New York Employers Face Far-Reaching Employment Law Changes

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The arrival of 2014 has already ushered in major reforms to New York's employment law landscape, with broad ramifications, particularly for New York City employers. The sweeping changes to the state's minimum wage and unemployment insurance program, as well as New York City's pregnancy accommodation and paid sick leave laws, could prove costly to employers that fail to address the laws' new requirements.

New York State Minimum Wage Rises

On December 31, 2013, New York's minimum hourly wage increased from $7.25 to $8.00, and will rise to $8.75 and then to $9.00, effective December 31, 2014 and December 31, 2015, respectively. The New York Department of Labor ("NYDOL") is expected soon to finalize its regulations detailing the impact of these minimum wage increases on tipped employees. [1]

New York City Law Requires Reasonable Accommodation for Pregnant Employees

Effective January 30, 2014, an amendment to the New York City Human Rights Law ("NYCHRL") will require city employers with four or more employees to reasonably accommodate their employees' pregnancy, childbirth, and related medical conditions, so long as the accommodation enables the employee to perform the essential functions of her position. Prior to the amendment's passage, employers' obligations to provide reasonable accommodations were limited to those employees with actual disabilities.

The NYCHRL defines "reasonable accommodation" as an accommodation that does not cause the employer an "undue hardship." While employers may raise undue hardship as an affirmative defense to their reasonable accommodation obligation, they then have the burden to prove that the requested accommodation would actually cause undue hardship, which may involve evaluating the nature and cost of the accommodation, the size and financial resources of the employer and the facility at issue, and the nature of the employer's operations.

To comply with the NYCHRL, employers must also provide a written notice of the right to be free from discrimination on the basis of pregnancy, childbirth, or a related medical condition. Employers must distribute this notice to new employees at the start of their employment and to existing employees within 120 days of the

law's effective date. The form of the notice is available on the New York City Commission on Human Rights' website.[2] Employers that violate the NYCHRL can face private actions and liability for punitive damages and attorneys' fees.

New York City Employees Entitled to Paid Sick Leave

In 2013, the New York City Council overrode Mayor Michael Bloomberg's veto to enact the Earned Sick Time Act (the "Act"),[3] which amends the NYC Charter and the NYC Administrative Code to require private-sector employers in the city to provide a certain amount of sick leave to employees—and for most employees, that sick leave must be paid. Before the Act takes effect on April 1, 2014, employers should make any necessary changes to their leave policies and employee handbooks to confirm that they are in full compliance with the new law, summarized below.

Generally, employees who have worked for an employer for more than 80 hours in a calendar year, on either a full- or part-time basis, are entitled to use sick leave. Notably, the Act does not apply to federal, state, or local governmental employers, as well as certain employers in the manufacturing sector.[4] The Act also excludes independent contractors, federal work-study participants, and certain hourly professional employees licensed by the New York State Education Department who call in for work assignments and receive an hourly wage at least four times greater than the federal minimum wage. In addition, employees covered by a collective bargaining agreement ("CBA") already in place on the Act's effective date will not be subject to the Act until the CBA expires, and even after the CBA's expiration date, the employer and union may expressly waive the Act's provisions when the CBA provides comparable time-off benefits.

Starting from April 1, 2014, covered employers[5] with 20 or more employees must provide paid sick leave to each eligible employee. By October 1, 2015, the paid sick leave requirements will extend to employers with 15 or more employees. Employers with employees not entitled to paid sick leave must still afford unpaid sick leave in accordance with the Act.

Sick Leave Accruals and Payouts

While sick leave begins to accrue at the start of employment, employees are not entitled to use their sick leave until after the later of 120 days following their commencement of employment or the Act's effective date. Employees are entitled to one hour of sick leave per 30 hours worked, and they may carry over accrued, unused leave time into the following year—unless their employers pay the accrued, unused sick leave at the end of the calendar year and provide an amount of paid sick leave, starting on the first day of the following year, that meets or exceeds the Act's requirements. Notably, the Act permits employers to limit the use of sick leave to a total of 40 hours in a calendar year (the equivalent of a five-day workweek).

Employers of domestic workers will be subject to different sick leave obligations. Beginning October 1, 2015, domestic employees who work more than 80 hours in a calendar year are entitled to two days of paid sick leave after one year of work with the same employer, in addition to the time off they are already entitled to under New York Labor Law § 161(1). Domestic employees do not have a right to carry over unused sick time.

The Act does not require employers to pay out accrued, unused sick leave upon an employee's departure. In addition, employers already affording comparable or more favorable paid leave policies (including paid time off, vacation and/or personal days) need not provide additional sick time to employees, so long as their leave policies meet the Act's requirements and may be used for the same purposes and conditions as the sick leave provided under the Act.

Specifically, the Act allows employees to use their sick time for absences that occur due to (1) the employee's mental or physical illness, injury or health condition, need for medical diagnosis or care, or need for preventive care; (2) care of a family member in need of such diagnosis, care, treatment or preventative care; or (3) closure of the place of business due to a public health emergency (as declared by a public health official) or the employee's need to care for a child whose school or childcare provider has been closed due to a public health emergency.

Notice, Confidentiality, and Anti-Retaliation Provisions

Under the Act, employers may require employees to provide reasonable notice of their need to use sick leave. Where the need is foreseeable, employees may be required to give up to seven days' notice. Where the need is unforeseeable, employers may require notice as soon as practicable. While employees absent for more than three consecutive work days may

be required to supply documentation from a licensed healthcare provider indicating the need for the amount of sick leave taken, employers may not mandate disclosure of the nature of the employee's (or the employee's family member's) condition. Furthermore, any health information must be treated as confidential.

Employers must provide new hires with a notice describing the employees' entitlement to accrual and use of sick leave, the calendar year of the employer, and their right to file a complaint with the City's Department of Consumer Affairs ("DCA") and be free from retaliation for requesting or using sick leave. The notice must be in English and in any other language primarily spoken by the employee if the DCA has posted a version of the notice in that language on its website. The DCA will make sample notices available prior to the Act's effective date.

Employers are required to maintain records for two years that document each employee's hours worked and amount of sick leave accrued and taken, and permit the DCA to audit those records upon request. Furthermore, the Act's anti-retaliation provision protects employees' exercise of their right to take sick leave, though employers may discipline employees found to have used sick leave for improper purposes. As the Act affords no private right of action, its enforcement rests with the DCA, which can impose penalties that increase for each violation.

Employers will therefore now need to review their paid leave policies for compliance with the Act, and will need to track each employee's accrual of leave. Employers should prepare a notice for distribution to new employees (the Act does not require notice to existing employees) that contains the necessary information.

Unemployment Insurance Changes for New York Employers

As a result of the economic downturn, New York's unemployment insurance fund became insolvent, and the state borrowed $3.5 billion from the federal government to support its unemployment insurance program. To more quickly repay that loan, New York has implemented a package of reforms to its unemployment insurance law.[6]

Prior to January 1, 2014, claimants could receive severance payments and unemployment benefits at the same time. Now, former employees who receive severance payments within 30 days after losing their jobs can no longer collect unemployment benefits for any week in which they receive severance pay greater than the maximum weekly benefit rate, which is currently $405 (and will rise to $420 in October 2014). With respect to lump-sum severance payments, the NYDOL uses a formula to determine the number of weeks of regular wages that the severance would cover. Claimants who receive their severance payment more than 30 days after their termination of employment, however, may be able to collect their full unemployment benefits.

Additionally, unemployment benefits for claimants collecting pension benefits from their former employer will be reduced by the amount of the pension, provided that their employer had contributed to the pension.

The wage base for the unemployment contributions charged to employers' accounts has also changed. As of January 1, 2014, employers' contributions will be assessed on the first $10,300 of each employee's earnings. The amount of employers' contributions, which was previously assessed on the first $8,500 of each employee's wages, will continue to rise each year; by 2026, the unemployment insurance tax will be assessed on the first $13,000 of each employee's earnings.

These changes arrive on the heels of the mandate, implemented in October 2013, for employers to adequately respond to any request for information on unemployment benefits claims by the date specified in the NYDOL's notice. Employers that provide incomplete information or fail to timely respond may forfeit any relief from unemployment charges to their account, even if the employer were otherwise entitled to such relief due to overpayment of benefits or the claimant's ineligibility for benefits. The NYDOL may make exceptions to this rule if the employer shows good cause for its failure to comply with the NYDOL's request.

Endnotes

1 The New York Department of Labor's proposed regulations are available at http://www.labor.ny.gov/legal/laws/pdf/minimum-wage/Art-19-regs.pdf.

2 See http://www.nyc.gov/html/cchr/html/publications/pregnancy-employment-poster.shtml.

3 N.Y. City Admin. Code §§ 20-911 to 20-924.

4 The Act exempts manufacturing-sector employers that are classified in sections 31-33 of the North American Industry Classification System, such as factories and mills, and certain establishments that manufacture products on site.

5 Covered "employers" under the Act include "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business, or service." N.Y. Lab. Law § 190(3).

6 The New York Department of Labor has issued a Factsheet summarizing these unemployment insurance reforms, available at http://labor.ny.gov/formsdocs/ui/P822.pdf.

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