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Management Alert

Shifty Business VI: NYC Temporary Schedule Change Law Effective July 18

By William P. Perkins, Robert S. Whitman, Joshua D. Seidman, and Meredith-Anne Berger

Seyfarth Synopsis: *Effective July 18, 2018, New York City employers must grant two temporary schedule changes per year to eligible employees for certain qualifying "personal events." Unlike other bills which were a part of the NYC Fair Workweek legislation, this law is not limited to retail or fast food employers.*

As previously reported here, a new law requires NYC employers to grant employees two temporary schedule changes per year, of up to one business day each, for certain personal events. The law takes effect on July 18, 2018, and applies to most employers with NYC employees.

Qualifying personal events that entitle employees to leave include:

- providing care for a minor child or other individual under the employee's care;
- attending legal proceedings for subsistence benefits to which the employee, the employee's family member, or the employee's care recipient is a party; and
- any circumstance that would qualify for use of safe or sick time under the recently-amended Earned Safe and Sick Time Act ("ESSTA"). (For more information on the recent changes to ESSTA, see our prior alert.)

The law provides examples of temporary schedule changes to which the employee will be entitled, which include:

- using paid time off;
- working remotely;
- changing work hours;
- swapping shifts; or
- using short-term unpaid leave.

The inclusion of these examples does not necessarily mean that employers are required to grant employees' specific requests. Likewise, the law does not limit potential schedule changes to only these enumerated examples. For instance, remote work may not be conducive to certain positions that require the employee to be physically present at the employer's location. In such cases, the employer may offer an alternative approach to the employee's request that is better suited to the employee's position.

The law mandates the process by which employees request a schedule change and employers respond:

1. Employees must provide notice of the need for a change as soon as they are aware of it and propose a specific schedule adjustment, unless they seek unpaid leave. The initial notice need not be written, but the employee must submit a written request within two days after returning to work. The written notice must state (a) the date for which the change was requested; and (b) that it was due to a covered personal event. The request may be submitted electronically if the employer typically uses electronic means to manage leave requests.

2. The employer must immediately respond to a temporary schedule change request. "Immediately" is not defined under the law. This initial response need not be written, but a written response is required within 14 days of the employee's written request. The written response must state (a) whether the employer agrees to the employee's requested temporary change or will provide leave without pay; (b) if the request is denied, an explanation for the denial; and (c) how many requests and how many business days the employee has left in the calendar year, after taking into account the decision on the employee's current request. If the employee does not submit a written request, the employer does not need to respond in writing.

3. Employers can deny a temporary schedule change request relating to a covered personal event *only* if the employee has exhausted the two allotted requests in the calendar year or if one of the exclusions listed below applies.

4. Even after employees have exhausted their rights under this law, the employer must still follow the steps set forth above, to the extent applicable. If an employee's requests under the law are exhausted, however, an employer has the option to either grant or deny an employee's request.

Specifically excluded from the law are:

- employees covered by a valid collective bargaining agreement, but only if the CBA waives the provisions of the law and addresses temporary changes to work schedules;
- employees who have been employed fewer than 120 days;
- employees working fewer than 80 hours in NYC in a calendar year; or
- individuals performing certain types of work in the theater, film, or TV industry.

"Calendar year" under the law means a regular and consecutive twelve-month period, as determined by an employer, which is the same definition used under ESSTA. If the employer grants an employee a single request spanning two business days, then it need not grant a second request within that calendar year.

The law's requirements are in addition to, and not in lieu of, an employer's obligations under ESSTA. Employees do *not* need to use or exhaust their available leave under ESSTA before requesting a schedule change, and unpaid leave granted under the law does *not* count towards the employee's entitlement to leave under ESSTA. In turn, leave granted under ESSTA does not constitute a schedule change under this law.

The law includes a non-retaliation provision, which includes protections for employees who request schedule changes *other than* those that employers must grant under this law. Those requests must still follow the process required by this law.

The penalty for violation of the law is a $500 fine and an order directing compliance. However, an employer that fails to provide an employee with the written response required under the law may cure the violation without a penalty by presenting proof that it provided the employee with the required written response within seven days of receiving notice of the opportunity to cure.

The NYC Office of Labor Policy & Standards has not yet released guidance to clarify employers' obligations under the law. In the meantime, employers should consider implementing a specific policy in light of this law's interplay with ESSTA, which warrants explanation to employees.

If you would like further information, please contact William P. Perkins at wperkins@seyfarth.com, Robert S. Whitman at rwhitman@seyfarth.com, Joshua D. Seidman at jseidman@seyfarth.com, or Meredith-Anne Berger at mberger@seyfarth.com.

www.seyfarth.com