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East Coast Edition

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Another New Form of Protected Activity- Mandatory Leave Time to Donate Blood

By David M. Wirtz and Bruce R. Millman

Beginning December 13, 2007, most New York employers will be required to provide employees with leave time so that they may donate blood. Section 202-j has been added to New York's Labor Law and will require employers to provide employees with no fewer than three hours of leave time to donate blood within any twelve-month period.¹

The new law will apply to all persons or entities that employ 20 or more employees at one or more work sites. The law covers both public and private entities. All employees who perform services for hire and work for an average of 20 or more hours per week at any site operated and owned by the employer are eligible. Independent contractors are explicitly excluded from coverage.

The statute does not define how the twelve-month period is to be calculated (e.g. calendar year, fiscal year, or rolling twelve months based on when the employee last took a leave). Nor does the statute state whether the leave is paid or unpaid. The New York State Commissioner of Labor is authorized to establish guidelines on these kinds of questions, but has yet to do so. Under federal regulations, if an employee is exempt from overtime, the leave must be paid in order to retain the employee's exempt status.²

Recommendations

New York employers need to adopt a policy regarding the use of this new leave time. The policy should address the definition of a twelve-month period

and state whether the leave will be paid or unpaid. Unless and until the New York State Department of Labor issues clarifying regulations, we believe that an employer may safely select any one of the methods for determining the computation period that are outlined in the U.S. Department of Labor regulations governing the Family and Medical Leave Act. Those regulations allow an employer to choose a calendar year, a fixed twelve-month year or fiscal year, a twelve-month period from when the employee first makes use of the leave, or a rolling twelve-month period measured backward from when the employee used any of the leave.

Employers should also consider including notice and approval procedures in their policies, to minimize workplace disruption and help to ensure proper use of the leave. For example, consideration should be given to requiring employees to fill out a form for requesting the leave time, and to provide a note confirming attendance at the blood donor center or clinic.³

There remains some uncertainty with regard to the new law. In his approval message, Governor Spitzer raised a concern that Section 202-j fails to take into account existing blood drive initiatives. He observed that many employers already sponsor or participate in blood drives and expressed a concern that employers who do would still be required to provide three hours of leave time to employees who wish to donate blood under the new law, and that this might

discourage employer-sponsored blood-drives. Accordingly, an amendment to Section 202-j is currently pending before the state legislature, which would give an employer the option of providing three hours of leave time or permitting employees to donate blood during work hours at least two times per year at a convenient time and place to be set by the employer, with no draw on a participating employee's leave time.⁴ It also remains unclear whether employers may require employees to use or substitute existing paid or unpaid leave for blood donations. Although the legislative memorandum from the sponsor of 202-j suggests that the leave is meant to be in addition to other employee benefits, the statute itself, unlike others, is not so clear. The Governor's proposed amendment implies but does not state that other accommodated leaves could be used. In any event, employers should not await passage of these amendments before beginning the process of drafting and promulgating an appropriate policy.

Penalties

In addition to promulgating a policy concerning the new law, employers would be well advised to provide notice to all supervisory and managerial personnel regarding employees' rights under the law. Section 202-j contains its own anti-retaliation provision, prohibiting employers from retaliating against employees who ask for or obtain a leave under the section. In addition, employers face both civil and criminal liability for noncompliance under Sections 213, 214, 215 and 218 of the New York State Labor Law.⁵

Other Mandatory Leaves

This new type of leave expands the list of required leave time under New York Law. Additional situations in which New York employers are required to provide leave time include:

- Elections
- Juror service
- Time off for victims or witnesses in a criminal proceeding
- Military service
- Adoptive parents
- Bone marrow donations
- Nursing mothers to express breast milk

For more information, assistance in drafting leave policies, or any questions resulting from this statute, please call experienced counsel.

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¹The state of Illinois also requires certain employers to provide leave time so that employees may donate blood.

²The U.S. Department of Labor regulations do not allow an employee to be classified as exempt from overtime if an employer makes partial-day deductions from the employee's pay for leave required under state law. Under these regulations, the employer has a choice of either providing paid leave, which would maintain the employee's exempt status, or deducting the time from the employee's pay, which could result in a loss of exempt status.

³When considering these documentation procedures, employers with unionized workforces should bear in mind that some procedures, for example requiring a doctor's note, may create a duty to bargain over the matter before it is implemented.

⁴The bill also includes an amendment to Section 202-j clarifying the Commissioner's authority to establish notice, approval and documentation guidelines.

⁵Section 213 provides criminal liability for any person who violates or fails to comply with any provision of the Labor Law. Section 214 authorizes the Attorney General to prosecute criminally any person who violates any provision of the Labor Law. Section 218 creates civil liability for failures to comply with the Labor Law, and Section 215 provides for fines for retaliating against an employee who complains that his/her employer has violated the Labor Law.