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Cornell
Cooperative
Extension





Cornell University

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Who’s in the House?

STI STELLAR TECHNOLOGY

Sullivan Free Library
sullivanfreelibrary.org

TSI

PES Pinnacle Employee Services

UPSTATE CARING PARTNERS
Empowering People

Opportunities FOR OTSEGO

PEACE INC
EMPOWERING PEOPLE TO THRIVE | EST. 1968

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Thanks for Joining Us Today!



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Employee Access to Personnel Files: The Rules Just Changed

Michael Sciotti, Partner

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Agenda

- General Overview
- Employer Obligations
- Enforcement Actions
- Interaction With Other Laws
- Action Items

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General Overview

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Effective Date of New Law

- The Act adds § 210-b to the New York State Labor Law (NYSLL).
- Entitled: Access to Personnel Records
- Effective Date: November 8, 2026

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Employee

- “Employee” means a person currently employed or formerly employed by an employer.

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Employer

- “Employer” means any individual, corporation, partnership, labor organization, unincorporated association or any other legal business, including any governmental entity or public employer, and any commercial entity, including agents of such employer.

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What Is a Personnel Record?

- A “personnel record” means a record kept by an employer that identifies an employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee’s qualifications for employment, promotion, transfer, additional compensation or disciplinary action.

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What Is a Personnel Record? (Cont.)

- A “personnel record” shall include a record in the possession of a person, corporation, partnership or other association that has a contractual agreement with the employer to keep or supply a personnel record.

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What Is a Personnel Record? (Cont.)

- A “personnel record” shall **not** include information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of such other person’s privacy.

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What Documents Are Personnel Records?

- The following written information or documents (to the extent prepared by an employer) regarding an employee shall be included in the personnel record for that employee:
  1) The name, address, and date of birth of the employee
  2) Job title
  3) Job description
  4) Rate of pay and any other compensation paid to the employee
  5) Starting date of employment

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What Documents Are Personnel Records? Cont.

6) Job application of the employee
7) Resumes or other forms of employment inquiry submitted to the employer in response to the employer's advertisement by the employee
8) All employee performance evaluations
9) Employee evaluation documents
10) Written warnings of substandard performance
11) Lists of probationary periods
12) Waivers signed by the employee
13) Copies of dated termination notices
14) Any other documents relating to disciplinary action regarding the employee

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Personnel Records: Open Issues

- Supervisor files
- Internal investigations
- Emails
- Text messages
- Other

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Personnel Record: Format

- A personnel record shall be maintained in typewritten or printed form or may be handwritten in indelible ink.
  - No pencil
- Indelible ink is a specialized, permanent marking fluid that cannot be easily washed away, erased, or removed by conventional solvents or laundering.

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Employer Obligations

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Employer Obligation #1

- An employer shall retain the complete personnel record of any employee without deletions or expungement of information from the date of employment of such employee to a date three years after the termination of employment of the employee with such employer.

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Employer Obligation #2

- If an employer elects to have a written personnel policy regarding the terms and conditions of employment, such personnel policy, as the same may be amended from time to time, shall be continuously maintained at the office of such employer where personnel matters are administered.

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Employer Obligation #3 (Union Employer)

- Nothing in the new law shall be construed to supersede the terms of a collective bargaining agreement (CBA).
- However, that such CBA must provide at least substantially similar access by an employee to their personnel records as is provided by the new law.

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Employer Obligation #4 (Antiretaliation)

- No employer or any other person shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee who exercises such employee's rights under the new law.

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Employer Obligation #4 (Antiretaliation) (Cont.)

- To threaten, penalize, or in any other manner discriminate or retaliate against an employee includes, but is not limited to, threatening to contact **or contacting** United States immigration authorities or otherwise reporting or threatening to report an employee's suspected citizenship or immigration status or the suspected citizenship or immigration status of an employee's family or household member, to a federal, state, or local agency. (Emphasis added.)

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Employer Obligation #5 (Employer Notice)

- An employer shall notify an employee within 10 days of the employer placing in the employee's personnel record any information to the extent that the information is, has been used or may be used, to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation, or the possibility that the employee will be subject to disciplinary action.

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Employer Obligation #5 (Employer Notice) (Cont.)

- An employer receiving a written request from an employee to access such employee's personnel record shall provide the employee with a copy of such personnel record, at no cost to the employee, within five business days of submission of a written request for such copy to the employer.

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Employer Obligation #5 (Employer Notice) (Cont.)

- An employer shall not be required to allow an employee to review the employee's personnel record on more than two separate occasions in a calendar year.
- However, that the notification and review caused by the placing of negative information in the personnel record shall not be deemed to be one of the two annually permitted reviews.

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Employer Obligation #5 (Employer Notice) (Cont.)

- If there is a disagreement with any information contained in a personnel record, removal or correction of such information may be mutually agreed upon by the employer and the employee.

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Employer Obligation #5 (Employer Notice) (Cont.)

- If an agreement is not reached, the employee may submit a written statement explaining the employee's position, which shall be contained and become a part of such employee's personnel record.

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Employer Obligation #5 (Employer Notice) (Cont.)

- The statement shall be included when said information is transmitted to a third party as long as the original information is retained as part of the file.

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Enforcement

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Employee Remedies

- Any violation of the new law by an employer or (any other person) shall be punished by a fine between $500 and $2,500.
- The new law shall be enforced by the Office of the New York State Attorney General and not the New York State Department of Labor.
- There is no defined period or procedure for an employee to file a claim with the New York State Attorney General.

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Labor Bureau: NYS Attorney General

- The Office of the New York State Attorney General investigates complaints regarding wage and hour claims, benefits, paid leave, job safety, discrimination, and harassment.
- Remedies available: back pay, reinstatement, and changes in behavior and policies.
- Link to file a complaint: https://ag.ny.gov/file-complaint/employment

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Employee Remedies (False Information)

- If an employer places any information in a personnel record that such employer knew or should have known to be false, the employee shall have remedy through the CBA, other personnel procedures, or judicial process to have such information expunged.
- This provision does not prohibit the removal of information contained in a personnel record upon mutual agreement of the employer and employee for any reason.

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Interaction With Other Laws

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OSHA Complaince

- The new law does not impact employer obligations to comply with employee access to medical records under the Occupational Health and Safety Act.

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Segregation of Medical Records

- The new law does not impact employer obligations to comply with the separation of medical records from employee personnel files under the:
  - New York State Human Rights Law
  - Americans With Disabilities Act
  - Family and Medical Leave Act
  - Genetic Information Non-Discrimination Act

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Protection of Employee Data

- The new law does not impact employer obligations to protect employee information and privacy under the NYSLL.

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Action Items

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Action Items

- Prepare Templates:
  - Notice to Employee
  - Objection by Employee
  - Employee Access Request
  - Agreement to Amend Personnel Records
- Employment Policy?
- No Employment Poster
- Supervisor and Manager Notice and Training
- Take Inventory of Personnel Records

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More to Come?

- Will the New York State Department of Labor and the New York State Attorney General issue any guidance?
- Regulations?

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More to Come? (Cont.)

- NYS Governor's Request for Changes
  - When signing the bill, NYS Governor Kathy Hochul issued an approval memorandum acknowledging ambiguities in the law.
  - Amendments are expected to narrow the broad definition of "personnel records."

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Questions? Get in Touch!



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Conducting Internal Investigations: A Briefing for General Counsel

10 Questions to Answer Before—and After—the Hotline Rings

Rick Hartunian, Partner, and Pei Pei Cheng de Castro, Partner

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ROADMAP

10 questions, in the order you will face them

01 How does an investigation begin?

02 When should it formally open, and who decides?

03 Who leads: outside or in-house counsel?

04 How do we set and manage scope?

05 What must we preserve, and who owns the hold?

06 How do we prepare for and open interviews?

07 How do we handle cooperation and discipline?

08 When and how do we tell the board?

09 When must we disclose?

10 How do we close out the matter?

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01 · HOW INVESTIGATIONS BEGIN

Some matters you find; others find you

INTERNAL · YOU SET THE PACE

Hotline complaint

Anonymous or named; often the first written record of the allegation.

Report to a supervisor

Informal and easy to lose—managers need to know when to escalate.

EXTERNAL · SOMEONE ELSE SETS THE CLOCK

Regulatory inquiry

Often a voluntary request—but your cooperation posture starts on day one.

Subpoena

Grand jury, administrative, or trial—compelled, with firm deadlines.

Civil investigative demand

Compulsory, pre-suit process from a civil enforcer.

City and agency requests

Municipal agencies and oversight bodies, such as inspectors general.

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CIDs and subpoenas compel answers; ignoring them escalates

	Civil investigative demand	Grand jury subpoena	Administrative or state subpoena
Issued by	DOJ Civil Division, FTC, CFPB, and state attorneys general	Federal and state prosecutors	Agencies (e.g., SEC) and state and local bodies
Stage	Civil, before any complaint is filed	Criminal investigation	Civil or administrative inquiry
Can demand	Documents, interrogatories, and oral testimony	Documents and testimony	Documents and testimony
If ignored	Court enforcement, then contempt	Contempt; obstruction exposure	Court enforcement; penalties

Across all three: a missed deadline also costs cooperation credit and credibility.

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The GC or CCO decides—and writes down why

WHO DECIDES

The general counsel or chief compliance officer

Consult the audit committee chair when the matter touches financial reporting, senior management or a material control failure.

The contemporaneous record

- What was reported
- When, and by whom
- Why an investigation was warranted—not a routine HR review

Regulators and plaintiffs ask for this record first. Have counsel prepare it, for the purpose of giving legal advice, and mark it privileged.

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Bring in outside counsel when independence is the point

- Senior executives are implicated
- Potential criminal exposure
- A government inquiry is likely
- A whistleblower may go to the SEC
- In-house counsel reports up through the accused

WHY IT MATTERS

Independence protects the credibility of the findings—and keeps your own lawyers from becoming witnesses.

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Privilege turns on purpose: directed by counsel, for legal advice

1

Frame the purpose

Conducted to provide legal advice—not an ordinary-course business review.

2

Counsel retains experts

Forensic accountants and consultants engaged by counsel, so Kovel-type protection attaches.

3

Mark work product

Label materials as privileged and prepared at the direction of counsel.

4

Route facts through counsel

No business units writing their own summaries of what happened.

If in-house counsel leads, put the mandate in a written scope memo.

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04 · SCOPE

Start with a written scope memo

ALLEGATION	As reported—in the reporter's terms
TIME PERIOD	The window under review
WHO AND WHERE	Business units and individuals implicated
LEGAL ISSUES	Fraud, FCPA, securities, employment, and safety

Tight enough to move quickly; broad enough to answer the question the board or regulator will actually ask:

"Was this isolated—and is it still happening?"

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Scope creep is normal—treat each expansion as a collaborative decision

Document every call

Record each expansion—and each conscious decision not to expand—with the reason.

Revisit reporting lines

If scope reaches people who were overseeing the investigation, change who it reports to.

Manage cost in phases

Start with the key custodians and witnesses; widen when the evidence says to.

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The duty to preserve starts when an inquiry is reasonably anticipated

Often the day you open the file—sometimes earlier. Issue a written hold immediately, covering:

- **Email**
- **Slack, Teams, and chat**
- **Mobile devices**
- **Shared drives**
- **Physical documents**

And switch off the machinery of deletion: suspend auto-delete and routine retention schedules for the custodians and systems involved.

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Counsel owns the hold; IT makes it real

COUNSEL
Drafts and issues the hold

→

CUSTODIANS
Acknowledge in writing; counsel tracks it

→

IT AND RECORDS
Suspend deletion and confirm it's done

→

COUNSEL
Follows up; reissues as scope grows

The failure mode

A notice nobody confirms, or that IT never implements, is a spoliation problem waiting to happen.

The consequences

Court sanctions, adverse-inference instructions, obstruction exposure, and lost credibility.

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Every interview opens with an Upjohn warning

1. I represent the company, not you.
2. This conversation is privileged.
3. The privilege belongs to the company, which alone decides whether to waive it.
4. You are free to retain your own counsel.



Get the acknowledgment on the record—even a simple “do you understand?” in the notes.



Skipping or softening it is one of the most common ways investigations lose privilege or credibility.

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Prepare each interview like a deposition

Documents first

Pull the relevant documents and communications before anyone sits down.

Build the chronology

A witness-by-witness timeline of what each person saw and sent.

Decide who attends

Settle in advance whether the witness's own or company-provided counsel or union representative will be present.

Decide how to memorialize

Notes or a memo; a recording only rarely—it creates a discoverable transcript.

SEQUENCE OF INTERVIEWS

Peripheral witnesses
Context, systems, process

↓

Closer witnesses
Saw or handled key events

↓

Central witnesses
Interviewed last, with the full record

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Employees can be required to cooperate—within limits

Employee	Key rule	What it means in practice
Private sector	No Fifth Amendment right	Cooperation can be a condition of employment.
Public sector	Garrity	Protects statements compelled by government employers.
Unionized	Weingarten	May request union representation if discipline is reasonably feared.

State the consequence of refusing—up to termination—and apply it consistently with policy, employment agreements, and any collective bargaining agreement.

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Be candid with witnesses; be consistent in discipline

WHEN A WITNESS ASKS

“Do I need my own lawyer?”

Don’t minimize it. Repeat that company counsel does not represent them and they are free to consult their own attorney.

WHEN FINDINGS LEAD TO DISCIPLINE

Decide the process early

Document each decision and treat similarly situated employees alike to avoid disparate-treatment claims.

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Tell the board when a reasonable director would want to know

Think materiality to financials, safety, senior-management involvement, or regulatory exposure—not literal SEC thresholds.

CEO, CFO, OR A DIRECTOR IMPLICATED?

Go straight to the board or a committee of independent directors—not through management.

1 First notice: brief and oral

What's alleged · who's involved · what's being done · when the next update comes

↓

2 As it matures: counsel's assessment

Factual findings · the legal exposure they suggest · a remediation recommendation

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Privilege survives board reporting

Protect it

- Brief the board orally and in-person rather than circulating a detailed privileged report.
- Minutes at a high level: “Counsel presented findings; the committee discussed and directed next steps”
- Mark materials “Privileged and confidential—prepared at the direction of counsel.”

Two waiver traps

- **Forwarding the memo** to auditors, insurers, or directors who share it further
- **Using findings offensively** in a proxy statement or press release—a classic subject-matter waiver

Auditors need comfort: agree in advance what can be shared, and in what form.

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Disclosure triggers run in parallel, on different clocks

Securities law	Duty to correct or update statements found to be materially false
Sector regulators	Mandatory reporting rules in banking, health care, environmental, and safety sectors
Contract	Notice duties to counterparties and insurers
State AG and local authorities	State and municipal reporting obligations
DOJ—by choice	Voluntary self-disclosure to earn cooperation credit

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A four-step framework for the disclosure decision

1

Map every regime

Securities, sector regulator, DOJ, state AG, and contract.

2

Assess each on its own

Materiality and timing, independently under each regime.

3

Weigh the trade

Declination, credit, or inviting scrutiny.

4

Stay behind the facts

Never let the disclosure analysis outrun what you actually know.

A premature or inaccurate disclosure can be worse than a well-prepared one made a few weeks later.

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Deliver findings in the form that will actually be used

Written report

When the client wants a durable privileged record—and understands the discovery risk if privilege is later waived or challenged

Oral briefing

With a short set of talking points, when the goal is a board or regulator conversation without a detailed document

Either way, separate factual findings from legal analysis and recommendations—the latter are more clearly protected work product.

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Make remediation specific and trackable

Action	Owner	Due
Policy changes	[Name]	[Date]
Control enhancements	[Name]	[Date]
Training	[Name]	[Date]
Personnel actions	[Name]	[Date]

Close the loop

- Release or narrow the litigation hold
- Archive the privileged file apart from business records
- Calendar a follow-up to confirm remediation happened

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Questions? Get in Touch!



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Mental Health Accommodation Requests and Related Leave Issues

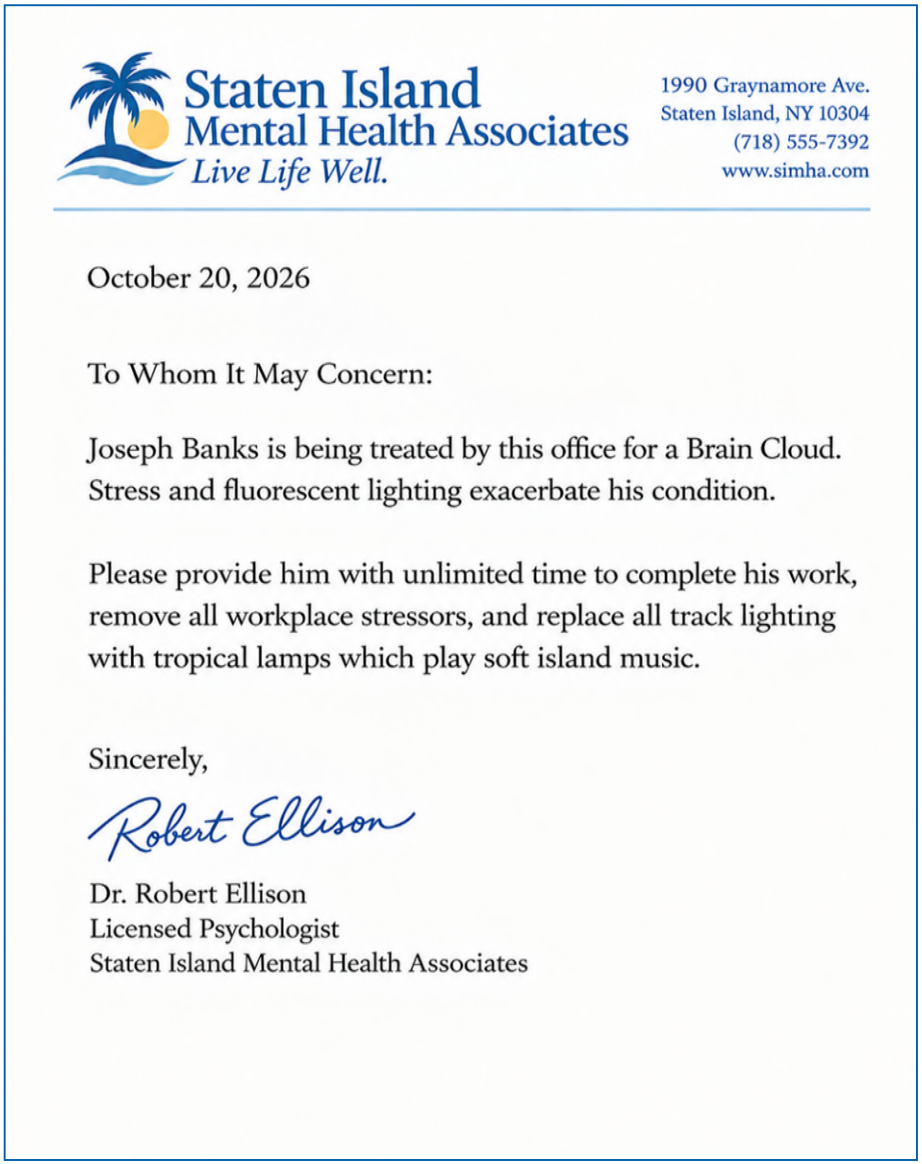
Scott Rogoff, Hotels, Hospitality & Food Service Team Leader

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Staten Island
Mental Health Associates
Live Life Well.

1990 Graynamore Ave.
Staten Island, NY 10304
(718) 555-7392
www.simha.com

October 20, 2026

To Whom It May Concern:

Joseph Banks is being treated by this office for a Brain Cloud. Stress and fluorescent lighting exacerbate his condition.

Please provide him with unlimited time to complete his work, remove all workplace stressors, and replace all track lighting with tropical lamps which play soft island music.

Sincerely,

Robert Ellison

Dr. Robert Ellison
Licensed Psychologist
Staten Island Mental Health Associates

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Agenda

1. What Is an Accommodation?
2. Recognizing Accommodation Requests
3. Assessing and Responding to Requests
4. Related Leave Issues

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What Is an Accommodation?

- **ADA:**
  - Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position.

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What Is an Accommodation?

- **NYSHRL:**
  - Actions taken which permit an employee or prospective employee with a disability, or a pregnancy-related condition, to perform in a reasonable manner the activities involved in the job or occupation sought … provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested.

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Recognizing an Accommodation Request

- **In General:**
  - The employee must communicate to the employer they have a medical condition that negatively affects their ability to perform the essential functions of the job, and that they need a workplace adjustment because of it.

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Recognizing an Accommodation Request (Cont.)

- **Exceptions:**
  - Employer knows the employee has a disability; AND
  - Employer knows the employee is experiencing performance or conduct issues because of the disability; AND
  - Employer knows the disability prevents the employee from asking for the accommodation.

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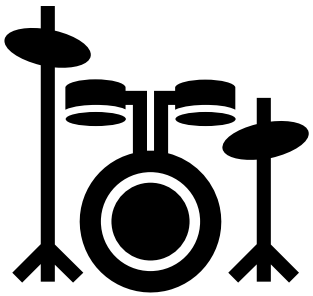
Recognizing an Accommodation Request (Cont.)

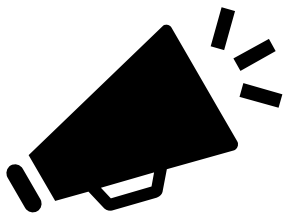


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Are These Accommodation Requests?

1. Employee fills out a Reasonable Accommodation Request Form.
2. Employee gives HR a doctor's note requesting an extension to a deliverable deadline due to employee's anxiety.
3. Employee emails manager: "I need to move my cubicle because of the NOISE! I CAN'T CONCENTRATE!!!"





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Are These Accommodation Requests? (Cont.)

4. Manager overhears an employee tell a coworker: “This job is too much. I really need a mental health day.”
5. Manager observes an employee crying at their desk.
6. Employee asks for a change in their job duties because of ADHD but doesn’t use the term “accommodation.”

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Responding to Requests

1. What does the employee want?
2. Why do they need it?
3. Is there documented medical support?
4. Are there other alternatives?
5. Is the request unreasonable?
6. Did both the employer and employee engage in an **interactive process**?

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Scenario 1

Fran is a staff accountant at a hotel and has severe anxiety and low self-esteem. She requests to be off-camera during weekly videoconferences, not to be asked any questions on the spot, and to have all questions submitted in writing two days before each videoconference.

What do you do?

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Scenario 2

Greg is the quality control manager for a manufacturing facility. He was in a recent car accident and sustained emotional trauma. Greg has requested temporary remote work as an accommodation due to fear of driving. He claims he can do all paperwork remotely and if there are any issues with products, he can view them on-screen.

What do you do?

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Scenario 3

Wanda is the manager of a food pantry. She works on-site and opens the building. She has depression, which sometimes prevents her from even getting out of bed. Wanda requests an accommodation for a flexible schedule to arrive late or even call off altogether without discipline whenever her condition requires.

What do you do?

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Scenario 4

What do we do about Joe Banks?



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Takeaways

1. Assess whether the employee has requested an accommodation and/or whether there is an objective reason to believe one is necessary.
2. If the reason for the request is not obvious, ask for medical documentation limited to information concerning restrictions as they relate to the job.
3. Find out **exactly** what the employee is requesting. It is not always clear.
4. If the request can't be granted immediately, engage in the **interactive process** to determine whether another accommodation may be appropriate.
5. If there is another reasonable alternative, offer it in writing. If refused, you may be able to terminate.

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Leave as an Accommodation



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Initial Considerations

- What governs whether an employee is entitled to protected leave?

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Initial Considerations (Cont.)

1. Policy?
2. Practice?
3. Law/Regulation/Executive Order?
4. Employment Agreement?
5. Collective Bargaining Agreement?

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What Laws May Apply?

1. ADA
2. FMLA
3. NYSHRL
4. NYCHRL
5. Title VII of the Civil Rights Act of 1964
6. NY Paid Sick and Safe Leave Act
7. USERRA

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What Laws May Apply? (Cont.)

8. Pregnant Workers Fairness Act
9. NYS Paid Family Leave
10. NYS Prenatal Leave
11. NYS Disability Benefits Law
12. NYS Workers' Compensation Law
13. NY Military Leave Law
14. NY Jury Duty Law
15. NY Voting Leave Law

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What Hopeful Law Will Apply?

- BUFFALO BILLS SUPER BOWL VICTORY MONDAY LEAVE LAW!!!





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Application: Scenario 1

Daniel undergoes major surgery and takes leave under FMLA. At the end of his 12 weeks, he tells HR he has physically recovered, but “mentally” he’s not ready to come back. The company “outsources” FMLA to a third-party vendor, which denies additional FMLA and the employer terminates Daniel.

Was the termination legal?

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Application: Scenario 2

Jodi is a warehouse worker who sustains a major back injury while at work. She files a workers' compensation claim and also takes concurrent FMLA leave. After four weeks, Jodi's doctor clears her to return to light-duty work. She refuses, saying she wants to stay home and use her remaining FMLA leave until she's 100 percent healed.

What should the employer do?

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Application: Scenario 3

Tracy is a full-time direct care worker who helps individuals with developmental disabilities. She is 30 weeks pregnant.

Tracy tells her supervisor she needs two hours off next week for a routine prenatal appointment. Her supervisor responds that the house where she works is short-staffed and to schedule the appointment outside of working hours or use her accrued vacation time.

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Application: Scenario 3 (Cont.)

Tracy explains that she can't get a doctor's appointment outside her scheduled work hours. She also starts to cry and requests the rest of the week off because of stress this is causing.

The supervisor denies Tracy's request for any time off and tells her to either use vacation time or receive an attendance violation.

Any concerns with the supervisor's response?

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Application: Scenario 4

Victor sells used cars at a local dealership. He develops severe depression and asks for unpaid leave as an ADA/NYSHRL accommodation. The employer grants the request. After eight weeks of leave, the dealership tells Victor his continued absences have caused an undue burden and he will be terminated if he doesn't return. Victor then asks for FMLA leave and provides a doctor's note stating he has a serious health condition.

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Application: Scenario 4 (Cont.)

The dealership has a written policy stating that it may run ADA/NYSHRL leaves of absences concurrently with FMLA leave. However, the dealership did not provide Victor with FMLA paperwork when he first took leave.

Is Victor entitled to FMLA leave?

If so, how many weeks does he have?

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Takeaways

1. When considering and granting any request for any leave of absence, make sure the exact type of leave (e.g., ADA, NYSHRL, FMLA, etc.) is clearly documented and communicated to the employee.
2. Before taking an adverse action against an employee related to protected leave, including a failure to return from one form of protected leave, make sure no other types of leave may be in play.

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Takeaways (Cont.)

3. Consider creating a “checklist” of the various forms of protected leave and apply it to every leave request to assess whether more than one type of leave may apply.
4. Determine which types of leave may run concurrently and make sure to provide the employee with documentation confirming the employer is running leave concurrently with other types of leave.

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Questions?



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Are You Ready for the December 31, 2026, 401(k) Amendment Deadline?

Michael McGovern, Partner

2026 Barclay Damon Labor & Employment Law Conference

Thursday, October 29, 2026 | © 2026 Barclay Damon LLP

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The December 31 Deadline: What Is Actually Due?

YEAR-END FOCUS

The deadline is real—but not every mandatory provision is due in 2026.

1 December 31, 2026

For most nongovernmental, non–collectively bargained plans, discretionary SECURE/SECURE 2.0 provisions already implemented generally need to be reflected in a written amendment.

2 Later Deadlines

Mandatory LTPT, Roth catch-up, automatic enrollment, and many RMD amendments generally follow later Required Amendments List or guidance deadlines.

3 Do This Now

Confirm how the plan has actually been operated, reconcile provider elections, and preserve a clear record of the employer's compliance choices.

Do not treat a later amendment deadline as permission to delay operational compliance.

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Mandatory Changes: Four Operational Priorities

1 Long-Term Part-Time Employees

Track multiyear service and make sure eligible part-time employees can defer.

2 Mandatory Roth Catch-Up

Identify affected higher-paid employees and coordinate payroll/recordkeeper treatment.

3 Required Minimum Distributions

Apply the new starting ages and updated post-death distribution rules.

4 Automatic Enrollment

Determine whether the mandate applies and confirm default/escalation operations.

Operational compliance can precede the formal plan-amendment deadline.

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LTPT Eligibility: Who Must Be Covered?

MANDATORY

Age 21+	500–999	2 Years	January 1, 2024
Minimum age for the LTPT rule	Hours of service in each computation period	Consecutive 12-month periods beginning with 2025 eligibility	Operational coverage began for calendar-year plans

Why this still matters in 2026:

- Employers need historical hour data to identify employees who should already have entered the plan.
- For 2024 eligibility, the original rule looked to three consecutive 12-month periods; SECURE 2.0 reduced the test to two periods beginning in 2025.

> **Employer check: Can HR/payroll reliably identify employees who repeatedly work 500–999 hours?**

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LTPT: What Must Be Documented?

DOCUMENTATION

Service Tracking

- **Computation period.** Confirm whether the plan uses employment-year or plan-year periods.
- **Hours.** Confirm actual-hour tracking versus any permitted equivalency method.
- **History.** Make sure the employer can reconstruct prior-year service for employees near the LTPT threshold.

Participation and Contributions

- **Entry and deferrals.** Confirm entry dates, Roth/catch-up eligibility, and any auto-enrollment or escalation rules.
- **Employer contributions.** Decide how matching, nonelective, safe-harbor, and top-heavy provisions apply.
- **Other features.** Confirm treatment of rollovers and any after-tax contributions.

> **Employer takeaway:** Some employers simplify administration by bringing part-time employees into the plan earlier rather than maintaining a separate LTPT regime.

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Roth Catch-Up: Who Is Affected?

MANDATORY IN 2026

Catch-up eligible participant + **2025 FICA wages > $150,000** → **2026 catch-up must be Roth**

- The wage test looks to prior-year Social Security FICA wages from the participant's common-law employer (generally Form W-2, Box 3).
- Self-employment income does not count toward the Roth catch-up wage threshold.
- The statutory rule is operational in 2026; the final regulations are generally applicable beginning in 2027.

Practical point: Identify affected employees before they cross a contribution limit—not after year-end.

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Roth Catch-Up: Operational Choices

IMPLEMENTATION

1. Determine the wages. The default rule looks to wages from the common-law employer. Optional common-paymaster or related-employer rules may apply if adopted.

2. Confirm the plan design. If the plan does not already have a Roth feature, decide whether to add one or limit catch-up contributions for affected employees.

3. Coordinate the systems. Payroll, the recordkeeper, and the written plan need to use the same approach, including any deemed Roth election process.

> **Employer takeaway:** Treat this as a payroll and recordkeeping implementation project—not merely a document amendment.

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Required Minimum Distributions: What Changed?

MANDATORY

Applicable Starting Age

70½	72	73	75
Born before 7/1/1949	Born 7/1/1949–1950	Born 1951–1959	Born 1960 or later

Still Working Exception

Non-more-than-5% owners may generally delay RMDs until retirement. More-than-5% owners do not get that delay.

Roth Accounts

Designated Roth accounts in qualified plans are no longer subject to lifetime RMDs.

Employer check: Confirm ownership data and make sure the recordkeeper is using the correct RMD age and Roth treatment.

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RMDs After Death: A Practical Decision Tree

BENEFICIARIES

For deaths before the participant's required beginning date:

- **No designated beneficiary.** Generally, the account must be paid by the end of the calendar year containing the fifth anniversary of death.

- **Most designated beneficiaries.** Generally, the account must be emptied by the end of the calendar year containing the 10th anniversary of death.

- **Eligible designated beneficiary.** Depending on the plan terms, certain beneficiaries may qualify for life-expectancy payments instead.

> **Employer takeaway:** Do not assume the recordkeeper's default payout is the plan's rule. Confirm the document and beneficiary-election process.

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Mandatory Automatic Enrollment: Does It Apply?

MANDATORY FOR CERTAIN NEW PLANS

401(k)/403(b) established before December 29, 2022?

YES → **Generally Grandfathered**

NO → **Check Statutory Exceptions**

Common Exceptions

- SIMPLE 401(k)
- Governmental/church plans
- Employer in existence < 3 years
- Small employers (generally 10 or fewer employees, with transition rules)

If no exception applies, the mandate generally became operational with the 2025 plan year.

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Automatic Enrollment: What Employers Need to Administer

IMPLEMENTATION

Default and Escalation

- **Initial default.** Generally 3%–10% of compensation.
- **Annual escalation.** Increase by 1 percentage point per year until at least 10%; the required maximum need not exceed 15%.

Employee Rights and Administration

- **Employee choice.** Employees may opt out or affirmatively elect another contribution rate.
- **Investments and notices.** Confirm QDIA treatment and required notices for participants who do not make investment elections.
- **Systems.** Confirm eligibility feeds, enrollment dates, escalation timing, and payroll coding with the recordkeeper.

> **Employer takeaway:** The formal amendment may come later; the operational requirement does not.

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Year-End 401(k) Amendment Checklist

ACTION ITEMS

1	**Inventory**	List every mandatory and discretionary provision the plan has actually implemented.
2	**Reconcile**	Compare the amendment elections with payroll, recordkeeper, and TPA operations.
3	**Confirm**	Verify effective dates, service-crediting choices, and plan-specific elections.
4	**Approve**	Obtain board/committee approvals and signatures before the applicable deadline.
5	**Preserve**	Keep implementation records, notices, and provider communications with the plan file.

> **Do not sign a vendor amendment until someone has confirmed that the elections match actual operations.**

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Optional Changes: Where to Spend Your Time

Not every SECURE 2.0 option deserves equal airtime—or equal administrative complexity.

HIGHER PRACTICAL IMPACT

- Increase cash-out limit to $7,000
- Higher catch-up for ages 60–63
- Hardship self-certification
- Roth employer contributions
- Student-loan matching
- Top-heavy relief for otherwise excludable employees

WORKFORCE-SPECIFIC/QUICK HITS

- Emergency/special-purpose distributions
- De minimis enrollment incentives/PLESA
- QACA escalation to 15%
- Portability and lifetime-income features
- Military-spouse and difficulty-of-care provisions

The best optional amendment is one that solves an actual workforce or administration problem.

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Cash-Out Limit: $5,000 → $7,000

COMMON DESIGN CHOICE

- **$7,000 threshold.** Allows the plan to remove more small terminated-participant accounts; the participant may still elect cash or a direct rollover.
- **Automatic rollover.** If a nonresponsive participant's distribution exceeds $1,000, the amount generally must be transferred to an automatic-rollover IRA.
- **Lower-threshold alternative.** A $1,000-or-less cash-out limit can avoid automatic-rollover IRAs but leaves more small terminated accounts in the plan.
- **Rollover balances.** Confirm whether rollover balances are counted when applying the cash-out threshold.

> **Employer takeaway:** Choose the threshold based on the employer's recordkeeping and small-account administration priorities.

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Higher Catch-Up Limit for Ages 60–63

OPTIONAL

- **Higher statutory limit.** For 2026, participants who turn age 60, 61, 62, or 63 may use an $11,250 catch-up limit, compared with the $8,000 general age-50 catch-up limit.
- **Plan election.** The plan may—but is not required to—offer the higher age 60–63 limit. Confirm the effective date.
- **Controlled groups.** Coordinate availability across controlled-group plans where the rules require consistent treatment.
- **Payroll.** Make sure the payroll system recognizes the participant's age-based limit in the correct calendar year.

> **Employer takeaway:** A participant-friendly feature, but one that requires clean age and contribution-limit coding.

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Hardship Self-Certification

ADMINISTRATIVE SIMPLIFICATION

- **Participant certification.** The employee certifies that a qualifying safe-harbor hardship occurred and that the requested amount is needed to satisfy the financial need.
- **Plan reliance.** The plan may generally rely on the certification unless it has actual knowledge that the certification is incorrect.
- **Documentation.** Participants should retain supporting records; the plan should retain the certification and a clear administrative record.
- **Implementation.** Update forms, procedures, and recordkeeper workflows before using self-certification.

> **Employer takeaway:** Self-certification reduces paperwork; it does not eliminate the need for a controlled process.

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Designated Roth Matching and Nonelective Contributions

OPTIONAL

- **What can be Roth.** Participants may be allowed to elect Roth treatment for certain vested matching and nonelective employer contributions.
- **Vesting.** The participant must be fully vested in the type of contribution being designated Roth when it is allocated.
- **Election timing.** The election must be made no later than allocation and is irrevocable for that contribution.
- **Tax reporting.** The contribution is taxable in the year allocated and reported on Form 1099-R but is not subject to income-tax withholding or FICA/FUTA.

Employer takeaway: Before adding the feature, confirm participant demand and whether payroll and recordkeeping can administer it cleanly.

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Matching Contributions for Student-Loan Payments

OPTIONAL

- **Who it helps.** Employees who are paying student debt and therefore may not be able to defer enough to receive the full employer match.
- **How it works.** The employer match may be based on the combination of actual salary deferrals and certified qualified student-loan payments.
- **Administration.** Coordinate certification, payroll data, matching calculations, and ACP testing with the recordkeeper or TPA.
- **Workforce fit.** The feature is most compelling when student debt is a meaningful recruiting or retention issue.

> **Employer takeaway:** Adopt it because it addresses a workforce need—not simply because SECURE 2.0 permits it.

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Top-Heavy Relief for Otherwise Excludable Employees

OPTIONAL

- **What the rule allows.** Plans may exclude employees who have not yet satisfied the Code's statutory age/service standards from the group required to receive top-heavy minimum contributions.
- **Why it matters.** Employers can offer more generous early deferral eligibility without automatically creating a top-heavy minimum contribution for every early entrant.
- **Employer contributions.** Any discretionary employer contribution to otherwise excludable employees continues to follow the plan terms and applicable requirements.
- **Document details.** Review vendor language carefully; last-day employment conditions and contribution caps may be document-specific.

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Other Optional Changes: Quick Hits

Distribution Access

- Qualified birth/adoption distributions
- Emergency personal-expense distributions
- Domestic-abuse victim distributions
- Long-term-care distributions
- Terminal-illness and disaster relief

Plan Design/Portability

- De minimis enrollment incentives
- QACA escalation up to 15%
- Pension-linked emergency savings accounts
- Lifetime-income/auto-portability features
- Military-spouse and difficulty-of-care provisions

> **Employer takeaway:** These can be useful for the right workforce, but confirm current guidance, provider capability, and the specific amendment deadline before adopting.

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Use the 401(k) Review to Check Executive Deferred Compensation

RELATED PLAN REVIEW

Inventory the Arrangements

- SERPs/excess plans
- Elective deferral programs
- Deferred bonuses and equity
- Employment/change-in-control agreements
- Separation agreements with deferred payments

Check Section 409A and Cross-References

- Eligibility, vesting, elections, and payment timing
- Compensation definitions and qualified-plan offsets
- Separation from service/change in control
- Six-month delay for specified employees
- Payroll and participant communications

A document/operational mismatch under Section 409A can create immediate tax consequences for the executive.

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Year-End Retirement Plan Administration: Beyond the Amendment

BEFORE JANUARY 1

Plan Administration

- **Annual notices.** Identify applicable safe-harbor, automatic-enrollment, QDIA, and other notices; confirm delivery timing.
- **Payroll/limits.** Load new contribution limits and any January 1 plan-design changes.
- **Testing data.** Confirm census, compensation, ownership, and controlled-group information before year-end testing begins.

Governance and Communications

- **Fiduciary governance.** Review committee minutes, investment monitoring, service-provider issues, fees, and cybersecurity processes.
- **Participant communications.** Make sure enrollment materials and participant-facing descriptions match how the plan will operate in 2027.

Employer takeaway: Use the amendment project as a prompt to review the full retirement-plan administrative cycle.

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Beyond the 401(k): Other 2027 Benefits Items to Check

YEAR-END BENEFITS

- **ACA affordability.** For plan years beginning in 2027, the affordability percentage is 10.22%. Recheck employee contributions and applicable safe harbors.
- **HSA/HDHP limits.** The 2027 HSA limits are $4,500 self-only and $9,000 family; HDHP minimum deductibles are $1,750 and $3,500.
- **Open enrollment and documents.** Confirm vendor and plan-design changes and update SBCs, SPDs/SMMs, enrollment materials, and required notices as applicable.
- **Section 125/HSA/FSA administration.** Update payroll elections and eligibility rules, review nondiscrimination testing, and coordinate year-end election deadlines.

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Guidelines for Using AI in Employment Decisions

Cat Scott, Partner

2026 Barclay Damon Labor & Employment Law Conference

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Scale vs. Accountability

- AI can make high-volume workflows faster, more consistent, and easier to document.
- The employer remains accountable for the employment decision—even when a vendor takes action or makes a recommendation.

- **Rule of Thumb**
  - Low-impact assistance: organize, summarize, draft
  - High-impact use: rank, infer, flag, recommend, decide

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Map the Full Employment Lifecycle

- **Attract:** sourcing, targeted ads, candidate chatbots, and outreach
- **Select:** résumé screening, assessments, interview transcription/scoring, and ranking
- **Manage:** productivity analytics, scheduling, performance ratings, pay and promotion recommendations
- **Respond:** complaint triage, investigation summaries, policy questions, and accommodation workflows
- **Exit:** discipline recommendations, misconduct flags, reductions in force, and termination decisions

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What Has Federal Guidance Said Thus Far?

- Title VII and other EEO laws apply when a tool screens, ranks, monitors, or evaluates people.
- A discriminatory criterion can create disparate treatment.
- ADA: accessibility, reasonable accommodation, disability-related inquiries, and tests that screen out qualified people
- Also consider ADEA, GINA, wage/hour, labor law, privacy, biometric, consumer-reporting, and state/local rules.
- A vendor contract, “human in the loop,” or bias-audit badge is not a legal safe harbor.

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NYC Local Law 144

- **Scope:** NYC hiring/promotion screening; covered Automated Employment Decision Tool (AEDT) tool must substantially assist or replace discretionary decision-making.
- **Before use:**
  - Independent bias audit completed within the prior year.
  - Publish a summary of the most recent audit and the tool's distribution date.
- **Notice:** notify NYC-resident candidates/employees at least 10 business days before use; identify job qualifications/characteristics assessed.
- **Accommodation/alternatives:** notice must explain how to request an accommodation or alternative selection process.
- **Data transparency:** disclose data type, source, and retention policy on the website or provide on written request; audit ≠ proof of validity or legal compliance.

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California: FEHA Rules for Automated Decisions

- **Effective October 1, 2025:** California amended FEHA employment regulations to address AI, algorithms, and automated-decision systems.
- **Broad reach:** systems that make or facilitate decisions about employment benefits—including recruiting, selection, promotion, and other employment actions.
- **No discriminatory use:** employers/covered entities may not use a system or selection criteria that discriminates based on FEHA–protected characteristics; proxies can matter.
- **Disability guardrail:** assessments, tests, puzzles, or games that elicit disability-related information may be unlawful medical inquiries.
- **Records:** retain employment records, including automated-decision-system data, for at least four years; document criteria, validation, outcomes, and human review.

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California's 2026 Workplace AI Laws

- **SB 947: Automated employment decisions (effective July 1, 2027)**
  - Employers may not rely solely on an automated decision system (ADS) for discipline or termination; human oversight/verification and written post-use notice are required. Employees may request a description of their own data primarily used.
- **AB 1883: AI workplace surveillance (effective January 1, 2027)**
  - Prohibits AI workplace-surveillance tools from inferring or predicting an employee's emotional state or collecting neural data.
- **SB 951: AI/automation-related displacement notice (effective January 1, 2027)**
  - Adds notice obligations for qualifying workforce reductions caused by AI or other automated technology; coordinate with existing Cal-WARN review.

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Hiring

- Résumé ranking may reward career paths, credentials, or language patterns that are proxies—not actual job requirements.
- Targeted recruiting can narrow whoever sees the opportunity.
- Video/voice analysis can penalize accent, speech differences, disability-related behavior, or assistive technology.
- Tests and chatbots can create inaccessible steps or discourage accommodation requests.
- **Ask:** Is the criterion job-related, validated for this role, accessible, and consistently applied?

- **Practical Test**
  - Could we explain—and defend—the criterion if a recruiter applied it manually to every candidate?

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Interviewing

- **Safe(r) uses:** scheduling, structured question banks, transcription with notice, interview-note organization
- **Higher-risk uses:** emotion detection, personality inference, facial/voice analysis, automated fit scores
- Use a consistent rubric tied to essential job functions; score evidence, not “vibe.”
- Offer an accessible alternative and a clear accommodation route.
- Review the underlying transcript or evidence—not only the vendor’s score.

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Selection Rates, Validation, and Audits

- Measure outcomes by stage: who applies, passes each screen, advances, receives offers, and is hired.
- Investigate disparities across protected groups; a vendor's overall accuracy metric is not enough.
- Where applicable, assess job-relatedness and business necessity, and consider less discriminatory alternatives.
- Confirm scope and local requirements before deployment; laws and definitions differ.

- **Don't Stop at the Audit:**
  - Ask what was tested, on what data, for which job families, which version, and what changed after the audit.

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Current Employees: The Quiet Expansion of AI

- **Monitoring:** keystrokes, screenshots, location, call analytics, email/chat scanning, and productivity scores
- **Performance:** ranking, productivity forecasts, scheduling, promotion or compensation recommendations
- **Workforce decisions:** attrition prediction, flight-risk flags, “engagement” or sentiment analysis

The risk is not just bias—it is inaccurate inference, opaque criteria, chilling effects, and loss of trust.

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Investigations

- **Potentially useful:** timeline building, transcript search, issue coding, policy comparison, and draft summaries
- **Danger zone:** credibility scores, emotion/deception detection, inferring intent, or treating allegations as established facts
- Protect confidentiality and privilege; do not paste sensitive employee data into unapproved public tools.
- Verify every factual statement against source material and preserve context, including exculpatory evidence.
- Keep the investigator responsible for findings and the rationale.

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Discipline and Termination

- An AI-generated “risk” or “low performer” label is a lead—not proof.
- Check data quality, comparators, protected activity, accommodations, leave, and inconsistent manager treatment.
- Ask whether the model captures the actual policy standard and whether employees can correct inaccurate inputs.
- Use a documented human decision-maker with authority to disagree and explain why.
- Preserve relevant inputs, outputs, model/version details, and decision records under the retention plan.

- **Red Flag:**
  - “The system recommended termination” is not a defensible explanation of why the employer terminated.

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Concerted Protected Activity Under Section 7 of the NLRA

- Monitoring and analytics may capture union discussions, organizing, concerted complaints, or employee advocacy.
- AI-generated sentiment or “flight risk” labels may be based on protected speech or group activity.
- Automated surveillance can chill employees even when no discipline follows.
- Review NLRA implications, applicable collective bargaining obligations, and any contract terms on monitoring/technology.

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Privacy and Security

- Map data in and out: applicant/employee data, prompts, model training, subprocessors, retention, and deletion.
- Restrict sensitive inputs; use approved enterprise environments and role-based access.
- Check recording, biometric, electronic-monitoring, and consumer-reporting rules where relevant.
- Plan for discovery: can the employer preserve the prompt, output, source records, model version, and decision trail?

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Vendor Diligence: Questions Worth Asking

- What exactly does the tool do—and what employment decision does it influence?
- What job-related evidence supports each input, feature, and recommendation?
- What subgroup testing, accessibility testing, and validation have been performed?
- Can we audit outcomes, inspect meaningful explanations, and disable risky features?
- What happens when the model changes, data drifts, or a complaint reveals a failure?
- Who owns notices, accommodations, records, incident response, and remediation?

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A Workable Governance Model

Inventory → Assess → Monitor

1. **Inventory:** identify every AI-enabled feature used in recruiting, HR, operations, and management.
2. **Classify:** what data does it use, who is affected, and how much does it influence the outcome?
3. **Assess:** legal scope, validation, bias, accessibility, privacy, labor relations, and security.
4. **Control:** approved use cases, notices, accommodations, human review, escalation, and documentation.
5. **Monitor:** outcomes, complaints, model changes, drift, incidents, and periodic reapproval.

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Seven Questions to Ask Before Deployment and Decision

1. What decision will this tool influence—and how consequential is it?
2. Is the criterion job-related, necessary, and explainable?
3. Could the tool disadvantage a protected group or a person needing accommodation?
4. Have we checked applicable notice, audit, privacy, and labor obligations?
5. Can a qualified human review and override the result?
6. Can the affected person correct errors or request accommodation?
7. Can we reconstruct and defend the decision later?

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Bottom Line: Accountable Use Beats Blind Delegation

- Start with a real business problem and the least risky tool that solves it.
- Treat scores and summaries as fallible evidence—not truth.
- Measure outcomes, make accommodations accessible, and create a meaningful challenge path.
- Keep humans accountable, with authority and evidence to disagree.
- Document the rationale before the decision—not just after a complaint.
- **One Sentence to Remember:**
  - AI may assist the decision. The employer still owns it.

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New York Noncompetes and Restrictive Covenants in 2026

Changes in Law, Current Compliance, and Best Practices

Chris Harrigan, Partner

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The Big Picture

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State of the Law: Enforceable, but Heavily Scrutinized

- **Federal Level:** The FTC's sweeping nationwide ban is officially dead.
- **New York State Level:** Sweeping statutory bans failed to pass in 2026. New York State Senate Bill **S9759** remains stalled in the assembly committee.
- **Current Framework:** Common law applies; noncompetes are enforceable **only if narrowly tailored.**

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The Death of the Federal (FTC) Ban

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Federal Update: From Rulemaking to Case-by-Case Enforcement

- **The History:** The Biden administration's 2024 FTC ban was blocked in federal court.
- **The Eradication:** In late 2025, under the Trump administration, the FTC officially dismissed its appeals.
- **The 2026 Strategy:** The FTC relies strictly on **case-by-case enforcement** rather than industry-wide rules.
- **Federal Focus:** Targeting egregious abuses, particularly in health care and low-wage sectors.

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New York State Legislative Battleground

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Status of Pending Litigation

- **2023 Veto:** NYS Governor Kathy Hochul vetoed a blanket ban, demanding exemptions for high earners.
- **Senate Bill S9759 (2026):** Passed the senate in June 2026 but **failed to advance** in the assembly before the session ended.
- **Key Proposals in S9759:**
  - Bans noncompetes for anyone earning under **$500,000 annually**.
  - Ban on health care–related professionals, regardless of compensation.
  - Imposes a **one-year maximum cap** on allowed covenants.
  - Requires **garden leave** (continued salary payment during the restriction).
- **Outlook:** Stalled for now, but eligible to roll over or be reintroduced for the 2027 legislative cycle.

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Current Enforceability: The Four-Part Test

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NY Common Law: *BDO Seidman* Still Controls

- To be enforceable in New York, a noncompete must satisfy the following:
  1. **Reasonable in Time and Geographic Scope.**
  2. **Necessary to Protect a Legitimate Business Interest:** must protect trade secrets, unique/extraordinary skills, or confidential client relationships.
  3. **Enforcement Does Not Cause Undue Hardship:** cannot completely prevent a person from earning a livelihood.
  4. **Not Injurious to the Public:** Cannot harm the public interest (highly critical for physicians/medical care).

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The Reason for Termination Matters!

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Voluntary Resignation vs. Involuntary Termination

- **Voluntary Resignation:** Noncompetes are generally enforceable if they pass the common-law test.
- **Termination FOR Cause:** Covenants remain enforceable.
- **Termination WITHOUT Cause (Including Layoffs):** New York courts strongly favor the employee.
- **Recent Precedent:** A 2026 federal court ruling applying NY law (*Plug Power*) reinforced that a noncompete is generally **unenforceable** if the employer terminates the relationship without cause.

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Alternative Strategies and Best Practices for Employers

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An Enforceability Action Plan

- **Audit Existing Templates:** Immediately phase out broad, blanket noncompetes for mid- and low-level staff.
- **Strengthen NDAs and Confidentiality Agreements:** Focus on intellectual property and robust nondisclosure agreements.
- **Use Nonsolicitation Agreements:** Protect client bases and employee poaching, which are much less scrutinized by courts.
- **Consider Garden Leave:** If a noncompete is critical for an executive, build in provisions to pay their base salary during the restricted window.

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But What About . . . ?

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Example Scenarios

- What if I sell my business and have a noncompete?
- What if I conduct an audit and need to revise all my existing agreements?
- What about severance agreements?
- What if I have employees in different states?
- What if there is a breach? What do I do?

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Summary

- Noncompetes are enforceable in New York State.
- The legitimate interest is KEY.
- There are multiple ways to protect your interests beyond noncompetes.
- Changes are coming; be prepared.

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Questions? Get in Touch!

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