COLLAZO FLORENTINO & KEIL LLP *Client Advisory*

For Clients And Friends Of The Firm

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NEW YORK CITY LABOR AND EMPLOYMENT LAW UPDATE

In addition to the sexual harassment legislation recently passed by the NYC Council (awaiting signature from Mayor de Blasio), there have been a number of developments in New York City labor and employment law this year. Effective July 18, 2018, NYC employers will be required to grant an employee's request for a "temporary change" to the employee's work schedule due to a "personal event," with limited exceptions. Relatedly, as of October 2018, the New York City Human Rights Law ("NYCHRL") will increase an employer's obligations when an employee requests a reasonable accommodation for any number of covered reasons. Finally, the NYCHRL's definitions of the terms "sexual orientation" and "gender" will be expanded, effective May 11, 2018. Below is a summary of these three new laws, and recommendations on what steps employers should take in response to these developments.

TEMPORARY WORK SCHEDULE CHANGES FOR PERSONAL EVENTS

Effective July 18, 2018, NYC employers will be required to grant, with limited exceptions, an employee's request for a "temporary change" to the employee's work schedule relating to a "personal event." A "personal event" is defined as:

- the need for a caregiver (someone who provides direct and ongoing care) to provide care to a minor child (under 18) or care recipient (a person with a disability who (i) is a family member or resides in the caregiver's household and (ii) relies on the caregiver for medical care or to meet the needs of daily living);[1]
- the need to attend a legal proceeding or hearing for subsistence benefits to which the employee, a family member, or the employee's care recipient is a party; or

[1] Note that both "family member" and "child" have the expansive definitions set forth in the Earned Safe and Sick Time Act.

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- for any reason covered under the NYC Earned Safe and Sick Time Act ("ESTA").

A "temporary change" is a limited alteration in the hours, times, or locations of the employee's work. Such an alteration may include, among other things, using paid time off, working remotely, swapping or shifting work hours, and using short-term unpaid leave. Employers must grant such a request two times in a calendar year for up to one business day per request. A "business day" is defined as "any 24-hour period when an employer requires employees to work at any time." Employers can fulfill this requirement by permitting an employee to use two business days for one request.

Although employers are required to grant a temporary schedule change for reasons covered by ESTA, the employer cannot require the employee to use ESTA leave before requesting a temporary schedule change. Additionally, any ESTA leave an employer grants does not count toward the two schedule changes required by this new legislation. Similarly, any unpaid leave granted for a personal event under this law does not count toward an employer's obligation to grant leave under ESTA.

Employee Requirements

To be eligible for this flexible scheduling, the employee must work 80 or more hours in the city in a calendar year, and have been employed by the employer for at least 120 days. When an employee becomes aware of the need for a temporary change in work schedule, the employee must notify their employer or direct supervisor of the need for a temporary change and state that the change is due to a personal event. The statute is silent on any specific amount of advance notice. Unless the employee seeks leave without pay, the employee must make a proposal for the temporary change to the work schedule.

The employee's initial request need not be in writing. Nonetheless, the employee must submit the request in writing as soon as practicable, but no later than the second business day after the employee returns to work following the conclusion of the temporary change to the work schedule. This written request must indicate the date(s) for which the change was requested and that it was due to the employee's personal event. The request may be submitted electronically if employees commonly use electronic forms to request and manage leave and schedule changes. If the employee fails to submit a written request, the employer's obligation to respond in writing (described below) is waived.

Employer Obligations

Under the law, employers must respond to the employee's initial request (described above) "immediately." The statute is silent on how much time constitutes "immediately." Although the employer's initial response does not need to be in writing, the employer must respond in writing as soon as is practicable, but no later than 14

days after the employee submits their written request. The response may be electronic if such a form is easily accessible to the employee and must include the following:

- Whether the employer will agree to the temporary change to the work schedule in the manner requested by the employee, or instead provide leave without pay (this option does not constitute a denial of the request);
- If the request is denied, an explanation for the denial; and
- The number of requests and business days the employee has left in the calendar year, after taking into account the employer's decision contained in the written response.

Unlike in the reasonable accommodation process, there is no "undue hardship" defense set out in the statute which would permit an employer to deny the employee's request. Rather, an employer may deny the employee's request only if (1) the employee has exhausted their two requests in the calendar year, or (2) if the employee is otherwise not covered by the statute, either due to not meeting the eligibility requirements, because the employee is exempt under a CBA (discussed below), or because the employee performs certain roles in the entertainment industry. Notably, the law does not otherwise affect an employer's obligation to provide reasonable accommodations in the form of flexible or altered work schedules pursuant to other laws. Additionally, and somewhat ambiguously, the law also notes that employees may request a change in work schedule other than the temporary changes an employer is required to grant under this law. An employer is required to respond to an employee's request for such other change pursuant to the procedures listed above "to the extent applicable." The law does not, however, appear to require the employer to grant such other changes.

Employee's Covered by a CBA

As stated above, the law contains special provisions for employees covered by a collective bargaining agreement. If there is a valid CBA in effect on July 18, 2018, the new law will not take effect until the termination date of the CBA. However, if the new CBA waives the provisions of the law and otherwise addresses temporary changes to work schedules, then the employees covered by the CBA are exempt from the above statutory requirements.

Next Steps

Employers should review their employee handbooks and other guidance to ensure that a process is in place for addressing employee requests for temporary schedule changes. Managers should be trained on the limited reasons for denials of such requests as well as the alternatives to granting the employee's requested schedule change (*e.g.*, providing leave without pay).

UPDATED REQUIREMENTS FOR REASONABLE ACCOMMODATIONS

Under the NYCHRL, absent undue hardship to the employer, employers are required to provide reasonable accommodations to employees who need an accommodation due to disability, pregnancy, childbirth or a related medical condition, religious purposes, or the individual's status as a victim of domestic violence, sex offenses or stalking. As part of the reasonable accommodation process, many employers already engage in an interactive process with the employee to discuss the requested accommodation and the various options.

Effective October 15, 2018, New York City employers will be legally required to engage in such an interactive process. Specifically, the NYCHRL will be amended to require employers to engage in a "cooperative dialogue" with an employee who has requested a reasonable accommodation, or who the employer has notice may require such a reasonable accommodation for any of the reasons set forth above.

The law defines a "cooperative dialogue" as the process by which an employer and an employee who may be entitled to an accommodation under the law engage, in good faith, in a written or oral dialogue concerning: (1) the employee's accommodation needs; (2) potential accommodations that may address the employee's accommodation needs, including alternatives to the requested accommodation; and (3) the difficulties that such potential accommodations may pose for the employer. Employers will be familiar with these requirements as they mirror the best practices for the interactive process under the Americans with Disabilities Act. The law states that this cooperative dialogue must occur within a "reasonable time"; however, "reasonable time" is not defined.

After engaging in a cooperative dialogue, the employer must provide the employee with a **written final determination** identifying any accommodation that was granted or denied. The determination that no reasonable accommodation would enable the person requesting an accommodation to satisfy the essential requisites of a job or enjoy the right(s) in question may only be made after the parties have engaged, or the employer has attempted to engage, in a cooperative dialogue. Importantly, an employer cannot assert that there is no reasonable accommodation that would enable the individual to satisfy the essential requirements of the job unless and until the parties have engaged or attempted to engage in the cooperative dialogue.

Failure or refusal to engage in a cooperative dialogue within a reasonable time or the failure to provide a written final determination identifying any accommodation that was granted or denied is considered an unlawful discriminatory practice.

Next Steps

The advent of this new law poses an opportunity for employers to revisit their policies and practices surrounding requests for reasonable accommodation to ensure that the relevant personnel understands the employer's obligations and the possible reasons for

accommodation. Employers should ensure that Human Resources is aware of the new requirements regarding formalizing the cooperative dialogue in writing, even if they may already be engaging in a variation on the cooperative dialogue described above.

EXPANDED DEFINITIONS OF "SEXUAL ORIENTATION" AND "GENDER" UNDER THE NYCHRL

Effective May 11, 2018, the definitions of the terms "sexual orientation" and "gender" under the NYCHRL will be expanded. Specifically, "sexual orientation," which previously only included heterosexuality, homosexuality or bisexuality, will now be defined as: "an individual's actual or perceived romantic, physical or sexual attraction to other persons, or lack thereof, on the basis of gender. A continuum of sexual orientation exists and includes, but is not limited to, heterosexuality, homosexuality, bisexuality, asexuality, and pansexuality."

Additionally, the term "gender" is amended to more clearly include: "actual or perceived sex, gender identity, and gender expression including a person's actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth."

Next Steps

Employers should ensure that any relevant policies are updated to include these revised definitions. Training programs that address sexual orientation and gender discrimination should also be amended to reflect these expanded definitions.

In light of all of the above, employers should begin reviewing their policies, internal guidance, and employee training programs to ensure all personnel are informed about these changes in the law. If you have any questions about any of the above legislation, please contact Tina Grimshaw, Milan Chatterjee, or any other attorney at the Firm.