Labor & Employment Law Alert: New York State Budget Creates New Paid Sick Leave Program

As employers in New York State cope with the recently enacted federal and state COVID-19 paid emergency sick leave and paid expanded family and medical leave, New York State has implemented a much broader paid sick leave program as part of the New York State FY 2021 Enacted Budget, with employer obligations commencing toward the end of this year and beyond.

The Budget establishes a new paid sick leave program for the employees of private sector employers in the state by the creation of a new Section 196-b of the New York State Labor Law. Businesses with 5-99 employees will be required to provide their employees up to 40 hours of job-protected paid sick leave per year and businesses with 100 employees or more will have to provide up to 56 hours of paid sick leave per year. Smaller businesses with four or fewer employees will be required to guarantee up to 40 hours of job-protected unpaid sick leave to their employees every year. However, if a smaller business had a net income of greater than $1 million in the previous tax year, the 40 hours of sick leave must be paid leave. As governmental agencies, public sector employers are not subject to the requirements of the new paid sick leave program.

The new law states that it does not prohibit an employer from providing an amount of sick leave, paid or unpaid, which is more generous than the above requirements, or from adopting a paid leave policy that provides additional benefits to its employees.

An employer can comply by electing to provide its employees with the total amount of annual sick leave at the beginning of the "calendar year." If the employer elects to do so, it cannot reduce or revoke the amount of sick leave credited to the employee based on the number of hours actually worked by the employee during that calendar year. A "calendar year" is defined as the period from January 1 – December 31 of any particular year, or any regular and consecutive 12-month period as determined by the employer.

In the alternative, the employer can credit the employee with paid sick leave at a rate of not less than one hour per every 30 hours worked beginning at the commencement of employment or running from October 1, 2020, the apparent effective date of the new law, whichever is later. The employer can set a reasonable minimum increment for the use of the paid sick leave which shall not exceed four-hour increments. The employee must be paid at the employee's regular rate of pay or the applicable New York State minimum wage, whichever is greater.

Beginning January 1, 2021, upon the written or oral request of the employee, the employer must allow the employee to use the accrued sick leave for the following purposes:

1. Mental or physical illness, injury or health condition of the employee or the employee's family member, and regardless of whether the illness, injury or health condition has been diagnosed or requires medical care at the time the employee requests such leave;

2. Diagnosis, care, or treatment of a mental or physical illness, injury or health condition of, or the need for a medical diagnosis of, or preventive care for, the employee or the employee's family member; or

3. An absence from work because the employee or employee's family member has been the victim (and not the perpetrator) of domestic violence, a family offense, sexual offense, stalking, or human trafficking, and the employee needs to obtain services from a domestic violence shelter, rape crisis center, or other services program;

4. An absence from work because the employee or employee's family member has been the victim of domestic violence, a family offense, sexual offense, stalking or human trafficking, and the employee or employee's family member is participating in safety planning, temporarily or permanently, to relocate or take other actions to increase the safety of the employee or the employee's family member(s);

5. An absence from work because the employee or employee's family member has been the victim of domestic violence, a family offense, sexual offense, stalking or human trafficking, and the employee or employee's family member will be meeting with an attorney or other social services provider to obtain information and advice on, or to prepare for, or participate in, any criminal or civil proceeding; or

6. An absence from work because the employee or employee's family member has been the victim of domestic violence, a family offense, sexual offense, stalking or human trafficking, and the employee or employee's family member will be filing a complaint or domestic incident report with law enforcement, meeting with a district attorney's office, or enrolling a child in a new school, or taking any other actions necessary to ensure the health and safety of the employee or the employee's family member(s) or to protect those who associate with or work with the employee.

For purposes of the paid sick leave program, a "family member" is defined broadly as 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. The term "parent" means 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. The term "child" means a biological, adopted or foster child, a legal ward, or a child of an employee standing in loco parentis.

The employer cannot compel the employee to disclose confidential or private information as a condition for receiving the paid sick leave. And the employee has a right to be restored to his/her position, with no reduction in pay, benefits, or other terms and conditions of employment, after using the paid sick leave.

Any unused sick leave must be carried over to the following calendar year, provided, however, that an employer with fewer than 100 employees may limit the use of sick leave to 40 hours per calendar year, and an employer with 100 employees or more may limit the use of sick leave to 56 hours per calendar year. The employer is not required to pay an employee for unused sick leave upon the employee's termination, resignation, retirement, or any other separation from employment.

The new paid sick leave law also prohibits employers from discharging, threatening, penalizing, or otherwise discriminating or retaliating against employees for requesting sick leave or using sick leave in a manner consistent with the program.

An employer is not required to provide any additional sick leave if the employer has in place a sick leave or time off policy that meets or exceeds the requirements of the new paid sick leave program including the accrual, carryover, and use requirements described above. Nor will the paid sick leave program prohibit any collective bargaining agreement (CBA) from providing a comparable benefit for the bargaining unit employees in lieu of those under the paid sick leave program, or be viewed as impeding, or infringing, or diminishing the ability of unions to negotiate the terms and conditions of sick leave different from the provisions of the paid sick leave program. However, the provisions of any such CBA clause must acknowledge the provisions of Section 196-b of the New York State Labor Law which, as stated above, created the new paid sick leave program.

Employers must keep accurate payroll records regarding the paid sick leave program for a period of at least six years. And, within three business days of an employee's request the employer must provide the employee with a summary of the amounts of the sick leave used in the current calendar year and/or any previous calendar year.

The New York State Commissioner of Labor is authorized to adopt regulations and issue guidance on the new paid sick leave program as well as to conduct a public awareness campaign to inform employees and employers of the details of the program.

As New York State's private sector employers seek to navigate this new law, the labor and employment law attorneys at Hancock Estabrook stand ready to assist.

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