Labor&Employment

Double Trouble: Courts Shy Away From **Treble Damages** in Wage, Hour Suits

BY GLENN S. GRINDLINGER AND ALEXANDER W. LEONARD

When a wage and hour suit is filed against an employer, one of the first questions asked by the defendant-employer is: What's my exposure?

Generally, in New York state, in wage and hours suits, plaintiffs allege violations of the federal Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL). Both statutes permit prevailing plaintiffs to recover compensatory damages (usually back wages), their reasonable attorney fees and costs and liquidated damages. Whether a successful plaintiff can recover liquidated damages simultaneously under the FLSA and NYLL is an open issue in New York.

In 2010, the legislature passed and the governor signed into law, the New York Wage Theft Prevention Act (WTPA). Effective April 9, 2011, the WTPA increased liquidated damages that may be awarded in wage and hour cases for violations of the NYLL from 25 percent of the underlying back wages owed to 100 percent of the back wages owed and made liquidated damages virtually automatic unless the defendant could prove that it acted in good faith compliance with the law.[1] In other words, after the enactment of the WTPA, for every dollar in back pay owed to a successful plaintiff for violations of the NYLL, the defendant would also likely have to pay the plaintiff an additional dollar in liquidated damages under New York law.

Under the FLSA, successful plaintiffs can also recover liquidated damages equal to 100 percent of the back pay owed and like the NYLL, the burden is on the defendant to prove that it acted in good faith compliance with the FLSA to avoid liquidated damages. Thus, after the enactment of the WTPA, for the first time, the liquidated damage provision under the NYLL appeared to mirror the liquidated damage provision under the FLSA. As most wage and hour practitioners in New York are acutely aware, the plaintiffs' bar has naturally championed applying both sets of liquidated damages to violations covered by both statutes.[2] This permits successful plaintiffs to potentially recover treble damages (i.e., up to 200 percent liquidated damages in addition to any underlying wage liability) in wage and hour litigations, thereby multiplying the recovery available for even relatively minor, technical violations of the NYLL and FLSA.

At the time the WTPA was enacted, practitioners and commentators forecasted these arguments, warning potential "double recovery" theories would be advocated by the plaintiffs' bar,[3] in addition to the robust remedies already available, such as attorney fees that may be awarded to a prevailing plaintiff.


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There was certainly a reasonable argument for such cumulative liquidated damages, as federal and state court decisions prior to the enactment of the WTPA (when liquidated damages were only 25 percent under the NYLL) often permitted the recovery of liquidated damages under both statutes (i.e., 125 percent liquidated damages).[4] The theory used by such courts was that liquidated damages under the FLSA were "compensatory" in nature (i.e., meant to compensate the employee for the time he or she was without his or her wages) whereas liquidated damages under the NYLL were "punitive" (i.e., meant to punish and deter employers from engaging in future wage violations).[5] After the enactment of the WTPA, it was assumed that these theories concerning the nature of liquidated damages under both statutes would continue and treble damages might be awarded, thus providing a windfall for successful plaintiffs and further promoting the increase in wage and hour litigation that has occurred over the past decade.

Yet, since the enactment of the WTPA, a split of authority has developed in New York federal and state courts concerning the award of liquidated damages under the FLSA and NYLL. Initially, many courts appeared to allow the simultaneous application of *both* FLSA and NYLL liquidated damages, thus resulting in the application of 200 percent liquidated damages.[6] These courts reasoned that, under existing case law, both statutes still served differing purposes, and noted that nothing had fundamentally changed regarding either statute other than simply increasing the liquidated damages recovery available under the NYLL.

However, even in 2011, seeds of dissent were already sprouting given the obvious windfall this handed to plaintiffs. Some courts aptly noted that since liquidated damages under the NYLL now mirrored the FLSA, both sets of liquidated damages effectively "serve the same purpose and have the *same practical effect* of deterring wage violations and compensating underpaid workers."[7] This "practical effect" argument lingered as some judges, then in the minority,[8] refused to allow double liquidated damages. These judges found that the purported distinction between liquidated damages under the NYLL and FLSA was illusory since both remedies were identical.

Despite this split of authority, no appellate court has yet to weigh in and settle whether both forms of liquidated damages may be recovered simultaneously.[9] Thus, over the past several years, the courts have reversed course from the initial bevy of federal and state court decisions applying 200 percent liquidated damages. Countless applications seeking 200 percent liquidated damages have since been denied by numerous judges who find such recoveries to be duplicative and unnecessary.[10] These courts continue to reason that "[b]oth forms of damages seek to deter wage-and-hour violations in a manner calculated to compensate the [plaintiff]."[11] Even judges that still apply *both* NYLL and FLSA liquidated damages together have noted the recent trend away from granting 200 percent liquidated damages.[12]

In fact, in some instances judges have begun abrogating their own precedent, and now embrace the view that double liquidated damages under both the NYLL and FLSA are inappropriate given the similarities between both stat-

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Gender Identity Guidelines Bring New **Compliance Issues**

BY ERIC RAPHAN AND LINDSAY COLVIN

On Dec. 21, 2015, the New York City Human Rights Commission (the Commission) issued one of the most powerful sets of guidelines[1] in the nation prohibiting gender identity discrimination in employment.[2]

Gender identity is already a protected class under the New York City Human Rights Law, (NYCHRL), the City's law prohibiting employment discrimination, but the new guidelines provide explicit examples of what kind of workplace behavior leads to liability.[3] Penalties for violation of the NYCHRL range from $125,000 to $250,000, and the statute does not provide a limit for the amount of compensatory damages that a discrimination victim can recover.[4] Given the potential for damages and the fact that there are an estimated 25,200 transgender and gender non-conforming individuals in New York City[5] (three-quarters of whom have reported harassment in the workplace[6]), New York City employers must be especially careful to observe and comply with the new guidelines going forward.

While the Commission's guidelines are new, they are generally articulated clearly, and include helpful examples of discriminatory behavior that could give rise to liability under the NYCHRL. The guidelines spell out eight explicit potential actions that could constitute employment discrimination based on gender identity: (1) failing to use an individual's preferred name or pronoun; (2) refusing to allow individuals to utilize single-sex facilities and programs consistent with their gender; (3) sex stereotyping; (4) imposing different uniforms or grooming standards based on sex and gender; (5) providing employee benefits that discriminate based on gender; (6) considering gender when evaluating requests for accommodations; (7) engaging in discriminatory harassment; and (8) engaging in retaliation.[7] This article recommends steps New York City employers should take—as well as policies they should consider adopting—in order to fully comply with the recently issued guidelines and avoid workplace gender identity discrimination.

Relevant Definitions.

There are several important definitions associated with the new guidelines that may be unfamiliar, and are especially important for employers to understand when formulating and communicating policies to comply with the NYCHRL. "Gender identity" is defined under the NYCHRL as "actual or perceived sex [including] a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth."[8] Individuals whose biological sex and gender identity match (for instance, a man who self-identifies as male) are defined as "cisgender." Alternatively, "transgender" individuals are those whose gender identity or expression is not typically associated with the sex that person was born with (a man who self-identifies as female). An individual may also be "gender non-conforming," an adjective which describes "someone whose gender expression differs from traditional gender-based stereotypes" (a man who prefers to wear women's clothes). Not every gender non-conforming person is transgender, and not all transgender people are gender non-conforming.[9] Further,

Given the potential for damages and the fact that there are an estimated **25,200 transgender and gender non-conforming individuals in New York City**, New York City employers must be especially careful to observe and comply with the new guidelines going forward.

"androgynous" individuals may reject outward expressions of gender identity altogether.[10] When implementing the new guidelines, employers should be aware of the multiple sensitive and fact-specific definitions provided in the guidelines, and make sure to understand which might apply to their workforce.

Identify Employees the Way They Identify Themselves.

The Commission's guidelines set forth several ways in which an employer can be liable for discrimination for failing to treat employees as the gender that they identify with. As a general rule, New York City employers should carefully assess how their employees self-identify, and ensure that management and co-workers alike treat them accordingly. For instance, City employers may survey workers who are already employed, or ask potential employees during the application process, to ascertain their preferred gender identity and ensure that they know an employee's preferred name, pronoun, and title.

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The **Fair Chance Act:** Understanding **Key Provisions** and **Impact** on Employers

BY MICHAEL S. KATZEN

New York City's Fair Chance Act (FCA), Local Law 63 of 2015, amended §8-107 of the Administrative Code of the City of New York (NYC Human Rights Law) by, in part, making it an unlawful discriminatory practice for most employers,[1] labor organizations, and employment agencies to inquire about or consider the criminal history of job applicants[2] until after extending a conditional offer of employment.

Following the FCA's Oct. 27, 2015 effective date, the NYC Commission on Human Rights (the Commission) issued Interpretative Enforcement Guidance on Nov. 5, 2015, expanding upon the FCA's requirements. The Commission's 13-page document confirms that the FCA goes considerably further than other state and local ban-the-box laws by not only imposing restrictions on when an employer can ask an applicant about criminal history, but also by creating new procedural hurdles for employers that wish to use criminal history information once it is properly obtained. This article[3] summarizes the FCA's key procedural requirements, changes to long-standing HR practices that will need to be made in order to comply with the FCA, additional recordkeeping requirements imposed on NYC employers, and the potential for FCA compliance to implicate employer liability under other laws.

What Does the FCA Require?

Before a Conditional Offer.

Like most state and local ban-the-box laws, the FCA's crux is its prohibition against any verbal or written inquiries or statements related to an applicant's criminal history until after the applicant is extended a conditional job offer.[4] However, the FCA goes further, and prohibits employers from engaging in many traditionally common HR practices.

For example, employers can no longer identify limitations for employment positions related to an individual's criminal conviction history on solicitations, advertisements, employment applications, fliers, handouts, online postings, job fair materials, etc.[5] This means that employers are, for the most part, prohibited from advertising a job as being "conditioned upon successful completion of a criminal background check." Employers are similarly prohibited from soliciting background check disclosure and authorization forms or screens prior to making a conditional offer.[6] The

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Developments Under The Displaced Building Service Worker Protection Act,
BY JERROLD F. GOLDBERG

Developments Under the Displaced **Building Service Worker** Protection Act

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The New York City Displaced Building Service Worker Protection Act (DBSWA), NYC Administrative Code §22-505 (DBSWA or the Act), which was signed into law in November 2002, significantly changed the landscape in connection with labor and employment issues upon sales or transfers of real property in New York City, or changes in building service contractors.

While before the Act's enactment, purchasers or replacement managing agents or contractors could not refuse to hire persons because of their union status or to avoid union obligations, purchasers and replacement contractors had no statutory obligation[1] to offer to hire a predecessor's employees, and thus there was no presumptive continuance of representation of the employees by the predecessor's union.

The DBSWA requires that any buyer, transferee, or successor employer of most New York City commercial and residential properties offer the incumbent employees jobs after the change in ownership or change in employer for as many jobs as the new employer will have at the property,[2] and to keep those employees in employ for at least 90 days unless it has cause for discharge during that "probationary" period. However, it is important to note that the law does not require a buyer or new employer to maintain the existing terms and conditions of employment (e.g., wage rates, benefits, seniority), nor to assume an existing collective bargaining agreement.

The law itself excludes: (1) commercial office buildings of less than 100,000 square feet, (2) residential buildings with fewer than 50 units, and (3) any building in which New York City or any New York City governmental agency occupies 50 percent or more of the rentable square footage. The statute defines "building service employees," that is, those protected by the law, to include janitorial and security employees but not engineering employees, and excludes any person being paid more than $25 per hour, persons working fewer than eight hours per week at the building and persons who have been employed in the building for less than three months.[3]

This law, although applicable in both union and nonunion properties, was strongly supported during the enactment process by Local 32BJ, Service Employees International Union (Local 32BJ), which represents a large number of employees at such properties in New York City. Although not limited to union buildings, or to those whose employees who are represented by Local 32BJ, the law generally was considered to have the effect of keeping Local 32BJ in place when a building changed ownership or control, or there was a change in the contractor providing building services, because under federal labor law's so-called "successorship" doctrine, if a majority of the workforce of a successor employer is composed of employees of the predecessor, there is a legal presumption that those employees still wish to be represented by the incumbent union.

New York City is not the only jurisdiction to have such a law in the building service industry. The first such law was passed in Washington, D.C. in 1994. There are now similar laws in a number of counties and cities, such as: Westchester County, N.Y.; Montgomery County, Md.; Philadelphia, Pa.; Providence, R.I.; St. Louis, Mo.; and Los Angeles and San Francisco, Calif., among others. The laws vary in applicability in regard to those protected in terms of length of employment, size, and nature of the building and particular wage levels and scheduled hours.

Two of these statutes were challenged on the basis of federal preemption. Specifically, employers urged that laws requiring that employers maintain a predecessor's workforce were preempted by federal laws providing that "successorship" obligations should be left to the free play of market forces. As stated above, under federal labor law, if a majority of a successor employer's workforce is composed of persons who worked for the predecessor, there is a legal presumption that the union which represented the predecessor's employees remains the collective bargaining representative of the successor's employees. Both the District of Columbia Circuit Court of Appeals, reviewing the D.C. law, and the First Circuit Court of Appeals, reviewing the Providence, R.I. statute,[4] rejected the preemption arguments and upheld the statutes. See *Washington Service Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995) and *Rhode Island Hospitality Association v. City of Providence*, 667 F.3d 17 (1st Cir. 2011).

The New York City DBSWPA was challenged on preemption grounds in 2004 in *Alcantara v. Allied Properties*, 334 F. Supp.2d 336 (E.D.N.Y. 2004). In *Alcantara*, a number of employees sued in New York state court[5] to enforce their right to be offered continued employment under the DBSWPA when the residential buildings in which they were employed were sold and the purchaser failed to offer them employment. The building owner removed the case to federal court, but the federal court, while expressing some concerns about preemption, remanded the case to state court. The state court later rejected the preemption arguments, and held that the purchasers had violated the law. However, given that the 90-day probationary period had passed, the court did not order reinstatement of the employees.

It is important to note that the law **does not require** a buyer or new employer **to maintain the existing terms and conditions** of employment (e.g., wage rates, benefits, seniority), nor to assume an existing collective bargaining agreement.

More recently, employers have challenged not the DBSWPA itself, but the impact that the statute has in determining a union's continued representation status with a successor employer. As indicated above, the statute requires a successor employer (whether a building purchaser or replacement manager or contractor) to offer employment to the incumbent employees. Given that federal labor law deems as a "successor" with a duty to bargain with the predecessor's union any employer a majority of whose workforce is composed of the predecessor employees, the New York City law would seem to guarantee such a finding of successorship.[6] However, in several recent cases, employers have argued (with mixed results, as discussed below) that no successorship finding can be made until the 91st day after the closing or change in employer, inasmuch as the employer did not "voluntarily" or "consciously" choose to retain a majority until the 90-day probationary period ended.

In *Paulsen v. GVS Properties*, 904 F. Supp. 2d 282 (E.D.N.Y. 2012), a U.S. district judge in the Eastern District of New York denied a request for injunctive relief sought by the National Labor Relations Board (NLRB) seeking to compel a buyer to recognize the incumbent union (not Local 32BJ), holding that, because hiring pursuant to the DBSWA is not "voluntary" but mandatory, and that the federal labor law "successorship" doctrine is based on "voluntary" hiring of a majority by the successor, the fact that a buyer hired the seller's contractor's employees did not require the buyer to recognize and bargain with the union until the buyer made hiring decisions after the 90-day probationary period. Because the buyer's workforce of eight employees after 90 days included only four of the seller's contractor's employees, there was no majority and the judge denied the NLRB's request for a preliminary injunction.

Nonetheless, the NLRB proceeded with a hearing on the merits. Contrary to the District Court, the NLRB found that GVS (the buyer) *was* a successor employer. *GVS Properties*, 362 NLRB No. 194 (Aug. 27, 2015). The Board ruled that by complying with the New York City DBSWPA, the buyer made a "conscious decision" to be a "perfectly clear" successor obligated to bargain with the incumbent union.[7] GVS has appealed the NLRB's decision to the District of Columbia Circuit.

Interestingly though, counsel for the general counsel of the NLRB conceded on two occasions prior to the Board's decision in GVS that majority status cannot be determined until the 91st day. In *M&M Parkside Towers (Local 670, Retail Wholesale and Dept. Store Union)*, 2007 WL 313429. (Jan. 30, 2007), an NLRB administrative law judge held that the general counsel of the NLRB had conceded that under the DBSWPA, successorship cannot be determined until the employees are offered permanent employment after the 90-day probationary period or until a reasonable time after the 90 days. In *Novel Service Group, (Local 32BJ SEIU)*, 02-CA-113834 and 02-CA-11838602 (Jan. 15, 2015), an ALJ also ruled that majority status (and thus the successorship obligation to bargain) can only be determined after the 90-day period has expired. It is of course highly possible that the general counsel will retreat from this position in light of the Board's decision in *GVS*.

In November 2015, the New York City Council's Committee on Civil Service and Labor began consideration of a bill to amend the DBSWPA so as to extend its coverage. Intro. No. 1004-2015. The most significant change would be having the law apply to commercial tenants with 10,000 square feet or more who employ building service employees. Further it would enlarge the remedies available in the event of a violation (the present law provides only for reinstatement and backpay) so as to provide for "double damages" (double back pay). Finally the amendment would eliminate the exemption for City and City agency occupied buildings, and also eliminate the exclusion of workers making more than $25 per hour (given that most union cleaners will approach or exceed the $25 per hour rate in the next several years). The bill is currently pending consideration.

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1. Purchasers of real property could, *by contract*, agree to assume a seller's labor agreement, and/or offer to hire the incumbent building service employees. However, there was no statutory obligation for purchasers to do so.
2. To the extent that the new employer will staff the building with fewer employees, offers must be made in order of length of service in each classification.
3. The City Council has proposed a bill to eliminate the exclusion for New York City/City agency occupied buildings and the $25 per hour cap. See infra.
4. The Providence law at issue in the case applied specifically to hospitality industry properties.
5. The employer thereafter also filed an unfair labor practice charge alleging that the suit itself violated §8(b) of the Act. The charge was dismissed upon advice of the NLRB's General Counsel, Advice Memo, Case No. 29-CB-12639, Oct. 14, 2004.
6. After the law was passed, and since that time, employers have tried to avoid the applicability of the law by offering minimal wages and benefits in the hopes that employees would reject positions even if offered, or by offering severance packages to induce employees to leave employment prior to the closing or change in employer. However, at least in unionized buildings, this strategy has had minimal impact primarily because the incumbent union must be given 15 days' notice of the closing or change in contractor, and has utilized that time to persuade employees not to be induced to leave the job under these circumstances.
7. In dicta the Board suggested that a buyer/new employer could avoid a finding of "perfectly clear" successorship, even under the New York City law, by announcing its intent to establish new and different terms and conditions of employment before or simultaneously with its offer to employ the existing workers in compliance with the DBSWPA.

Gender Identity

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Additionally, employers should communicate these preferences to other employees in order to ensure that co-workers also observe individual preferences in the workplace. However, employers should be sure to obtain employee consent before communicating any information to co-workers regarding that employee's gender.[11] Appropriate pronouns may include he/him/his, she/her/hers, they/them/theirs, or ze/hir, regardless of the employee's sex assigned at birth, anatomical gender, medical history, appearance, or sex indicated on legally identifying materials.[12] Additionally, handbooks and employment policies should be thoroughly reviewed to eliminate any uniform or grooming standards that may impose distinctions based on sex or gender. In the new guidelines, the Commission states that policies that require different uniforms for different genders, mandate that female employees wear makeup, only allow women to wear makeup or jewelry, prohibit male employees from having long hair, or require all men to wear ties may provide a basis for gender identity discrimination.[13]

As the Commission notes, New York City employers should also ensure that their facilities and programs are friendly to individuals of all gender identities, and permit employees to use the resources that they identify as appropriate for their own gender identities. It is particularly important for employers to observe this recommendation in the provision of private facilities, such as bathrooms or dressing rooms. The NYCHRL mandates that all individuals must be allowed to use single-sex facilities or access single-sex programs consistent with their gender, regardless of their sex assigned at birth or otherwise.[14] While employers are not required to make existing bathrooms or locker rooms all-gender or to install new facilities, they should note that the guidelines explicitly prioritize the individual employee's desire to use facilities conforming with their gender identity over the comfort of others. For instance, the Commission clearly notes that objections from customers or co-workers do not provide lawful grounds to deny facility or program access to transgender or gender non-conforming individuals.[15] Further, employers may not lawfully require an individual to use a single-occupancy restroom in the workplace because of transgender or gender non-conforming status.[16] The safest way to comply with the NYCHRL and the Commission's guidelines in this instance is, to the extent possible, provide single-occupancy restrooms, and/or private space within multi-user facilities to accommodate privacy concerns for cisgender, transgender, and gender non-conforming employees alike. As the Commission recommends, employers should post a sign in all single-sex facilities that states, "Under New York City Law, all individuals have the right to use the single-sex facility consistent with their gender identity or expression."[17]

Review Benefit and Leave Policies.

New York City employers should carefully review and change as needed all employee benefit and leave policies to ensure compliance with the NYCHRL and the newly issued guidelines. From a benefits perspective, the most important policies to review (and those most likely to require adjustment) are those describing health benefits. It is unlawful under the NYCHRL to provide health benefit plans that deny or exclude services on the basis of gender, and such plans must include transgender care[18] (also known also as "transition-related" or "gender-affirming") care.[19] Transgender care is not limited to gender reassignment surgery, and may include hormone replacement therapy, counseling sessions, or voice training.[20] To avoid liability, employers should provide a health benefits option that includes comprehensive coverage for transgender individuals; the World Professional Association for Transgender Health provides standards of care that the benefits option should match.[21] Additionally, if they have not done so already, employers should ensure that they offer health benefits equally to same-sex and opposite-sex spouses of employees.

It is equally important for New York City employers to review leave policies in order to comply with the Commission's new guidelines. Specifically, leave policies should treat employee leave requests to address health or medical needs relevant to the individual's gender identity in the same way they treat leave requests for all other medical conditions.[22] Further, reasonable accommodations for medical issues should be made in the same way to employees undergoing gender transitions (including leave for medical and counseling appointments and recovery time) as made to employees with any other medical issue.[23]

Examine Handbooks and Educate the Workforce.

As discriminatory harassment and retaliation in the workplace based on protected classifications such as race or age are prohibited under the NYCHRL, so is harassment and retaliation based on gender identity.[24] Employers should review existing anti-harassment and anti-retaliation provisions enumerated in current employee handbooks to ensure that gender identity is specifically listed along with other classes such as race, age, national origin, and sexual orientation. Additionally, relevant handbook provisions should include definitions of potentially unfamiliar terms (such as "cisgender" and "gender non-conforming") to ensure that all employees are apprised of what type of conduct is potentially problematic and prohibited. Recruitment teams should also be apprised of the Commission's guidelines to avoid gender identity discrimination in the hiring process.[25]

Management training is of particular importance in ensuring compliance with the newly issued guidelines. Gender and transgender status is an emerging classification that may not be well-understood or immediately accepted by co-workers.[26] Moreover, a vast quantity of information (and possibly misinformation) passes to the public through the media, friends, family, and personal experience. Managers and supervisors are uniquely situated to communicate an employer's policies, practices, and expectations, and thus are key for employers seeking to avoid gender identity discrimination in the workplace.[27] Accordingly, employers should conduct management training regarding gender identity issues and sensitivity as soon as possible to ensure that the message of equality prescribed by New York City is transmitted to employees from the top down. City employers should also strongly consider conducting periodic company-wide training sessions to update their workforces and remind employees of what the NYCHRL requires and the employer's expectations for treatment of co-workers regardless of their individual characteristics. Where a transitioning or transgender individual is a member of the workforce, employers may consider holding small group meetings with employees who will have regular contact with the employee to review company policy, expected behavior, and any concerns or questions that may arise.[28]

Further, as the Commission recommends, employers should educate employees at all levels to avoid discriminatory sex stereotyping at work.[29] Discrimination based on a person's failure to conform to sex stereotypes, defined as "expectations of how an individual represents or communicates gender to others," is prohibited under the NYCHRL and explicitly addressed in the new guidelines on gender identity discrimination.[30] Common sex stereotypes may relate to behavior, clothing, hairstyle, activities, voice, mannerisms, or other characteristics connected to masculinity or femininity.[31] As the Commission notes, sex stereotyping may manifest itself implicitly, such as through the use of anti-gay epithets or overlooking employees for advancement opportunities because they do not conform to traditional gender norms.[32] Because sex stereotyping may be difficult to identify and address, it is particularly important for employers to inform employees of what may constitute sex stereotyping and how to avoid it.

Although the Commission's guidelines set forth new information for New York City employers to internalize, they also set forth clear expectations, easing the burden of compliance. Many of the actions employers can take to adhere to the guidelines are similar to measures they may already have taken to avoid discrimination against other protected classes. The most important steps employers can take to follow the guidelines include treating employees according to the gender identity they use for themselves and communicating expectations to other employees regarding how to respect their co-workers' identities as well. Employers should also be aware of the novel issues and stereotype-based biases that may be implicated, and take prompt and thorough steps to avoid liability under the NYCHRL.

1. New York City Commission on Human Rights, "Legal Enforcement Guidance on the Discrimination on the Basis of Gender Identity or Expression" (Dec. 21, 2015), http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderID_Interpretive-Guide_2015.pdf (Guidance).
2. Associated Press, "New York City Unveils Rules on Gender Discrimination," Wall St. J. (Dec. 21, 2015), http://www.wsj.com/articles/new-york-city-unveils-rules-on-gender-discrimination-1450742331.
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4. The New York City Human Rights Law, N.Y.C. Admin. Code §8 (2016).
5. Michael Balsamo & Jennifer Peltz, "New York City Officials Unveil New Guidelines for Businesses on Gender Discrimination," Associated Press (Dec. 21, 2015), http://www.usnews.com/news/business/articles/2015-12-21/new-york-city-unveils-new-rules-on-gender-discrimination.
6. Reuters, "NYC Lays Out Transgender Protection on Dress Codes, Bathroom Use," Metro New York (Dec. 22, 2015), http://www.metro.us/new-york/new-york-city-lays-out-transgender-protection-on-dress-codes-bathroom-use/zsJolv—ViLgUB183gvcU/.
7. Guidance, supra note 1.
8. The New York City Human Rights Law, N.Y.C. Admin. Code §8 (2016).
9. Guidance, supra note 1.
10. Society of Human Resources Managers, "Managing Gender Transition in the Workplace" (Dec. 16, 2013), http://www.shrm.org/templatestools/toolkits/pages/managinggendertransitionintheworkplace.aspx (Managing Gender Transition).
11. New York City Bar, Comments on Gender Identity Discrimination, Proposed Regulation §466.13, I.D. HRT-44-15-00033-P (Dec. 21, 2015), http://www2.nycbar.org/pdf/report/uploads/20073022-CommentsonGenderIdentityDiscriminationLGBT12.21.15.pdf.
12. Guidance, supra note 1.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. The provision of transgender care in New York goes beyond private health plans. For instance, in March 2015, the New York State Department of Health adopted new regulations for Medicaid coverage of care and services for transgender New Yorkers. N.Y. State Dep't of Health, "Transgender Related Care and Services" (March 11, 2015), https://www.health.ny.gov/regulations/recently_adopted/docs/2015-03-11_transgender_related_care_and_services.pdf.
19. Guidance, supra note 1.
20. Id.
21. Id.; World Professional Association for Transgender Health, "Standards of Care" (last visited Jan. 12, 2016), http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351.
22. Guidance, supra note 1.
23. Id.
24. The New York City Human Rights Law, N.Y.C. Admin. Code §8 (2016).
25. Managing Gender Transition, supra note 10.
26. Id.
27. Id.
28. Id.
29. Guidance, supra note 1.
30. Id.
31. Id.
32. Id.

Fair Chance Act

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FCA likewise bans employers from conducting targeted Internet searches for information on an applicant's criminal history before extending a conditional job offer.[7]

The Commission's Interpretive Enforcement Guidance also contemplates an applicant's inadvertent disclosure of criminal history information before a conditional offer has been made, which, importantly, does not by itself create employer liability.[8] However, employers are cautioned that inadvertent disclosure does not give the employer carte blanche to explore the applicant's criminal history at this stage of the hiring process. Instead, the Commission suggests the employer inform the applicant that it may only consider the applicant's criminal history if and when it extends a conditional job offer.[9] Similarly, if an applicant asks whether he or she will be subject to a criminal background check, the Commission indicates that the employer may state that a criminal background check will be conducted only after a conditional offer of employment has been made, but then suggests that the employer change the topic of discussion.[10] Importantly, employers that make a good faith effort to exclude information regarding criminal history before extending a conditional offer of employment will not be liable under the FCA.[11]

After a Conditional Offer.

Once a conditional offer is made, an employer may ask the applicant about his or her criminal history verbally or in writing.[12] Note, however, that the employer may only ask about criminal convictions and pending arrests.[13] Additionally, while verbal inquiries are permitted under the FCA, employers may run into the practical problem of having to one day prove (either before the Commission or in litigation) what information was actually solicited, thereby making written inquiries a preferred option under many circumstances. Employers that choose to inquire about an applicant's conviction history after a conditional offer has been made may consider using the following language suggested by the Commission:

> Have you ever been convicted of a misdemeanor or felony? Answer "NO" if your conviction: (a) was sealed, expunged, or reversed on appeal; (b) was for a violation, infraction, or other petty offense such as "disorderly conduct;" (c) resulted in a youthful offender or juvenile delinquency finding; or (d) if you withdrew your plea after completing a court program and were not convicted of a misdemeanor or felony.[14]

Employers may also run a criminal background check at this point in the process.[15] Employers that obtain background check information from a "consumer reporting agency" (CRA)—which is essentially a company in the business of compiling background information for third parties[16]—must also follow the requirements of the federal Fair Credit Reporting Act (FCRA).[17] Under these circumstances, FCRA requires employers to: provide a stand-alone notice informing the applicant that it may obtain a consumer report containing information that might be used in making decisions about his or her employment, and obtain the applicant's written permission to do the background check.[18] These requirements are frequently met by way of a single "disclosure and authorization" form for job applicants to sign. Employers are also required to provide job applicants in New York state with a copy of Article 23-A of the New York Corrections Law whenever they conduct a criminal background check, per the New York State Employer Education Act of 2008.[19]

If an employer wishes to hire an applicant after learning about her or his conviction history, the FCA does not require the employer do anything more.[20] However, an employer that wants to withdraw its conditional offer of employment must first consider each and every one of the factors outlined in Article 23-A of the New York Corrections Law, which the Commission's Interpretative Enforcement Guidelines describe as including:

- That New York public policy encourages the licensure and employment of people with criminal records;
- The specific duties and responsibilities of the prospective job;
- The bearing, if any, of the person's conviction history on her or his fitness or ability to perform one or more of the job's duties or responsibilities;
- The time that has elapsed since the occurrence of the events that led to the applicant's criminal conviction, not the time since arrest or conviction;
- The age of the applicant when the events that led to her or his conviction occurred, not the time since arrest or conviction;
- The seriousness of the applicant's conviction history;
- Any information produced by the applicant, or produced on the applicant's behalf, regarding her or his rehabilitation or good conduct; and
- The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.[21]

Employers must also consider a certificate of relief from disabilities or a certificate of good conduct, which creates a presumption of rehabilitation regarding the relevant conviction.[22] The Article 23-A factors are designed to assist an employer in determining (1) whether a direct relationship exists between the applicant's criminal record and the prospective job, or (2) whether employing the applicant "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public," one of which needs to be answered in the affirmative before an employer can lawfully refuse to hire a New York applicant based on his or her conviction history.[23]

An employer that still wishes to withdraw its conditional offer[24] after evaluating the Article 23-A factors must follow the FCA's new "Fair Chance Process."[25]

FCA's 'Fair Chance Process'.

The "Fair Chance Process" requires an employer to disclose to the applicant a written copy of any inquiry it conducted into the applicant's criminal history (e.g., the applicant's written response to a criminal history question, printouts of the Internet search conducted by the employer, or a written summary of the employer's verbal conversations during which the criminal history was obtained),[26] and a written copy of its Article 23-A analysis, which can be prepared using either the Commission's new "Fair Chance Notice" form[27] or the employer's own form so long as it contains the same material substance.[28]

Employers that use a CRA to run criminal background checks must also provide the applicant with a copy of the background check report, as well as a copy of the FTC publication entitled "A Summary of Your Rights Under the Fair Credit Reporting Act."[29] This notice is commonly referred to as the FCRA "pre-adverse action notice."

> Employers that wish to deny employment based on criminal history information must take care to **maintain the records necessary for compliance with the FCA.**

The employer must allow the applicant at least three business days from receipt of the inquiry and analysis to respond to the employer's concerns, and in the event a criminal background check was run, to dispute any errors in the report.[30] The employer must then examine whether the additional information (if any) provided by the applicant changes its Article 23-A analysis.[31] However, employers can still refuse to hire applicants who lie when responding to an otherwise legally permissible request for criminal history information provided the discrepancy between the information provided by the applicant and the information in the background check report is not due to an error in the report.[32]

If the employer decides not to hire the applicant after receiving all of the information and going through the Fair Chance Process, it must notify the applicant of its decision.[33] Employers that use consumer reporting agencies to run criminal background checks must also notify the applicant: of the name, address, and phone number of the company that sold the report; that the company selling the report did not make the hiring decision and cannot give specific reasons for it; and that he or she has a right to dispute the accuracy or completeness of the report, and to get an additional free report from the reporting company within 60 days.[34] This notice is commonly referred to as the FCRA "adverse action notice."

Increased Records Requirements

Employers that wish to deny employment based on criminal history information must take care to maintain the records necessary for compliance with the FCA, including their written Article 23-A analyses and "a complete and accurate copy of every piece of information [the employer] relied on to determine that an applicant has a criminal record, along with the date and time the employer accessed the information."[35]

Additionally, recordkeeping could become even more onerous for employers that seek to claim an exemption under the FCA. By its own terms, the FCA does not apply to employers hiring for positions where federal, state, or local law requires criminal background checks or bars employment based on certain criminal convictions; employers required by a self-regulatory organization to conduct criminal background checks of regulated persons; police and peace officers, law enforcement agencies, and other exempted city agencies; and city positions designated by the Department of Citywide Administrative Services (DCAS) as exempt.[36] However, because an employer claiming an exemption under the FCA has the burden of showing that the position falls under an exempt category, the Interpretative Enforcement Guidance suggests that employers claiming an exemption maintain an "exemption log" detailing which exemption was claimed, how the position fits into the specific exemption, a copy of the inquiry along with the name of the employee who made it, a copy of the employer's Article 23-A analysis, and the final employment action taken based on the applicant's criminal history.[37]

Increased Liabilities

Individuals interested in vindicating their rights under the FCA can choose to file a complaint with the Commission's Law Enforcement Bureau within one year of the discriminatory act or file a complaint in New York State Supreme Court within three years of the discriminatory act.[38] Employers that violate the FCA may be found liable for civil penalties of up to $125,000 or $250,000 (depending on whether the violation was willful),[39] as well as other remedies normally available under the NYC Human Rights Law, including, but not limited to, back and front pay, compensatory and punitive damages, and reasonable attorney fees. Additionally, the Interpretative Enforcement Guidance notes that any employer that revokes a conditional offer of employment will be subject to a rebuttable presumption that the employer's decision was motivated by the applicant's criminal record, and that any information known to the employer before the conditional offer cannot constitute a legitimate reason to withdraw the offer.[40]

However, possible liabilities resulting from the FCA could potentially span beyond those provided for under the FCA itself. For example, employers that obtain information on applicants through the Internet and social media could unintentionally discover information about one or more of the applicant's "protected characteristics," such as age, race, national origin, religious affiliation, disability, etc. Consequently, even if an employer acts lawfully under the FCA when withdrawing a conditional job offer, that employer may still be subject to allegations of discrimination in violation of Title VII of the Civil Rights Act of 1964, New York State Human Rights Law and New York City Human Rights Law based on its exposure to this information.

Employers who choose to provide job references for former employees above and beyond "dates of employment and positions held" could also find themselves subjected to a greater number of lawsuits for torts like defamation and tortious interference, even if the information provided ends up being true. And while liability stemming from "Googling" job applicants and providing extensive job references existed well before the FCA's enactment, strict compliance with the FCA and its Interpretative Enforcement Guidance could result in employers creating potentially damaging documentation, which would then be provided to applicants whose conditional job offers are being withdrawn (i.e., potential plaintiffs).

Finally, it should be noted that an increased focus on the procedural aspects of the criminal background check process could result in an increase in FCRA class action lawsuits, which offer plaintiffs potential statutory damages, punitive damages and attorney fees.[41]

Conclusion

New York City employers that inquire about applicant criminal history need to be aware of the FCA and its various intricacies. Training is sure to play a significant role in avoiding liability under the FCA, both as it relates to the law's pre-conditional offer restrictions and "Fair Chance Process," as well as how to safely prepare written Article 23-A analyses. Employers would also be wise to have experienced employment counsel review their disclosure and authorization, pre-adverse action and adverse actions background check forms to ensure compliance with the FCRA.

1. Employers must have four or more employees in New York City to be covered by the Fair Chance Act. For small businesses, the owner herself/himself counts. The four employees need not work in the same location, as long as one of them works in New York City. See Fair Chance Act: Fact Sheet for Employers at www.nyc.gov/html/cchr/html/coverage/fair-chance-employers.shtml.

2. While the FCA applies to all employment decisions (e.g., hiring, firing and promotion), this article, and the Commission's FCA guidance, focuses on "applicants" because the law will most frequently be implicated during the hiring process. 3. This article is intended to provide general information on the FCA. While comprehensive in nature, it is neither legal advice, nor a complete review of each and every aspect of the FCA and its Interpretative Enforcement Guidance.

4. N.Y.C. Admin. Code §8-107(11-a)(2); Interpretative Enforcement Guidance (IEG) §III(2) and IV(A). Indeed, according to Ban the Box Campaign's FAQs, the "Ban the Box Campaign" was initiated "to end structural discrimination against people with conviction and incarceration histories … [and] asks employers to remove questions regarding conviction histories from their employment applications and to adopt hiring practices that give applicants a fair chance." www.banttheboxcampaign.org/?page_id=179#.VqacZoUrJhF.

5. N.Y.C. Admin. Code §8-107(11-a)(1); IEG §III(1), IV(A)(i).

6. IEG §IV(A)(ii.).

7. Id.

8. IEG §IV(A)(iii).

9. Id.

10. Id.

11. Id.

12. IEG §IV(B).

13. IEG §II (defining "criminal history" to include "a previous record of criminal convictions or non-convictions or a currently pending criminal case"); N.Y. Exec. L. §296(16) (New York State Human Rights Law) prohibits covered employers from inquiring about or taking action based on arrests that did not lead to convictions, sealed convictions, or youthful offender adjudications. NY Criminal Procedural Law §160.60 protects applicants, in most circumstances, from being required to divulge an arrest or prosecution of a criminal action that terminated "in favor of the accused."

14. IEG §IV(B).

15. Id.

16. 15 U.S.C. §1681a(f).

17. 15 U.S.C. §1681b.

18. 15 U.S.C. §1681b(b)(2) and (3). Additionally, employers that use "investigative consumer reports" (i.e., reports based on personal interviews concerning an applicant's character, general reputation, personal characteristics, and lifestyle) have additional obligations under FCRA, which include providing written notice that the employer may request or has requested an investigative consumer report, and providing a statement that the applicant has a right to request additional disclosures and a summary of the scope and substance of the report. 15 U.S.C. §1681d(a), (b).

19. N.Y. Gen. Bus. L. §380-g(d). NY employers must also prominently post a copy of Article 23-A in the workplace. N.Y. Lab. L. §201-f.

20. IEG §IV(B).

21. IEG §IV(C); N.Y. Correct. L. §753(1)(a)-(h).

22. N.Y. Correct. L. §753(2).

23. N.Y. Correct. L. §752; IEG §IV(C).

24. The Commission's Enforcement Guidance clarifies that for temporary help firms that "employ individuals and place them in job assignments at the firm's clients," a "conditional offer of employment is an offer to place an applicant in the firm's labor pool, from which the applicant may be sent on job assignments to the firm's clients." IEG §VI. Additionally, employers who obtain workers from temporary help firms must wait until after the worker is assigned to the employer before inquiring about criminal history, and must follow the FCA's Fair Chance Process in the event the employer chooses to decline the worker's employment. Id.

25. IEG §IV(B).

26. IEG §V(A).

27. www.nyc.gov/html/cchr/downloads/pdf/FairChance_Form23-A_distributed.pdf.

28. N.Y.C. Admin. Code §8-107(11-a)(2)(b)(i)-(iii); IEG §V(B).

29. 15 U.S.C. §1681b(b)(3); N.Y. Gen. Bus. L. §380-b(b).

30. IEG §V(C). The FCRA similarly requires that the applicant be given a "reasonable amount of time" to dispute any errors. 15 U.S.C. §1681m(a).

31. IEG §V(C). If an applicant demonstrates an error on a background check report, the employer must re-conduct the entire Fair Chance Process from the beginning. IEG §V(C)(i).

32. IEG §V(C)(ii).

33. IEG §V(C). Similarly, Article 23-A requires employers in New York state give a written explanation of the job denial to candidates within 30 days, albeit only when requested by the candidate.

34. 15 U.S.C. §1681m(a).

35. IEG §§V(A).

36. N.Y.C. Admin. Code §8-107(11-a)(2)(f); IEG §VII(A)-(D).

37. IEG §VIII.

38. N.Y.C. Admin. Code §§8-109(e) and 8-402(b).

39. N.Y.C. Admin. Code §8-126. The Commission's Enforcement Guidance indicates that the amount of the civil penalty will be guided by a variety of factors, including but not limited to, the severity of the violation, whether there existed additional previous or contemporaneous violations, the employer's revenue and number of employees, and whether or not the employer knew or should have known about the FCA. IEG §IX.

40. IEG §IX.

41. 15 U.S.C. §§1681n and 1681o. Currently before the U.S. Supreme Court is the case of *Spokeo v. Robins*, No. 13-1339, wherein the court will consider whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare technical violation of a federal statute. While *Spokeo v. Robins* involves the plaintiff's right to sue under FCRA over false information provided in a consumer report, the case could potentially have broad implications for class actions asserting technical violations of FCRA's disclosure and authorization requirements that do not result in any actual injury. Argument was heard on Nov. 2, 2015, and no decision has been issued as of the writing of this article.

Damages

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utes.[13] Today, the prevailing view appears to be that applying liquidated damages remedies under both the NYLL and FLSA results in "a windfall that neither the state nor the federal legislature appears explicitly to have intended."[14] Some courts have gone even further and held that applying pre-judgment interest pursuant to N.Y. C.P.L.R. §5004 is inappropriate as well since such interest serves an identical purpose to the FLSA. Therefore, pre-judgment interest cannot be awarded where FLSA liquidated damages are also available.[15]

It is certainly difficult to speculate as to the impetus for this sudden reversal by the courts. Perhaps the Second Circuit's recent increased scrutiny of wage and hour cases in the seminal *Cheeks v. Freeport Pancake House* in 2015 sparked this trend.[16] Alternatively, perhaps this trend is a backlash to the record-breaking filings of wage and hour cases in recent years that have clogged federal dockets. Regardless of the reason, there are strong trends within the judiciary to oppose 200 percent liquidated damages for prevailing plaintiffs in FLSA and NYLL litigations.

While much remains to be seen as to how the split among the lower court judges will be resolved over the next few years, and/or if an appellate court will weigh in on the subject, as of now it is clear that a multitude of judges reject treble damages for wage and hour violations in New York. Indeed some plaintiffs' attorneys have begun forgoing such cumulative claims altogether given this recent trend.[17] Now that the initial proliferation of duplicative damages under the NYLL and FLSA has been counterbalanced, practitioners can also expect the defense bar to increasingly reject redundant liquidated damages claims. This is especially true now that some judges who have previously approved both forms of liquidated damages are more recently rejecting such windfall recoveries.

1. Wage Theft Prevention Act of 2010, ch. 564, 2010 N.Y. Laws 1446; N.Y. LAB. LAW §§198(1-a), 663(1).

2. The NYLL provides for a six year statute of limitations, while the FLSA provides for up to a two or three year statute of limitations period depending on whether the violations were "willful." See 29 U.S.C. §255(a); N.Y. LAB. LAW §198(3). Therefore, the double liquidated damages discussed in this article are only applicable for the two or the three year period where both statutes of limitations overlap.

3. See, e.g., "New York Enacts Law Increasing Penalties for Wage and Hour Violations," Carolyn D. Richmond & Glenn S. Grindlinger, December 2010 ("These changes to the NYLL are likely to embolden plaintiffs' attorneys. In the event an employer fails to properly pay its employees, employees will be able to obtain double damages."), available at http://www.foxrothschild.com/publications/new-york-enacts-law-increasing-penalties-for-wage-and-hour-violations; see also "New York's New 'Wage Theft' Law: What It Means, and What To Do Now," Allan S. Bloom & Rebecca E. Raiser, March 2011 ("[T]he WTPA allows a plaintiff to recover "double damages" for wage violations."), available at http://www.paulhastings.com/Resources/Upload/Publications/1845.pdf.

4. See, e.g., *Cao v. Wu Liang Ye Lexington Rest.*, No. 08 CIV. 3725, 2010 WL 4159391, at *5 (S.D.N.Y. Sept. 30, 2010); *Ke v. Saigon Grill*, 595 F. Supp. 2d 240, 261-62 (S.D.N.Y. 2008).

5. *Cao*, 2010 WL 4159391, at *5 ("Under the FLSA, liquidated damages are compensatory, rather than punitive … . In contrast, liquidated damages under the Labor Law are punitive 'to deter an employer's willful withholding of wages due.' … . Because liquidated damages under the FLSA and the Labor Law serve fundamentally different purposes, a plaintiff may recover liquidated damages under both the FLSA and the Labor Law.") (citations omitted).

6. See, e.g., *Gurung v. Malhotra*, 851 F. Supp. 2d 583, 593-94 (S.D.N.Y. 2012); *Santillan v. Henao*, 822 F. Supp. 2d 284, 297 (E.D.N.Y. 2011); see also *Ho v. Sim Enterprises*, No. 11 Civ. 2855, 2014 WL 1998237, at *19 (S.D.N.Y. May 14, 2014); *Hernandez v. P.K.L. Corp.*, No. 12-CV-2276, 2013 WL 5129815, at *1, *5-6 (E.D.N.Y. Sept. 12, 2013); *Hernandez v. Punto y Coma*, No. 10-CV-3149, 2013 WL 4875074, at *1, *8 (E.D.N.Y. Sept. 11, 2013); *Castellanos v. Deli Casagrande*, No. CV 11-245, 2013 WL 1207058, at *6 (E.D.N.Y. March 7, 2013), report & rec. adopted, 2013 WL 1209311 (E.D.N.Y. March 25, 2013).

> Now that the initial proliferation of duplicative damages under the NYLL and FLSA has been counterbalanced, practitioners can also expect the defense bar to **increasingly reject redundant liquidated damages claims.**

7. *Fu v. Pop Art Int'l*, No. 10 Civ. 8562, 2011 WL 4552436, at *3-5 (S.D.N.Y. Sept. 19, 2011) (emphasis added) (holding that plaintiff was not entitled to liquidated damages under both federal and state law simultaneously), report & rec. adopted as modified on other grounds, 2011 WL 6092309 (S.D.N.Y. Dec. 7, 2011); *Pineda-Herrera v. Da-Ar-Da*, No. 09-CV-5140, 2011 WL 2133825, at *4-5 (E.D.N.Y. May 26, 2011).

8. *Gurung*, 851 F. Supp. 2d at 593 n.6 (stating that the theory that double damages should not be awarded in light of the amendment of the NYLL to mirror the FLSA is the "minority view").

9. *Inclan v. New York Hosp. Grp.*, 95 F. Supp. 3d 490, 505 (S.D.N.Y. 2015) ("There is no appellate authority as to whether a plaintiff may recover cumulative (sometimes called 'simultaneous' or 'stacked') liquidated damages under the FLSA and NYLL … ."); see also *Garcia v. JonJon Deli Grocery*, No. 13 CIV. 8835, 2015 WL 4940107, at *6 (S.D.N.Y. Aug. 11, 2015) ("The Second Circuit has provided no guidance on whether a Plaintiff may obtain cumulative recovery of liquidated damages under the FLSA and the NYLL.").

10. E.g., *Inclan*, 95 F. Supp. 3d at 506 ("[W]e decline to rule that plaintiffs are entitled to cumulative liquidated damages under the FLSA and NYLL"); see also *Kim v. 511 E. 5TH St.*, No. 12CV8096, 2015 WL 5732079, at *11 (S.D.N.Y. Sept. 30, 2015); *Chowdhury v. Hamza Exp. Food*, No. 14-CV-150, 2015 WL 5541767, at *8 (E.D.N.Y. Aug. 21, 2015) report & rec. adopted, No. 14-CV-150, 2015 WL 5559873 (E.D.N.Y. Sept. 18, 2015); *Garcia*, 2015 WL 4940107, at *6; *McGlone v. Contract Callers*, No. 11-CV-3004, 2015 WL 4425895, at *2 (S.D.N.Y. July 20, 2015); *Olvera v. Los Taquitos Del Tio*, No. 15 CIV. 1262, 2015 WL 3650238, at *2 n.2 (E.D.N.Y. June 11, 2015); *Lopez v. Yossi's Heimishe Bakery*, No. 13 CV 5050, 2015 WL 1469619, at *11 (E.D.N.Y. March 30, 2015); *Jimenez v. Computer Express Int'l Ltd.*, No. 14-CV-5657, 2015 WL 1034478, at *2 (E.D.N.Y. March 10, 2015); *Chuchuca v. Creative Customs Cabinets*, No. 13 Civ. 2506, 2014 WL 6674583, at *16 (E.D.N.Y. Nov. 25, 2014); *Shiu v. New Peking Taste*, No. 11 Civ. 1175, 2014 WL 652355, at *13 (E.D.N.Y. Feb. 19, 2014).

11. *Chuchuca*, 2014 WL 6674583, at *16.

12. *Spain v. Kinder Stuff 2010*, No. 14-CV-2058, 2015 WL 5772190, at *6 (E.D.N.Y. Sept. 29, 2015) ("There is an emerging trend towards denying a cumulative recovery of liquidated damages."); *Herrera v. Tri–State Kitchen & Bath*, No. 14 Civ. 1695, 2015 WL 1529653, at *12 (E.D.N.Y. March 31, 2015) ("[T]here is an emerging trend towards denying a cumulative recovery of liquidated damages, as the NYLL liquidated damages provision now closely parallels the FLSA provisions because of the 2011 amendments, which increased liquidated damages from 25 percent to 100 percent and changed the standard of proof.").

13. Compare *Shiu*, No. 11-CV-1175, 2014 WL 652355, at *13 & n.19 (denying double liquidated damages) (Garaufis, J.), and *Kim*, 2015 WL 5732079, at *11 (S.D.N.Y. Sept. 30, 2015) (denying double liquidated damages) (Maas, Mag. J.), with *Hernandez*, 2013 WL 4875074, at *1, *8 (E.D.N.Y. Sept. 11, 2013) (allowing double liquidated damages) (Garaufis, J.), and *Gurung*, 851 F. Supp. 2d at 593-94 (S.D.N.Y. 2012) (allowing double liquidated damages) (Maas, Mag. J.); see also *Lopez*, 2015 WL 1469619, at *11 & n.13 (E.D.N.Y. March 30, 2015) (denying double liquidated damages and discussing at length that the presiding judge had previously allowed double liquidated damages).

14. *Lopez*, 2015 WL 1469619, at *11.

15. E.g., *Chen v. New Fresco Tortillas Taco*, No. 15 Civ. 2158, 2015 WL 5710320, at *9 (S.D.N.Y. Sept. 25, 2015) ("The same logic which prevents this Court from allowing cumulative liquidated damages under both the NYLL and FLSA … likewise prevents prejudgment interest on overlapping claims for which FLSA liquidated damages have been awarded.") (citation omitted).

16. *Cheeks v. Freeport Pancake House*, 796 F.3d 199 (2d Cir. 2015).

17. *Baltierra v. Advantage Pest Control Co.*, No. 14 CIV. 5917, 2015 WL 5474093, at *9 (S.D.N.Y. Sept. 18, 2015) ("Plaintiffs do not seek cumulative liquidated damages under both the NYLL and FLSA … . In any event, the Court would not award them."); *Pinovi v. FDD Enterprises*, No. 13 CIV. 2800, 2015 WL 4126872, at *6-7 (S.D.N.Y. July 8, 2015) ("A number of courts have challenged whether this 'different purposes' rationale is persuasive after the April 9, 2011 amendment to the NYLL, which renders the liquidated damages provisions of the FLSA and the NYLL nearly identical … . Here, this Court need not choose a side in this debate because Plaintiff's proposed damages calculations only request liquidated damages consistent with the FLSA.") (citation omitted).