New Law In NY Places Employee NIL Rights In Spotlight

By **Timothy Bechen** (January 13, 2025)

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On Dec. 21, New York Gov. Kathy Hochul signed the Fashion Workers Act, or S.B. S9832, into law, to take effect in June 2025.[1] This legislation provides numerous safeguards for workers in the fashion industry, including defined legal rights for the use of name, image and likeness, or NIL, for models.

This act illustrates the legal trend of protecting NIL rights for individual employees. While New York is the first state to codify such rights, the legal landscape appears to be expanding NIL rights, made famous in recent years by college athletes.

Does your company have a Facebook page where you post images of employees playing softball at the company picnic, pictures of team members serving meals for charity, or photos from your holiday event? Does your company have a LinkedIn page with informational articles and company announcements that include employee headshots, or photos of employees sitting around the conference room table? Does your company have a website with pictures or videos of your team members? Does your company have a YouTube channel where employees explain a product or service?

Permissibility of these uses varies by state, and there is no general governing federal statute. For instance, Virginia Statute 8.01-40 provides a civil action for the unauthorized use of the name, portrait or picture of a person without their written consent, where such uses are for "advertising purposes or for the purposes of trade."

In Virginia, there is limited case law on using an employee's NIL. According to the U.S. District Court for the Eastern District of Virginia's 1999 ruling in Williams v. Newsweek Inc., "courts applying Virginia law have relied upon the interpretation of the similarly-phrased New York law as conducted by New York Courts for guidance in construing this provision."[2]

In the Newsweek case, the plaintiff, Lionell Elijah Williams, was an inmate in prison whose image was included in a Newsweek story about a fellow prisoner, Nathan McCall, and his memoir publication. Williams filed suit under the Virginia statute asserting his image was published without written consent. The court clarified the required balance for personal NIL rights and public interests, recognizing the exceptions for uses deemed "public interest" and "newsworthy."[3]

The Newsweek case furthers the U.S. District Court for the Eastern District of New York's 1997 ruling in D'Andrea v. Rafla-Demetrious, a case concerning New York Methodist Hospital's use of an employee's photo in a promotional brochure.[4]

According to the opinion, the plaintiff, Mark D'Andrea, was a resident in the hospital's radiation oncology department. During his residency, the defendant, on behalf of the hospital, took numerous pictures around campus for inclusion in a brochure promoting its medical internship and residency programs, including a photo of D'Andrea. Years later, D'Andrea brought suit with numerous claims against his former employer, appending his claim of unlawful use of his image under the New York Civil Rights Law, Section 51.

The Eastern District of New York sought to balance individual rights versus "the 'values our State and Federal Constitutions bespeak in the area of free speech and free press.'"[5] Thus, the court recognized the exceptions of public interest and newsworthy uses. In this case, the court dismissed D'Andrea's claim, asserting the claim was misguided, that the inclusion of D'Andrea's image was minimal, and that he had given implied consent to said use.

The U.S. District Court for the Northern District of Maryland's 2002 ruling in Fox v. Encounters International provides further color on how the courts interpret individual NIL rights.[6] In that case, the defendant, Encounters International, operated a so-called mail-order bride service where potential suitors could view images of Russian and Ukrainian women seeking marriage proposals and U.S. citizenship.

The plaintiff, Natilya Mikhaylovna Fox, sued the company on a myriad of claims, including violation of Virginia Statute 8.01-40 because the website used her image for up to 20 months after she was already married, and thus presumably not available for a new marriage proposal.

The case involved numerous claims by Fox. Encounters International sought to have the misappropriation of likeness claim dismissed on two grounds: (1) public interest, and (2) consent.[7]

The court recognized the public interest and newsworthy exception established by the Newsweek ruling. In denying the dismissal of the claim, the court found that advertising a marriage service is not a public interest exception. As for consent, the decision emphasized the statute's plain language requiring written consent and held there was a lack of evidence of written consent.

Moving on to a different case, an August 2024 slip opinion from the Eastern District of Virginia in Moreland v. Pal of Mine Corp. sheds light on potential monetary damages. According to the opinion, Pal of Mine operated a business "of selling alcohol and food in a sexually[]charged atmosphere" and "used social media to promote its business and 'attract patrons.'"[8] Part of the promotional material included unauthorized images of the plaintiffs, models who "earn a living by licensing their images."

While the plaintiffs were not employees, the Pal of Mine ruling offers insights into the court's reasoning for damages assessments. Here, the court noted the plaintiffs' "day rates" for images, the number of times images were posted online, and the length of time the posts remained online. The lead plaintiff, Andra Cheri Moreland, was awarded $290,000 in damages for two images posted online for 2.9 years. In all, online postings for six plaintiffs amounted to total damages of $391,300. These monetary damages were in addition to injunctive relief and attorney fees.

Additionally, the Pal of Mine ruling further conforms to New York law by clarifying that: "Any recognizable likeness, not just an actual photograph, may qualify as a 'portrait or picture.'"[9]

As seen in the Encounters International and D'Andrea rulings, parties are apt to encounter a claim for NIL misuse or misappropriation not as a stand-alone lawsuit, but as an added assertion on a civil complaint.

A happy, well-engaged employee is not anticipated to sue his or her employer for an NIL violation. Instead, a claim is likely to arise upon termination: The former employee raises a

series of allegations, e.g. wrongful termination, discriminatory workplace, harassment, etc., and the plaintiffs counsel adds the NIL violation as an additional claim.

We advocate an ounce of prevention.

Most companies have relatively standard onboarding processes where a human resources representative reviews the employee handbook and other policies with new hires. We recommend including a simple form as part of this process where new employees can give written consent to be included in marketing, social media and other promotional materials. For current employees, consider presenting the form as part of an annual or quarterly review process.

Where state-specific requirements may vary, and if you operate across multiple states, we recommend a form that conforms to the strictest jurisdiction.

Depending on the circumstances, you may also include opt-out provisions, which include exceptions for incidental or erroneous publications with the employer's right to cure. By contrast, if the grant of written consent is a condition of employment, opt-out provisions can be excluded.

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[1] https://www.nysenate.gov/legislation/bills/2023/S9832.

[2] Williams v. Newsweek, Inc., 63 F.Supp.2d 734 (US Dist. Ct., Norfolk Div.) (1999) citing Town & Country Properties, Inc. v. Riggins, 249 Va. 387, 457 S.E.2d 356, 362 (1995).

[3] Williams at 735 citing Falwell v. Flynt, 797 F.2d 1270, 1277 (Fed.Cir,.1986).

[4] D'Andrea v. Rafla-Demetrious 972 F.Supp 154 (1997).

[5] Id. at 156 citing Arrington v. New York Times Co., 55 N.Y.2d 433, 439 449 N.Y.S.2d 941, 434 N.E.2d 1319 (1982), cert denied, 459 U.S. 1146, 103 S.Ct. 787, 74 L.Ed2d 994 (994).

[6] Fox v. Encounters Intern., 318 F.Supp.2d 279 (2002).

[7] Id. at 292.

[8] Moreland et.al. v. Pal of Mine Corp., Slip Copy (2024).

[9] Moreland at 2 citing McPherson v. Kith Retail, LLC, 214 N.Y.S.3d 677 (N.Y. Sup. Ct. 2024).