FRANKLIN, GRINGER & COHEN, P.C.
ATTORNEYS AT LAW
# LEGAL BRIEFING
ATTORNEY ADVERTISING
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## REMARKABLE RESULTS

## SIX FIGURE SETTLEMENT CONCERNING AN ELEVATOR ACCIDENT

We recently settled a personal injury matter for one of our clients who was seriously injured when an elevator he was riding in malfunctioned. As a result of his injuries, he was caused to miss time from work and lose wages.

The case was fiercely litigated for over four years in Kings County Supreme Court. During the course of discovery, we obtained hundreds of pages of documents to demonstrate that this particular elevator had a long history of malfunctions, breakdowns and requests that it be fully modernized and upgraded. This was crucial to our client's case since it was our burden to prove that the owner of the premises and the elevator contractor hired to take care of the elevator were aware (or should have been aware) that this elevator was dangerous and hazardous to its passengers.

As a trial date was approaching, a mediation was scheduled in an attempt to

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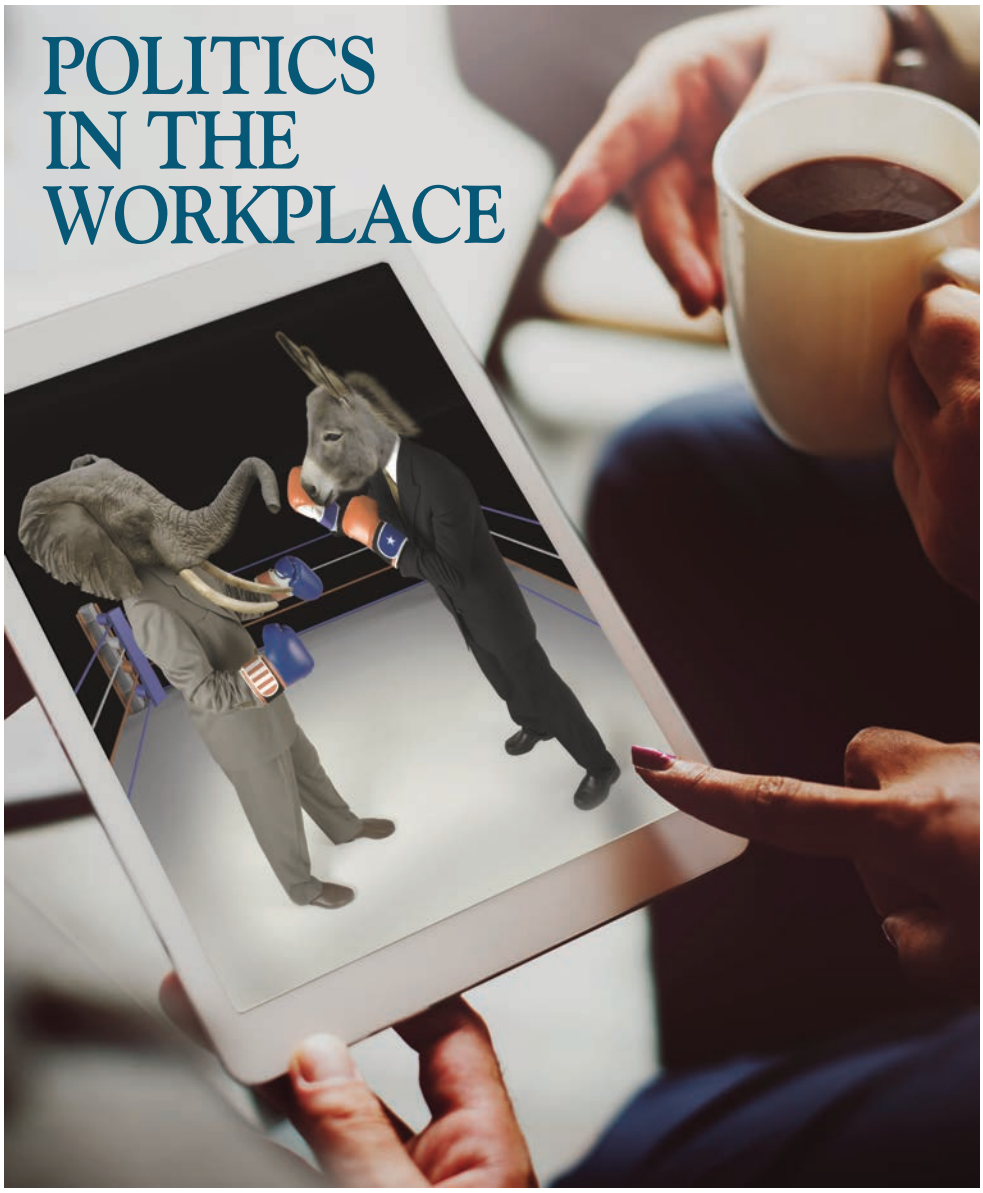
## POLITICS IN THE WORKPLACE



Much has been written about the political divisions in the country and how they disrupt families who have members on opposite sides of the fence. Just as politics can disrupt a family, it can disrupt a workplace when employees have strong disagreements. Employers need a legal framework to help them navigate these disputes in the most constructive way. These hypothetical examples describe some different scenarios and how they should be handled:

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# CLIENT CONCERN CORNER

## QUESTION:

*Two years ago, a man dressed in shabby clothing came to the house and rang the front door bell. He politely asked if there were any chores he could do for us around the house or in the yard. I felt sorry for him and asked him if he could rake the leaves on the lawn and the sidewalk in front of the house. When he was done an hour later, I gave him twenty dollars and wished him luck. He came back the following week and I gave him something else to do. He came by just about every other week and I always gave him twenty dollars. It usually took him about an hour to complete the chore I asked him to do.*

*He stopped coming by about three months ago. Last week, I got a letter from a law firm saying that they represented this man and he was claiming he worked twenty hours a week for us and we had failed to pay him the proper minimum wage. I can't believe that after the kindness we had shown this man he would turn around and threaten us with a legal action. Is this something I should be worried about?*

## ANSWER:

In our office, we frequently say when we get a situation like this that "No good deed goes unpunished." It always seems that the employee that you lend money to or bail out of jail in the middle of the night is the employee who will turn around and sue you.

Unfortunately, there is nothing that can be done to stop this person from suing you under New York State Labor Law. As a result, you would be responsible for hiring (and paying) an attorney to handle the litigation. There would be no quick dismissal since the issue is ultimately one of credibility. (How many hours did he actually work?) A jury would have to decide who was telling the truth. In litigation, there are no guarantees what a jury may decide. If a jury were to give this person any award, you would be liable for the person's attorneys' fees and double damages.

It is important to protect yourself from this kind of thing happening by treating this individual as an employee: keep appropriate time and pay records. Or you may want to rethink your act of charity.

**If you have any questions regarding this or any other labor and employment law matter, please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131.**

# FLSA LIABILITY AND BANKRUPTCY

In *Moreno Cocoletzi v. Orly*, a group of employees filed a complaint in the United States Bankruptcy Court for the Southern District of New York against their former employer, seeking a judgment pursuant to the U.S. Bankruptcy Code, that back wages awarded to them by a district court were not dischargeable in bankruptcy.

The employer owned and operated two pizza places in New York City. A group of employees sued the employer for violations of the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL). The employees alleged that the employer had failed to pay them minimum wage, overtime and spread-of-hours wages. Spread of hours "wages" are paid to an employee when the length of time between the beginning and end of his or her workday is greater than ten hours. The length of time includes any time off duty, including meals, rest periods or time between shifts. When this occurs, the employee must be paid an extra hour at the applicable minimum wage. This applies to all employees in the hospitality industry and employees earning close to the minimum wage in other industries. The employees also alleged that the employer had not provided them wage notices and statements and required the employees to pay for the costs and expenses of purchasing tools of the trade without reimbursing them. Shortly thereafter, the employer filed for bankruptcy and tried to discharge the award given to its employees. The court would have to analyze whether the debt was dischargeable in bankruptcy.

Section 523(a)(6) of the Bankruptcy Code bars the discharge of any debt that is the product of "willful and malicious" injury by the debtor to the creditor. A creditor must establish three elements to prevail on a claim under this section: first, that the debtor acted willfully, second that the debtor acted maliciously, and third, that the debtor's willful and malicious actions caused injury to the creditor. To establish that a debtor caused a willful injury, a creditor must prove that the debtor deliberately caused the injury or that there was a subjective, substantial certainty that the injury would occur. Conduct which is certain to cause financial harm to the creditor, in addition to the debtor's knowledge that he or she is violating the creditor's legal rights, is sufficient to establish malice. As for injury, the conduct complained of must be intended to or necessarily cause injury in order for the debt to be determined non-dischargeable.

Here, the court held that the employer acted willfully because it deliberately acted with the specific intent to cause the employees to suffer economic injury by not paying them the wages owed to them. The court also held that the employees established that the employer acted maliciously because its conduct was clearly certain to cause the employees' financial harm and the employer knew it was violating the employees' legal rights under the FLSA. Lastly, the court held that the employer's intentional and willful acts caused injury to its employees. Therefore, the employer's motion to dismiss the employees' complaint was denied.

Employers should be aware that when it comes to wage and hour claims under the FLSA and NYLL, there is personal liability and that the debt is typically not dischargeable in bankruptcy. Courts will often find that any scheme to avoid paying wages is willful and malicious conduct that causes economic injuries to employees.

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# POLITICS IN THE WORKPLACE

*A newspaper has an article about one of your employees with his photo stating that he was present at the demonstration in Charlottesville, Virginia with a group of neo-Nazis shouting anti-Semitic slurs. You bring him in to your office to get his side of the story. He admits that he was present and that he is a member of a neo-Nazi group. However, he argues that he has the right under the First Amendment to join any political group and to engage in any political activities he wants and to have whatever political beliefs he has. You want to terminate him. Does the First Amendment protect him?*

The First Amendment does not apply to private sector employers. It only applies to government employers. So, it does not protect the neo-Nazi employee in this case. However, an examination should also be made of the New York Legal Activities Law, enacted in 1993. The Legal Activities Law protects employees from adverse employment action from certain legal activities, including some political activity, that take place outside the workplace. (A full description of the Legal Activities Law is on our website, ***www.franklingringer.com/news-articles/labor-employment-law/new-york-legal-activities-law/)*** The law defines political activities as running for public office, campaigning for a candidate or participating in fund-raising activities for a candidate, a political party or political advocacy group. Accordingly, it would be necessary to investigate whether any of the employee's activities in Charlottesville could be construed to be covered by this definition of "political activities." However, the law only protects "legal" activities. If the employee engaged in conduct that could be construed to be unlawful, he might lose whatever protection under the law he might have had.

*An employee is a strong supporter of Candidate A because he is an advocate for workers' rights and is endorsed by local labor organizations. He spends his break and lunch periods as well as before and after the work day to solicit employees to support his candidate. He wears a button on his clothes identifying his support for Candidate A. He has also used the office email system to send emails to his fellow employees urging their support for Candidate A. Some employees have complained about his zealousness in his solicitations and feel they are being harassed by him. What can you do?*

As stated above, the First Amendment does not protect an employee in a private sector job. Also, the Legal Activities Law does not apply since we are talking about activities taking place in the workplace. Section 7 of the National Labor Relations Act (NLRA) protects the rights of employees to engage in concerted activities for "mutual aid and protection." It is possible that the employee can argue that his support for Candidate A is for the "mutual aid and protection" of workers since Candidate A is an advocate for workers' rights. The National Labor Relations Act also sets parameters on no-solicitation rules. Rules that totally ban solicitation for union causes or mutual aid and protection have been ruled to be too broad. No-solicitation rules must be limited to working time. Since the solicitation is taking place during non-working time, it would be permissible under a valid no-solicitation rule. With respect to wearing the button, the issue again would hinge on whether the button is protected by Section 7. Is it strictly a political button or is it for mutual aid and protection? The NLRA protects employees who wear union buttons at work.

With respect to the use of the office email, there are some recent National Labor Relations Board decisions permitting employees to use office email systems for union organizing. However, the continued viability of these decisions is in doubt because of recent Republican appointments to the Board.

Finally, concerning possible harassment, an investigation should be conducted to see if the employee's actions crossed the line. Just because an employee may feel subjectively intimidated, does not mean that there was harassment. Were threats made? Did the employee persist repeatedly after he was told by other employees that they were not interested?

*You are a strong supporter of Candidate B. You want to do everything you can to help him /her win. Can you offer your employees a bonus if he wins the election? Can you force your employees to campaign for him?*

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New York prohibits employers from influencing employees' political opinions or actions. For example, employers in New York are prohibited from placing a political message on or inside an employee's pay envelope, exhibiting any poster or handbill in the workplace within 90 days of a general election that threatens that work will be stopped, wages will be reduced or the business will close if any particular candidate is elected or defeated, and anything else that attempts to influence an employee's political opinions or actions. New York also prohibits employers from offering employees a promotion or raise in order to induce them to support a particular candidate or party. It is also unlawful for an employer to stop an employee who is entitled to vote the privilege of attending an election and may not subject an employee to any penalty or reduce their wages because the employee is exercising his or her right to vote. Any employer who is found guilty of interfering with an employee's political opinions or actions may be convicted of a misdemeanor, which is punishable by imprisonment for up to a year and a fine of up to $500.00.

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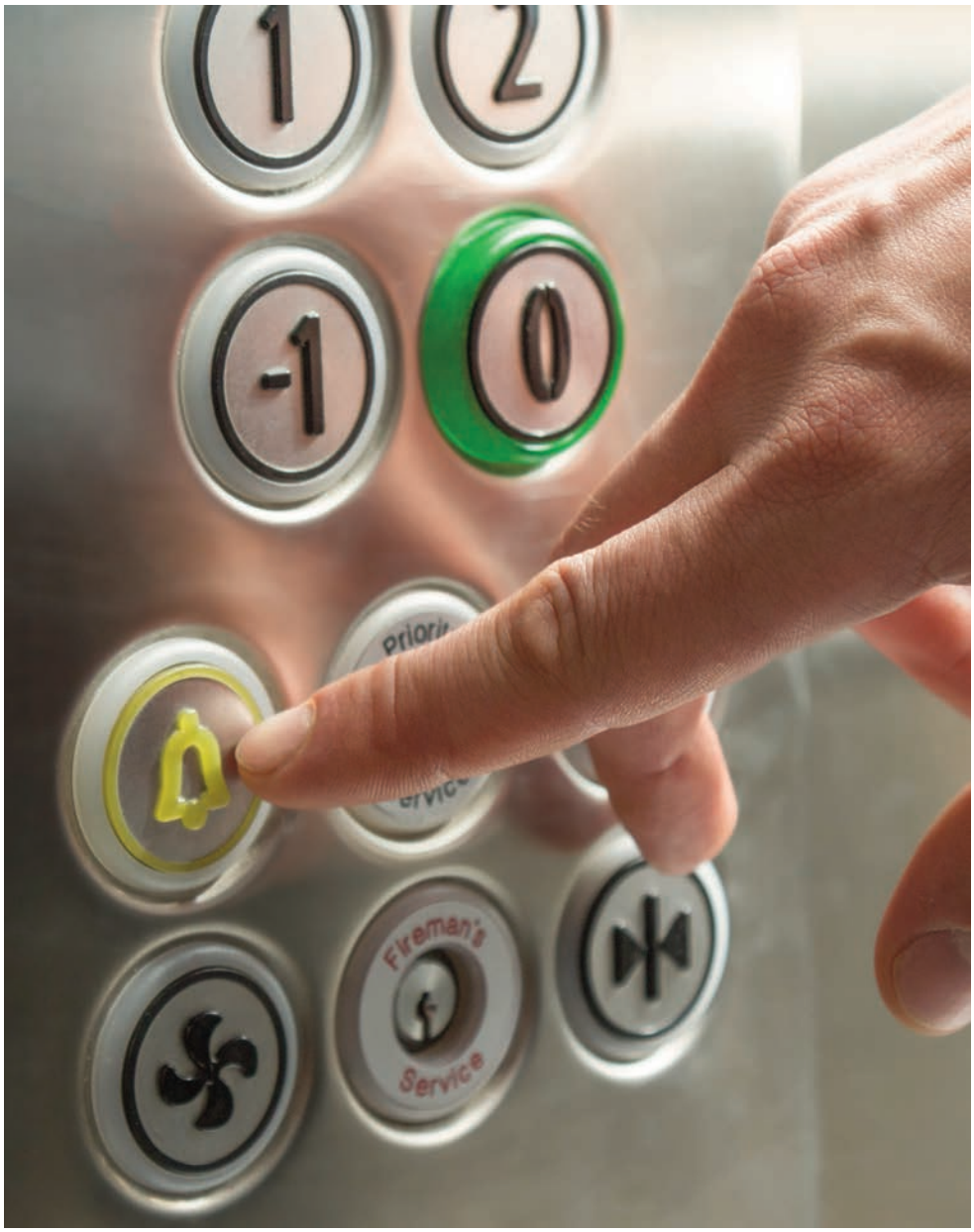
## REMARKABLE RESULTS

## *SIX FIGURE SETTLEMENT CONCERNING AN ELEVATOR ACCIDENT*

settle this matter. Mediation is an alternative dispute resolution where the parties meet with a neutral third party (usually a retired judge or an attorney) in an attempt to settle the case. After an eight-hour mediation, we successfully obtained a $550,000.00 settlement for our client.

If you have any questions concerning any possible personal injury matters, please call our firm for a free consultation. We would be happy to speak with you.

**If you have any questions regarding this or any other labor and employment law matter, please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131.**



# IMPORTANT LAW UPDATE FOR ALL EMPLOYERS IN NEW YORK

**Effective December 31, 2018, the New York State minimum wage and salary threshold for exempt employees will increase.**

## MINIMUM WAGE

**New York City**
- Large employers (11 or more employees) ..... $15.00 per hour
- Small employers (10 or less employees) ..... $13.50 per hour

**Long Island and Westchester** ..... $12.00 per hour
**Remainder of the State** ..... $11.10 per hour

## FAST FOOD WORKERS

**New York City** ..... $15.00 per hour
**Remainder of the State** ..... $12.75 per hour

## SALARY THRESHOLD

**New York City**
- Large employers (11 or more employees) ..... $1,125.00 per week
- Small employers (10 or less employees) ..... $1,012.50 per week

**Long Island and Westchester** ..... $900.00 per week
**Remainder of the State** ..... $832.00 per week

*Please note that just because an employee is paid a salary does not mean he or she is exempt from overtime.

**There will also be corresponding increases to the allowances for tips, meals, lodging, utilities, and uniform maintenance. Please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131 for the specifics regarding these increases and any other labor and employment questions.**

# IMPORTANT LAW UPDATE FOR EMPLOYERS IN WESTCHESTER COUNTY

Lawmakers in Westchester County have approved the "Earned Sick Leave for Certain Employees" bill.

- The law goes into effect on March 30, 2019.
- Under the law, all full-time and part-time employees who work more than 80 hours per year in Westchester County will be eligible to earn sick leave at a rate of 1 hour for every 30 hours worked, up to 40 hours per calendar year.
- For employers with five or more employees working in Westchester County, this leave must be paid at the employee's normal rate of pay.
- Employers with fewer than five employees need only provide unpaid leave.
- Employees will be able to use sick leave for any of the following reasons:
  - For an employee's mental or physical illness, injury or health condition; an employee's need for medical diagnosis, care or treatment of such illness, injury or health condition; or an employee's need for preventative care;
  - Care of a family member with a mental or physical illness, injury or health condition; for the family member's need for medical diagnosis, care or treatment of such illness, injury or health condition; or for the family member's need for preventative care;

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- Care of an employee or family member when it has been determined by public health authorities that the employee's or family member's presence in the community may jeopardize the health of others because of his or her exposure to a communicable disease; and/or
- Closure of the employee's place of business or a day care or elementary or secondary school attended by an employee's child where such closure is due to a public health emergency.

- The term "family members" includes an employee's child, spouse, domestic partner, parent, sibling, grandchild or grandparent; and the child or parent of an employee's spouse, domestic partner or household member.
- Employees may be required to comply with the employer's usual notice and procedural requirements for absences or for requesting leave.
- Employers may require documentation of the need for sick leave for absences of more than three consecutive days.

# LAW UPDATE FOR ALL EMPLOYERS IN SUFFOLK COUNTY

The Suffolk County Legislature has adopted legislation prohibiting employers from asking about a job applicant's salary history at any point during the employment process.

- The law goes into effect on June 30, 2019.
- Under the law, an employer, employment agency, employee, or agent thereof employing four or more persons may not:
  - Ask a job applicant or an applicant's former employer about a job applicant's wage or salary history, including, but not limited to, compensation and benefits.
  - Conduct a search of publicly available records or reports to find out an applicant's salary history.
  - Rely on an applicant's salary history to determine the wage or salary amount at any stage in the employment process.
- The stated purpose of the law is to combat pay inequity for women and minorities. However, the law applies to all applicants and prospective employees regardless of gender, race and/or or ethnicity.
- If an applicant voluntarily discloses his or her salary history, the employer still cannot use that information to determine the applicant's salary and benefits.
- Suffolk County joins New York City, Westchester County and Albany County as localities having similar legislation. A state-wide bill had previously been passed in the Assembly but stalled in the Senate. With the recent change of control of the Senate to the Democrats, it is likely a state-wide law will be passed during the next legislative session.
- The law does not give guidance as to how salary discussions should take place. The New York City law, for example, allows employers to discuss the applicant's salary expectations. The Suffolk County law does not address this issue.
- Employers should begin updating their employment practices now to comply with the law.
- An employer's failure to comply with the law could lead to the following consequences:
  - Compensatory damages to the individual;
  - Payment to the County's general fund;
  - Civil fines and penalties in an amount not to exceed $50,000 ($100,000 if the violation is found to be willful, wanton, or malicious).

**If you have any questions regarding this or any other labor and employment law matter, please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131.**

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We have over ninety years of combined experience representing employers in labor relations and employment law matters. We believe that there are numerous advantages for a company to look to a firm that has practiced labor and employment law for many years in both preventing and defending employment discrimination litigation. Our foremost concern is to avoid litigation whenever possible through preventive planning. Our clients consult with us on a regular basis before taking action to avoid labor disputes and costly lawsuits. The best result for a client is the lawsuit that does not happen in the first place.

We have been giving seminars and writing articles for many years on how to avoid litigation through the use of progressive discipline, documentation, consistent treatment, adoption of anti-harassment policies, employee handbooks, and proper training of supervisory staff. We give this advice because we have seen that it has worked for our clients. Our long-term clients who regularly consult with us before taking adverse disciplinary action rarely face litigation over those decisions.

## OUR FIRM ALSO PRACTICES IN THE FOLLOWING AREAS

**LABOR RELATIONS AND EMPLOYMENT LAW ON BEHALF OF MANAGEMENT**
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