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CLIENT ALERT

New York City Continues Trend of Enacting Employee-Friendly Legislation

FEBRUARY 16, 2018

New York City employers should be aware of the city's continuing trend of enacting employee-friendly legislation. In January, the city enacted three bills that employers should note. One, Int. 1399-A, amends the New York City Fair Workweek Law to require employers to provide employees in the city with two temporary schedule changes per year for qualifying "personal events." The other two amend the New York City Human Rights Law (NYCHRL). Int. 804-A amends the NYCHRL to explicitly require employers to engage in a "cooperative dialogue" with individuals seeking reasonable accommodations. Int. 1186-A expands the NYCHRL's definitions for sexual orientation and gender. Highlights of 1399-A, 804-A, and 1186-A follow.

Int. 1399-A (Local Law 69 of 2018) – Scheduling Changes

Coverage and Exceptions

Int. 1399-A requires employers to provide employees working in New York City with temporary work schedule changes for up to two days per year relating to a "personal event." Employers must either grant the employee two requests per calendar year for a one-day temporary work schedule change or one request per calendar year for a two-day temporary work schedule change. Unlike the requirements of the Fair Workweek Law enacted last year, which were limited to employees of fast food establishments or retail businesses, the requirements of Int. 1399-A apply broadly to most employers and employees.

Int. 1399-A defines a temporary schedule change as "a limited alteration in the hours or times that or locations where an employee is expected to work, including, but not limited to, using paid time off, working remotely, swapping or shifting work hours and using short-term unpaid leave." A personal event for which a change must be granted is: the need for a caregiver to provide care to a minor child or care recipient; an employee's 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 any circumstance that would constitute a basis for permissible use of safe time or sick time under the New York City Earned Safe and Sick Time Act (ESSTA).

Int. 1399-A will not apply to employees who have been employed by an employer for less than 120 days or who work less than 80 hours in New York City in a calendar year. As with other provisions of the Fair Workweek Law, employers will be prohibited from retaliating against any employee for exercising or attempting to exercise any

rights under the law. Int. 1399-A will not affect leave granted under ESSTA, or apply to employees under certain collective bargaining agreements or to certain employees in the entertainment industry.

Interactive Process
Int. 1399-A also establishes an interactive written process for employees and employers to communicate regarding requests for work schedule changes. An employee seeking a temporary schedule change is required to notify his or her employer that the change is needed due to a personal event as soon as the employee becomes aware of the need for the temporary change. The employee must further make "a proposal for the temporary change to the work schedule, unless the employee seeks leave without pay." The law also provides that the employee does not need to put the initial request in writing, but should do so "as soon as is practicable, and no later than the second business day after the employee returns to work following the conclusion of the temporary change to the work schedule." The employer may require that the request be submitted in electronic form if such electronic form is commonly used for the employer's employees to request and manage leave and schedule changes. Notably, if the employee fails to submit the written request, the employer's obligation to respond in writing, as described below, is waived.

Int. 1399-A further requires that an employer "respond immediately" to an initial request, and memorialize the response in writing "as soon as is practicable," but no later than 14 days after the employee submits the request in writing. An employer's written response must include whether the employer will agree to the requested temporary work schedule change or will provide the temporary change as leave without pay, and the number of requests and number of business days that an employee has left in the calendar year for temporary work schedule changes. Significantly, the provision of leave without pay will not constitute a denial of the request. If the employer does deny the request for a temporary schedule change, it must provide an explanation for any denial.

Employees are also protected under Int. 1399-A when making requests for work schedule changes other than the two days per year of temporary changes that employers are required to grant. Employers may grant or deny such requests, but the same procedure for employee requests and employer responses applies.

Leave granted under Int. 1399-A does not count toward an employer's obligation to grant leave under the ESSTA, and leave taken under the ESSTA does not count toward an employer's obligation to grant leave under Int. 1399-A. The office of labor standards is charged with the promulgation of rules before the measure's effective date of July 18, 2018.

Int. 804-A (Local Law 59 of 2018)

Int. 804-A amends the NYCHRL to explicitly require employers and other covered entities to engage in a "cooperative dialogue" with individuals who may be entitled to accommodations for religious needs, disabilities, pregnancy or related medical conditions, as well as in response to an individual's needs as a victim of domestic violence, sex offenses or stalking.

The NYCHRL already requires that covered employers make reasonable accommodations for victims of domestic violence, sex offenses or stalking; individuals with pregnancy, childbirth or related medical conditions; for religious needs; or for disabilities—so long as these accommodations would not impose an "undue hardship" on the covered entity. Prior to Int. 804-A, however, the NYCHRL did not previously expressly require an employer to engage in any particular interactive process in response to the request for an accommodation.

As amended by Int. 804-A, it is "an unlawful discriminatory practice" under the NYCHRL for covered entities not to engage "within a reasonable time," "in good faith in a written or oral dialogue" with a person who may be entitled to an accommodation "concerning the person's accommodation needs, potential accommodations that may address the person's accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may post for the covered entity." Further, "[u]pon reaching a final determination at the conclusion of a cooperative dialogue," covered entities will be required to provide the person requesting an accommodation with "a written final determination identifying any accommodation granted or denied." Moreover, an employer's determination "that no reasonable accommodation would enable the person requesting an accommodation to satisfy the essential requisites of a job or enjoy the right or rights in question" may not be made until "after the parties have engaged, or the covered entity has attempted to engage, in a cooperative dialogue."

Engaging in a cooperative dialogue and memorializing its determination will not insulate an employer, however. Int. 804-A specifies that compliance with its provisions will not be a defense to a claim of not providing a reasonable accommodation.

Suits to enforce the provisions of Int. 804-A will include the full range of damages and remedies available under the NYCHRL, including compensatory and punitive damages, as well as attorneys' fees. Int. 804-A will take effect on October 15, 2018.

Int. 1186-A (Local Law 38 of 2018)

Int. 1186-A expands the NYCHRL's definitions of sexual orientation and gender, and thus broadens the statute's explicit protections against discrimination. Previously, sexual orientation was defined as "heterosexuality, homosexuality, or bisexuality." As amended, the law defines sexual orientation 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." The revised definition of "gender" includes "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." The law will take effect on May 10, 2018.

Action Items
New York City employers should review policies and practices to ensure compliance with the new requirements of each amendment. Employers should take special care to ensure that supervisors and managers are aware of the interactive process requirements under 1399-A and 804-A, including the written response requirements under those laws.

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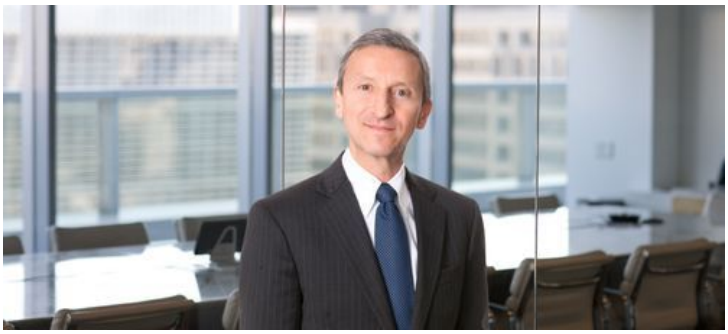

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