



## New York City Prohibits Discrimination Against The Unemployed and Requires Mandatory Sick Leave

*June 28, 2013*

### **Introduction**

Employers in New York City should take note of two recent initiatives by the New York City Council to expand workers' rights. The first is a new law that amends the New York City Human Rights Law to make it unlawful for employers to discriminate against individuals on the basis of unemployment. The law went into effect on June 11, 2013. In addition, this week the City Council overrode Mayor Bloomberg's veto and enacted the Earned Sick Time Act, which requires employers to provide a minimum amount of sick leave to employees, in most cases with pay. The law will go into effect no earlier than April 1, 2014 (potentially later depending on a formula tied to an economic index). Below is a summary of the new laws.

### **Amendment to NYC Human Rights Law Prohibiting Discrimination Against the Unemployed**

#### **Protected Status**

An individual is protected from discrimination on the basis of his or her unemployment status. The terms "unemployed" or "unemployment" are defined as:

- Not having a job;
- Being available for work; and
- Seeking employment.

#### **Definition of "employer"**

The prohibitions of the new law apply to employers, employment agencies, or agents that employ at least four persons. Persons include independent contractors who are not themselves employers.

#### **Prohibited Conduct**

Under the new law, an employer cannot base an employment decision (regarding hiring, compensation or the terms, conditions or privileges of employment) on an applicant's unemployment.

In addition, an employer must refrain from including certain phrases in an advertisement for any job vacancy in New York City, unless otherwise permitted by city, state or federal law. The advertisement must not contain:

- Any provision stating or indicating that current employment is a requirement or qualification for the job; or
- Any provision stating or indicating that the employer will not consider individuals for employment based on their unemployment.

**Exceptions to Prohibited Conduct**

Notwithstanding the foregoing prohibitions, an employer is permitted to:

- Consider an applicant's unemployment where there is a substantially job-related reason for doing so (e.g., when breaks in employment may affect licensure required for the job);
- Ask about the circumstances of an applicant's separation from the prior employment;
- Consider for employment or give priority to applicants currently employed by the employer; and
- Set compensation or terms or conditions of employment based on a person's actual amount of experience.

When making employment decisions or advertising for vacancies, an employer can still consider any "substantially job-related qualifications," including but not limited to:

- A current and valid professional or occupational license;
- A certificate, registration, permit, or other credential;
- A minimum level of education or training; or
- A minimum level of professional, occupational, or field experience.

**Disparate Impact Claims**

The new law also provides for disparate impact claims, setting forth the following framework.

- *Prima Facie Case*: The plaintiff must demonstrate that an otherwise lawful policy or practice, or a group of policies or practices, resulted in a disparate impact on unemployed individuals. (If alleging a group of policies or practices, the plaintiff is not required to identify a specific policy or practice.)
- *Affirmative Defense*: The employer can plead and prove that the challenged policy or practice (1) is based on a substantially job-related qualification (including those listed above), or (2) does not contribute to the disparate impact.
- *Alternative Policy*: The plaintiff must produce substantial evidence that an alternative policy or practice works just as well with less disparate impact.
- *Alternative Policy Insufficient*: The employer can rebut by proving that the alternative policy practice would not serve it as well.

**Enforcement**

Either an aggrieved individual or the New York City Commission on Human Rights may bring a claim of discrimination under the new law. An individual may file a direct action in court or a complaint with the Commission. Remedies in court could include back and front pay, injunctive relief, punitive damages and attorneys' fees. The Commission could fine a violating employer up to \$125,000 per violation, or \$250,000 for willful discrimination, as well as awarding back and front pay and injunctive relief.

**Earned Sick Time Act Requiring Mandatory Sick Leave****Coverage**

The Earned Sick Time Act applies to virtually all private sector employers in New York City and provides job-protected sick leave to full-time and part-time employees who work more than 80 hours in a calendar year.

The Act does not apply to employees covered by a collective bargaining agreement that provides for comparable benefits and waives rights under the Act, or to employees in the construction or grocery industry covered by a collective bargaining agreement containing a waiver of rights.

Notably, the Act does not affect employers who already provide comparable time off. An employer is not required to provide additional sick time under the Act if it provides time off (including vacation, sick, personal or similar leave) sufficient to meet the requirements of the Act *and* allows such time off to be used for the same purposes and under the same conditions as set forth in the Act. Employers who currently provide time off may need to adjust their policies when the Act takes effect to cover part-time employees and to comply with the usage, accrual and carryover requirements, discussed further below.

### **Sick Time Requirements and Accrual**

Under the Act, an employee accrues 1 hour of sick time for every 30 hours worked, capped at 40 hours of sick time per year. Employees begin accruing sick time upon commencement of employment or on the effective date of the law, whichever is later, and are permitted to use accrued time 120 days later. After that, employees may use sick time as it accrues, and employers may set a reasonable minimum use increment of no greater than 4 hours. A domestic worker is entitled to sick time only after one year of work with the same employer and such leave is capped at 2 days per year.

The chart below sets forth the requirements for annual paid and unpaid leave.

Threshold	Paid or Unpaid	Sick Time Requirements
20 or more employees	Paid leave	Up to 40 hours/year
15-19 employees	Unpaid leave, then paid leave 18 months after law takes effect	Up to 40 hours/year
14 or less employees	Unpaid leave	Up to 40 hours/year
1 or more domestic worker	Paid leave 18 months after law takes effect	Up to 2 days/year (in addition to 3 paid rest days under New York's Domestic Workers' Bill of Rights)

### **Carryover**

Any unused sick time must be carried over to the next year, although an employer is not required to allow the use of more than 40 hours of sick time in a calendar year. In addition, an employer can avoid carryover of unused paid sick time if the employer agrees to:

- Pay any unused sick time at the end of the year in which it was accrued; and
- Provide the employee with 40 hours of paid sick time the first day of the next year.

An employer is *not* required to pay for unused sick time upon termination of employment.

**Use of Sick Time**

Employees may use sick time for absence from work due to:

- Mental or physical illness, injury or health condition, need for medical diagnosis, care or treatment, or need for preventive medical care;
- Care of a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or who needs preventive medical care; or
- Closure of the employee's place of business by order of a public official due to a public health emergency or employee's need to care for a child whose school has been closed for a public health emergency.

**Notice and Documentation**

Employers must give written notice at the commencement of employment of the employee's rights under the law. An employer may require reasonable advance notice of up to seven days of the employee's need to use sick time, or notice as soon as practicable when the need is not foreseeable. An employer also may require reasonable documentation from a health care provider for absences of more than three consecutive work days. Employers must retain compliance records for two years.

**Enforcement**

An aggrieved employee can file a complaint with the Department of Consumer Affairs, but there is no right to bring a private civil action. Penalties for violations include: three times the wages that should have been paid for used sick time (or a minimum of \$250); \$500 for each instance of sick time unlawfully denied by the employer; and, in cases of unlawful discharge, lost wages, benefits, a \$2500 penalty, and equitable relief including reinstatement. Employers also may be fined up to \$500 for the first violation and up to \$1,000 for subsequent violations, and willful violations of the notice requirements can result in fines of \$50 per employee.

\* \* \*

In light of these developments, employers should review their application and interview procedures, personnel policies and employee handbooks. For assistance or further information, please contact J. Scott Dyer or Julie Levy of the Firm's Labor and Employment Group.

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