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ACT NOW ADVISORY

New York City's Temporary Schedule Change Law: Newly Released Information and Resources

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The New York City Temporary Schedule Change Law ("Law") became effective on July 18, 2018. As we reported in a previous *Act Now Advisory*, the Law allows most New York City employees up to two temporary schedule changes (or permission to take unpaid time off) per calendar year when such changes are needed due to a "personal event." The Law also prohibits retaliation against workers who request temporary schedule changes. The New York City Department of Consumer Affairs, Office of Labor & Policy Standards ("DCA"), recently launched a website that provides employers and employees with information about, and resources regarding, the Law.

Summary of the Law

Eligible employees may request temporary schedule changes for certain "personal events," which include:

- 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 the permissible use of safe time or sick time under New York City's Earned Safe and Sick Time Act ("ESSTA").

An employee is eligible to request such temporary schedule changes if he or she (a) works in New York City for 80 or more hours in a calendar year, (b) has worked for the employer for at least 120 days, and (c) is not exempted through (i) a valid collective bargaining agreement ("CBA") (see below) or (ii) the entertainment industry exemption.[1]

[1] Employers in the entertainment industry (e.g., movie, theater, television) are exempted from the Law, except for employees (a) who primarily perform office or non-manual work related to the management or general business operations of the entertainment industry employer or the employer's customers, or (b)

Employees may request up to two separate schedule changes of up to one business day each, or one schedule change for up to two business days each year. Employees may propose the type of schedule change they prefer, such as (a) using unpaid leave or paid time off, (b) working remotely, (c) swapping shifts, or (d) shifting work hours. With limited exceptions, employers must grant the temporary schedule change or offer leave without pay, provided the employee has not already exhausted his or her annual right to make such requests. If an employer offers leave without pay instead of the requested change, this will not be considered a denial of the request. Employers may offer employees the ability to use paid time off (in lieu of taking unpaid leave) but may not require the employee to do so. Further, and importantly, employers may not require the use of sick leave under ESSTA when an employee requests a temporary schedule change.

The Law contains detailed provisions relating to (a) how employees must request temporary schedule changes, (b) how employers must respond to such requests, and (c) the grounds upon which an employer may deny a temporary schedule change request. For information on these requirements, please see our previous *Act Now Advisory*.

Information and Resources Available on the DCA Website

The DCA's website provides the following information and resources:

- An overview of the Law titled "Temporary Schedule Change Law: What Employers/Workers Need to Know"
- A Notice of Employee Rights under the Law, titled "You Have a Right to Temporary Changes to Your Work Schedule"
- A complaint form for employees who wish to file a complaint through the New York City Office of Labor Policy & Standards ("OLPS")
- A set of Frequently Asked Questions
- A packet with the text of the Law

Workplace Posting Requirement

The Law requires that New York City employers post the newly released Notice of Employee Rights where it is easily visible to employees. The notice, which must be printed on an 11" x 17" page, must be posted in English and any language that is the primary language of at least 5 percent of the employees at each New York City workplace, so long as the City has prepared a notice in that language. The poster is currently only available in English, but the DCA has indicated that it will be posting

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whose primary duty is performing routine mental, manual, mechanical, or physical work in connection with the care or maintenance of an existing building or location used by the entertainment industry employer.

copies of the notice in other languages soon. Failure to post the Notice of Employee Rights is an independent violation of the Law.

Prohibition on Retaliatory Conduct

Employers are prohibited from retaliating against employees and/or taking any action against employees that might deter them from exercising their rights under the Law. Significantly, the Law's prohibition against retaliation extends to any additional requests for schedule changes made by an employee in excess of those permitted by the Law, even though the employer is not required to grant such request(s).

What Does the Law Mean for Employers with Union-Represented Employees?

The Law as It Applies to Employees Covered by a CBA

The Law, as written, applies to employees represented by a union and covered by a CBA. However, the Law contains a qualified exemption for employees covered by a CBA, which specifies that the Law does not apply to any employee who:

> [i]s covered by a valid collective bargaining agreement if such agreement waives the provisions of this subchapter and addresses temporary changes to work schedules[.]

The text of the Law also addresses, in very general terms, the question of whether the Law is preempted by the National Labor Relations Act when it comes to interpreting a CBA for purposes of determining whether it contains a "waiver" of the applicable provisions of the Law or addresses changes to work schedules. That provision states that the Law does not:

> [p]reempt, limit or otherwise affect the applicability of any provisions of any other law, regulation, requirement, policy or standard, other than a collective bargaining agreement, that provides comparable or superior benefits for employees to those required herein.

What Does This Mean to Employers Whose Employees Are Represented by a Union?

While the above language may seem confusing, it appears that the City Council and the OLPS at the City's DCA are taking an approach similar to that followed under ESSTA. ESSTA provided for an exemption from compliance in cases where (a) employees were covered by a CBA, (b) the CBA contained an "express waiver" of ESSTA's paid safe and sick time requirements, and (c) the paid safe and sick time benefits under the CBA were substantially comparable to those mandated by ESSTA.[2]

[2] ESSTA also waived the requirement of substantially comparable benefits in the case of employers in the grocery and construction industries whose employees are covered by a CBA containing an express waiver of ESSTA's requirements.

Significantly, in the case of ESSTA, the text of the statute only calls for a waiver and comparable benefits—the requirement that the waiver be an "express waiver" is one that was created by the OLPS and DCA in their administration of ESSTA. It is foreseeable that the DCA will follow the same approach in its administration and enforcement of the Law. To date, in its enforcement of ESSTA, the OLPS has demonstrated an unwillingness to defer to the agreement of an employer and its employees' bargaining representative or acknowledge that the sick leave or paid time off under a CBA is comparable or superior to such leave or time off under ESSTA.

Accordingly, employers that employ union-represented employees will need to ensure that, as they renegotiate their CBAs and/or negotiate first contracts, the CBAs contain clear and unequivocal language confirming that the employer and the union have agreed to "expressly waive" the provisions of the Law *and* the provisions of the CBA concerning taking and scheduling time off and temporary schedule changes provide employees with benefits that are "comparable or superior" to those mandated by the Law.

What Happens with CBAs That Were Negotiated Before the Law Took Effect?

While the Law is, in most instances, effective as of July 18, 2018, the 180th day after its enactment, this is not the case for employees covered by a CBA that was in effect on that date. The Law provides that:

> in the case of employees covered by a valid collective bargaining agreement . . . this local law takes effect on the date of termination of such agreement . . . .

Accordingly, employees covered by an existing CBA are not covered by the Law until the expiration of the CBA. Upon the expiration of an existing CBA, employers will need to ensure that they propose and secure the necessary express waivers and agreements for comparable benefits in all new or renewal CBAs from this point forward.

What New York City Employers Should Do Now

- Post the Notice of Employee Rights on an 11" x 17"-sized page, in a conspicuous manner in the workplace, and monitor the DCA website for additional versions of the notice in other languages if at least 5 percent of the employees at a given location speak a different language (and the DCA has prepared a notice in those languages).

- Review, and, if necessary, revise your current policies and procedures on temporary schedule changes to make sure that they are consistent with the procedures set forth above. If you do not already have a policy that touches upon the subject of temporary schedule changes, consider implementing one.

- Consider preparing a Temporary Schedule Change Request Form or other method for documenting requests and actions taken to respond to the request.

- Train all managers and supervisors who could receive requests for schedule changes on the requirements of the Law and any changes to your policies and procedures resulting from the Law.

- For employers that employ union-represented employees, when a CBA is negotiated or renegotiated, ensure that:

    - the CBA contains clear language confirming that the parties have agreed to "expressly waive" the provisions of the Law, and

    - the provisions of the CBA concerning taking and scheduling time off and temporary schedule changes provide employees with benefits that are "comparable or superior" to what is required under the Law.

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