions. New York state has long valued the benefits that come with a diverse immigrant population and has held out to be a land of opportunity for all. Currently, 4.4 million immigrants live in New York state, with over three million residing in New York city. In 2018, immigrant households in New York paid \$35.4 billion in federal taxes and \$21.8 billion in state and local taxes. Immigrants comprise more than 34 percent of all self-employed New Yorkers and generated \$7.8 billion in income during 2018 alone. Immigrants throughout New York state have proven to strengthen New York’s economy and diversify social and cultural life.

To coincide with New York state’s inclusive and welcoming platform on immigration matters, the terms “alien” and “illegal alien” should be removed from all state laws. By replacing these terms with “noncitizen” and “undocumented noncitizen,” New York state will both match the language anticipated to be in federal codes and demonstrate respect and humanity to its immigrant population.

Amendment Notes

The 2022 amendment by ch 669, § 15, substituted “Noncitizen status” for “Alienage” in the section heading; and substituted “noncitizen” for “alien” and “noncitizen status” for “alienage.”

Notes to Decisions

Where applicant for examination for job as city sanitation man was not a citizen at the time the application was filed, his certification and appointment were void though applicant was a veteran and believed he was a citizen. [*Perotta v Gregory*, 4 Misc. 2d 769, 158 N.Y.S.2d 221, 1957 N.Y. Misc. LEXIS 3718 \(N.Y. Sup. Ct. 1957\)](#).

Section of the Administrative Code requiring citizenship for appointment to police force of the City of New York is not unconstitutional, and thus policeman discharged on the ground that he was not a citizen at the time of appointment was not entitled to reinstatement on the basis of unconstitutionality of more general statute requiring citizenship for appointment to any position in the competitive class. [*Di Franco v New York*, 88 Misc. 2d 852, 389 N.Y.S.2d 968, 1976 N.Y. Misc. LEXIS 2760 \(N.Y. Sup. Ct. 1976\)](#).

If discharged policeman was within class to be protected by subsequent United States Supreme Court decision holding unconstitutional section of the Civil Service Law which provides that no person shall be eligible for any position in the competitive class unless he is a citizen of the United States, neither res judicata on basis of unsuccessful challenge to the unconstitutionality

of that statute, prior to such Supreme Court decision, nor statute of limitations in that instant Article 78 proceeding was not brought within four months after determination that petitioner was not qualified would be a bar to petitioner's reinstatement. [*Di Franco v New York*, 88 Misc. 2d 852, 389 N.Y.S.2d 968, 1976 N.Y. Misc. LEXIS 2760 \(N.Y. Sup. Ct. 1976\)](#).

The court taking judicial notice of the mobility of modern society and of the numerous persons who flock to New York City and Washington, D. C. for relatively short periods in order to gain valuable experience through government employment, exclusion of permanent resident aliens from civil service employment on the grounds that they were less likely to remain in the United States during their employment life than were American citizens and thus adversely affect the efficiency and stability of the administration of the governments of New York City and the state, especially in the absence of any proof that such persons who have resided in New York or the surrounding area for a number of years and whose families reside there, would be a poorer risk for a career position in New York than an American citizen who prior to his employment with the City or State had been residing elsewhere, was invalid. [*Dougall v Sugarman*, 339 F. Supp. 906, 1971 U.S. Dist. LEXIS 10873 \(S.D.N.Y. 1971\)](#), aff'd, [*413 U.S. 634, 93 S. Ct. 2842, 37 L. Ed. 2d 853, 1973 U.S. LEXIS 147 \(U.S. 1973\)*](#).

Civil servant, unfairly denied promotion on the basis of the statute, subsequently ruled unconstitutional, failed to present evidence sufficient to sustain his action for damages resulting from the lawful discrimination. [*Arunga v New York City Dep't of Personnel*, 342 F. Supp. 983, 1972 U.S. Dist. LEXIS 13717 \(S.D.N.Y. 1972\)](#).

Opinion Notes

Agency Opinions

[*Civil Service Law § 53*](#) does not require employee in noncompetitive class to be a citizen of the United States and such an employee is not a Public Officer under § 3 of Public Officers Law. 1967 NY Ops Atty Gen Mar 1.

Research References & Practice Aids

Cross References:

This section referred to in CLS Unconsol Ch 59 § 1.

Hierarchy Notes:

[*NY CLS Civ S, Art. IV*](#)

Forms

Forms

Allegation of Discrimination on the Basis of Alienage

On _____, 20_____, plaintiff applied for appointment as _____ [position] [or applied to take the civil service examination then being given to establish the eligibility list for the position of _____] and although such position was then, and has subsequently been available, defendant wilfully failed and refused to appoint plaintiff [or to allow plaintiff to take examination] solely because of her alienage age, plaintiff then being an alien lawfully admitted for permanent residence in the United States, thereby violating the provisions of Civil Service Law § 53.

New York Consolidated Laws Service
Copyright © 2025 All rights reserved.

End of Document

Pagination

* BL

Majority Opinion >

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

NAOMI GASKIN-EL, Plaintiff, -against- 1199SSEIU NATIONAL BENEFIT FUND, Defendant.

No. 24-CV-1169 (LAP)

February 19, 2025, Filed

February 19, 2025, Decided

For Naomi Gaskin-El, Plaintiff: Steven Michael Warshawsky, Law Firm of Steven M. Warshawsky, Mount Kisco, NY.

For 1199SEIU National Benefit Fund, Defendant: Ian Andrew Weinberger, LEAD ATTORNEY, New York, NY.

LORETTA A. PRESKA, Senior United States District Judge.

LORETTA A. PRESKA

OPINION AND ORDER

LORETTA A. PRESKA, Senior United States District Judge:

Before the Court is the motion to dismiss filed by Defendant 1199SEIU National Benefit Fund (the "Fund"). (See Motion to Dismiss Plaintiff's Complaint ("Motion to Dismiss"), dated May 6, 2024 [dkt. no. 9].) Plaintiff Naomi Gaskin-El ("Plaintiff") opposes the Motion. (See Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss ("Pl. Opp'n"), dated May 28, 2024 [dkt. no. 14].) For the reasons stated below, Defendant's Motion is DENIED.

I. Background ²

A. Factual Background

Plaintiff began working at the Fund in March 2004 as a telephone representative and was promoted over the years, eventually becoming a quality control reviewer in June 2019. (See Complaint ("Compl."), dated Feb. 16, 2024 [dkt. no. 1] ¶ 19.) Plaintiff is Muslim and has been a member of the Moorish Science Temple of America for her entire life. (*Id.* ¶ 42.) The Fund is a self-funded multi-employer welfare benefit trust fund. (*Id.* ¶ 4.)

On August 27, 2021, as a result of the COVID-19 pandemic, the Fund announced that it was adopting a vaccination policy, whereby all employees were required to be fully vaccinated against COVID-19 by October 25, 2021 as a condition of employment. (*Id.* ¶ 30; see also Ex. B to the Compl. ("Ex. B") [dkt. no. 1-2].) Under the Fund's policy, "all employees [were] required to receive the COVID-19 vaccine unless a reasonable accommodation for medical or religious reasons is approved." (Ex. C to the Compl. ("Ex. C") [dkt. no. 1-3] at 1; see also Compl. ¶ 34 (quoting Ex. C).) To request a medical or religious accommodation, an employee was required to submit a request in writing to Human Resources by September 17, 2021. (Ex. C at 2; see also Compl. ¶ 35.) The policy did not notify employees as to any particular information or documentation required to be submitted as part of an accommodation request. (See Ex. C. at 2.)

In accordance with the Fund's policy, on September 16, 2021, Plaintiff submitted a timely written request for a religious accommodation. (See Compl. ¶ 39; Ex. D to the Compl. ("Ex. D") [dkt. no. 1-4].) Specifically, Plaintiff submitted a completed "Request for Accommodation" form, provided to her by the Fund (Ex. D at 1-3), and a "Declaration of Faith" certificate from the Moorish Mosque (see *id.* at 4). In the Request for Accommodation form, Plaintiff sought permission to work remotely until the COVID-19 vaccination mandate was no longer in place. (*Id.* at 1.) When asked to "describe the religious belief or practice and how it relates to COVID-19 vaccination" on the form, Plaintiff wrote "the 1st Amendment to the U.S. Constitution, Article I - religious freedom." (*Id.*) Plaintiff also explained that she was vaccinated "by force" as a child for measles [*2] and mumps. (*Id.* at 2.) On the section of the form to be completed by Plaintiff's religious leader, Yusef Ali Ibrahim, Grand Sheik, wrote that the basis of Plaintiff's "faith/beliefs which are contrary to the practice of vaccination or use of the COVID-19 vaccination" was the "U.S. Declaration of Independence," the "Bill of Rights - Amendment 1," and the "United States Constitution - Article VI." (*Id.* at 3.) In her Declaration of Faith certificate, Plaintiff declared that she "accept[s] 'Islam' as [her] Religion," and affirmed that "there is no God but 'Allah,'" and "Muhammad is the messenger of 'Allah.'" (*Id.* at 4.) In the same certificate, Plaintiff vowed to keep the fundamental principles of Islam, including daily prayers, charitable giving, fasting during Ramadan, and making the pilgrimage to Mecca once in her lifetime. (*Id.*; Compl. ¶ 43.)

On October 1, 2021, the Fund denied Plaintiff's request for a religious accommodation, explaining it had "insufficient information to identify the aspect of [her] religious belief that prevent[ed] [her] from receiving any of the available COVID-19 vaccines." (Ex. E to the Compl. ("Ex. E") [dkt. no. 1-5]; Compl. ¶ 52.) The Fund permitted Plaintiff to submit additional information for its consideration within five days, along with a Health Insurance Portability and Accountability Act ("HIPAA") disclosure consent form. (Ex. E; Compl. ¶ 52.)

On October 4, 2021, Plaintiff appealed the Fund's decision by submitting a personal statement outlining her objection to the COVID-19 vaccination policy (Ex. F to the Compl. ("Ex. F") [dkt. no. 1-6]; Compl. ¶ 56);

providing the requested HIPAA form (Ex. 1 to the Weinberger Aff. ("Ex. 1") [dkt. no. 10-1]; Compl. ¶ 57); and enclosing "additional supporting documentation" including a "document from [her] religious organization" that expressed opposition to certain vaccines (Compl. ¶¶ 57-58; Ex. 3 to the Weinberger Aff. ("Ex. 3") [dkt. no. 10-3]). In her personal statement, Plaintiff explained, "I am against the use of [sic] practice of testing vaccines on aborted fetal cell lines as is well documented. I am also against the use of all vaccines. My body is my temple and in that temple I was created with a natural immune system to guard against and fight any foreign agent." (Ex. F at 1.) Plaintiff wrote that the only prescribed medication she had taken was thyroid medication and "to the best of [her] knowledge from research it is not made from aborted fetuses, and if it is discovered that it is there are many other alternatives." (Id.) She added "[p]rior to Covid, I haven't had as much as a cold since 2013, because my GOD GIVEN immune system is working the way it was designed to as well as the natural foods and vitamins in nature." (Id.) "Please do not tell me that man made synthetic antibodies are better than my God given ones I fully believe that the Creator of all things had the Omniscience to create in nature sustenance to sustain all beings." (Id.) The document that Plaintiff attached to her statement from the "Moorish Holy Temple of Science of the World" relates to the passage of a Connecticut Bill and does not mention COVID-19 but objects to vaccines "derived from aborted fetal cell tissue" as "diametrically against our belief that [*3] no life should be 'aborted'. Let alone used as an agent to be injected into the 'temple of God.'" (Compl. ¶ 58 (quoting Ex. 3 at 9).)

On October 21, 2021, the Fund denied Plaintiff's request for a religious accommodation. (Compl. ¶ 62; Ex. G to the Compl. ("Ex. G") [dkt. no. 1-7].) The Fund determined that Plaintiff's request failed because the mRNA COVID-19 vaccines "are not derived, developed, or produced in fetal cell lines." (Ex. G at 1.) In addition, according to the Fund, "[i]f [Plaintiff's] religious belief prohibits the use of pharmaceuticals that affect, augment, or counteract the natural God-given systems of the human body and their functions, then [her] medical history would show no medications for [her] or [her] minor children." (Id.)

On November 19, 2021, following Plaintiff's failure to provide proof of vaccination in accordance with the Fund's policy, Plaintiff was terminated. (Compl. ¶¶ 76-78; Ex. H to the Compl. ("Ex. H") [dkt. no. 1-8].)

B. Procedural History

On December 13, 2023, the U.S. Equal Employment Opportunity Commission ("EEOC") issued Plaintiff a Notice of Right to Sue. (See Ex. A to the Compl. ("Ex. A") [dkt. no. 1-1].)

On February 16, 2024, Plaintiff filed her Complaint against the Fund in this Court, alleging religious discrimination for failure to accommodate Plaintiff's sincerely held religious beliefs under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (" Title VII "), the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq. ("NYSHRL"), and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 et seq. ("NYCHRL"). (Compl. ¶ 1.)

On May 6, 2024, the Fund filed its Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (See Motion to Dismiss at 1.)

II. Legal Standards

A. Pleading Standard Under Rule 12(b)(6)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *In re Actos End-Payor Antitrust Litig.*, 848 F.3d 89, 97 (2d Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. That "standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Palin v. N.Y. Times Co.*, 940 F.3d 804, 810 (2d Cir. 2019). Evaluating "whether a complaint states a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

When considering a motion to dismiss, the Court "accept[s] as true all factual allegations and draw[s] from them all reasonable inferences" in the plaintiff's favor. *Dane v. UnitedHealthcare Ins. Co.*, 974 F.3d 183, 188 (2d Cir. 2020) (cleaned up). The Court is not required, however, "to credit conclusory allegations or legal conclusions couched as factual allegations." *Id.* (ellipsis omitted). "Accordingly, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (cleaned up).

B. Incorporation of Extrinsic Documents

In determining the sufficiency of a claim under Rule 12(b)(6), a court is "normally required to look only [***4**] to the allegations on the face of the complaint." *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007). However, a court may also consider documents that are: (1) attached to the complaint; (2) incorporated by reference in the complaint; or (3) integral to the complaint, even if not explicitly incorporated by reference. *United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 106 (2d Cir. 2021); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002). The complaint "'is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.'" *Chambers*, 282 F.3d at 152 (quoting *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995)).

To incorporate a document by reference, the complaint "must make a clear, definite and substantial reference" to the document. *DeLuca v. AccessIT Grp., Inc.*, 695 F. Supp. 2d 54, 60 (S.D.N.Y. 2010) (internal quotation marks and citation omitted). This requires more than "[a] mere passing reference or even references," *Williams v. Time Warner, Inc.*, 440 F. App'x 7, 9 (2d Cir. 2011) (summary order), or a "limited quotation," *Goldman v. Belden*, 754 F.2d 1059, 1066 (2d Cir. 1985). "Even if the referenced document is relevant, the court may not consider it based on a plaintiff's 'limited and indirect citations.'" *Jacobson v. Conflict Int'l, Inc.*, No. 22-CV-10177, [2024 BL 108040], 2024 U.S. Dist. LEXIS 57836, [2024 BL 108040], 2024 WL 1348863, at *4 (S.D.N.Y. Mar. 29, 2024) (quoting *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 299 n.39 (S.D.N.Y. 2008)). In contrast, "explicit citations to specific provisions of a document are sufficient to incorporate that document by reference." *Id.* (citing *Wawa, Inc. v. Mastercard Int'l, Inc.*, No. 22-CV-03186, 2023 U.S. Dist. LEXIS 167292, [2023 BL 330301], 2023 WL 6147177, at *5 (S.D.N.Y. Sept. 20, 2023)).

"Where a document is not incorporated by reference, the court may [nevertheless] consider it where the complaint relies heavily upon its terms and effect, thereby rendering the document integral to the complaint." *AECOM*, 19 F.4th at 106; see also *Palin*, 940 F.3d at 811. However, for the Court to consider such a

document, the plaintiff must have actually "reli[ed] on the terms and effect of [the] document in drafting the complaint [M]ere notice or possession is not enough" to merit the Court's consideration. Chambers, 282 F.3d at 153.

III. Discussion

A. Introduction of Extrinsic Documents

Plaintiff attaches eight documents to her Complaint (dkt. nos. 1-1-9), all of which the Court may consider in evaluating the sufficiency of her claims. See Chambers, 282 F.3d at 152-53. The Fund submits three documents in support of the Motion to Dismiss: (1) an Authorization for Release of Protected Health Information form ("Authorization Form") signed by Plaintiff on October 4, 2021 (Ex. 1); (2) Plaintiff's prescription medication records from October 21, 2021, obtained by the Fund in accordance with the Authorization Form signed by Plaintiff (Ex. 2 to the Weinberger Aff. ("Ex. 2") [dkt. no. 10-2]); and (3) the set of documents Plaintiff submitted on October 4, 2021 in support of her appeal of the Fund's decision to deny Plaintiff a religious accommodation (Ex. 3).

The Complaint makes clear and explicit references to Exhibits 1 and 3—the Authorization Form and "additional supporting documentation, including legal materials and information" that Plaintiff submitted in appealing the Fund's denial of her religious exemption request. (Compl. ¶¶ 52, 57.) To explain her religious objection to the COVID-19 vaccination, the Complaint [*5] also quotes directly from the additional supporting documentation Plaintiff submitted. (*Id.* ¶ 58 (quoting Ex. 3 at 9).) Exhibit 1 and 3 are therefore incorporated by reference and the Court may consider them. See Chambers, 282 F.3d at 152-53.

With respect to Exhibit 2, Plaintiff's prescription medication records, the Complaint states that the Fund "invited [Plaintiff] to submit additional information in support of her request, along with a HIPAA authorization form to obtain her medication and vaccination records" and that Plaintiff then submitted the Authorization Form. (Compl. ¶¶ 52, 57.) Plaintiff further alleges that in denying her appeal, the Fund reasoned that if Plaintiff's religious beliefs prohibited "the use of pharmaceuticals that affect, augment, or counteract the natural God-given systems of the human body and their functions, then [Plaintiff's] medical history would show no medications for [her]self or [her] minor children." (*Id.* ¶ 64.) Because the Complaint makes only limited references in passing to Plaintiff's medical history, and there is no clear and explicit citation to Plaintiff's medical records, the Complaint does not incorporate Exhibit 2 by reference. See Jacobson, [2024 BL 108040], 2024 U.S. Dist. LEXIS 57836, [2024 BL 108040], 2024 WL 1348863, at *4.

The Court also concludes that the Complaint does not "rel[y] heavily upon [the] terms and effect" of Plaintiff's medical records such that they are rendered integral to the Complaint. AECOM, 19 F.4th at 106. While the Fund may have considered Plaintiff's medical records in choosing to deny Plaintiff a religious exemption, Plaintiff does not rely on her medical records to assert her claim of religious discrimination. Cf. Bonworth, Inc. v. Runway 7 Fashions, Inc., No. 17-CV-9712, 2023 U.S. Dist. LEXIS 139135, [2023 BL 274188], 2023 WL 5016321, at *9 (S.D.N.Y. June 20, 2023), report and recommendation adopted, [2023 BL 233560], 2023 U.S. Dist. LEXIS 117956, [2023 BL 233560], 2023 WL 4421871 (S.D.N.Y. July 10, 2023) (considering email that provided the "necessary predicate" for plaintiff's claim). The Court declines to consider Exhibit 2.

B. Plaintiff's Failure to Accommodate Claims

1. Title VII Claim

Plaintiff's first cause of action is a Title VII claim of employment discrimination based on the Fund's failure to accommodate Plaintiff's religious objection to its COVID-19 vaccination policy. (See Compl. ¶¶ 81-88.)

"To make out a prima facie case of religious discrimination based on a failure to accommodate in violation of Title VII," Plaintiff must allege that she "(1) [] held a bona fide religious belief conflicting with an employment requirement"; (2) [] informed [her] employers of this belief; and (3) [was] disciplined for failure to comply with the conflicting employment requirement." *Baker v. The Home Depot*, 445 F.3d 541, 546 (2d Cir. 2006). Once the employee establishes a prima facie case, "the burden then shifts to the employer to show it could not accommodate the employee[s] religious beliefs without undue hardship." *Algarin v. N.Y.C. Health + Hosps. Corp.*, 678 F. Supp. 3d 497, 508 (S.D.N.Y. 2023) (quoting *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001)), *aff'd*, No. 23-1063, [2024 BL 85061], 2024 U.S. App. LEXIS 6114, [2024 BL 85061], 2024 WL 1107481 (2d Cir. Mar. 14, 2024) (summary order). An accommodation presents an undue hardship if the employer can "show [that] a burden is substantial in the overall context of an employer's business." *D'Cunha v. Northwell Health Sys.*, No. 23-476, [2023 BL 418222], 2023 U.S. App. LEXIS 30612, [2023 BL 418222], 2023 WL 7986441, at *2 (2d Cir. Nov. 17, 2023) (summary order) (quoting *Groff [*6] v. DeJoy*, 600 U.S. 447, 468, 143 S. Ct. 2279, 216 L. Ed. 2d 1041 (2023)); accord *Kueh v. N.Y. & Presbyterian Hosp.*, No. 23-CV-00666, 2024 U.S. Dist. LEXIS 213886, [2024 BL 430315], 2024 WL 4882172, at *4 (S.D.N.Y. Nov. 25, 2024).

To survive a motion to dismiss, the "complaint need not allege facts establishing each element of a prima facie case of discrimination" but "it must at a minimum assert nonconclusory factual matter sufficient to 'nudge' [the] clai[m] 'across the line from conceivable to plausible . . .'" *E.E.O.C. v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 254 (2d Cir. 2014) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)) (quoting *Iqbal*, 556 U.S. at 680).

The Fund does not dispute that Plaintiff has sufficiently established the second and third elements of her prima facie case. Plaintiff plainly informed her employer of her religious belief by submitting 1) a written request for a religious accommodation, partially completed by her religious leader (Ex. D at 1-3); 2) a Declaration of Faith certificate from her Mosque in which Plaintiff declared she accepts Islam as her religion (*id.* at 4); and 3) a personal statement detailing her objection to the COVID-19 vaccine (Ex. F). There is also no question that Plaintiff was "disciplined for failure to comply with the conflicting employment requirement." *Baker*, 445 F.3d at 546. She was terminated for failing to submit proof of compliance with the Fund's COVID-19 vaccination policy. (Compl. ¶¶ 76-78; Ex. H.) The Fund also does not claim that affording Plaintiff an accommodation would have presented an undue hardship.

Instead, the Fund's Motion to Dismiss argues only that Plaintiff's Title VII claim must be dismissed because Plaintiff fails to allege sufficiently a bona fide religious belief. (Def. Br. at 9.) First, the Fund argues that Plaintiff does not explain "what about her religion . . . prevents her from taking a vaccine that was tested on aborted fetal cell lines" and asserts that Plaintiff's use of medications tested on fetal cell lines contradicts her purported belief. (*Id.* at 10-12.) Second, the Fund argues Plaintiff's allegation that she is opposed to all vaccines because her "body is a temple" with a "natural immune system to guard against and fight any foreign agent" is

not "connect[ed] . . . to a religious belief in the Qu'ran or any other religious text." (*Id.* at 12-13.) Such a broad statement is, in the Fund's view, "more akin to a personal belief that the vaccine is impure or dangerous[.]" (*Id.* at 13.)

Title VII defines religion to include "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). The inquiry as to whether a person's belief is religious is twofold: "whether the beliefs professed by a [plaintiff] are sincerely held and whether they are, in [her] own scheme of things, religious." *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

Both the Supreme Court and Court of Appeals have warned that courts must have a limited function in determining whether religious beliefs are protected. See, e.g., *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981); *Friedman v. Clarkstown Cent. Sch. Dist.*, 75 F. App'x 815, 818 (2d Cir. 2003) (summary order). "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task [T]he resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not [*7] be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. The inquiry "examines an individual's inward attitudes towards a particular belief system" and "[i]mpulses prompted by dictates of conscience as well as those engendered by divine commands are [] safeguarded against secular intervention, so long as the claimant conceives of the beliefs as religious in nature." *LeFevre*, 745 F.2d at 157-58 (citation omitted). In addition, the sincerity of a plaintiff's religious belief "is a question of fact—unsuitable to resolution at the motion to dismiss stage." *Gardner-Alfred v. Fed. Rsrv. Bank of New York*, 651 F. Supp. 3d 695, 721 (S.D.N.Y. 2023) (citation omitted).

The Court concludes Plaintiff has sufficiently alleged a bona fide religious belief that conflicted with the Fund's COVID-19 vaccination policy. Plaintiff alleges that she is Muslim and has been a member of the Moorish Science Temple of America for her entire life. (Compl. ¶ 42.) Her objection to the COVID-19 vaccine was twofold: 1) Plaintiff was against the practice of testing vaccines on aborted fetal cell lines, and 2) Plaintiff believes her "body is [her] temple," her "GOD GIVEN immune system" was working the way it was designed to, and "the Creator of all things had the Omniscience to create in nature sustenance to sustain all beings." (Ex. F at 1.) The Complaint explicitly states that Plaintiff's opposition to the COVID-19 vaccine was based on "long recognized religious beliefs, including her body as the temple of God, reliance on her God-given immune system, and opposition to abortion." (Compl. ¶ 59.) At the Motion to Dismiss stage, these allegations are sufficient.

The Fund's assertion that Plaintiff must cite a religious text or otherwise explain the specific aspect of her religion motivating her objection to the COVID-19 vaccine is belied by numerous decisions in this Circuit. See, e.g., *Mumin v. City of New York*, No. 23-CV-03932, [2024 BL 462411], 2024 U.S. Dist. LEXIS 228994, [2024 BL 462411], 2024 WL 5146085, at *2 (S.D.N.Y. Dec. 17, 2024) (plaintiff sufficiently alleged a sincere religious belief where she requested an exemption from the COVID-19 vaccine mandate "based on her Islamic religion, which prohibits her from being vaccinated against all conditions, ailments[,] and impairments, including the corona virus."); *Riley v. New York City Health & Hosps. Corp.*, No. 22-CV-2736, [2023 BL 52472], 2023 U.S. Dist. LEXIS 27562, [2023 BL 52472], 2023 WL 2118073, at *4 (S.D.N.Y. Feb. 17, 2023) (rejecting defendant's argument that plaintiff did not plead "why her self-identification as a 'Christian' is in conflict with Defendant's

requirement that she receive the COVID-19 vaccine" at the motion to dismiss stage); *Moore v. Montefiore Med. Ctr.*, No. 22-CV-10242, [2023 BL 397113], 2023 U.S. Dist. LEXIS 197715, [2023 BL 397113], 2023 WL 7280476, at *5 (S.D.N.Y. Nov. 3, 2023) (plaintiff set forth a prima facie case despite failing to identify her religion and allege how it conflicted with receiving the vaccine, given plaintiff's "implicit descri[ption] of herself as a Christian" based on references to Bible verses); *Algarin*, 678 F. Supp.3d at 508 (plaintiff sufficiently alleged bona fide religious belief where he informed his employer that "as a practicing Christian, his sincerely held religious beliefs prevented him from receiving 'a COVID-19 vaccine that was tested, developed, or produced with fetal cell [*8] lines derived from procured abortions.'"); *Haczynska v. Mount Sinai Health Sys., Inc.*, 738 F. Supp. 3d 300, 310 (E.D.N.Y. 2024) (plaintiff stated prima facie case where her request "cited her strong religious beliefs as a Roman Catholic and asserted that the vaccines went against her sincerely held religious beliefs because they were produced using fetal cell lines derived from aborted fetuses"); *Langer v. Hartland Bd. of Educ.*, No. 22-CV-01459, 2023 U.S. Dist. LEXIS 167136, [2023 BL 330795], 2023 WL 6140792, at *5 (D. Conn. Sept. 20, 2023) (plaintiff plausibly alleged a sincerely held religious belief despite failing to allege the name of her religion or its overall belief structures, but alleged her objection to the COVID-19 vaccine was based on "religious expression," including that she has "sincerely-held beliefs" and that "[t]esting me when I am healthy and without symptoms is coercing me to participate in an untruth, which I cannot do.").

The Fund relies on *Winans v. Cox Auto., Inc.*, where the court dismissed the Title VII claim of a plaintiff who, despite requesting both a medical and religious exemption from the COVID-19 vaccine, was not a member of a religious organization, either formal or informal. 669 F. Supp. 3d 394, 401 (E.D. Pa. 2023).³ Similarly, in *Cagle v. Weill Cornell Med.*, plaintiff failed to allege a bona fide religious belief where she baldly alleged only that "she ha[d] 'religious beliefs' and that those beliefs include 'religious practices of non-vaccination.'" 680 F. Supp. 3d 428, 435 (S.D.N.Y. 2023). Plaintiff makes factually supported allegations that her opposition to the COVID-19 vaccine was based on her Islamic beliefs—a far cry from the bare allegations of religion in *Winans* and *Cagle*.⁴

Ultimately, the Complaint raises a plausible inference that Plaintiff's objection to the COVID-19 vaccine was religious in nature. "[W]hether [Plaintiff] had a genuinely religious reason for objecting" to the COVID-19 vaccine "is a question for the parties to explore in discovery and, if necessary, to be resolved by a factfinder at trial." *Langer*, 2023 U.S. Dist. LEXIS 167136, [2023 BL 330795], 2023 WL 6140792, at *7. The Fund's Motion to Dismiss Plaintiff's Title VII claim is denied.

2. NYSHRL and NYCHRL Failure to Accommodate Claims

Plaintiff also alleges concurrent claims for failure to accommodate her religious beliefs based on the NYSHRL and NYCHRL. (See Compl. ¶¶ 89-95, 96-102.) It follows from the Court's decision on Plaintiff's Title VII claim that Defendant's Motion to Dismiss the NYSHRL and NYCHRL claims must also be denied, "as the standards applicable to those claims are either the same or more employee-friendly than the standards applicable to Title VII." *Rizzo v. New York City Dep't of Sanitation*, No. 23-CV-7190, [2024 BL 225497], 2024 U.S. Dist. LEXIS 116666, [2024 BL 225497], 2024 WL 3274455, at *3 (S.D.N.Y. July 2, 2024) (denying motion to dismiss plaintiff's Title VII, NYSHRL, and NYCHRL failure to accommodate claims); see also *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009) (explaining that "claims under the City HRL must be reviewed

independently from" and "more liberally" than their federal counterparts); *Doolittle v. Bloomberg L.P.*, [2023 BL 389569], 2023 U.S. Dist. LEXIS 194764, [2023 BL 389569], 2023 WL 7151718, at *7 (S.D.N.Y. Oct. 31, 2023) (noting that following the New York legislature's 2019 amendment to the NYSHRL, courts scrutinize discrimination claims brought pursuant to the NYSHRL under a more lenient pleading standard than Title VII claims, [*9] similar to the standard for NYCHRL discrimination claims).

IV. Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss is DENIED. The Clerk of Court is respectfully directed to close docket entry 9.

The parties and counsel shall appear for a settlement conference on March 11, 2025 at 10 a.m. in Courtroom 12A, 500 Pearl Street, New York, New York 10007. Plaintiff and a decision maker for Defendant shall attend.

SO ORDERED.

Dated: February 19, 2025

New York, New York

/s/ Loretta A. Preska

LORETTA A. PRESKA

Senior United States District Judge

fn

1

(See also Memorandum of Law in Support of Defendant's Motion to Dismiss Plaintiff's Complaint ("Def. Br."), dated May 6, 2024 [dkt. no. 11]; Affirmation of Ian A. Weinberger, Esq. ("Weinberger Aff."), dated May 6, 2024 [dkt. no. 10]; Defendants' Reply Memorandum of Law in Further Support of Defendant's Motion to Dismiss Plaintiff's Complaint ("Def. Reply"), dated June 14, 2024 [dkt. no. 17].)

fn

2

The facts in this opinion are drawn primarily from the Complaint and documents integral to the Complaint of which this Court takes judicial notice. (See *infra* Part II(B) (outlining standard for incorporating extrinsic documents).)

fn

3

Other decisions cited by the Fund which dismissed claims of failure to accommodate religious exemptions from the COVID-19 vaccination have recently been reversed. *Kiel v. Mayo Clinic Health Sys. Se. Minnesota*,

685 F. Supp. 3d 770, 783 (D. Minn. 2023), rev'd and remanded sub nom. Ringhofer v. Mayo Clinic, Ambulance, 102 F.4th 894 (8th Cir. 2024) (COVID-19 vaccination requirements conflicted with Christian plaintiffs' anti-abortion beliefs and view that the body is a temple); Passarella v. Aspirus, Inc., No. 22-CV-287, [2023 BL 79051], 2023 U.S. Dist. LEXIS 40958, [2023 BL 79051], 2023 WL 2455681, at*3-*4 (W.D. Wis. Mar. 10, 2023), rev'd and remanded, 108 F.4th 1005 (7th Cir. 2024) (Christian plaintiffs invoked Bible and asserted "[m]y body is a temple of the Holy Spirit").

fn

4

Notwithstanding the Court's decision declining to consider Plaintiff's medical records, see supra, Part III(A), the Fund's argument that Plaintiff's medication use contradicts her religious beliefs (Def. Br. at 13-14) goes to the sincerity of Plaintiff's beliefs, a question of fact inappropriate for resolution at this stage. See Gardner-Alfred, 651 F. Supp. 3d at 721.

2024 N.Y. AB 8876

Chaptered, September 4, 2024

Reporter

2024 N.Y. ALS 303; 2024 N.Y. Laws 303; 2024 N.Y. Ch. 303; 2024 N.Y. AB 8876

NEW YORK ADVANCE LEGISLATIVE SERVICE > NEW YORK 247TH ANNUAL LEGISLATIVE SESSION > CHAPTER 303 > ASSEMBLY BILL 8876

Notice

Added: Text highlighted in green

Deleted: ~~Red text with a strikethrough~~

Synopsis

AN ACT to amend the civil service law, in relation to establishing timeline standards for candidates to take competitive examinations

Became a law September 4, 2024, with the approval of the Governor.

Passed by a majority vote, three-fifths being present.

Text

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section [54](#) of the civil service law, as amended by chapter 278 of the laws of 1994, is amended to read as follows:

§ 54. Age and educational requirements.

1. Notwithstanding any provision of law to the contrary, except as herein provided, neither the state civil service department nor the state civil service commission, nor any municipal civil service commission shall prohibit, prevent, disqualify, or discriminate against, any person who is physically and mentally qualified, from participating in a civil service examination or from qualifying for a position in the classified civil service, or penalize any such person in a final rating by reason of his or her age; and any such rule, requirement, resolution, regulation or penalization shall be void. Nothing herein contained, however, shall prevent the adoption of reasonable minimum or maximum age requirements for open competitive examinations for positions where it is determined by the department and approved by the commission that such age

requirements would be reasonable minimum qualification for such position. Minimum age requirements shall in no case prohibit an applicant who is within ~~six~~twelve months of the minimum age requirement from taking any competitive examination. Nothing herein contained shall be construed to prohibit the disqualification, on account of age, of any applicant for a position who has reached the mandatory retirement age applicable by law to such position.

2. Minimum education requirements shall in no case prohibit an applicant who is within twelve months of obtaining the minimum education requirements from taking any competitive examination.

Section 2.

This act shall take effect immediately.

History

Approved by the Governor September 4, 2024

Effective date: September 4, 2024

Sponsor

Pheffer Amato

NEW YORK ADVANCE LEGISLATIVE SERVICE
Copyright © 2025 LexisNexis. All rights reserved.

End of Document

2024 N.Y. AB 9935

Chaptered, September 4, 2024

Reporter

2024 N.Y. ALS 306; 2024 N.Y. Laws 306; 2024 N.Y. Ch. 306; 2024 N.Y. AB 9935

NEW YORK ADVANCE LEGISLATIVE SERVICE > NEW YORK 247TH ANNUAL LEGISLATIVE SESSION > CHAPTER 306 > ASSEMBLY BILL 9935

Notice

Added: Text highlighted in green

Deleted: ~~Red text with a strikethrough~~

Synopsis

AN ACT to amend the civil service law, in relation to the disclosure of information to employees

Became a law September 4, 2024, with the approval of the Governor.

Passed by a majority vote, three-fifths being present.

Text

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section [72](#) of the civil service law, as amended by chapter 547 of the laws of 1984, is amended to read as follows:

1. When in the judgment of an appointing authority an employee is unable to perform the duties of ~~his or her~~ such employee's position by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workers' compensation law, the appointing authority may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction. Written notice of the facts providing the basis for the judgment of the appointing authority that the employee is not fit to perform the duties of ~~his or her~~ such employee's position, and copies of any written, electronic or other communication by the appointing authority to a medical officer or any other entity regarding the claim that such employee is unable to perform their duties pursuant to this section, shall be provided to the employee, the authorized representative of such employee and the civil service department or commission having jurisdiction prior

to the conduct of the medical examination. If, upon such medical examination, such medical officer shall certify that such employee is not physically or mentally fit to perform the duties of ~~his or her~~ such employee's position, the appointing authority shall notify such employee that ~~he or she~~ they may be placed on leave of absence. An employee placed on leave of absence pursuant to this section shall be given a written statement of the reasons therefor and complete copies of all of the documentation, reports and records relied upon by the medical officer during their examination, including any documents, reports and correspondence sent to the appointing authority at the conclusion of the examination. Such notice shall contain the reason for the proposed leave and the proposed date on which such leave is to commence, shall be made in writing and served in person or by first class, registered or certified mail, return receipt requested, upon the employee. Such notice shall also inform the employee of ~~his or her~~ their rights under this procedure. An employee shall be allowed ten working days from service of the notice to object to the imposition of the proposed leave of absence and to request a hearing. The request for such hearing shall be filed by the employee personally or by first class, certified or registered mail, return receipt requested. Upon receipt of such request, the appointing authority shall supply to the employee, ~~his or her~~ such employee's personal physician or authorized representative, copies of all diagnoses, test results, observations and other data supporting the certification, and imposition of the proposed leave of absence shall be held in abeyance until a final determination is made by the appointing authority as provided in this section. The appointing authority will afford the employee a hearing within thirty days of the date of a request by the employee to be held by an independent hearing officer agreed to by the appointing authority and the employee except that where the employer is a city of over one million in population such hearing may be held by a hearing officer employed by the office of administrative trials and hearings. If the parties are unable to agree upon a hearing officer, ~~he or she~~ such hearing officer shall be selected by lot from a list of persons maintained by the state department of civil service. The hearing officer shall not be an employee of the same appointing authority as the employee alleged to be disabled. ~~He or she~~ The hearing officer shall be vested with all of the powers of the appointing authority, and shall make a record of the hearing which shall, with ~~his or her~~ such hearing officer's recommendation, be referred to the appointing authority for review and decision and which shall be provided to the affected employee free of charge. A copy of the transcript of the hearing shall, upon request of the employee affected, be transmitted to ~~him~~ such employee without charge. The employee may be represented at any hearing by counsel or a representative of a certified or recognized employee organization and may present medical experts and other witnesses or evidence. The employee shall be entitled to a reasonable period of time to obtain such representation. The burden of proving mental or physical unfitness shall be upon the person alleging it. Compliance with technical rules of evidence shall not be required. The appointing authority will render a final determination within ten working days of the date of receipt of the hearing officer's report and recommendation. The appointing authority may either uphold the original proposed notice of leave of absence, withdraw such notice or modify the notice as appropriate. In any event, a final determination of an employee's contest of a notice of leave shall be rendered within seventy-five days of the receipt of the request for review. An employee on such leave of

absence shall be entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to ~~his or her~~ such employee's credit. The appointing authority in the final determination shall notify the employee of ~~his or her~~ such employee's right to appeal from such determination to the civil service commission having jurisdiction in accordance with subdivision three of this section.

Section 2.

This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

History

Approved by the Governor September 4, 2024

Effective date: January 1, 2025

Sponsor

Pheffer Amato

NEW YORK ADVANCE LEGISLATIVE SERVICE
Copyright © 2025 LexisNexis. All rights reserved.

End of Document

[New York State firefighter bill of rights act, 2022 N.Y. SB 8481](#)

Chaptered, December 9, 2022

Reporter

2022 N.Y. ALS 674; 2022 N.Y. Laws 674; 2022 N.Y. Ch. 674; 2022 N.Y. SB 8481

NEW YORK ADVANCE LEGISLATIVE SERVICE > NEW YORK 245TH ANNUAL LEGISLATIVE SESSION > CHAPTER 674 > SENATE BILL 8481

Notice

Added: Text highlighted in green

Synopsis

AN ACT to amend the civil service law, in relation to independent hearing officers for certain disciplinary hearings

Became a law December 9, 2022, with the approval of the Governor.

Passed by a majority vote, three-fifths being present.

Text

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Short title.

This act shall be known and may be cited as the “New York State firefighter bill of rights act”.

Section 2. Section [75](#) of the civil service law is amended by adding a new subdivision 2-a to read as follows:

2-a. Independent hearing officer. (a) Notwithstanding any other provision of law to the contrary, including but not limited to subdivision four of section seventy-six of this title, any paid officer or member of an organized fire company or fire department of a city of less than one million population, or town, village or fire district who is represented by a certified or recognized employee organization pursuant to article fourteen of this chapter shall not be subjected to the penalty of dismissal from service or any other discipline if the hearing, upon such charge, has been conducted by someone other than an independent hearing officer to be agreed to by the employer and the person against whom disciplinary action is proposed. If the parties are unable to agree upon a hearing

officer, the hearing officer shall be selected from a list of seven names to be provided by the public employment relations board. The public employment relations board shall maintain a list of independent hearing officers for this purpose. The parties shall select the hearing officer by alternately striking names from the list of seven. The hearing officer shall be vested with all powers of the appointing authority, shall conduct and make a record of the hearing, and shall render a final decision. The cost incurred in obtaining such independent hearing officer shall be divided equally between the parties; provided that as may be determined upon the circumstances of the case, the hearing officer shall be authorized to allocate such cost on the basis of the frivolous nature of any claim made or any defense interposed. In order to find a claim or defense to be frivolous, the hearing officer must find at least one of the following:

- (i) the claim or defense was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the action or to harass or maliciously injure another; or
 - (ii) the claim or defense was commenced or continued in bad faith without any reasonable basis in law or fact. If the claim or defense was promptly discontinued when the party learned or should have learned that the claim or defense lacked such reasonable basis, the hearing officer may find that the party did not act in bad faith. A person served with charges may then, however, elect in writing to proceed with a hearing pursuant to the procedures established in subdivision two of this section in lieu of the procedures set forth in this subdivision.
- (b) The rights set forth in paragraph (a) of this subdivision shall be in addition to, and shall not supplant, modify or replace any rights provided to an employee pursuant to agreements negotiated by a public employer and an employee organization pursuant to article fourteen of this chapter, or pursuant to any other provision of law, including but not limited to other provisions of this section.

Section 3. Subdivision 4 of section [201](#) of the civil service law, as amended by chapter 606 of the laws of 1992, is amended to read as follows:

4. The term “terms and conditions of employment” means:

- (a) salaries, wages, hours and other terms and conditions of employment provided, however, that such term shall not include any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void.
- (b) in addition, the terms and conditions of employment for firefighters shall include discipline and disciplinary procedures including alternatives to any statutory disciplinary system, provided, however, that any right of firefighters under the terms of any state law to elect coverage under either a statutory disciplinary system or a disciplinary system established by collective negotiations shall not be impaired, unless any such state law authorizes exclusivity of a negotiated disciplinary system and provided further that no provision contained in the town law, general city law,

second class cities law, general municipal law, municipal home rule law, county law, or other state, local, special law or charter provision, or any special police act or other special act created by local law or charter or otherwise created, or this chapter shall prevent or impair the right to collective bargaining for or modification of disciplinary procedures.

Section 4. Section [204-a](#) of the civil service law is amended by adding a new subdivision 4 to read as follows:

4. The terms of any current or expired agreement or interest arbitration award between any public employer and any public employee organization representing firefighters relating to the discipline of any firefighters shall be deemed valid and enforceable from the effective date of this subdivision.

Section 5.

This act shall take effect on the first of March next succeeding the date on which it shall have become a law and shall apply to proceedings commenced on or after such effective date. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of the provisions of this act on its effective date are authorized to be made and completed on or before such effective date.

History

Approved by the Governor December 9, 2022

Effective date: March 1, 2023

Sponsor

Jackson

NEW YORK ADVANCE LEGISLATIVE SERVICE
Copyright © 2025 LexisNexis. All rights reserved.

End of Document

STATE OF NEW YORK

5255

2025-2026 Regular Sessions

IN SENATE

February 20, 2025

Introduced by Sen. JACKSON -- read twice and ordered printed, and when printed to be committed to the Committee on Civil Service and Pensions

AN ACT to amend the civil service law, in relation to hearing procedures for certain public employees

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivision 2 and paragraph (a) of subdivision 2-a of
2 section 75 of the civil service law, subdivision 2 as amended by chapter
3 226 of the laws of 1994 and paragraph (a) of subdivision 2-a as added by
4 chapter 674 of the laws of 2022, are amended and a new subdivision 2-b
5 is added to read as follows:

6 2. Procedure; New York city employees. [~~Am~~] For any employee in the
7 service of the city of New York described in paragraph (a), (b), (c),
8 (d), or (e) of subdivision one of this section, if such employee [~~who~~]
9 at the time of questioning appears to be a potential subject of disci-
10 plinary action, such employee shall have a right to representation by
11 [~~his or her~~] their certified or recognized employee organization under
12 article fourteen of this chapter and shall be notified in advance, in
13 writing, of such right. [~~A state employee who is designated managerial~~
14 ~~or confidential under article fourteen of this chapter, shall, at the~~
15 ~~time of questioning, where it appears that such employee is a potential~~
16 ~~subject of disciplinary action, have a right to representation and shall~~
17 ~~be notified in advance, in writing, of such right.~~] If representation is
18 requested a reasonable period of time shall be afforded to obtain such
19 representation. If the employee is unable to obtain representation with-
20 in a reasonable period of time the employer has the right to then ques-
21 tion the employee. A hearing officer under this section shall have the
22 power to find that a reasonable period of time was or was not afforded.
23 In the event the hearing officer finds that a reasonable period of time
24 was not afforded then any and all statements obtained from said ques-
25 tioning as well as any evidence or information obtained as a result of

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD10013-01-5

1 said questioning shall be excluded, provided, however, that this subdi-
2 vision shall not modify or replace any written collective agreement
3 between a public employer and employee organization negotiated pursuant
4 to article fourteen of this chapter. A person against whom removal or
5 other disciplinary action is proposed shall have written notice thereof
6 and of the reasons therefor, shall be furnished a copy of the charges
7 preferred against ~~him~~ such person and shall be allowed at least eight
8 days for answering the same in writing. The hearing upon such charges
9 shall be held by the officer or body having the power to remove the
10 person against whom such charges are preferred, or by a deputy or other
11 person designated by such officer or body in writing for that purpose.
12 In case a deputy or other person is so designated, ~~he~~ they shall, for
13 the purpose of such hearing, be vested with all the powers of such offi-
14 cer or body and shall make a record of such hearing which shall, with
15 ~~his~~ their recommendations, be referred to such officer or body for
16 review and decision. The person or persons holding such hearing shall,
17 upon the request of the person against whom charges are preferred,
18 permit ~~him~~ such person against whom charges are preferred to be
19 represented by counsel, or by a representative of a recognized or certi-
20 fied employee organization, and shall allow ~~him~~ them to summon
21 witnesses in ~~his~~ their behalf. The burden of proving incompetency or
22 misconduct shall be upon the person alleging the same. Compliance with
23 technical rules of evidence shall not be required.

24 (a) Notwithstanding any other provision of law to the contrary,
25 including but not limited to subdivision four of section seventy-six of
26 this title, any paid officer or member of an organized fire company or
27 fire department of a city of less than one million population, or town,
28 village or fire district who is represented by a certified or recognized
29 employee organization pursuant to article fourteen of this chapter shall
30 not be subjected to the penalty of dismissal from service or any other
31 discipline if the hearing, upon such charge, has been conducted by some-
32 one other than an independent hearing officer to be agreed to by the
33 employer and the person against whom disciplinary action is proposed. If
34 the parties are unable to agree upon a hearing officer, the hearing
35 officer shall be selected from a list of seven names to be provided by
36 the public employment relations board. The public employment relations
37 board shall maintain a list of independent hearing officers for this
38 purpose and for the purpose described in subdivision two-b of this
39 section. The parties shall select the hearing officer by alternately
40 striking names from the list of seven. The hearing officer shall be
41 vested with all powers of the appointing authority, shall conduct and
42 make a record of the hearing, and shall render a final decision. The
43 cost incurred in obtaining such independent hearing officer shall be
44 divided equally between the parties; provided that as may be determined
45 upon the circumstances of the case, the hearing officer shall be author-
46 ized to allocate such cost on the basis of the frivolous nature of any
47 claim made or any defense interposed. In order to find a claim or
48 defense to be frivolous, the hearing officer must find at least one of
49 the following:

50 (i) the claim or defense was commenced, used or continued in bad
51 faith, solely to delay or prolong the resolution of the action or to
52 harass or maliciously injure another; or

53 (ii) the claim or defense was commenced or continued in bad faith
54 without any reasonable basis in law or fact. If the claim or defense was
55 promptly discontinued when the party learned or should have learned that
56 the claim or defense lacked such reasonable basis, the hearing officer

1 may find that the party did not act in bad faith. A person served with
2 charges may then, however, elect in writing to proceed with a hearing
3 pursuant to the procedures established in subdivision two of this
4 section in lieu of the procedures set forth in this subdivision.

5 2-b. Procedure; non-New York city employees. For any employee
6 described in paragraph (a), (b), (c), or (e) of subdivision one of this
7 section not in the service of the city of New York, the following proce-
8 cedure shall apply: An employee under this subdivision who at the time of
9 questioning appears to be a potential subject of disciplinary action
10 shall have a right to representation by their certified or recognized
11 employee organization under article fourteen of this chapter and shall
12 be notified in advance, in writing, of such right. A state employee who
13 is designated managerial or confidential under article fourteen of this
14 chapter, shall, at the time of questioning, where it appears that such
15 employee is a potential subject of disciplinary action, have a right to
16 representation and shall be notified in advance, in writing, of such
17 right. If representation is requested a reasonable period of time shall
18 be afforded to obtain such representation. If the employee is unable to
19 obtain representation within a reasonable period of time the employer
20 has the right to then question the employee. A hearing officer under
21 this section shall have the power to find that a reasonable period of
22 time was or was not afforded. In the event the hearing officer finds
23 that a reasonable period of time was not afforded then any and all
24 statements obtained from said questioning as well as any evidence or
25 information obtained as a result of said questioning shall be excluded,
26 provided, however, that this subdivision shall not modify or replace any
27 written collective agreement between a public employer and employee
28 organization negotiated pursuant to article fourteen of this chapter. A
29 person against whom removal or other disciplinary action is proposed
30 shall have written notice thereof and of the reasons thereof, shall be
31 furnished a copy of the charges preferred against such person and shall
32 be allowed at least eight days for answering the same in writing. The
33 hearing upon such charges shall be held by a hearing officer who shall
34 be selected by the mutual agreement of the person against whom discipli-
35 nary action is proposed and of the employing officer or body. If such
36 mutual agreement cannot be reached, then the hearing officer shall be
37 selected from a list of seven names to be provided by the public employ-
38 ment relations board pursuant to subdivision two-a of this section. The
39 parties shall select the hearing officer by alternately striking names
40 from the list of seven. Such hearing officer shall, for the purpose of
41 such hearing, be vested with all the powers of such officer or body and
42 shall make a record of such hearing which shall, with their recommenda-
43 tions and decision, be referred to such officer or body for implementa-
44 tion. The hearing officer holding such hearing shall, upon the request
45 of the person against whom charges are preferred, permit such person
46 against whom charges are preferred to be represented by counsel, or by a
47 representative of a recognized or certified employee organization, and
48 shall allow them to summon witnesses on their behalf. The burden of
49 proving incompetency or misconduct shall be upon the person alleging the
50 same. Compliance with technical rules of evidence shall not be required.
51 The cost incurred in obtaining the independent hearing officer shall be
52 divided equally between the parties; provided that as may be determined
53 upon the circumstances of the case, the hearing officer shall be author-
54 ized to allocate such cost on the basis of the frivolous nature of any
55 claim made or any defense interposed in the manner provided for in para-
56 graph (a) of subdivision two-a of this section. Provided, however, that

1 the provisions of this subdivision shall not supersede or apply to an
2 existing hearing officer policy and procedure that is the result of a
3 collective bargaining agreement between an employer and a recognized or
4 certified employee organization or any hearing officer policy and proce-
5 dure currently existing for state employees designated managerial or
6 confidential which was in effect on the effective date of this subdivi-
7 sion.

8 § 2. Subdivision 3 of section 75 of the civil service law, as amended
9 by chapter 710 of the laws of 1984, is amended to read as follows:

10 3. Suspension pending determination of charges; penalties; New York
11 city employees. [~~Pending~~] For any employee in the service of the city of
12 New York described in paragraph (a), (b), (c), (d), or (e) of subdivi-
13 vision one of this section, pending the hearing and determination of
14 charges of incompetency or misconduct, the officer or employee against
15 whom such charges have been preferred may be suspended without pay for a
16 period not exceeding thirty days. If such officer or employee is found
17 guilty of the charges, the penalty or punishment may consist of a reprimand,
18 a fine not to exceed one hundred dollars to be deducted from the
19 salary or wages of such officer or employee, suspension without pay for
20 a period not exceeding two months, demotion in grade and title, or
21 dismissal from the service; provided, however, that the time during
22 which an officer or employee is suspended without pay may be considered
23 as part of the penalty. If [~~he~~] such officer or employee is acquitted,
24 [~~he~~] they shall be restored to [~~his~~] their position with full pay for
25 the period of suspension less the amount of any unemployment insurance
26 benefits [~~he~~] such officer or employee may have received during such
27 period. If such officer or employee is found guilty, a copy of the
28 charges, [~~his~~] their written answer thereto, a transcript of the hear-
29 ing, and the determination shall be filed in the office of the depart-
30 ment or agency in which [~~he~~] such officer or employee has been employed,
31 and a copy thereof shall be filed with the civil service commission
32 having jurisdiction over such position. A copy of the transcript of the
33 hearing shall, upon request of the officer or employee affected, be
34 furnished to [~~him~~] such officer or employee without charge.

35 § 3. Subdivision 3-a of section 75 of the civil service law, as added
36 by chapter 753 of the laws of 1990, is amended and a new subdivision 3-b
37 is added to read as follows:

38 3-a. Suspension pending determination of charges and penalties relat-
39 ing to police officers of the police department of the city of New York.
40 [~~Pending~~] Notwithstanding the provisions of subdivision three of this
41 section, pending the hearing and determination of charges of incompeten-
42 cy or misconduct, a police officer employed by the police department of
43 the city of New York may be suspended without pay for a period not
44 exceeding thirty days. If such officer is found guilty of the charges,
45 the police commissioner of such department may punish the police officer
46 pursuant to the provisions of sections 14-115 and 14-123 of the adminis-
47 trative code of the city of New York.

48 3-b. Suspension pending determination of charges; penalties; non-New
49 York city employees. For any employee described in paragraph (a), (b),
50 (c), or (e) of subdivision one of this section not in the service of
51 the city of New York, pending the hearing and determination of charges
52 of incompetency or misconduct, the officer or employee against whom such
53 charges have been preferred may be suspended for a period not exceeding
54 thirty days. The suspension shall be with pay. If such officer or
55 employee is found guilty of the charges, the penalty or punishment may
56 consist of a reprimand, a fine not to exceed one hundred dollars to be

1 deducted from the salary or wages of such officer or employee, suspen-
2 sion without pay for a period not exceeding two months, demotion in
3 grade and title, or dismissal from the service. If such officer or
4 employee is acquitted, they shall be restored to their position. If such
5 officer or employee is found guilty, a copy of the charges, their writ-
6 ten answer thereto, a transcript of the hearing, and the determination
7 shall be filed in the office of the department or agency in which such
8 officer or employee has been employed, and a copy thereof shall be filed
9 with the civil service commission having jurisdiction over such posi-
10 tion. A copy of the transcript of the hearing shall, upon request of the
11 officer or employee affected, be furnished to such officer or employee
12 without charge.

13 § 4. This act shall take effect immediately.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

STATE OF TEXAS	§	
	§	
v.	§	CIVIL NO. 4:24-CV-499-SDJ
	§	
UNITED STATES DEPARTMENT	§	
OF LABOR, ET AL.	§	

MEMORANDUM OPINION AND ORDER

The State of Texas challenges a rule issued by the United States Department of Labor (the “Department”) that raises the minimum salary at which executive, administrative, and professional (“EAP”) employees are exempt from overtime pay under the Fair Labor Standards Act (“FLSA”)—thereby changing the exemption statuses of millions of employees. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 89 Fed. Reg. 32842 (Apr. 26, 2024) (to be codified at 29 C.F.R. pt. 541) (the “2024 Rule”).¹ Texas contends that the 2024 Rule’s changes to the salary level for the EAP-employee exemption (“EAP Exemption”) exceeds the Department’s authority under the FLSA and is otherwise unlawful.

¹ Defendants include the Department; Julie A. Su, in her official capacity as Acting U.S. Secretary of Labor; the Wage and Hour Division of the Department; and Jessica Looman, in her official capacity as Administrator of the Wage and Hour Division. Defendants will be collectively referenced herein as the “Department.”

The subject matter is familiar to the Court. In 2017, the Court permanently enjoined a similar Department regulation, the “2016 Rule,”² concluding that it increased the minimum salary for the EAP Exemption to a level that “essentially ma[de] an employee’s duties, functions, or tasks irrelevant if the employee’s salary f[ell] below the new minimum salary level,” and unlawfully “ma[de] salary rather than an employee’s duties” the determinative factor for the EAP Exemption. *Nevada v. U.S. Dep’t of Lab.*, 275 F.Supp.3d 795, 806–07 (E.D. Tex. 2017) (Mazzant, J.) (“*Nevada II*”).³

Before the Court is Texas’s Motion for Temporary Restraining Order and/or Preliminary Injunction and/or to Postpone the Effective Date of the 2024 Rule (“Injunctive Relief Motion”). (Dkt. #2). Because the Court concludes that the 2024 Rule is likely unlawful and therefore Texas is likely to succeed on the merits, and Texas otherwise meets the requirements for a preliminary injunction, the motion will be granted.

I. BACKGROUND

Enacted in 1938, the FLSA, 29 U.S.C. § 201 *et seq.*, generally requires covered employers to pay their employees at least the federal minimum wage for all hours worked and requires overtime pay to employees who work more than forty hours in a

² Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (May 23, 2016) (the “2016 Rule”).

³ The Court first preliminarily enjoined the 2016 Rule, finding that it was likely unlawful and that the movants, a coalition of States, otherwise met the requirements for injunctive relief. *Nevada v. U.S. Dep’t of Lab.*, 218 F.Supp.3d 520, 526–33 (E.D. Tex. 2016) (Mazzant, J.) (“*Nevada I*”).

week. *Id.* § 206 (minimum wage); *id.* § 207 (overtime). Among a number of exemptions from minimum wage and/or overtime requirements, Congress created the EAP Exemption for “any employee employed in a bona fide executive, administrative, or professional capacity,” as those “terms are defined and delimited” by agency regulations. *Id.* § 213(a)(1). There is no mention in the statute of any minimum salary for this exemption or, for that matter, of any compensation level associated with the EAP Exemption.

A. The EAP Exemption from 1938–2004

Notwithstanding the fact that the FLSA’s language providing for the EAP Exemption makes no mention of any minimum salary component or requirement, the Department has considered salary in some capacity since the FLSA’s inception. In 1938, the Department’s initial rule included a \$30 per week minimum salary level for executive and administrative employees to be exempt from overtime requirements. 89 Fed. Reg. at 32844. In 1940, the Department amended the rule by implementing a three-part test to determine whether an employee falls within the EAP Exemption. Under the test, an employee is exempt from overtime requirements if: (1) his job duties primarily involve executive, administrative, or professional duties (“duties test”); (2) he is paid a predetermined and fixed salary (“salary-basis test”); and (3) his salary exceeds the minimum weekly amount set by the Department (“salary-level test”). 29 C.F.R. §§ 541.100 (executive), 541.200 (administrative), 541.300 (professional). This test is still in effect today.

Initially, the salary thresholds were deliberately set low by the Department, as they were designed to “screen[] out the obviously nonexempt employees.” Harry

Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541*, 7–8 (1949) (the “Weiss Report”); *see also* Harold Stein, “*Executive, Administrative, Professional . . . Outside Salesman*” *Redefined* 21 (1940) (the “Stein Report”) (noting that in some industries, the salary threshold “is an exceedin[g]ly small protection, indeed no protection at all”). As the Department noted, “[i]n an overwhelming majority of cases . . . personnel who did not meet the salary requirements would also not qualify under other sections of the regulations as the Divisions and the courts have interpreted them,” i.e., the duties test. Weiss Report at 8. Thus, the Department’s view was that, while the salary test, set at a sufficiently low level, could serve as a proxy for identifying workers who also would not meet the duties test, the Department could not adopt a test “based on salary alone.” *Id.* at 23. Courts reached a similar conclusion, recognizing that, although salary information could be a “pertinent criterion” in “most cases,” “a person might be a bona fide executive in the general acceptance of the phrase, *regardless of the amount of salary which he receives.*” *Walling v. Yeakley*, 140 F.2d 830, 832–33 (10th Cir. 1944) (emphasis added); *see also id.* at 832 (observing that, “[o]bviously, the most pertinent test for determining whether one is a bona fide executive is the duties which he performs”).

In 1949, the Department developed a two-tiered structure in which employees could satisfy either a “long” test (combining a more rigorous duties test with a lower salary level) or a “short” test (combining a less rigorous duties test and a higher salary level). *Defining and Delimiting the Terms “Any Employee Employed in a Bona Fide Executive, Administrative, Professional or Local Retailing Capacity, or in the*

Capacity of Outside Salesman,” 14 Fed. Reg. 7705, 7705–07 (Dec. 24, 1949). The Department retained the long and short duties tests for the next five decades, but it updated the applicable salary levels in 1958, 1963, 1970, and 1975.

The Department changed the test’s structure in 2004 by discarding the long and short duties tests and replacing them with a single “standard” duties test—which was akin to the short duties test—and setting a single standard salary level at \$455 per week (\$23,660 annually). *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22126 (Apr. 23, 2004) (the “2004 Rule”). According to the Department, the \$455 standard salary level was “equivalent to the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South) and in the retail industry nationally.” 89 Fed. Reg. at 32845. This new salary level was ostensibly “comparable to the lower long test salary level used in the two-test system (i.e., if the Department’s long test salary level methodology had been applied to contemporaneous data).” *Id.*

B. The 2016 Rule

In 2016, the Department again changed the rule. Relevant here, the 2016 Rule retained the single-test structure but (1) increased the salary level from \$455 per week to \$913 per week (or from \$23,660 annually to \$47,476 annually) and (2) implemented a mechanism to automatically update the salary level triennially. 81 Fed. Reg. at 32393, 32440. The new salary level of \$913 represented a jump from the 20th percentile to the 40th percentile of weekly earnings of full-time salaried workers in the South. As the 2024 Rule notes,

The Department explained that the increase in the standard salary level was needed because, in moving from a two-test to a one-test system, the 2004 rule exempted lower-salaried employees performing large amounts of nonexempt work who had historically been, and should continue to be, covered by the overtime compensation requirement. Since the standard duties test was equivalent to the short duties test, the Department asserted that a salary level in the short test salary range—traditionally 130 to 180 percent of the long test salary level—was necessary to address this effect of the 2004 rule.

89 Fed. Reg. at 32863 (footnote omitted).

Twenty-one states and a multitude of business organizations challenged the 2016 Rule in this Court. Ruling for the challengers, the Court first preliminarily enjoined the 2016 Rule, finding that the challengers were likely to show that the Rule was unlawful and that they would be irreparably injured if the Rule went into effect. *Nevada I*, 218 F.Supp.3d at 526–33. The Court later granted summary judgment for the challengers and held that the 2016 Rule was invalid. *Nevada II*, 275 F.Supp.3d at 805–08.

The Court explained that “Congress defined the EAP [E]xemption with regard to duties. In other words, Congress unambiguously intended the exemption to apply to employees who perform ‘bona fide executive, administrative, or professional capacity’ duties.” *Id.* at 805. The Court went on to hold that, contrary to the FLSA’s plain text and Congressional intent, the 2016 Rule “ma[de] overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee’s job duties.” *Id.* at 806; *see also id.* at 807 (“By raising the salary level in this manner, the Department effectively eliminate[d] a consideration of whether an employee performs ‘bona fide executive, administrative, or professional capacity’ duties.”). Because the Department was without power to displace the FLSA’s duties-

based test with an exclusive or predominant salary-level test, the Court concluded that the 2016 Rule—including the automatic-update mechanism—was invalid. *Id.* at 807–08.

C. The 2019 Rule

Three years later, the Department tried again, ultimately promulgating its 2019 Rule. *See* *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 51230 (Sept. 27, 2019) (the “2019 Rule”). The Department began by acknowledging the problems with its 2016 Rule, as identified and explained by this Court in *Nevada I* and *Nevada II*. Observing that it had “long used a salary level test as part of its method for defining and delimiting [the EAP Exemption],” the Department reaffirmed that the test should only be used to help identify and screen out “obviously nonexempt employees.” *Id.* at 51237. The Department also recognized, “[a]n approach that emphasizes salary alone, irrespective of employee duties, would stand in significant tension with the [FLSA].” *Id.* The Department went on to explain why a “salary only” approach to the EAP Exemption runs afoul of the FLSA: “Section 13(a)(1) [of the enabling statute] directs the Department to define and delimit employees based on the ‘capacity’ in which they are employed. Salary is a helpful indicator of the capacity in which an employee is employed, especially among lower-paid employees. But it is not ‘capacity’ in and of itself.” *Id.*

The Department then candidly admitted its errors in the 2016 Rule. It explained:

By excluding from exemption, without regard to their duties, 4.2 million workers who would have otherwise been exempt because they passed the salary basis and duties tests established under the 2004 final rule, the 2016 final rule was in tension with the [FLSA] and with the Department's longstanding policy of setting a salary level that does not 'disqualify[] any substantial number of' bona fide executive, administrative, and professional employees from exemption.

Id. at 51238. The Department further conceded that “[a] salary level set that high does not further the purpose of the [FLSA], and is inconsistent with the salary level test’s useful, but limited, role in defining the EAP exemption.” *Id.*

The Department then “reexamined the 2016 final rule in light of [this Court’s *Nevada I* and *Nevada II* decisions] and the salary level’s historical purpose.” *Id.* The Department explained that the *Nevada I* and *Nevada II* decisions “underscore[] that except at the relatively low levels of compensation where EAP employees are unlikely to be found, the salary level is not a substitute for an analysis of an employee’s duties.” *Id.* Instead, salary level is, “at most, an indicator of those duties.” *Id.* The Department went on to conclude that, “[f]or most white collar, salaried employees, *the exemption should turn on an analysis of their actual functions, not their salaries, as Congress instructed.*” *Id.* (emphasis added). “The salary level test’s primary and modest purpose is to identify potentially exempt employees by screening out obviously nonexempt employees.” *Id.*

Eschewing the 2016 Rule’s dramatic changes to the EAP Exemption, the 2019 Rule retained the 2004 Rule’s methodology for calculating the standard salary level, setting the salary level equal to the 20th percentile of weekly earnings of full-time salaried workers in the South based on contemporary data. This update raised the salary level from \$455 per week to \$684 per week (or from \$23,660 annually to

\$35,568 annually). Notably, unlike the 2016 Rule, the 2019 Rule did not include a mechanism to automatically increase the standard salary level.

The 2019 Rule has been challenged as an unlawful exercise of administrative power in *Mayfield v. United States Department of Labor*, No. 1:22-CV-792-RP, 2023 WL 6168251 (W.D. Tex. Sept. 20, 2023). The *Mayfield* plaintiffs argue that the Department's use of any salary component in defining and delimiting the terms of the EAP Exemption is unauthorized by the FLSA. Rejecting this argument, the *Mayfield* court upheld the 2019 Rule. The court first explained that the Fifth Circuit's controlling decision in *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966), established the Department's ability to use salary in promulgating rules concerning the EAP Exemption. *See Mayfield*, 2023 WL 6168251, at *3. The court further concluded that, even if *Wirtz* were not controlling, the Department's implementation of the salary test squared with the EAP Exemption's text. *See id.* at *4–6. The *Mayfield* decision is on appeal before the Fifth Circuit.

D. The 2024 Rule and the Present Action

The Department's 2024 Rule reflects a return to the unlawful approach it adopted in the 2016 Rule. The 2024 Rule makes three changes to the salary aspect of the test for the EAP Exemption, each of which Texas challenges as exceeding the Department's statutory authority. *First*, the 2024 Rule raises the salary level from \$684 per week to \$844 per week (or from \$35,568 annually to \$43,888 annually) starting on July 1, 2024. 89 Fed. Reg. at 32854. Like the 2004 and 2019 Rules, this change updates the salary level to the 20th percentile of weekly earnings of full-time salaried workers in the South and/or retail industry nationally based on

contemporary data. *Id.* at 32855. The Department anticipates “approximately 1 million employees” will become non-exempt—i.e., eligible for overtime pay—as a result of this change. *Id.* at 32843.

Second, the 2024 Rule raises the salary level from \$844 per week to \$1,128 per week (or from \$43,888 annually to \$58,656 annually) starting on January 1, 2025. *Id.* at 32971. This increase is due to a departure from the 2004 Rule’s metric. Starting January 1, 2025, the salary level will be based off the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region and/or retail industry nationally—not the 20th percentile, as it has been since 2004. *Id.* at 32842, 32845. The Department expects that this change will result in an additional three million people becoming non-exempt. *Id.* at 32843.

Third, like the 2016 Rule, the 2024 Rule implements a mechanism to automatically increase the salary level triennially based on contemporary earnings data. The first automatic change—which would not require Notice and Comment—will occur on July 1, 2027. *Id.* at 32971. The Department estimates that these automatic updates will result in millions more employees becoming non-exempt.⁴ *Id.* at 32940.

Texas filed the present Injunctive Relief Motion to stop the 2024 Rule from going into effect. Texas asserts that it will be directly affected by the Rule, as it employs individuals who are currently exempt from overtime but who will become

⁴ According to the Department, the salary increases will affect 4.3 million workers in Year 1; 4.1 million in Year 2; 3.8 million in Year 3; 4.8 million in Year 4; 4.6 million in Year 5; 4.3 million in Year 6; 5.4 million in Year 7; 5.1 million in Year 8; 4.8 million in Year 9; and 6 million in Year 10. 89 Fed. Reg. at 32940.

non-exempt due to the Rule’s increases to the salary level. Texas requests that the Court preliminarily enjoin the Rule or postpone its effective date.

II. LEGAL STANDARD

A. Preliminary Injunction

A party seeking a preliminary injunction⁵ must establish “(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.” *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011) (quoting *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009)).⁶ The last two factors merge when the Government is the defendant. *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009).

“A preliminary injunction is an extraordinary remedy and should only be granted if the plaintiffs have clearly carried the burden of persuasion on all four requirements.” *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008) (cleaned up).

B. Standard of Review

Under the Supreme Court’s decision in *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), for decades

⁵ Since Defendants “received notice, made an appearance, and the issues have been fully briefed and argued by the parties,” the Court need not address Texas’s Motion for a Temporary Restraining Order. *Texas v. Becerra*, 577 F.Supp.3d 527, 537 (N.D. Tex. 2021).

⁶ These factors also govern motions to stay pursuant to 5 U.S.C. § 705. *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 241–42 (5th Cir. 2023), *rev’d on other grounds*, 144 S.Ct. 1540 (2024).

courts have sometimes been required “to defer to ‘permissible’ agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently.” *Loper Bright Enters. v. Raimondo*, 603 U.S. —, — S.Ct. —, — L.Ed.2d —, 2024 WL 3208360, at *6 (June 28, 2024). Today, the Supreme Court did away with this requirement, holding that “*Chevron* is overruled.” *Id.* at *22. The Court made clear that “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority.” *Id.* The exercise of such independent judgment, the Court explained, is rooted in the “solemn duty” imposed on courts under the Constitution to “say what the law is.” *Id.* at *9 (citing *United States v. Dickson*, 15 Pet. 141, 162, 40 U.S. 141, 10 L.Ed. 689 (1841) (Story, J.); *Marbury v. Madison*, 1 Cranch 137, 177, 5 U.S. 137, 2 L.Ed. 60 (1803)); *see also id.* (“The Framers [] envisioned that the final ‘interpretation of the laws’ would be ‘the proper and peculiar province of the courts.’”) (quoting *The Federalist* No. 78, at 525 (J. Cooke ed. 1961) (A. Hamilton))).

The exercise of independent judicial judgment to decide legal questions, the Court observed, is also embodied in the Administrative Procedure Act (“APA”), which “directs that ‘[t]o the extent necessary to decision and when presented, [a] reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” *Loper Bright*, 2024 WL 3208360, at *12 (quoting 5 U.S.C. § 706). Likewise, under the APA, a reviewing court is required to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law.” *Id.*

(quoting § 706(2)(A)). “The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment.” *Id.*

The *Loper Bright* Court recognized that a statute may authorize an agency to exercise a degree of discretion, and “some statutes ‘expressly delegate[]’ to an agency the authority to give meaning to a particular statutory term.” *Id.* at *13. The Court went on to instruct that, when a statute delegates discretionary authority to an agency, “the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits.” *Id.* at *14. Courts “fulfill[] that role by recognizing constitutional delegations, fix[ing] the boundaries of [the] delegated authority, and ensuring the agency has engaged in ‘reasoned decisionmaking’ within those boundaries.” *Id.* (cleaned up). “By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.” *Id.*

In the analysis that follows, the Court carefully follows *Loper Bright*’s controlling guidance and the APA.

III. TEXAS IS ENTITLED TO INJUNCTIVE RELIEF

A. Texas is Likely to Succeed on the Merits.

“To assess the likelihood of success on the merits, [courts] look to standards provided by the substantive law.” *Janvey*, 647 F.3d at 596 (cleaned up). Relying on the APA, Texas argues that the Department’s changes to the EAP Exemption in the 2024 Rule are “in excess of statutory jurisdiction” and are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” (Dkt. #1 at 32–35)

(citing 5 U.S.C. § 706(2)(A), (C)); *see id.* § 706(2) (requiring courts to “hold unlawful and set aside” such agency actions).⁷ At this stage, Texas need not prove that it will ultimately succeed on its claim. Instead, it need only establish that it is *likely* to succeed. *See Byrum*, 566 F.3d at 446 (“A plaintiff is not required to prove its entitlement to summary judgment in order to establish a substantial likelihood of success on the merits for preliminary injunction purposes.” (cleaned up)).

As explained below, Texas has made the requisite showing that it is likely to succeed, and thus preliminary injunctive relief is appropriate.

i. Statutory Construction

“Administrative agencies are creatures of statute.” *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117, 142 S.Ct. 661, 211 L.Ed.2d 448 (2022). Accordingly, they “must point to explicit Congressional authority justifying their decisions.” *Inhance Techs., L.L.C. v. U.S. EPA*, 96 F.4th 888, 893 (5th Cir. 2024); *see also VanDerStok v. Garland*, 86 F.4th 179, 187 (5th Cir. 2023) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.” (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988))). To determine whether a statute granted an agency the authority it claims, the Court looks to the statute’s text. *VanDerStok*, 86 F.4th at 188 (“How do we know when an agency has exceeded its statutory authority? Simple: the plain language of the statute

⁷ Texas has also asserted claims that the 2024 Rule is invalid and/or may not be applied to Texas under the major questions doctrine, the non-delegation doctrine, and the Tenth Amendment. *See* (Dkt. #1). The Injunctive Relief Motion is not premised on any of these theories, and therefore they are not considered herein.

tells us so.”); *see also BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) (explaining that statutory interpretation “begins with the statutory text, and ends there as well if the text is unambiguous”).

The FLSA exempts from overtime requirements “any employee employed in a bona fide executive, administrative, or professional capacity.” 29 U.S.C. § 213(a)(1). Congress chose not to define any of the operative terms—i.e., the terms “bona fide,” “executive,” “administrative,” “professional,” and “capacity.” Instead, it delegated to the Secretary the authority to “define[] and delimit[]” those terms. *Id.* The current three-part test described above—which considers salary, method of payment, and duties—is the Secretary’s definition and delimitation of the terms. The question before the Court is whether the text of the EAP Exemption authorizes the Secretary to increase the minimum salary level as the 2024 Rule would, changing the exemption statuses of millions of employees.

Courts construe undefined terms in accordance with their “ordinary meaning” at the time the statute was enacted. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566, 132 S.Ct. 1997, 182 L.Ed.2d 903 (2012). Dictionary definitions often serve to inform a term’s ordinary meaning. *United States v. Radley*, 632 F.3d 177, 182–83 (5th Cir. 2011). An examination of the ordinary meaning of the EAP Exemption’s undefined terms shows that the Exemption turns on an employee’s functions and duties, requiring only that they fit one of the three listed, i.e., “executive,” “administrative,” or “professional capacity.” The exemption does not turn on compensation.

To begin, at the time the FLSA was enacted, “capacity” was defined as “[o]utward condition or circumstances; relation; character; position; as in the *capacity* of a mason or carpenter.” Webster’s New Int’l Dictionary 396 (2d ed. 1934).⁸ The ordinary meaning of this term suggests a functional inquiry into the nature of an employee’s duties within his workplace and industry, rather than his compensation. The Supreme Court’s analysis of the same term, albeit in the context of another FLSA exemption, supports the Court’s view of the ordinary meaning of “capacity” in the EAP Exemption. Construing the FLSA’s outside-salesman exemption, the Court observed as follows concerning the term “capacity:” “[t]he statute’s emphasis on the ‘capacity’ of the employee counsels in favor of a functional, rather than a formal, inquiry, one that views an employee’s responsibilities in the context of the particular industry in which the employee works.” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 161, 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012). In short, the term “capacity” looks to an employee’s role in their workplace and industry.

The words “executive,” “administrative,” and “professional” are consistent with the function-based inquiry required by the EAP Exemption’s use of the term “capacity.” As this Court previously explained, each of those words focuses on “a person’s performance, conduct, or function.” *Nevada II*, 275 F.Supp.3d at 804. One contemporary dictionary defined the term “executive” to mean “[d]esigned or fitted for, or pert[aining] to, execution, or carrying into effect,” or as “[e]ffectual, active, or

⁸ See also 2 The Oxford Eng. Dictionary 89 (1933) (defining “capacity” as “holding power. . . . [A] position which enables, or renders capable. . . . Position, condition, character, relation.”).

skillful in execution.” Webster’s New Int’l Dictionary 892 (2d ed. 1934).⁹ “Administrative” was defined as “[o]f or pertaining to administration, esp[ecially] management; executive.” Webster’s New Int’l Dictionary 34 (2d ed. 1934).¹⁰ And “professional” was defined as “[o]f or pertaining to a profession, esp[ecially] a learned or skilled profession,” or as “[c]haracteristic of or conforming to the technical or ethical standards of a profession or an occupation regarded as such.” Webster’s New Int’l Dictionary 1976 (2d ed. 1934).¹¹

The plain meaning of these terms makes clear that the proper inquiry into whether someone works in an executive, administrative, or professional capacity must turn on that person’s function and duties. Each definition describes tasks or conduct—e.g., “carrying into effect,” “management,” “conforming to the technical . . . standards,” and likewise focuses on the nature of a person’s “performance,” “learning,” and “skills,” among other, similar attributes. Glaringly absent from these definitions is any mention of salary. Put simply, in the EAP Exemption, “Congress

⁹ See also 3 The Oxford Eng. Dictionary 395 (1933) (defining “executive” as one “[c]apable of performance; operative . . . Active in execution, energetic. . . . Apt or skillful in execution. . . . Pertaining to execution; having the function of executing or carrying into practical effect”).

¹⁰ See also 1 The Oxford Eng. Dictionary 118 (1933) (defining “administrative” as “[p]ertaining to, dealing with, the conduct or management of affairs; executive. . . . Of the nature of stewardship, or delegated authority. . . . An administrative body; company of men entrusted with management”).

¹¹ See also 8 The Oxford Eng. Dictionary 1428 (1933) (defining “professional” as a person “[e]ngaged in one of the learned or skilled professions, or in a calling considered socially superior to a trade or handicraft. . . . That follows an occupation as his (or her) profession, life work, or means of livelihood. . . . That is trained and skilled in the theoretic or scientific parts of a trade or occupation. . . . that raises his trade to the dignity of a learned profession”).

elected to exempt employees based on the capacity in which they are employed. It's their duties and not their dollars that really matter." *Hewitt v. Helix Energy Sols. Grp., Inc.*, 15 F.4th 289, 315 (5th Cir. 2021) (en banc) (Jones, J., dissenting).¹²

Finally, as this Court previously explained, "[t]he fact that 'bona fide' modifies the terms executive, administrative, and professional capacity suggests the exemption should apply to those employees who, in good faith, perform actual executive, administrative, or professional capacity duties." *Nevada II*, 275 F.Supp.3d at 805. As with its construction of the other EAP Exemption terms, the Court's reasoning was premised on the ordinary meaning of "bona fide" when the FLSA was enacted. *Id.* at 804–05 (noting that "bona fide" was defined to mean "[i]n good faith, with sincerity; genuinely") (quoting 1 *The Oxford Eng. Dictionary* 980 (1933)).¹³

The "bona fide" requirement is part of a phrase in the EAP Exemption, "employee *employed in* a bona fide . . . capacity,' [that] emphasizes a focus on the employee's actual duties," rather than the employee's compensation. *Hewitt*, 15 F.4th at 314 (Jones, J., dissenting). Consistent with this understanding, Fifth Circuit cases have often characterized the EAP Exemption "as applying to those 'working in' a bona fide executive, administrative or professional capacity when describing the statute." *Id.* at 314 n.20 (citing *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326,

¹² The majority opinion did not address the salary-level test under the EAP Exemption. Instead, it only considered whether an employee was a "highly compensated employee" when he was not paid on a "salary basis," as the regulation requires. *Hewitt*, 15 F.4th at 293.

¹³ See also Webster's New Int'l Dictionary 305 (2d ed. 1934) (defining "bona fide" as "[i]n or with good faith; without fraud or deceit; genuine").

331–33 (5th Cir. 2000) (recognizing the exemption applies to employees “*working in* a bona fide executive, administrative or professional capacity” (emphasis added)); *Faludi v. U.S. Shale Sols., L.L.C.*, 950 F.3d 269, 273 (5th Cir. 2020) (same); *Cowart v. Ingalls Shipbuilding, Inc.*, 213 F.3d 261, 266 (5th Cir. 2000) (same). Thus, the “bona fide” requirement points to Congress’s intent that the EAP Exemption apply only to employees who genuinely perform EAP “tasks” in their employment and to deny the Exemption to employees who merely enjoy a lofty job title without commensurate EAP duties.¹⁴

* * *

The plain text of the EAP Exemption allows the Department to define and delimit¹⁵ the Exemption’s operative terms, all of which concern an employee’s duties—not his salary. Since the ordinary meaning of the EAP Exemption focuses

¹⁴ Fifth Circuit precedent reflects a similar construction regarding the seaman exemption, which applies to “any employee *employed as a seaman.*” 29 U.S.C. § 213(b)(6) (emphasis added); *see, e.g., Dole v. Petroleum Treaters, Inc.*, 876 F.2d 518, 523 (5th Cir. 1989) (recognizing that the “italicized words mean something” and are not “mere tautology”; instead they “warn us to look to what the employees do” rather than “rest on a matter of a name, or the place of their work” (quoting *Walling v. W.D. Haden Co.*, 153 F.2d 196, 199 (5th Cir. 1946))).

¹⁵ While the Secretary has “broad latitude to ‘define and delimit’” the EAP Exemption, *Wirtz*, 364 F.2d at 608, the definition and delimitation cannot be at odds with the text. *See Inhance Techs.*, 96 F.4th at 893 (explaining that agencies “must point to explicit Congressional authority justifying their decisions”); *see also Nat’l Pork Producers Council v. U.S. EPA*, 635 F.3d 738, 753 (5th Cir. 2011) (“[C]ourts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with the statutory mandate or that frustrate the congressional policy underlying a statute. . . . [A]n agency’s authority is limited to what has been authorized by Congress.” (cleaned up)).

solely on duties, any rule implementing the EAP Exemption—including the 2024 Rule—must likewise center on duties.¹⁶

ii. The 2024 Rule’s Salary Changes Likely Fall Outside of Congress’s Grant of Authority.

Texas is likely to succeed on its claim that the 2024 Rule’s changes to the minimum salary level contravene the plain text of the EAP Exemption and that the 2024 Rule therefore impermissibly exceeds the Department’s authority to define and delimit the EAP Exemption.

As explained herein, *see supra* Part III.A.i, the EAP Exemption mandates that “any employee employed in a bona fide executive, administrative, or professional capacity” be exempted from the overtime requirements. 29 U.S.C. § 213(a)(1). This language turns on consideration of an employee’s duties, not her salary. In this regard, the Court notes that the Fifth Circuit has concluded that the Department’s creation of a salary-level component falls within the bounds of the EAP Exemption’s statutory text when appropriately set. *See Wirtz*, 364 F.2d at 608 (rejecting the argument that “the minimum salary requirement is not a justifiable regulation under [the FLSA],” and concluding the then-applicable salary threshold was not “arbitrary

¹⁶ It’s worth noting that judicial concern about the Department’s creation of a salary component to determine the application of the EAP Exemption is not new. To the contrary, courts were wary of the Department’s use of a salary-based test from the veritable get-go. As one court observed not long after the introduction of the salary test, although salary information could be a “pertinent criterion” in “most cases,” “a person might be a bona fide executive in the general acceptance of the phrase, *regardless of the amount of salary which he receives.*” *Yeakley*, 140 F.2d at 832–33 (emphasis added); *see also id.* at 832 (observing that, “[o]bviously, the most pertinent test for determining whether one is a bona fide executive is the duties which he performs”). Then, as now, courts recognized that the duties test is the predominant consideration, and that the Exemption may apply to any number of employees “regardless of the amount of salary” that they receive. *Id.*

or capricious”). But, as this Court concluded in *Nevada II*, *Wirtz’s* approval of the Department’s salary thresholds that were in effect over fifty years ago¹⁷ cannot be extended to bless *any and all* salary thresholds adopted by the Department. *See Nevada II*, 275 F.Supp.3d at 805 & n.5. Indeed, the Department itself has recognized that, notwithstanding *Wirtz*, it has no authority to adopt a “salary only” test for the EAP Exemption. Specifically, the Department has stated that, “[a]n approach that emphasizes salary alone, irrespective of employee duties, would stand in significant tension with the [FLSA].” 84 Fed. Reg. at 51237. Tension indeed. By any measure, a salary requirement that effectively displaces the only EAP Exemption test authorized by statutory text, i.e., the duties test, flatly contravenes the Department’s authority under the FLSA.

Which brings the Court to the substance of the 2024 Rule. As the New York Yankees’ (inarguably) best catcher is reported to have said, this is “déjà vu all over again.” *United States v. Lee*, 966 F.3d 310, 323 (5th Cir. 2020) (quoting Yogi Berra). In its 2024 Rule, the Department once again seeks to implement sweeping changes to the EAP Exemption’s regulatory framework, designed on their face to effectively displace the FLSA’s duties test with a predominant, if not exclusive, salary-level test.¹⁸ On July 1, the 2024 Rule will increase the salary level from \$684 per week to

¹⁷ At that time, the relevant salary level was \$100 per week.

¹⁸ The Department’s response to the injunctive relief motion focuses primarily on the July 1 change, explaining that it is “not addressing the merits” of the January 1 change or the triennial update mechanism because those changes can be “comprehensively addressed through summary-judgment briefing.” (Dkt. #22 at 30). However, as explained below, *see*

\$844 per week.¹⁹ 89 Fed. Reg. at 32971. Further, where the 2016 Rule attempted to dramatically raise the salary threshold level for the EAP Exemption from the 20th percentile to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region (the South) and/or in the retail industry nationally, the 2024 Rule similarly raises the salary threshold level from the 20th percentile to the 35th percentile on January 1. *Id.* Likewise, imitating the 2016 Rule, the 2024 Rule puts in place a mechanism that automatically updates the minimum salary requirements to even higher levels every three years. *Id.* at 32973. According to the Department, in the first year that the 2024 Rule is effective, more than four million employees all over the country will lose their exempt status. *See id.* at 32901, Table 4. In succeeding years, millions more employees will lose their exempt status. *See id.*; *id.* at 32940.

Thus, when the 2024 Rule goes into effect, the Department calculates that one million exempt employees will wake up on July 1 non-exempt—i.e., entitled to overtime pay. *Id.* at 32843. On January 1, the same thing will happen to another three million employees. *Id.* Then, on July 1, 2027, and every three years thereafter, millions more employees will have their statuses changed. Nothing about these employees' jobs will have changed. Their duties and salaries will be identical both before and after the increases. Rather, the only changes determining their statuses

infra Part IV.B, all aspects of the 2024 Rule are ripe for review. The Court thus considers all relevant changes in this discussion.

¹⁹ Although the Department attempts to distinguish the July 1 change because it accords with the Department's prior practice, the fact remains that one million employees will become non-exempt on account of this salary change alone.

and making them non-exempt will be increases to the minimum salary level in the Acting Secretary's definition and delimitation of the EAP Exemption.²⁰

If this sounds like something the Department itself has already admitted cannot be reconciled with the FLSA's text or the Department's own "longstanding policy," that's because it is. Winding our time machine back just a few years, here is what the Department said in 2019 about similar, dramatic changes regarding salary thresholds it attempted to implement in the 2016 Rule that this Court invalidated:

By excluding from exemption, without regard to their duties, 4.2 million workers who would have otherwise been exempt because they passed the salary basis and duties tests established under the 2004 final rule, the 2016 final rule was in tension with the [FLSA] and with the Department's longstanding policy of setting a salary level that does not disqualify[] any substantial number of bona fide executive, administrative, and professional employees from exemption.

84 Fed. Reg. at 51238 (cleaned up). The Department further conceded that "[a] salary level set that high does not further the purpose of the [FLSA], and is inconsistent with the salary level test's useful, but limited, role in defining the EAP exemption."

*Id.*²¹ The Department has also previously acknowledged that it has no "specific

²⁰ In direct contravention of the FLSA's requirement that duties be the primary (if not sole) consideration, the Department acknowledges that the 2024 Rule will mean that "firms will no longer be required to apply the duties test to the 8.7 million employees earning above the current standard salary level of \$684 and less than the new standard salary level of \$1,128." 89 Fed. Reg. at 32910.

²¹ Although the 2016 Rule set the salary level at the 40th percentile of weekly earnings of full-time salaried workers in the South and/or in the retail industry nationally, and this Rule retains the 20th percentile metric for the July 1 change and increases the metric to the 35th percentile for the January 1 change, the fact remains that millions of employees' statuses will be changed due to the increases to salary level alone. Thus, even though these increases are not as "high" as those in the 2016 Rule, the rationale for finding these changes unlawful remains the same: status cannot turn on salary. Period.

Congressional authorization” to implement an “automatic updating” mechanism, or for that matter “a salary level or salary basis test.” 81 Fed. Reg. at 32431.

The Department was right when it reached these conclusions about the limits of its authority.²² And while the Acting Secretary may have had a profound change of heart since then, the Court hasn’t. The application of a salary threshold for the EAP Exemption only comports with the Department’s authority under the FLSA, if at all, to the extent such threshold serves as a plausible proxy for the categories of employees otherwise exempted by the duties test. To understand why this is so, one need only look to the FLSA’s unambiguous text. Congress created the EAP Exemption for “*any employee* employed in a bona fide executive, administrative, or professional capacity.” 29 U.S.C. § 213(a)(1) (emphasis added). It is axiomatic that courts give meaning to every word in a statute and that we understand Congress to “mean what it says.” *Loughrin v. United States*, 573 U.S. 351, 358, 134 S.Ct. 2384, 189 L.Ed.2d 411 (2014) (explaining that it is a “cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute” (cleaned up)); *see also Simmons v. Himmelreich*, 578 U.S. 621, 627, 136 S.Ct. 1843, 195 L.Ed.2d 106 (2016) (“[W]e presume Congress says what it means and means what it says.”).

The EAP Exemption says “any employee” who meets the duties test is entitled to the Exemption—not “most” employees who meet the duties test (plus a salary

²² Notably, in the 2019 Rule, the Department acknowledged that the 2016 Rule was at odds with the FLSA’s purpose because “it would have newly disqualified 4.2 million workers from exemption simply because of their salaries, regardless of their duties.” 84 Fed. Reg. at 51241. The 2024 Rule would disqualify millions more based on their salaries alone. *See supra* note 3.

threshold) or “some” employees who meet the test (plus a salary threshold). And as the Court has already explained, *see supra* Part III.A.i, the terms and phrasing of the FLSA-authorized duties test make clear it has nothing to do with compensation, only the tasks, duties, and functions of the employee. That means a Department-invented test, untethered to the text of the FLSA, that systematically deprives employees of the EAP Exemption when they otherwise meet the FLSA’s duties test, is necessarily unlawful.²³

That’s precisely the concern with the 2024 Rule. The Court concludes that the 2024 Rule likely is not based on a permissible construction of Section 213(a)(1). As was true of the 2016 Rule, the salary level thresholds imposed under the 2024 Rule “effectively eliminate” consideration of whether an employee performs “bona fide executive, administrative, or professional capacity” duties in favor of what amounts to a salary-only test. *See Nevada II*, 275 F.Supp.3d at 807. And, as this Court previously held, “[n]othing in Section 213(a)(1) allows the Department to make salary rather than an employee’s duties determinative of whether a ‘bona fide executive, administrative, or professional capacity’ employee should be exempt from overtime

²³ In the 2024 Rule, the Department acknowledges that, “[i]nvariably, any attempt to pair a single salary level with the current duties test will result in some employees who perform substantial amounts of nonexempt work being exempt, and some employees who perform almost exclusively exempt work being nonexempt. But such a result is inherent in setting any salary level.” 89 Fed. Reg. at 32870. This reasoning is in tension with the Department’s concessions that any salary test must be limited to a “modest” role as compared to the statutorily-authorized duties test, 84 Fed. Reg. at 51238, serving only as a proxy to “screen[] out the obviously nonexempt employees,” Weiss Report at 8. The salary-level test’s inherent under- and over-inclusion of employees who perform EAP duties heightens the Court’s concern that the test is at odds with the EAP Exemption’s mandate that “*any employee*” who works in an EAP capacity must be exempt from overtime. 29 U.S.C. § 213(a)(1) (emphasis added).

pay.” *Id.* at 807. In sum, since the EAP Exemption requires that exemption status turn on duties—not salary—and the 2024 Rule’s changes make salary predominate over duties for millions of employees, the changes exceed the authority delegated by Congress to define and delimit the relevant terms. Therefore, these changes to the minimum salary level are likely “in excess of statutory jurisdiction.” 5 U.S.C. § 706(2)(C).²⁴

B. The 2024 Rule Will Irreparably Harm Texas.

The Court next considers whether Texas will suffer irreparable harm absent an injunction. “In general, a harm is irreparable where there is no adequate remedy at law, such as monetary damages.” *Janvey*, 647 F.3d at 600. Texas, as an employer of employees who would become non-exempt if the 2024 Rule goes into effect, asserts that it will have to (1) raise its employees’ salaries, (2) pay one-and-a-half times the employees’ rates for any time worked over forty hours, or (3) prohibit the employees from working over forty hours in a week.

Although the first two injuries are economic, they still are likely unrecoverable, as “federal agencies generally enjoy sovereign immunity for any monetary damages.” *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021). For this reason, “complying with [an agency order] later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance

²⁴ Texas also argues that the 2024 Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in violation of Section 706(2)(A) of the APA. However, the Court need not address that argument herein, as the Court’s conclusion that the Department likely exceeded its authority is sufficient to warrant preliminary injunctive relief.

costs.” *Id.* (quoting *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016)). Thus, if the 2024 Rule is not enjoined now but is set aside at a later juncture, Texas will likely be unable to recover any of the costs that it should not have incurred in the first place. This includes both the increased wages it would be forced to pay to newly non-exempt employees, as well as the administrative costs of actually implementing the Rule statewide.

The Department acknowledges that implementation of the Rule will impose significant costs. As explained in the 2024 Rule,

Based on the economic impact analysis of this final rule, the Department determined that Year 1 costs for state and local governments would total \$197.7 million, of which \$98.9 million are direct employer costs and \$98.8 million are payroll increases. In subsequent years, state and local governments may experience payroll increases of as much as \$183.7 million (in year 10 of the rule).

89 Fed. Reg. at 32968–69. Notably, the “direct employer costs” include “[r]egulatory familiarization,”²⁵ “[a]djustment,” and “[m]anagerial”²⁶ costs. *Id.* at 32969. At least some of these costs would be incurred by Texas. *See* (Dkt. #31-1) (declaration of Texas agent stating that eighty-eight employees would be impacted by the Rule on July 1

²⁵ As to familiarization costs, the Department admits that it “assumes that all entities will incur some regulatory familiarization costs, even if they do not employ exempt workers, because all entities will need to confirm whether this rulemaking affects their employees.” 89 Fed. Reg. at 32908.

²⁶ The 2024 Rule specifically contemplates “ongoing managerial costs because the employer may spend more time developing work schedules and closely monitoring an employee’s hours to minimize or avoid paying that employee overtime. For example, the manager of a newly nonexempt worker may have to assess whether the marginal benefit of scheduling the worker for more than 40 hours exceeds the marginal cost of paying the overtime premium.” 89 Fed. Reg. at 32910. This admission conflicts with the Department’s contention that the “wage growth update does not require any employer to raise any employee’s salary or to prohibit any employee from working overtime hours.” (Dkt. #22 at 20).

and nearly 4,000 employees will be impacted on January 1); *see also* (Dkt. #31-1 ¶ 8) (“[T]he fiscal impact of the increased salaries required to maintain the state employees at their hourly exempt status may require the affected agencies to rebalance their biennium budget requests between the additional personnel costs and away from programs and services. . . . [T]here is no guarantee that the new non-exempt positions will be funded. Should the rule go into effect . . . it will have a significant economic impact on the agencies that provide health services, legal services, criminal justice, transportation, and protect the environmental quality in our State and its citizens.”).

The third injury—loss of labor—is likewise irreparable. Prohibiting employees from working over forty hours in a week deprives Texas of the benefit of the additional labor those employees otherwise would have performed. Future monetary relief (presuming Texas would be able to recover such relief) is an inadequate substitute for services that need to be performed today.

The Department counters that only eighty-eight of Texas’s employees will become non-exempt on July 1, and that any compliance costs would be de minimis. As to Texas’s effected employees, the Court notes that the Department does not contest that at least some of Texas’s employees would become non-exempt on July 1 if the Rule goes into effect—meaning that Texas would be required to pay them overtime for any hours they work over forty. The Department’s Rule forces Texas to pay its effected employees time-and-a-half for their overtime, increase their salaries to the minimum salary level to return them to non-exempt status, or forbid them from

working more than forty hours in a week. This certainly accounts for at least a portion (however small) of the \$98.8 million in payroll increases the Department anticipates.

Nor is the Court persuaded by the Department's assertion that Texas's compliance costs will be "de minimis," particularly given the Department's estimate that such costs will amount to \$98.9 million for state and local governments in the *first year* of the Rule's implementation. Although it is unclear precisely what portion of this nearly \$100 million bill Texas must pay, the Department could not seriously contend that Texas will incur *no* expenses—or even de minimis expenses—as a result of the Rule, particularly given that Texas is the second largest government employer among the States.²⁷ And so long as a plaintiff shows that it is likely to suffer more than de minimis harm, "it is not so much the magnitude but the irreparability that counts." *Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022) (cleaned up). In this regard, based on the record before the Court at this time, including the Department's analysis and estimates of the 2024 Rule's impact, it appears that the Rule will compel Texas to expend unrecoverable taxpayer dollars or forego unrecoverable labor, as well as impose unrecoverable "[r]egulatory familiarization," "[a]djustment," and "[m]anagerial" costs. 89 Fed. Reg. at 32969. As the Fifth Circuit has explained, unrecoverable harm is irreparable harm. *See Janvey*, 647 F.3d at 600. Texas has thus met the irreparable-harm prong of the preliminary injunction analysis.

²⁷ See U.S. Census Bureau, *2023 Annual Survey of Public Employment and Payroll (ASPEP): State Government Employment & Payroll Data* column C (2023), <https://www.census.gov/programs-surveys/apes/data/datasetstables/2023.html>.

C. The Balance of Equities and the Public Interest Favor Texas.

The final preliminary injunction considerations—the balance of equities and the public interest—also weigh in favor of enjoining the 2024 Rule. As the Supreme Court has explained, “[t]hese factors merge when the Government is the opposing party.” *Nken*, 556 U.S. at 435. When balancing the equities, the Court “looks to the relative harm to both parties if the injunction is granted or denied.” *Nuziard v. Minority Bus. Dev. Agency*, — F.Supp.3d —, No. 4:23-CV-00278-P, 2024 WL 965299, at *45 (N.D. Tex. Mar. 5, 2024) (citing *Def. Distributed v. U.S. Dep’t of State*, 838 F.3d 451, 460 (5th Cir. 2016)). And when evaluating public interests, the Court must be particularly mindful of the public consequences of an injunction. *Id.* at *46.

As explained above, Texas has shown that the 2024 Rule is likely an unlawful exercise of agency power. And the “public interest is in having governmental agencies abide by the federal laws that govern their existence and operations.” *Texas v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021) (cleaned up). In other words, “there is generally no public interest in the perpetuation of unlawful agency action.” *Id.* at 560 (cleaned up).

On the other hand, the Department argues that the public interest and the balance of equities favor denying injunctive relief and letting the 2024 Rule go into effect. It contends that the increase to the salary level will “return overtime protections to many low-wage employees who gained those protections under the 2019 EAP Rule, only to lose them as wages grew approximately 23% in the intervening five years.” (Dkt. #22 at 32). But this admission serves only to underscore that the 2024 Rule is designed to operate as a salary-only test for the EAP Exemption,

which is precisely the reason the Court suspects the Rule to be unlawful. Again, the public interest is not served by the implementation of a rule that is likely unlawful.

Finally, the Court expects that this case will be resolved in a matter of months through summary-judgment practice. Thus, if the 2024 Rule is ultimately determined to be lawful, then a preliminary injunction will only delay the effective date of the Rule for a short time. Such a limited delay does not alter the balance of equities, which otherwise favors the entry of a preliminary injunction.

* * *

In sum, Texas has established that all factors weigh in favor of granting a preliminary injunction. Texas is likely to succeed in showing that the 2024 Rule is an unlawful exercise of power, Texas will be irreparably harmed absent an injunction, and the balance of equities and the public interest favor preventing unlawful agency action.

IV. SCOPE OF RELIEF

A. Geographic Limits

Having concluded that Texas has sufficiently established the four requirements for injunctive relief, the Court now must consider the proper scope of such relief. The Court is guided by general principles of equity that apply when fashioning preliminary relief. Typically, such relief should not be “more burdensome to the defendant than necessary to [redress]’ the plaintiff’s injuries.” *Labrador v. Poe*, — U.S. —, 144 S.Ct. 921, 923, — L.Ed.2d — (2024) (Gorsuch, J., concurring) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)); see also *Gill v. Whitford*, 585 U.S. 48, 68, 138 S.Ct. 1916, 201 L.Ed.2d 313

(2018) (“[A] remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established.” (cleaned up)). Because the Court is granting relief based on Texas’s likelihood of success on its APA claim, the Court is also guided by 5 U.S.C. § 705, which states that the Court “may,” under certain “conditions[,] . . . and to the extent necessary to prevent irreparable injury, . . . issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.” Section 705 provides the Court with substantial discretion to fashion a preliminary remedy appropriate to the circumstances of each case. It neither requires nor prohibits relief that is nationwide in scope.²⁸

Here, the only party before the Court is the State of Texas, in its capacity as an employer, suing to prevent the 2024 Rule from going into effect.²⁹ Texas has put

²⁸ Fifth Circuit precedent supports the Court’s authority to enter universal relief postponing the effective date of the 2024 Rule under Section 705. *See, e.g., Braidwood Mgmt., Inc. v. Becerra*, — F.4th —, 2024 WL 3079340, at *13–14 (5th Cir. June 21, 2024) (explaining that vacatur under Section 706 is the “default remedy for unlawful agency action,” and that Section 706 has “nationwide effect, is not party-restricted, and affects persons in all judicial districts equally” (cleaned up)); *Career Colls. & Schs. of Tex. v. U.S. Dep’t of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024) (explaining that “the scope of preliminary relief under Section 705 aligns with the scope of ultimate relief under Section 706, which is not party-restricted and allows a court to ‘set aside’ an unlawful agency action”). However, the Court does not read this precedent to mean that it *must* enter universal relief any time it finds a regulation likely violates the APA. Indeed, the plain language of Section 705 indicates wide discretion to enter tailored relief. *See* 5 U.S.C. § 705 (emphasizing the authority of reviewing courts to use differing tools, including but not limited to the postponement of the effective date of an agency action, as may be necessary “to prevent irreparable injury”).

²⁹ A second case challenging the 2024 Rule is also before this Court: *Plano Chamber of Commerce v. United States Department of Labor*, Cause No. 4:24-CV-468 (E.D. Tex.). The plaintiffs in that case, a coalition of Texas and national trade associations and businesses, have not moved for preliminary injunctive relief.

on evidence of its own injuries as an employer, but has not otherwise offered any evidence of injuries to other entities or individuals. Under the circumstances, a preliminary injunction focused on Texas comports with the procedural posture of the case and the record before the Court, and will preserve Texas’s rights while fully insulating it from harm. *See Braidwood Mgmt.*, 2024 WL 3079340, at *16–17 (affirming district court’s judgment insofar as it enjoined the defendants from enforcing the preventive-care mandates against the plaintiffs it found had standing and reversing its entry of universal remedial relief); *Louisiana v. Becerra*, 20 F.4th 260, 264 (5th Cir. 2021) (affirming district court’s entry of preliminary injunction as to fourteen plaintiff states and reversing as to entry of nationwide preliminary injunction). Moreover, limiting injunctive relief to Texas is not “unwieldy,” nor will it cause confusion “for geographic reasons,” since it is limited to a single employer, the State of Texas, that has identified employees who would be affected by the 2024 Rule on July 1. *Braidwood Mgmt.*, 2024 WL 3079340 at *16 (finding party-restricted injunction to be appropriate where all plaintiffs resided in two neighboring counties). For these reasons, relief tailored to avoiding irreparable injury to Texas, and maintaining the status quo as to Texas, is appropriate.

B. Substantive Limits

The Department argues that any injunctive relief should only address the July 1 salary increase, as the other changes—the January 1 increase and the automatic updating mechanism—will not go into effect until after the Court could consider the merits on motions for summary judgment. Essentially, the Department argues that

the January 1 increase and the automatic updating mechanism changes are not ripe for consideration. The Court disagrees.

“A challenge to administrative regulations is fit for review if (1) the questions presented are ‘purely legal one[s],’ (2) the challenged regulations constitute ‘final agency action,’ and (3) further factual development would not ‘significantly advance [the court’s] ability to deal with the legal issues presented.’” *Texas v. United States*, 497 F.3d 491, 498–99 (5th Cir. 2007) (quoting *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 812, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2002)). Here, the only questions are legal ones—specifically, whether the Department’s changes to the EAP Exemption rule comport with the statute, or whether the Department is without authority to make such changes. The regulations also constitute final agency action, “as they are final rules that were promulgated through a formal, notice-and-comment rulemaking process after announcement in the *Federal Register*.” *Id.* at 499. Although some provisions of the Rule will not go into effect for some time, the Rule itself has all the characteristics of a final agency action. Finally, no further factual development is needed to adjudicate this case.

Since the 2024 Rule is ripe for review, the Court finds it appropriate to enjoin all provisions of the 2024 Rule that are likely to be held unlawful—specifically, the changes to the salary-level component of the EAP Exemption rule. Notwithstanding the Department’s argument that the Court will likely reach a decision on the merits before January 1, the fact remains that Texas has shown that these provisions are likely unlawful and that Texas will be irreparably harmed if they go into effect.

Therefore, those provisions should be preliminarily enjoined until the Court can issue a merits decision.

V. CONCLUSION

It is therefore **ORDERED** that Texas’s Motion for Preliminary Injunction, (Dkt. #2), is **GRANTED**. Defendants are hereby **RESTRAINED** and **ENJOINED** from implementing and enforcing against the State of Texas, as an employer, the following provisions: (1) the July 1, 2024, salary level change, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 89 Fed. Reg. 32842, 32971 (Apr. 26, 2024) (to be codified at 29 C.F.R. § 541.600(a)(1)); (2) the January 1, 2025, salary level change, *id.* (to be codified at 29 C.F.R. § 541.600(a)(2)); and (3) the automatic triennial salary level change mechanism, *id.* at 32971, 32973 (to be codified at 29 C.F.R. §§ 541.600(a)(3), 541.607(b)(1)), pending further order of the Court.

The Court has considered the issue of security pursuant to Rule 65(c) of the Federal Rules of Civil Procedure and determines that Defendants will not suffer any financial loss that warrants the need for Texas to post security. The Fifth Circuit has held that a district court has the discretion to “require no security at all.” *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996). After considering the facts and circumstances of this case, the Court finds that security is unnecessary and exercises its discretion not to require the posting of security here.

So ORDERED and SIGNED this 28th day of June, 2024.

A handwritten signature in black ink, appearing to read "Sean D. Jordan", written over a horizontal line.

SEAN D. JORDAN
UNITED STATES DISTRICT JUDGE

STATE OF NEW YORK

6108

2025-2026 Regular Sessions

IN SENATE

March 5, 2025

Introduced by Sens. PARKER, KRUEGER -- read twice and ordered printed,
and when printed to be committed to the Committee on Labor

AN ACT to amend the labor law, in relation to including public employ-
ment in wage payment provisions

The People of the State of New York, represented in Senate and Assem-
bly, do enact as follows:

1 Section 1. Subdivision 3 of section 190 of the labor law, as amended
2 by chapter 281 of the laws of 2002, is amended to read as follows:

3 3. "Employer" includes any person, corporation, limited liability
4 company, or association employing any individual in any occupation,
5 industry, trade, business or service. The term "employer" shall [~~not~~]
6 include [~~a governmental agency~~] counties, towns, villages, school
7 districts, and any other municipal corporations or public authorities.

8 § 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD10569-01-5

STATE OF NEW YORK

5828

2025-2026 Regular Sessions

IN SENATE

March 3, 2025

Introduced by Sen. SEPULVEDA -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

AN ACT to amend the labor law, in relation to prohibiting employers from asking job applicants about salary expectations and allowing job applicants to request the included benefits for the position they are applying for

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The labor law is amended by adding two new sections 194-c
2 and 194-d to read as follows:

3 § 194-c. Salary expectation inquiries prohibited. 1. No employer
4 shall:

5 a. rely on the salary expectations of an applicant in determining
6 whether to offer employment to such individual or in determining the
7 wages or salary for such individual.

8 b. orally or in writing seek, request, or require an applicant or
9 current employee to disclose salary expectations as a condition to be
10 interviewed, or as a condition of continuing to be considered for an
11 offer of employment, or as a condition of employment or promotion.

12 c. refuse to interview, hire, promote, otherwise employ, or otherwise
13 retaliate against an applicant or current employee based upon stated
14 salary expectations.

15 d. refuse to interview, hire, promote, otherwise employ, or otherwise
16 retaliate against an applicant or current employee because such appli-
17 cant or current employee did not provide salary expectations in accord-
18 ance with this section.

19 e. refuse to interview, hire, promote, otherwise employ, or otherwise
20 retaliate against an applicant or current or former employee because the
21 applicant or current or former employee filed a complaint with the
22 department alleging a violation of this section.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD02614-01-5

1 2. Nothing in this section shall prevent an applicant or current
2 employee from voluntarily, and without prompting, disclosing or verify-
3 ing salary expectations, including but not limited to for the purposes
4 of negotiating wages or salary.

5 3. An employer may confirm salary expectations only if at the time an
6 offer of employment with compensation is made, the applicant or current
7 employee responds to the offer by providing salary expectations to
8 support a wage or salary higher than offered by the employer.

9 4. For the purposes of this section, "employer" shall include but not
10 be limited to any person, corporation, limited liability company, asso-
11 ciation, labor organization, or entity employing any individual in any
12 occupation, industry, trade, business or service, or any agent thereof.
13 For the purposes of this section, the term "employer" shall also include
14 the state, any political subdivision thereof, any public authority or
15 any other governmental entity or instrumentality thereof, and any
16 person, corporation, limited liability company, association or entity
17 acting as an employment agent, recruiter, or otherwise connecting appli-
18 cants with employers.

19 5. An applicant or current or former employee aggrieved by a violation
20 of this section may bring a civil action for compensation for any
21 damages sustained as a result of such violation on behalf of such appli-
22 cant, employee, or other persons similarly situated in any court of
23 competent jurisdiction. The court may award injunctive relief as well as
24 reasonable attorneys' fees to a plaintiff who prevails in a civil action
25 brought under this section.

26 6. Nothing in this section shall be deemed to diminish the rights,
27 privileges, or remedies of any applicant or current or former employee
28 under any other law or regulation or under any collective bargaining
29 agreement or employment contract.

30 7. This section shall not supersede any federal, state or local law
31 enacted prior to the effective date of this section that requires the
32 disclosure or verification of salary history information to determine an
33 employee's compensation.

34 8. The department shall conduct a public awareness outreach campaign,
35 which shall include making information available on its website, and
36 otherwise informing employers of the provisions of this section.

37 § 194-d. Applicant request for benefit information. An applicant shall
38 be permitted to request and shall be provided with information regarding
39 employment benefits to be included with a job that an applicant is
40 applying for with a prospective or current employer.

41 § 2. This act shall take effect on the ninetieth day after it shall
42 have become a law.

STATE OF NEW YORK

515

2025-2026 Regular Sessions

IN SENATE

(Prefiled)

January 8, 2025

Introduced by Sens. PERSAUD, JACKSON -- read twice and ordered printed,
and when printed to be committed to the Committee on Labor

AN ACT to amend the labor law, in relation to flexible working arrangements for parents and legal guardians when day care centers and schools are closed during a state or local disaster emergency

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The labor law is amended by adding a new section 202-m to
2 read as follows:

3 § 202-m. Flexible working arrangements for parents and legal guardians
4 during a state or local disaster emergency. 1. Definitions. For the
5 purposes of this section:

6 (a) "School-aged child" shall mean a child or children enrolled in 3-k
7 or pre-kindergarten through twelfth grade.

8 (b) "Day care-aged child" shall mean a child enrolled in a day care
9 center.

10 (c) "Parent" shall mean a biological, foster, or adoptive parent, a
11 legal guardian, or other person who stands in loco parentis to a school-
12 aged child or children.

13 (d) "Employer" shall mean all employers within the state.

14 (e) "Flexible working arrangement" shall mean short-term, intermedi-
15 ate, or long-term changes in the employee's regular working arrange-
16 ments, including but not limited to, changes in the number of days or
17 hours worked, changes in the time the employee arrives at or departs
18 from work, remote work, or job-sharing. "Flexible working arrangement"
19 shall not include vacation, routine scheduling of shifts, or another
20 form of employee leave.

21 (f) "Inconsistent with business operations" shall mean a determination
22 by the employer based on the following considerations: (i) the burden on
23 an employer of undue additional costs; (ii) a legitimate or practical

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD02188-01-5

1 detrimental effect on aggregate employee morale unrelated to discrimi-
2 nation or other unlawful employment practices; (iii) a legitimate or
3 practical detrimental effect on the ability of an employer to meet
4 consumer demand; (iv) a significant inability to reorganize work among
5 existing staff; (v) a legitimate or practical inability to recruit addi-
6 tional staff; (vi) a significant detrimental impact on business quality
7 or business performance; (vii) an insufficiency of work during the peri-
8 ods the employee proposes to work; (viii) planned structural changes to
9 the business; and (ix) any other reasons as specified by the commission-
10 er.

11 2. Presumption of entitlement for parents and legal guardians to work
12 remotely when day care centers and schools are closed due to a state or
13 local disaster emergency. (a) Notwithstanding any other provision of
14 law to the contrary, an employee shall be entitled to work remotely
15 where the essential functions of the employee's position can be
16 performed remotely and (i) the employee is the parent of a school-aged
17 child or day care-aged child or children; (ii) the school or day care
18 center attended by such school-aged child or day care-aged child or
19 children has been closed pursuant to an order of a public official due
20 to a state or local disaster emergency, regardless of whether there will
21 be virtual or remote instruction or instruction has been suspended; and
22 (iii) the purpose of working remotely is to be able to supervise or
23 otherwise provide care for such school-aged child or day care-aged child
24 or children.

25 (b) There shall be a rebuttable presumption that an employee can
26 perform work remotely if such employee has already performed work
27 remotely for two consecutive pay periods, or two weeks, whichever is
28 less time, in the current or immediately preceding calendar year. The
29 presumption may be rebutted by evidence showing that the employee cannot
30 perform essential duties remotely.

31 (c) Where a significant portion, but not all, of the essential func-
32 tions of the position in which the employee is employed can be performed
33 remotely, employers shall consider whether a similar arrangement or a
34 partial remote work arrangement may be granted in a manner that is not
35 inconsistent with its business operations or legal or contractual obli-
36 gations.

37 3. Right of parents and legal guardians to request flexible working
38 arrangements when day care centers or schools are closed due to a state
39 or local disaster emergency. (a) Notwithstanding any other provision of
40 law to the contrary, an employee may request a flexible working arrange-
41 ment that meets the needs of both the employer and employee where: (i)
42 the employee is a parent of a school-aged or day care-aged child or
43 children; (ii) the school or day care center attended by such school-
44 aged child or day care-aged child or children has been closed pursuant
45 to an order of a public official due to a state or local disaster emer-
46 gency, regardless of whether there will be virtual or remote instruction
47 or instruction has been suspended; and (iii) the purpose of the flexible
48 working arrangement is to be able to supervise or otherwise provide care
49 for such school-aged child or day care-aged child or children.

50 (b) Nothing in this subdivision shall be construed to require an
51 employer to accept the flexible work arrangement requested by the
52 employee.

53 (c) The employer shall respond to the request for a flexible working
54 arrangement from the employee, and shall consider the employee's request
55 for a flexible working arrangement and whether the request or a similar

1 arrangement could be granted in a manner that is not inconsistent with
2 its business operations or its legal or contractual obligations.

3 4. (a) Nothing in this section shall be construed to prohibit an
4 employer from requiring an employee to request a remote work arrangement
5 or flexible working arrangement sufficiently in advance of when such
6 remote work or flexible working arrangement would commence. An employer
7 may establish reasonable standards to determine the time, place, and
8 manner in which the employee shall request a remote work or flexible
9 working arrangement pursuant to this section.

10 (b) An employer shall respond to the request for a remote work or
11 flexible working arrangement pursuant to this section in a reasonably
12 timely manner, but in no case shall such decision be provided later than
13 fourteen days from receipt of a request. If such request was submitted
14 in writing, the employer shall state any complete or partial denial of
15 the request in writing, citing the reason as to denying such request.

16 5. Nothing in this section shall be deemed to diminish the rights,
17 privileges, or remedies of any employee under any collective bargaining
18 agreement.

19 6. Nothing in this section shall be deemed to affect any legal rights
20 an employer or employee may have under applicable law to create, termi-
21 nate, or modify a remote work or flexible working arrangement.

22 7. No employer or their agent, or the officer or agent of any corpo-
23 ration, partnership, or limited liability company, or any other person,
24 shall discharge, threaten, penalize, or in any other manner discriminate
25 or retaliate against any employee because such employee has exercised
26 their rights afforded under this section.

27 8. (a) The commissioner may bring an action against an employer for
28 failure to adhere to the provisions of this section, including injunc-
29 tive relief to enjoin future conduct.

30 (b) Any employer who violates the provisions of this section shall
31 forfeit to the people of the state a sum of five hundred dollars for
32 each violation, to be recovered by the commissioner in any legal action
33 taken pursuant to this subdivision.

34 9. The commissioner shall promulgate rules and regulations for the
35 implementation of this section.

36 § 2. Nothing in this act shall be construed to prevent a locality from
37 enacting and enforcing local laws or ordinances which meet or exceed the
38 standards or requirements set forth in this act.

39 § 3. This act shall take effect on the thirtieth day after it shall
40 have become a law; provided, however, that effective immediately employ-
41 ees may begin the process of requesting remote work or flexible working
42 arrangements pursuant to this act.

STATE OF NEW YORK

1193

2025-2026 Regular Sessions

IN SENATE

January 8, 2025

Introduced by Sen. ADDABBO -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

AN ACT to amend the workers' compensation law, in relation to requiring public employers who opt out of providing paid family leave benefits to provide parental leave in the alternative

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivision 3 of section 212-b of the workers' compensation
2 law is amended by adding a new paragraph (c) to read as follows:

3 (c) Notwithstanding any other provision of law to the contrary, if a
4 public employer chooses to opt out of paid family leave benefits pursu-
5 ant to paragraph b of this subdivision, then such public employer shall
6 be required to offer parental leave to its employees for a period not to
7 exceed twelve weeks during any fifty-two week calendar period. Employers
8 shall pay employees on parental leave a rate of sixty-seven percent of
9 the employee's average weekly wage but shall not exceed sixty-seven
10 percent of the New York state average weekly wage in effect.

11 § 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD01432-01-5

STATE OF NEW YORK

372

2025-2026 Regular Sessions

IN SENATE

(Prefiled)

January 8, 2025

Introduced by Sen. GIANARIS -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

AN ACT to amend the labor law, in relation to establishing the "no severance ultimatums act"

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Short title. This act shall be known and may be cited as
2 the "no severance ultimatums act".

3 § 2. The labor law is amended by adding a new section 215-d to read as
4 follows:

5 § 215-d. Prohibition against coercive severance ultimatums. 1. Defi-
6 nitions. For the purposes of this section, the following terms shall
7 have the following meanings:

8 (a) "Employee" shall have the same meaning as set forth in section one
9 hundred ninety of this chapter.

10 (b) "Employer" shall:

11 (i) have the same meaning as set forth in section one hundred ninety
12 of this chapter; and

13 (ii) include governmental agencies.

14 2. Severance ultimatums. Any employer offering an employee or former
15 employee an agreement related to such employee's severance from employ-
16 ment shall notify such employee that:

17 (a) Such employee has the right to consult an attorney regarding such
18 agreement, and such employee shall be provided with a reasonable period
19 of time not less than twenty-one business days in which to consider the
20 agreement;

21 (b) Such employee may revoke such agreement within seven days of the
22 execution of such agreement, and the agreement shall not become effec-
23 tive or enforceable until such revocation period has expired; and

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD00738-01-5

1 (c) Such employee may sign such agreement prior to the end of such
2 revocation period, as long as such employee's decision to shorten such
3 revocation period is knowing, voluntary, and not induced by the employer
4 through fraud, misrepresentation, or a threat to withdraw or alter such
5 revocation period prior to the expiration of such revocation period, or
6 by providing different terms to such employee if such employee signs
7 such agreement prior to the expiration of such revocation period.

8 3. The provisions of this section shall not apply to any severance
9 agreement negotiated pursuant to a collective bargaining agreement.

10 4. Notwithstanding any other law to the contrary, any severance agree-
11 ment shall be deemed void and unenforceable if it violates the
12 provisions of subdivision two of this section.

13 5. Nothing herein shall be deemed in any way to limit, restrict, or
14 impair any law, rule, or regulation from providing greater protections
15 than provided for in this section.

16 § 3. This act shall take effect immediately.