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MEMORANDUM

TO: **Memo Distribution List**

FROM: Hinman Straub P.C.

Re: New York State Sick Leave Law

Date: April 3, 2020

As part of the 2020-21 enacted State Budget, Governor Andrew Cuomo signed into law a bill expanding New York's Labor Law to require all employers to provide sick leave to their employees, with the amount of time and whether paid or unpaid based on the size of the employer (hereinafter "Sick Leave Law"). This memorandum will review the details of the new Sick Leave Law and the impact on employers.

Overview of Sick Leave Law

The Sick Leave Law, Section 196-b of the Labor Law, requires employers to provide sick leave to their employees each calendar year as follows:

- Employers with 0-4 employees must provide up to forty (40) hours of unpaid sick leave;
- Employers with 0-4 employees with a net income greater than \$1 million must provide up to forty (40) hours of paid sick leave;
- Employers with 5-99 employees must provide up to forty (40) hours of paid sick leave; and
- Employers with 100 or more employees must provide up to fifty-six (56) hours of paid sick leave.

The law takes effect 180 days from the Governor signing the bill, at which time employees will be permitted to start accruing sick leave. However, under the new law, employees will not be permitted to utilize any of their accrued sick leave until January 1, 2021.

Number of Employees

For purposes of determining the number of employees, an employer must look at any “calendar year” or the “twelve-month period from January first through December thirty-first” (Labor Law § 196-b (1)). For example, if an employer has five (5) employees in any calendar year from January 1st through December 31st, the employer is required to provide forty (40) hours of paid sick leave.

Permissible Reasons for Sick Leave

On and after January 1, 2021, employers must permit their employees to take accrued sick leave:

1. For a mental or physical illness, injury, or health condition of such employee or such employee's family member, regardless of whether such illness, injury, or health condition has been diagnosed or requires medical care at the time that such employee requests such leave;
2. For the diagnosis, care, or treatment of a mental or physical illness, injury or health condition of, or need for medical diagnosis of, or preventive care for, such employee or such employee's family member; or
3. For an absence from work when the employee or employee's family member has been the victim of domestic violence, a family offense, sexual offense, stalking, or human trafficking:
 - a. to obtain services from a domestic violence shelter, rape crisis center, or other services program;
 - b. to participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members;
 - c. to meet with an attorney or other social services provider to obtain information and advice on, and prepare for or participate in any criminal or civil proceeding;
 - d. to file a complaint or domestic incident report with law enforcement;
 - e. to meet with a district attorney's office;
 - f. to enroll children in a new school; or
 - g. to take any other actions necessary to ensure the health or safety of the employee or the employee's family member or to protect those who associate or work with the employee.

(Id. § 196-b (4)(a)).

As is similar to the Human Rights Law, time off for reasons related to domestic violence, a sexual offense, stalking, or human trafficking, will not extend to the perpetrator of those offenses. (Id. at § 196-b (4)(a)(iii)).

“Family member” includes an employee’s “child, spouse, domestic partner, parent, sibling, grandchild or grandparent; and the child or parent of an employee's spouse or domestic partner.” (Id. at § 196-b (4)(b)). Additionally, the term “parent” refers to “a biological, foster, step- or adoptive parent, or a legal guardian of an employee, or a person who stood in loco parentis when the employee was a minor child.” (Id.) Lastly, “child” includes “a biological, adopted or foster child, a legal ward, or a child of an employee standing in loco parentis.” (Id.)

Accrual and Compensation of Sick Leave

The amount of sick leave earned by an employee is based upon hours worked, with the rate of accrual being no less than one (1) hour of sick leave per every thirty (30) hours worked. (Id. at § 196-b (3)).

As compared to the “calendar year” for determining the number of employees, the “calendar year” for accrual and usage of sick leave may be measured by either the “twelve-month period from January first through December thirty-first, or a regular and consecutive twelve-month period, as determined [and consistently applied] by the employer.” (Id. at § 196-b (1)(a)). For example, the employer’s policy may designate the date of hire as the calendar year for purposes of accruing and using sick time, rather than January 1st.

Those employers required to provide paid sick leave, must compensate employees for each hour of sick leave at their regular rate of pay or the applicable minimum wage, whichever is greater. (Id. at § 196-b (5)(b)).

Sick Leave Policy and Other Requirements

The Sick Leave Law permits employers to have a sick leave policy offering benefits more robust than the law. (Id. at § 196-b (2)). In that case, the employer is not required to provide additional sick leave as long as the current policy permits employees to accrue, carryover and use sick leave time in accordance with the new Sick Leave Law. (Id. at § 196-b (8)).

Additionally, the law allows employers to front load sick leave time to their employees at the beginning of the calendar year to eliminate the obligation to track how the time is earned. (Id. at § 196-b (2)). However, where the employer chooses to front load sick leave time, the employer is prohibited from reducing or revoking the time advanced if the employee does not work the hours sufficient to have earned the time. (Id.) Nonetheless, employers must accurately record sick leave earned and used and maintain records of same for a period a period of six (6) years, as is required for all wage-related records under the law. (Id. at § 195 (4)).

Under the Sick Leave Law, employers may set a “reasonable minimum increment” for employees to use earned sick leave, with the maximum increment being four (4) hours. (Id. at § 196-b (5)(b)).

Employers must also allow employees to roll their unused sick leave to the next calendar year, up to the maximum sick leave hours that can be earned. (Id. at §§ 196-b (6)). Thus, “an employer with fewer than one hundred employees may limit the use of sick leave to forty hours per calendar year . . . and an employer with one hundred or more employee may limit the use of sick leave to fifty-six hours per calendar year.” (Id. at §§ 196-b(6)(i)-(ii)). However, employers are not required to pay employees for accrued and unused sick time upon separation from employment, including “termination, resignation, [and] retirement.” (Id.).

Lastly, employers must furnish to an employee a summary of sick leave accruals within three (3) business days of a written or oral request. (Id. at § 196-b (11)).

Employer Prohibitions

Leave taken under the new Sick Leave Law is job-protected. Thus, the employee must be returned to the same position the employee held prior to taking leave with the same pay and terms and conditions. (Id. at § 196-b (10)).

Additionally, an employer is prohibited from requiring an employee to disclose confidential information¹ prior to taking sick leave “relating to an illness, injury, or health condition of such employee or such employee's family member, or information relating to absence from work due to domestic violence, a sexual offense, stalking, or human trafficking.” (Id. at § 196-b (5)(a)).

Employers are prohibited from taking adverse action or otherwise discriminating or retaliating against an employee who has requested or taken sick leave pursuant to the Sick Leave Law. (Id. at § 196-b (7)).

Collective Bargaining Agreements

The Sick Leave Law does not diminish rights under a collective bargaining agreement and allows agreements entered into on or after the effective date of the law to provide comparable sick leave benefits to covered employees. (Id. at § 196-b (9)(a)). Additionally, nothing under the Sick Leave Law will “impede, infringe, or diminish the ability . . . to negotiate the terms and conditions of sick leave different from the provisions of this section.” (Id. at § 196-b (9)(a)). However, the collective bargaining agreement must “specifically acknowledge” the Sick Leave Law. (Id. at §§ 196-b (9)(a)-(b)).

¹ The term “confidential information” is not defined in the Sick Leave Law.

Miscellaneous

The Sick Leave Law specifically provides that cities with a million or more residents are not prohibited from enacting and enforcing sick leave laws that meet or exceed the minimum requirements of the state's Sick Leave Law.² (Id. at § 196-b (12)).

Additionally, the New York State Department of Labor has the authority to adopt regulations and issue guidance with respect to the Sick Leave Law. Hinman Straub will continue to monitor same and provide pertinent updates as information is received.

If you have any additional questions regarding New York State's Sick Leave Law, please contact Sean Doolan, Esq. (sdoolan@hinmanstraub.com), Elena DeFio Kean, Esq. (ekean@hinmanstraub.com) or Kristin Foust, Esq. (kfoust@hinmanstraub.com) at (518) 436-0751.

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² Effective May 5, 2018, New York City's Paid Safe and Sick Leave Law requires certain employers to provide sick leave to employees, either paid or unpaid depending on the size of the employer, for certain enumerated reasons, similar to those under the State's Sick Leave Law. (New York City Administrative Code § 20-911, et seq.).