Top Ten Hits for 2021: An Update on Public Sector Labor and Employment Law

John F. Corcoran, Esq.

HANCOCK ESTABROOK

The Top Ten Hits for 2021
An Update on Public Sector Labor and Employment Law

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What a Time We Live In!

–"It just goes to show you, it's always something – if it's not one thing, it's another."

Roseanne Roseannadanna
aka Gilda Radner

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Everything Old is New Again?

- On June 24, 2021, Governor Cuomo signed Executive Order No. 210 (*see* supplemental materials) rescinding the COVID-based Executive Orders 202 through 202.111 and Executive Orders 205 through 205.3 as being no longer necessary.
- The Open Meetings Law still has a virtual meeting option of a sort. But you knew that!

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The Open Meetings Law

- "A public body that uses videoconferencing to conduct its meetings shall provide an opportunity for the public to attend, listen, and observe at any site at which a member participates." N.Y. Public Officers Law Section 103(c).

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Collective Bargaining Trends

- Was this "the Pause that Refreshes" as envisioned in Coca-Cola's ad campaign circa 1929?
- Have we resumed negotiating face-to-face?
- Are rollover agreements still in vogue?
- Settlements continue to be modest but the inflationary trend is concerning.
- PERB's remote mediations?

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Collective Bargaining Trends

- Early COVID – bonus pay/extra paid leave time for the "essentials." And then voluntary unpaid furloughs/temporary layoffs.
- Union bargaining demands related to FOIL requests for police officer/deputy sheriff personnel records.
- Yet to come – bargaining demands for hazardous duty pay and "sharing" American Rescue Plan Act monies?

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Recreational Marijuana

- Governor Cuomo signed the Marijuana Regulation and Taxation Act (MRTA) on March 31, 2021. A.1248A/S.854A. Chapter 92 of the Laws of 2021.
- Some provisions effective immediately, others not until 2022, or beyond, like expansion of medical marijuana program.
- Creates Office of Cannabis Management, Cannabis Control Board, and Advisory Board. Governor to appoint OCM Executive Director.

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Adult Recreational Marijuana

- MRTA permits adults over age 21 to purchase marijuana for recreational use.
- Some limited home growing allowed.
- Amends Public Health Law Section 1399-n to add cannabis to the definition of "smoking" prohibited by the New York Clean Indoor Air Act. No toking on a joint at the DMV!

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Recreational Marijuana

- MRTA expands Section 201-d of the Labor Law to prohibit employment discrimination based on:

  "an individual's legal use of consumable products, including cannabis in accordance with state law, prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without the use of the employer's equipment or other property."

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Recreational Marijuana

- Employers can still prohibit employees from using marijuana on work time.
- Indeed, MRTA states that an employer will not be in violation of Section 201-d where:

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Recreational Marijuana

- "The employer's actions are required by state or federal statute, regulation" or other mandate; or
- The employee is impaired by the use of cannabis at work or while performing his/her job duties or using the employer's equipment; or
- The employer's action would result in the employer violating federal law or losing a federal contract or federal funding.

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Recreational Marijuana

- There are federal law exceptions (*see* below example) but they do not allow public employers to discriminate against legal recreational marijuana users just because marijuana remains illegal as a controlled substance under federal law. Will Congress act to decriminalize marijuana use?
- Example: drug testing, including for marijuana, can still continue for CDL drivers under the federal Omnibus Transportation Employee Testing Act of 1991 (OTETA).

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Impairment Exception

- MRTA does allow employers to discipline employees for off-duty marijuana use where:
  - The employee displays "specific articulable symptoms" while working which decrease or lessen the performance of job duties; or
  - The symptoms interfere with the employer's obligation to provide a safe and healthy workplace, free from recognized hazards as required by state or federal occupational safety and health laws.

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Impairment Exception

- MRTA does not define "specific articulable symptoms"
  - But think of Jeff Spicoli in "Fast Times at Ridgemont High"
  - Pot odor, bloodshot eyes, lack of concentration, delayed reaction time, a case of the munchies, etc.
  - Will we see some State guidance?
  - *See* sample Reasonable Suspicion Checklist in the supplemental materials.

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Taylor Law Issues

- The restriction of a public employee's off-duty activities is usually a mandatory subject of collective bargaining. *See, e.g., City of Newburgh, 16 PERB ¶ 3030 (1983)(restrictions on outside employment).*
- And demands to incorporate statutory language into a collective bargaining agreement (CBA) have been held by the NYS PERB to be mandatory subjects of bargaining.

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Taylor Law Issues

- A demand to modify a statutory right related to employment is mandatorily negotiable unless: (1) the waiver or modification sought is against public policy; or (2) bargaining has been foreclosed by a clear expression of legislative intent to remove the issue from bargaining altogether.
- MRTA raises more questions than answers! Where do we go from here?

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Taylor Law Issues

- Does your county's CBAs contain any drug testing language prohibiting marijuana use?
- If so, is the language still enforceable under MRTA?
- Must the county now bargain anew in light of MRTA, or is there a good waiver argument?
- Does the CBA contain a "savings" or reopener clause?

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Taylor Law Issues

- Is a decision to subject safety-sensitive employees to random drug testing a managerial prerogative?
- And does it really matter if, as PERB has held, drug-testing procedures, and the consequences of testing such as disciplinary action, are generally mandatory subjects of bargaining?
- Is there any distinction between alcohol and marijuana test results?

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Marijuana Tests

- The length of time that marijuana remains in one's body depends on the individual's body fat, how often the individual consumes marijuana, and how much is used or smoked at any particular time.
- Detectable in bodily fluids for 1 to 30 days.
- Test results do not prove impairment without more.
- *See again* the Reasonable Suspicion Checklist.

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High Times for Attorneys?

- The NYS Bar Association's Committee on Professional Ethics issued Opinion No. 1225 on July 28, 2021 addressing the ethical issues of:
  - Counseling clients engaged in the recreational marijuana business;
  - Accepting partial ownership of the business in lieu of a fee; and
  - The attorney's personal use of recreational marijuana.
  - *See* supplemental materials.

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High Times Indeed!

- The New York Rules of Professional Conduct permit an attorney to assist a client in conduct complying with MRTA notwithstanding that federal narcotics law prohibits the activities authorized by MRTA.

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High Times Indeed!

- An attorney may accept an equity interest in a cannabis business in exchange for legal services but subject to Rule 1.7(a)(2)(business transactions with clients) and Rule 1.7 (conflicts of interest).
- But no use of the cannabis business as a cover for illegal narcotics trafficking or the transfer of sales revenues to criminal enterprises. Duh!!

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High Times Indeed!

- A lawyer may also use marijuana for recreational purposes and may, when MRTA becomes fully effective in 2023, cultivate an authorized amount of marijuana plants at home for personal use.
- Single resident will be able to grow up to three mature plants and three immature plants at their home. Multiple people at one residence – up to six mature and six immature plants per household.

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No Retaliation for COVID Leave Use

- Governor Cuomo has signed legislation (S.4201A/A4063)(Chapter 214 of the Laws of 2021) prohibiting public employers from dismissing or disciplining an employee, or taking any other adverse action, for using sick leave or compensatory time to quarantine, seek medical treatment, convalesce, or other COVID activities.
- Is retroactive to January 1, 2020. *See* supplemental materials for the bill. New § 159-c of Civil Service Law.

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Employee Entitlement to COVID-19 Leave

- New York State Law is still in effect. Is a statutory creation and not via an Executive Order of the Governor.
- Federal Families First Coronavirus Response Act has expired.

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NYS COVID-19 Paid Leave

- Guarantees job-protected paid leave to workers who are subject to a mandatory or precautionary order of quarantine or isolation for COVID-19, issued by the State of New York, the Department of Health, local board of health, or any government entity duly authorized to issue such order, or whose minor dependent child is under such an order.

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NYS COVID-19 Paid Leave

- Public employers (no matter how many employees) must provide employees with:
  - Job protection for the duration of the order of quarantine or isolation; and
  - Up to 14 calendar days of paid sick leave (up to 3x with proper documentation of positive test for 2nd & 3rd leaves)
- Not available to employees who are able to work through remote access or through other means.

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Stick it to me! Not so fast!!

- U.S. Equal Employment Opportunity Commission (EEOC) issued updated guidance on May 28, 2021 addressing among other things whether an employer can require employees to be COVID vaccinated or incentivize employees to get vaccinated.
- Maybe . . . But employer must still comply with federal non-discrimination laws such as Title VII and ADA.

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Mandatory COVID Vaccinations?

- Must not have disproportionate impact based on race, color, religion, gender, or national origin.
- Employers must also provide reasonable accommodations to those who cannot be vaccinated due to a disability or have a sincerely held religious belief against vaccination.

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Mandatory COVID Vaccinations?

- EEOC's recommended accommodations – telework, modified shift, reassignment, face masks, social distancing while at work.
- According to EEOC, "direct threat" defense possible (i.e., significant risk of substantial harm to health and safety of co-workers and others) but individual assessment is required.

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Mandatory COVID Vaccinations?

- EEOC also stated that employers may provide incentives to employees to get vaccinated, and also provide educational materials to employees and their family members.
- But incentives may not be "so substantial as to be coercive."
- Records of employee vaccinations must be kept confidential like any other medical record.

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Mandatory COVID Vaccinations?

- But are there constitutional and Taylor Law considerations? *See. e.g., Schalmont CSD, 25 PERB ¶ 4504 (ALJ Monte Klein)(school district held privileged to direct employees to not report to work if not vaccinated against rubella, but must bargain with union over whether resulting employee absences must be charged to accrued sick or personal time).*
- What are we telling our clients about requiring mandatory COVID vaccinations?

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Paid Leave for COVID Vaccinations

- New NYS Civil Service Law Section 159-c requires public employers to grant paid vaccine leave for a "sufficient period of time" not to exceed four hours per each COVID vaccine injection, unless a greater amount of time is required under a CBA or employer policy. "Sufficient period of time" is undefined.
- Paid at regular rate of pay with no charge to paid leave accruals like sick leave. Only available to employee and not employee's family members.

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Paid Leave for COVID Vaccinations

- According to NYS Labor Dep't, the new law does not prevent the employer from requiring advance notice from the employee of the vaccination time.
- Nor does the new law prevent the employer from requiring proof of vaccination from the employee – but be careful to maintain confidentiality of any related medical record.
- Law effective March 12, 2021 and remains effective until December 31, 2022.

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Paid Leave for COVID Vaccinations

- The new law is not retroactive.
- No employer retaliation is permitted.
- Collective bargaining waivers may be permissible but should expressly reference CSL Section 159-c.
- *See* supplemental materials for copy of 159-c and NYS DOL guidance.

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American Rescue Plan Act and COBRA

- ARPA, which was enacted on March 11, 2021, created a new election period for COBRA continuation coverage and imposed new subsidy and notice requirements.
- *See* Hancock Estabrook article in supplemental materials.

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Disclaimer

This presentation is for informational purposes and is not intended as legal advice.

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State of New York

Executive Chamber

No. 210

EXECUTIVE ORDER

Expiration of Executive Orders 202 and 205

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a disaster emergency in the State of New York in response to the COVID-19 pandemic;

WHEREAS, on June 25, 2020, I issued Executive Order Number 205, requiring the Commissioner of Health to issue a travel advisory implementing quarantine restrictions on travelers arriving in the State of New York;

WHEREAS, the State of New York successfully flattened the curve of COVID-19 cases in New York; and has undertaken a cautious, incremental, and evidence-based approach to reopening the State of New York;

WHEREAS, the State of New York successfully slowed the transmission of COVID-19 from almost 11,000 new cases a day, at the peak of the pandemic, to less than 300 new cases a day;

WHEREAS, the State of New York administered more than 20,650,000 doses of COVID-19 vaccine, and more than 71% of adults in the State have received at least one dose of the vaccine;

WHEREAS, the State of New York went from having the highest infection rate in the Country to one of the lowest, with a current seven-day rolling average positivity rate below 0.4%;

WHEREAS, the Declarations of the Secretary of the United States Department Health and Human Services issued pursuant to the federal Public Readiness and Emergency Preparedness (PREP) Act remain in effect and continue to provide authorizations and exemptions for many professions and activities related to the ongoing COVID-19 emergency response including, allowing an expanded list of professionals to administer vaccine or to administer COVD-19 testing;

WHEREAS, the Centers for Disease Control continue their guidance for unvaccinated individuals to wear masks, and for all rider on public transit and in other sensitive settings; and

WHEREAS, it has been determined that Executive Orders 202 through 202.111 and Executive Orders 205 through 205.3 are no longer necessary.

NOW, THEREFORE, I, ANDREW M. CUOMO, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and laws of the State of New York, do hereby order that upon due consideration, deliberation and review, Executive Orders 202 through 202.111 and Executive Orders 205 through 205.3are hereby rescinded effective June 25, 2021.

GIVEN under my hand and the Privy Seal of the State in the City of Albany this twenty-fourth day of June the year two thousand twenty-one.

BY THE GOVERNOR

Secretary to the Governor

Reasonable Suspicion Checklist

Reasonable Suspicion Checklist

(The following checklist should be completed when a manager or supervisor suspects drug or alcohol use based on the physical appearance and behavior of the employee. Also completing the checklist should be all other managers or supervisors who witnessed the employee being unfit for duty.)

PART 1: EMPLOYEE INFORMATION

Employee Name: _____

Employee Job Title: _____

Observation Date: _____

Observation Time (indicate a.m. or p.m.): _____

Location: _____

PART 2: OBSERVATIONS

(Place a checkmark next to any of the following observations exhibited by the employee.)

PHYSICAL

Walking:
___ Holding on, ___ Stumbling, ___ Unable to walk, ___ Unsteady ___ Staggering
___ Swaying ___ Falling ___ Other (describe)_____

Standing:
___ Swaying, ___ Feet wide apart, ___ Unable to stand, ___ Rigid, ___ Staggering,
___ Sagging at knees ___ Dizziness, ___ Other (describe) _____

Movements:
___ Fumbling ___ Jerky ___ Nervous ___ Slow ___ Normal, ___ Hyperactive
___ Reduced reaction time, ___ Not following tasks ___ Diminished coordination,
___ Tremors ___ Other (describe)_____

Eyes:
___ Bloodshot ___ Watery ___ Droopy, ___ Glassy ___ Closed
___ Dilated/Constricted Pupils ___ Other (describe)_____

Face:
___ Flushed, ___ Pale ___ Sweaty, ___ Other (describe)_____

Breath:
___ No alcoholic odor ___ Faint alcoholic odor, ___ Alcoholic odor, ___ Chemical odor,
___ Sweet/pungent tobacco odor, ___ Heavy use of breath spray,
___ Other (describe) _____

Speech:
___ Whispering ___ Slurred ___ Shouting ___ Incoherent, ___ Slobbering ___ Silent
___ Rambling, ___ Mute, ___ Slow ___ Other (describe)_____

Appearance:
___ Neat ___ Untidy ___ Messy ___ Dirty, ___ Stains on clothing,
___ Marijuana Odor ___ Partially dressed ___ Bodily excrement stains,
___ Visible puncture marks or tracks ___ Burnt rope smell on clothes, hair, body,
___ Excessive sweating in cool area, ___ Other (describe)_____

BEHAVIORAL

Demeanor:
___ Cooperative, ___ Calm, ___ Talkative/Rapid Speech ___ Polite, ___ Sarcastic
___ Sleepy, ___ Crying, ___ Sleeping on job ___ Argumentative ___ Excited,
___ Withdrawn, ___ Mood swings, ___ Overreacts to minor things, ___ Excessive laughter
___ Forgetful, ___ Other (describe)_____

Actions:
___ Hostile ___ Fighting ___ Profanity, ___ Drowsy ___ Threatening ___ Erratic
___ Hyperactive ___ Calm ___ Resisting communication ___ Paranoid
___ Possessing, using or distributing an illegal substance ___ Baseless Panic,
___ Other (describe) _____

Appetite:
___ Always munching on something ___ Constantly Chewing Gum
___ Frequently Eating Candy ___ Popping Mints Often
___ Other (describe) _____

MISCELLANEOUS
___ Presence of alcohol and/or drugs in employee's possession or vicinity
___ On-the-job misconduct by employee
___ Employee admission to alcohol and/or drug use or possession

CORROBORATING WITNESSES
(List names of all witnesses to the employee's conduct below)

_____
_____
_____
_____

NYSBA

Reasonable Suspicion Checklist

OTHER OBSERVATIONS
(List below any other observations not included in this checklist Also provide details for any accident that the employee in question caused or was involved in)

PART 3: EMPLOYEE'S RESPONSE
(Document below the employee's explanation or reasons for his/her conduct)

PART 4: ACTION PLAN

Once the above parts of this Reasonable Suspicion Checklist are completed by you and a witness, you can proceed to an action plan in a meeting with the employee Remember to follow your company's procedures as outlined in its drug-free policy

Place a checkmark next to the applicable action as agreed upon with the employee

____ Employee has agreed to testing
____ Employee has not agreed to testing
____ Employee referred to MAP/EAP
____ No further action at this time

Supervisor/Manager Signature Date

Supervisor/Manager Signature Date

Witness Signature Date

NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1225 (07/08/2021)

Topic: Counseling clients engaged in recreational marijuana business; accepting partial ownership of recreational marijuana business in lieu of fee; personal use of recreational marijuana.

Digest: In light of current federal enforcement policy, the New York Rules of Professional Conduct permit a lawyer to assist a client in conduct designed to comply with New York's Recreational Marijuana Law and its implementing regulations, notwithstanding that federal narcotics law prohibits the activities authorized by that law. A lawyer may also use marijuana for recreational purposes and may, when the law becomes fully effective, cultivate an authorized amount of marijuana plants at home for personal use. Finally, subject to compliance with Rules 1.7 and 1.8(a), an attorney may accept an equity ownership interest in a cannabis business in exchange for legal services.

Rules: 1.1(a); 1.2(d); 1.3; 1.16(b)(2); 1.7; 1.8(a); 8.4(b); 8.4(h).

FACTS

1. New York legalized cannabis products for medical use in July 2014. On March 31, 2021, Governor Andrew M. Cuomo signed into law Chapter 92 of the Laws of 2021, entitled the "Marihuana Regulation and Taxation Act," creating a regulated recreational cannabis industry in New York (the "Recreational Marijuana Law"). Although marijuana possession and use were legalized for non-medical purposes effective immediately with the adoption of the Recreational Marijuana Law, the authorized commercial sale of cannabis products awaits various administrative rules and regulations and is not anticipated to begin before late 2022.

2. The regulatory framework established by the Recreational Marijuana Law bears many similarities to New York's regulation of alcohol by the New York State Liquor Authority under the Alcoholic Beverage Control Law. A Cannabis Control Board and the Office of Cannabis Management will control the issuance and revocation of licenses for retail dispensaries and on-site consumption establishments and will administer both the adult-use and medical-use programs, promulgating rules, issuing licenses, and investigating and enforcing violations. The cultivation, processing, distribution, and sale of cannabis products will be tightly controlled and, when the law becomes fully effective, individuals will be permitted to grow a limited number of plants in their homes for personal use.

3. Through local legislation that is subject to permissive referendum, the Recreational Marijuana Law gives cities, villages and towns the authority to "opt out" of allowing retail dispensaries and on-site consumption establishments to operate within their jurisdictions. These localities may also regulate the time, place and manner of the operation of these adult-use facilities, provided the Cannabis Control Board does not determine that such restrictions make such

operations unreasonably impracticable. Cannabis businesses also remain subject to local zoning regulations.

QUESTIONS

4. The inquirer is an attorney who wants to provide legal services to a client engaged in the recreational cannabis business in New York. She poses three separate questions:

a. May an attorney ethically provide legal services to assist a client to comply with New York's Recreational Marijuana Law?
b. May an attorney ethically use marijuana recreationally and grow it at home for personal use?
c. May an attorney accept an equity interest in a client's cannabis business in exchange for providing legal services?

OPINION

Our Prior Opinions Regarding Rule 1.2(d) and New York's Medical Marijuana Law.

5. Rule 1.2(d) of the Rules of the New York Rules of Professional Conduct (the "Rules") provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

6. Notwithstanding Rule 1.2(d), following the enactment of New York's Compassionate Care Act (the "Medical Marijuana Law"), this committee held in N.Y. State 1024 (2014) that an attorney may ethically provide legal services and advice to doctors, patients, public officials, hospital administrators and others engaged in the cultivation, distribution, prescribing, dispensing, regulation, possession or use of marijuana for medical purposes to help them act in compliance with state regulation regarding medical marijuana, despite the federal narcotics laws that prohibit the possession, distribution, sale or use of marijuana and which provide no exception for medical uses.

7. We noted that the federal government had publicly announced that it was limiting its enforcement of federal narcotics laws and would not ordinarily prosecute individual actors and institutions who acted consistently with state laws that legalized and extensively regulated medical marijuana. Rather, the federal government said it would pursue enforcement only to further certain federal priorities, such as preventing the flow of revenue from marijuana sales to criminal enterprises and preventing marijuana activity from being used as a cover for trafficking other drugs. We reasoned that lawyers could provide a range of valuable assistance to clients seeking to comply with the Medical Marijuana Law consistent with this federal enforcement policy and, because a strong state regulatory system justified the federal policy of forbearance from the enforcement of federal narcotics laws, federal enforcement policy actually depended on the availability of lawyers to establish and promote compliance with a strong and effective state regulatory system.

8. Without minimizing the core tenet of Rule 1.2(d) or a lawyer's fundamental duty not to counsel a client to violate the law or to assist a client in so doing, we concluded that "nothing in the history and tradition of the profession, in court opinions, or elsewhere" suggested that Rule 1.2(d) was intended in this "highly unusual if not unique" circumstance to "preclude lawyers from counseling or assisting conduct that is legal under state law" or to provide assistance "that is necessary to implement state law and to effectuate current federal policy" We identified that "highly unusual and unique circumstance" as "where the state executive branch determines to implement the state legislation by authorizing and regulating medical marijuana, consistent with current, published federal executive-branch enforcement policy, and the federal government does not take effective measures to prevent implementation of the law." (N.Y. State 1024 ¶¶ 6 & 23-25; footnote omitted.)

9. We cautioned, however, that "If federal enforcement were to change materially, this Opinion might need to be reconsidered" (N.Y. State 1024 ¶ 25).

10. The federal enforcement policy we described in N.Y. State 1024 had been articulated in a Department of Justice memorandum issued August 29, 2013, known as the "Cole Memo" (named for then Deputy Attorney General James Cole, who was its author). On January 4, 2018, however, then Attorney General Jeff Sessions rescinded the Cole Memo. Accordingly, this committee, in N. Y. State 1177 (2019), reconsidered the conclusion we had reached in N.Y. State 1024.

11. N.Y. State 1177 adhered to the conclusion of N.Y. State 1024. We noted in Opinion 1177 that General Sessions' successor, William Barr, had testified during his confirmation hearing that he would not target state legal marijuana businesses and would leave it to Congress to act. We further noted that during the interval between our release of N.Y. State 1024 in November 2014, and the rescission of the Cole Memo in January 2018, Congress had in fact acted. Specifically, in December 2014, Congress adopted legislation known as the "Rohrabacher-Blumenauer Amendment" that prohibited the Department of Justice from using any of the funds appropriated by Congress to prevent States from implementing their own State laws that authorized the use, distribution, possession or cultivation of medical marijuana. We reasoned that, in these circumstances, the rescission of the Cole Memo "does not meaningfully change federal law enforcement policy" (N.Y. State 1177 ¶ 9).

12. Accordingly, based on the state of federal law enforcement policy from 2014 through today, and subject to future changes in that policy, we decided in N.Y. State 1024 and affirmed in N.Y. State 1177 that a lawyer may assist a client in conduct designed to comply with the Medical Marijuana Law without violating Rule 1.2(d).

13. We now apply these same principles to answer the inquirer's three questions.

Assisting a Client to Comply with New York's Recreational Marijuana Law.

14. The inquirer's first question is whether an attorney may ethically provide legal services to assist a client to comply with New York's Recreational Marijuana Law. This question does not require us to analyze any change in federal enforcement policy since we issued N.Y. State 1177 (to our knowledge there have been no changes). Rather, the question is whether New York's broader legalization of cannabis for recreational use imports into the analysis any additional factors or competing considerations that would alter the conclusion reached by the committee in N.Y.

State 1024 and 1177 regarding medical marijuana. For the reasons that follow, we believe it does not.

15. First, although the Rohrabacher-Blumenauer Amendment is specifically focused on marijuana for medical and not recreational purposes, over the course of three administrations -- Presidents Obama, Trump and Biden -- the Department of Justice has not, to our knowledge, taken any public position on federal enforcement that distinguishes between medical and recreational marijuana laws in the states. Indeed, unlike the Rohrabacher-Blumenauer Amendment, the Cole Memo (now rescinded) was not limited to medical marijuana. Inasmuch as 17 states, plus Washington, D.C., and Guam, have now legalized the recreational use of marijuana in some form, beginning with Colorado in 2012, it seems fair to say that for nearly a decade federal forbearance in the enforcement of federal narcotics laws has been equally applied to state laws legalizing recreational marijuana and to state laws legalizing medical marijuana.

16. Second, the comprehensive licensing and regulatory system that governs recreational use of marijuana in New York is clearly the type of robust and comprehensive state enforcement system that is squarely intended by federal enforcement policy to be an object of federal forbearance.

17. Third, the need for lawyer assistance to clients to assure compliance with state regulatory requirements in the medical marijuana industry, which justifies continued federal forbearance, applies with equal if not more force to recreational marijuana. For example, the licensing process under New York's Recreational Marijuana Law will function more expeditiously and with more consistency if lawyers can assist with preparing and submitting license applications and can counsel the regulators reviewing those applications. More generally, in a complex regulatory system where cultivation, distribution, possession, sale and use of a product are tightly regulated, legal advice and guidance has immense value. Without the aid of lawyers, the recreational marijuana regulatory system would, in our view, likely break down or grind to a halt. The participation of attorneys thus secures the benefits of the Recreational Marijuana Law for the public at large, as well promotes the interests of the private and public sector clients more directly involved in the law's implementation.

18. Fourth, as we observed in N.Y. State 1024, the tension created between federal and state narcotics laws remains a "highly unusual if not unique" situation that was never intended to fall within the blunt prohibition of Rule 1.2(d) against a lawyer counseling a client to engage in, or engaging in, conduct that the lawyer knows is illegal. The federal decision not to enforce narcotics laws against individuals and organizations engaged in conduct authorized by state law renders sui generis our determination of the issues presented by this inquiry, as well as in N.Y. State 1024 and N.Y. State 1177.

Ownership, Home Cultivation, and Personal Use by an Attorney.

19. The inquirer has been offered an equity stake in a client's cannabis business in exchange for legal services. She would also like to use cannabis products recreationally and grow lawful quantities of marijuana at home for personal use. She asks if this would be allowed under the Rules.

20. For many of the same reasons that lead us to conclude that an attorney may provide legal services to a cannabis business, we conclude that such ownership, home cultivation, and personal

use, without more, would not violate Rule 1.2(d). We must, also, however, consider Rule 8.4(b) and (h), which provide:

> A lawyer or law firm shall not:
> (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
> ***
> (h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

21. The first sentence of Comment [2] to Rule 8.4 provides:

> Many kinds of illegal conduct reflect adversely on fitness to practice law. Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law.

22. Nothing the inquirer proposes to do involves acts of violence. Moreover, if the inquirer's ownership interest in a cannabis business, her home cultivation of marijuana plants, and her personal recreational use of marijuana comply with the Recreational Marijuana Law, they will fall within the scope of federal forbearance. For that reason, although those activities are technically illegal under federal law, they will not constitute illegal conduct that involves "dishonesty, fraud, breach of trust, or serious interference with the administration of justice." Accordingly, without more, such conduct would not adversely reflect on the inquirer's "honesty, trustworthiness or fitness as a lawyer" within the meaning of Rule 8.4(b).

23. The excessive use of marijuana, however, like excessive consumption of alcohol, may adversely impact a lawyer's ability to competently and diligently represent a client as required by Rules 1.1(a) and 1.3. It could also have more serious consequences and create a physical or mental condition that materially impairs a lawyer's ability to represent a client, requiring mandatory withdrawal from representation (see Rule 1.16(b)(2)). Nothing we say here connotes approval of such excessive use or establishes a protective shield for a lawyer who is facing disciplinary charges, malpractice claims, or other adverse consequences arising out of marijuana use.

24. The second sentence of Comment [2] to Rule 8.4 provides:

> A pattern of repeated offenses, even ones of minor significance when considered separately can indicate an indifference to legal obligation.

25. It is true that growing and harvesting marijuana, as well as repeatedly using marijuana, could be said to reflect a "pattern of repeated offenses" of the federal narcotics laws, but we reject the notion that it is a pattern that indicates an "indifference to legal obligation" where, again, the conduct falls squarely within the scope of federal forbearance and New York explicit authorization.

26. Federal forbearance policy is also relevant to Comment [4] to Rule 8.4, which provides in pertinent part:

> A lawyer may refuse to comply with an obligation imposed by law if such refusal is based upon a reasonable good-faith belief that no valid obligation exists because, for example, the law is unconstitutional, conflicts with other legal or professional obligations, or is otherwise invalid.

27. In our view, the scope of federal forbearance provides inquirer with a "reasonable good-faith belief that no valid obligation exists" to comply with federal narcotics laws that would otherwise prohibit her ownership of an interest in a cannabis business, her home cultivation of marijuana plants for personal use, and her recreational use of marijuana, where and when such activities are authorized by New York State law.

Additional Rules Relevant to Accepting an Equity Interest in Exchange for Legal Services.

28. Accepting an equity interest in the client's cannabis business as compensation for providing legal services also requires compliance with Rule 1.8(a) regarding a business transaction with a client. In N.Y. State 913, ¶¶ 6 & 10 (2012), we concluded "that Rule 1.8(a) applies to negotiation of a fee in which a lawyer is to receive an equity interest in a client or the client's company." Accordingly, "the terms of the transaction must be fair and reasonable to the client, fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client, with the client being advised of the desirability of seeking independent legal advice and given a reasonable chance to do so, and the client signing a writing that describes the transaction and the lawyer's role in the deal, including whether the lawyer was acting for the client in the matter."

29. Further, the inquirer must consider whether acquiring or possessing an equity interest in the client's cannabis business will give rise to a conflict of interest under Rule 1.7(a)(2). A conflict will arise if there is a significant risk that the lawyer's advice or other legal assistance to the client will be adversely affected by the lawyer's financial self-interest. In that event, the lawyer may nevertheless proceed with the representation if (i) the lawyer reasonably believes she can provide competent and diligent representation despite the conflict and (ii) the lawyer obtains the client's informed consent, confirmed in writing. See Rule 1.7(b); N.Y. State 990 ¶ 26 (2013); N.Y. State 913 ¶¶ 13-14.

30. We caution that were the inquirer to engage in any cannabis related activity that constituted a serious violation of New York State law or of other federal laws, or in activity that would materially implicate federal enforcement priorities not subject to federal forbearance – for example, assisting in the transfer of sales revenues from recreational marijuana sales to criminal enterprises, or using a cannabis business as a cover for trafficking in other narcotics – her conduct would fall outside the safe harbor established by this opinion. In that case, her conduct would constitute violations of Rule 1.2(d) and Rules 8.4(b) and 8.4(h).

31. We further caution that law enforcement authorities may have views of their own on the reach of the criminal statutes they enforce, and whether the conduct we find here to be ethically permissible is within the prohibited scope of those statutes presents questions of law on which this committee does not opine. Our jurisdiction is limited to interpreting the Rules of Professional Conduct.

CONCLUSION

32. In light of current federal enforcement policy, the New York Rules of Professional Conduct permit a lawyer to assist a client in conduct designed to comply with New York's Recreational Marijuana Law and its implementing regulations, notwithstanding that federal narcotics law prohibits the activities authorized by that law. A lawyer may also use marijuana for recreational purposes and may, when the law becomes fully effective, cultivate an authorized amount of marijuana plants at home for personal use. Finally, subject to compliance with Rules 1.7 and 1.8(a), an attorney may accept an equity ownership interest in a cannabis business in exchange for legal services.

(08-21)

STATE OF NEW YORK

4201

2021-2022 Regular Sessions

IN SENATE

February 2, 2021

Introduced by Sen. SAVINO -- read twice and ordered printed, and when printed to be committed to the Committee on Civil Service and Pensions

AN ACT to amend the civil service law, in relation to prohibiting public employers from retaliating against employees for absences related to COVID-19

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 2 of section 75-b of the civil service law is amended by adding a new paragraph (b) to read as follows:

(b) A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment, including designating the employee as chronically absent, because the employee uses sick leave or compensatory time to quarantine, convalesce, seek medical treatment, or engage in other activities related to a COVID-19 diagnosis or contact.

§ 2. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after January 1, 2020.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD08048-01-1

25 PERB ¶ 4504, 25 Off. Dec. of N. Y. Pub. Employee Rel. Bd. ¶ 4504, 1992 WL 12649083

New York PERB Administrative Law Judge

IN THE MATTER OF SCHALMONT TEACHERS ASSOCIATION AND SCHALMONT NON-INSTRUCTIONAL EMPLOYEES ASSOCIATION, CHARGING PARTIES,FR AND SCHALMONT CENTRAL SCHOOL DISTRICT, RESPONDENT.

No. U-12705

MONTE KLEIN, Administrative LawJudge

January 3, 1992

Related Index Numbers

43.152 Compensation, Holidays and Vacations, Personal Days
43.153 Compensation, Holidays and Vacations, Accrued Vacation Credit
43.1682 Compensation, Leaves of Absence, Sick Leave, Accumulation of Credit
72.665 Unilateral Change in Term or Condition of Employment, Defenses to Unilateral Change, Management Prerogative

Judge/Administrative Officer

MONTE KLEIN, Administrative LawJudge

Case Summary

Although district was privileged to direct employees not to report to work if they lacked rubella **vaccination**, district violated its bargaining obligation by unilaterally requiring employees to charge those absences against accrued sick or personal time.

Full Text

Robert D. Clearfield, General Counsel (Harold G. Beyer, Jr., of counsel) for Charging Party

Hancock & Estabrook (David T. Garvey of counsel), for Respondent

Decision of Administrative Law Judge

On August 5, 1991, the Schalmont Teachers Association and Schalmont Non-Instructional Employees Association (Associations) filed an improper practice charge against the Schalmont Central School District (District) alleging that it violated §§ 209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it required that employees who did not report to school because they were not vaccinated for German Measles (rubella) charge their absences to leave accruals. The District's answer denied that it violated the Act and the parties submitted the matter on a stipulated record in lieu of a hearing. Both parties filed post-hearing briefs.

Facts

The stipulated record, in relevant part, follows:

1. The Schalmont Teachers Association . . . is the recognized representative . . . of the professional staff employed by the Schalmont Central School District and the Schalmont Non-Instructional Employees Association [is] the duly recognized representative for the support staff employed by the District, which is a central school district located in Rotterdam, New York. The terms and conditions of employment of the professional staff and the non-instructional employees are covered by separate collective bargaining agreements.

2. In the Spring of 1991, there was an outbreak of German Measles (rubella) in Upstate New York, which spread to the students in the District.

3. As a result thereof, the Schenectady County Public Health Services issued a certain directive to and or placed certain restriction (sic) on the Schalmont High School and the Schalmont Middle School in the effort to contain the spread of the communicable disease outbreak (rubella) which was identified and confirmed on April 12, 1991.

4. Among other things, the Schenectady County Public Health Services directed that all students, faculty and staff of both schools would be required to demonstrate proof of immunity to rubella by Wednesday, April 17 at 11:00 a.m. Failure to show proof of either positive (reactive) rubella titer or documented date of rubella vaccine receipt will result in exclusion from school until April 25, or until 21 days after the last case of rubella was identified, whichever was later.

5. The District was on vacation from April 20---April 29, 1991.

6. At the instruction of the County Health Department, employees of the District who showed positive on the blood test were informed by the District that they had to take a **vaccination** for rubella or that they would not be permitted to report to their duties.

7. Seven employees who failed to show positive refused to take a **vaccination** for rubella. . . . Two of [them] submitted a physicians statement indicating that a **vaccination** for rubella would be inappropriate. . . . Some of the remaining employees were advised orally by their physicians that they should not take the vaccine. Other employees were advised and/or determined by resort to medical tests that they were within a group for which the rubella **vaccination** presented a medical risk.

8. Pursuant to the Schenectady County Public Health Services directive, those employees were excluded from school until April 25, or until 21 days after the last case of rubella was identified, whichever was later.

9. As a result, those employees did not report for work for two days---April 18 and April 19, 1991.

10. The District paid each employee for those two days of work but correspondingly charged each employee two sick days or two personal days.

11. This charge involves only . . . the two days cited above.

12. a. The County Health Department was acting legally and reasonably with respect to the actions it took.

b. The District acted pursuant to the directions of the County Health Department in good faith.

c. There is no proof that the employees who refused to take the medical test were acting other than in good faith.

d. The employees had the right to refuse to be vaccinated with the rubella **vaccination**.

e. Pursuant to the Schenectady County Public Health Services' directive, the District was required to tell the employees who refused to take the **vaccination** that they must stay home during the quarantine period.

f. There was no negotiation of this issue.

g. Collective bargaining agreements are in effect between the parties but there are no provisions of either agreement that are specifically applicable to this issue.

13. The issue involved shall be determined by PERB.

Discussion

The Associations do not question the District's right to direct employees who failed to demonstrate proof of immunity and also failed to take a rubella **vaccination** not to report to work on April 18 and 19, but assert that such right does not permit the District to determine unilaterally that absent employees must charge those absences against their accrued sick or personal time.

The District unilaterally determined to charge the employees' accrued time, rather than dock their wages, for their absences. That determination violates the duty to bargain because time off, [1] wages [2] and decisions that employees charge directed absences to

leave accruals or to leave without pay[3] primarily involve terms and conditions of employment, and are, therefore, mandatorily negotiable.

The District's action is violative of § 209-a.1(d) of the Act because it has acted unilaterally in this regard. There is no violation of § 209-a.1(a), however, because there is no evidence of any intentional interference with other statutorily protected rights, and that aspect of the charge is hereby dismissed.

Accordingly, having found that the District violated § 209-a.1(d) of the Act, IT IS HEREBY ORDERED that it:

(1) Forthwith restore to unit employees who did not report to school on April 18 and 19, 1991, because they had not been vaccinated for rubella, the sick or personal leave that they were charged on those days; [4]

(2) Sign and post notice in the form attached at all work locations normally used to post written communications to unit employees.

Cases Cited
7 PERB 3078
16 PERB 3050
116 AD2d 827
19 PERB 7002
19 PERB 7006
19 PERB 4508
42 AD2d 73
6 PERB 7520
35 NY2d 743
7 PERB 7513

Footnotes

1 City of Albany, 7 PERB ¶3078 (1974).

2 Act, § 201.4.

3 State of New York (SUNYA), 16 PERB ¶3050 (1983), *aff'd sub nom.* CSEA v. Newman, 116 A.D. 2d 827, 19 PERB ¶7002 (3d Dep't 1986), *motion to amend granted*, 19 PERB ¶7006 (1986); Town of Clarence, 19 PERB ¶ 4508 (1986).

4 The District argues that restoration of the leave credits after it made payment for the days when the employees did not work constitutes an unpermissible gift of public funds in violation of Article VIII, Section I, of the New York State Constitution. In this forum, and apart from other avenues which the District may pursue, there is no gift where the payment is made pursuant to a legal obligation or duty, such as the duty to bargain. Moreover, leave benefits in a collective bargaining agreement do not violate the constitutional bar against the gift of money. Syracuse Teachers Ass'n v. Syracuse City School Dist., 42 A.D. 2d 73, 6 PERB ¶ 7520 (4th Dep't 1973), *aff'd*, 35 N.Y. 2d 743, 7 PERB ¶7513 (1974).

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McKinney's Consolidated Laws of New York Annotated
Civil Service Law (Refs & Annos)
Chapter 7. Of the Consolidated Laws (Refs & Annos)
Article X. Miscellaneous Provisions (Refs & Annos)

Effective: March 12, 2021

McKinney's Civil Service Law § 159-c

§ 159-c. Leave time for COVID-19 vaccination

Currentness

<[Expires and deemed repealed Dec. 31, 2022, pursuant to L.2021, c. 77, § 4. As added by L.2020, c. 77, § 1. See, also, § 159-c. as added by another act.]>

1. Every public officer, employee of this state, employee of any county, employee of any community college, employee of any public authority, employee of any public benefit corporation, employee of any board of cooperative educational services (BOCES), employee of any vocational education and extension board, or a school district enumerated in section one of chapter five hundred sixty-six of the laws of nineteen hundred sixty-seven, employee of any municipality, employee of any school district or any employee of a participating employer in the New York state and local employees' retirement system or any employee of a participating employer in the New York state teachers' retirement system shall be entitled to absent himself or herself and shall be deemed to have a paid leave of absence from his or her duties or service for a sufficient period of time, not to exceed four hours per vaccine injection, unless such officer or employee shall receive a greater number of hours pursuant to a collectively bargained agreement or as otherwise authorized by the employer, to be vaccinated for COVID-19.

2. The entire period of the leave of absence granted pursuant to this section shall be excused leave and shall not be charged against any other leave such public officer or employee is otherwise entitled to.

3. Nothing in this section shall be deemed to impede, infringe, diminish or impair the rights of a public employee or employer under any law, rule, regulation or collectively negotiated agreement, or the rights and benefits which accrue to employees through collective bargaining agreements, or otherwise diminish the integrity of the existing collective bargaining agreement.

Credits

(Added L.2021, c. 77, § 1, eff. March 12, 2021.)

McKinney's Civil Service Law § 159-c, NY CIV SERV § 159-c
Current through L.2021, chapters 1 to 248. Some statute sections may be more current, see credits for details.

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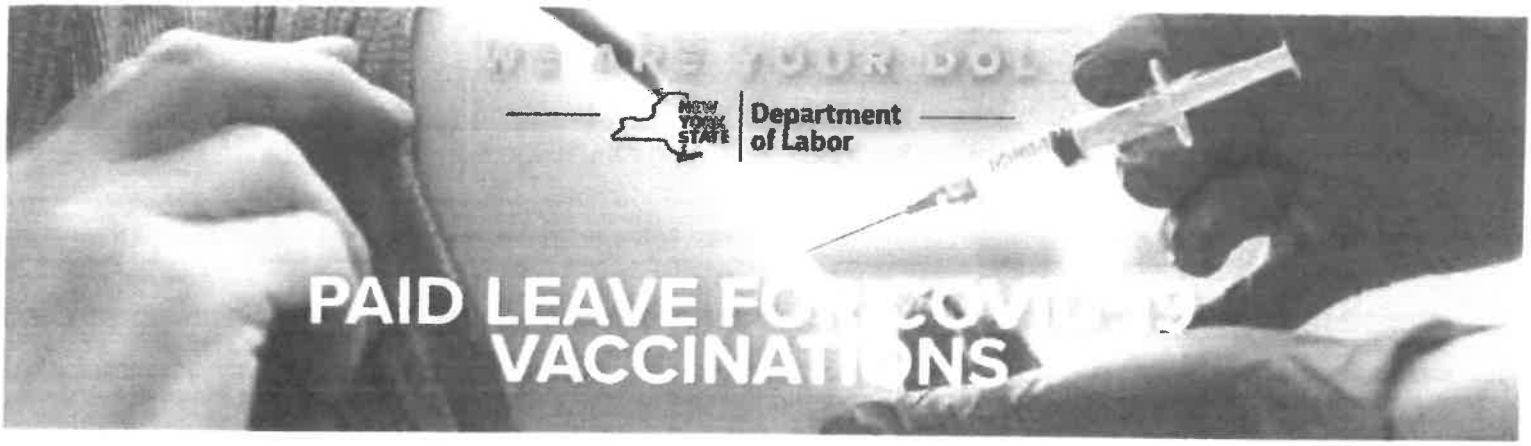

On **March 12, 2021**, Governor Andrew M. Cuomo signed a new law granting employees paid leave time to receive COVID-19 vaccinations. Below is the full text of the new Labor Law provision (Chapter 77 of the Laws of 2021).

LABOR LAW § 196-C. LEAVE TIME FOR COVID-19 VACCINATION:

1. Every employee shall be provided a paid leave of absence from his or her employer for a sufficient period of time, not to exceed four hours per vaccine injection, unless such employee shall receive a greater number of hours pursuant to a collectively bargained agreement or as otherwise authorized by the employer, to be vaccinated for COVID-19.

2. The entire period of the leave of absence granted pursuant to this section shall be provided at the employee's regular rate of pay and shall not be charged against any other leave such employee is otherwise entitled to, including sick leave pursuant to section one hundred ninety-six-b of this article, or any leave provided pursuant to a collective bargaining agreement.

3. The provisions of this section may be waived by a collective bargaining agreement, provided that for such waiver to be valid, it shall explicitly reference this section of law.

In addition, the law provides that no employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person, shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee because such employee has exercised his or her rights afforded under this act, including, but not limited to, requesting or obtaining a leave of absence to be vaccinated for COVID-19.

FREQUENTLY ASKED QUESTIONS

Q: ARE ALL EMPLOYERS ARE COVERED BY THIS LAW?

For purposes of this law, employers include any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service. Public employers, including state and local government entities, are covered by a separate paid vaccine leave law under New York State Civil Service Law §159-c.

Q: WHAT IS THE MAXIMUM NUMBER OF HOURS OF PAID LEAVE THAT AN EMPLOYEE IS ENTITLED TO UNDER THIS NEW LAW?

The maximum number of hours that an employee is entitled to paid leave under this law depends on the number of required COVID-19 vaccine injections. If a COVID-19 vaccine requires two injections, then the employee would be entitled to two periods of paid leave of up to four hours each (which could be up to 8 hours in total).

Q: WHAT IS A "SUFFICIENT PERIOD OF TIME" TO BE ABSENT FOR A VACCINE INJECTION?

The law does not define this term, however, the paid leave period for a single injection cannot exceed four hours.

Q: CAN AN EMPLOYEE USE THIS PAID LEAVE TO ASSIST A RELATIVE OR ANOTHER PERSON IN GETTING A VACCINE?

No. The paid leave granted by this law is only available to the employee for their own receipt of COVID-19 vaccine.

Q: DO EMPLOYEES HAVE TO BE PAID AT A CERTAIN RATE DURING THIS PAID LEAVE PERIOD?

The law requires employees to be paid at their regular rate of pay.

Q: CAN EMPLOYERS SUBSTITUTE THIS PAID LEAVE OTHER EXISTING LEAVE OPTIONS, SUCH AS PAID SICK LEAVE?

The law does not permit employers to substitute other existing leave options available to the employee, including sick leave under Labor Law §196-b or leave provided by a collective bargaining agreement.

Q: CAN AN EMPLOYER REQUIRE EMPLOYEES TO PROVIDE NOTICE BEFORE TAKING THIS PAID LEAVE PERIOD?

The law does not prevent an employer from requiring notice.

Q: CAN AN EMPLOYER REQUIRE PROOF OF VACCINATION TO ALLOW AN EMPLOYEE TO CLAIM THIS PAID LEAVE PERIOD?

The law does not prevent an employer from requiring proof of vaccination. However, employers are encouraged to consider any confidentiality requirements applicable to such records prior to requesting proof of vaccination.

Q: WHEN DOES THIS NEW LAW BECOME EFFECTIVE?

This law became effective on **March 12, 2021** and will remain in effect until **December 31, 2022**.

Q: WHAT IF AN EMPLOYEE TOOK TIME OFF TO GET VACCINATED BEFORE THIS LAW WENT INTO EFFECT?

This law does not create any retroactive benefit rights and only employees receiving vaccinations on or after **March 12, 2021** are eligible for paid leave. However, nothing in the law prevents employers from voluntarily providing employees with such benefits retroactively.

Q: HOW DOES THIS LAW AFFECT LEAVE PROVISIONS UNDER COLLECTIVE BARGAINING AGREEMENTS?

The rights afforded under this law may be waived in a collective bargaining agreement. To satisfy the requirements of this law, any agreement must specifically reference Labor Law §196-c.

Q: WHAT SHOULD AN EMPLOYEE DO IF HE OR SHE IS DENIED PAID LEAVE UNDER THIS NEW LAW?

The employee should contact the Department of Labor to file a complaint at **1-888-4-NYSDOL (1-888-469-7365)** or by filing a complaint at **https://dol.ny.gov/ls223-file-labor-standards-complaint**

Q: WHAT SHOULD AN EMPLOYEE DO IF HE OR SHE HAS BEEN RETALIATED AGAINST FOR EXERCISING HIS OR HER RIGHTS UNDER THIS NEW LAW?

Employees who believe that they have been retaliated against for exercising their paid leave rights should contact the Department of Labor's Anti-Retaliation Unit at **888-52-LABOR** or **LSAsk@labor.ny.gov.**

Labor & Employment Law Alert: American Rescue Plan Act Requires COBRA Subsidies Starting April 1, 2021

On March 11, 2021, the American Rescue Plan Act of 2021 ("ARPA") was enacted, creating a new election period for COBRA continuation coverage and imposing new subsidy and notice requirements. Starting April 1, 2021, employers with 20 or more employees must subsidize 100% of COBRA premiums for assistance-eligible individuals ("AEI") from April 1, 2021 through September 30, 2021 (the "Subsidy Period"). Employers are required to pay for the subsidy but may seek reimbursement through a quarterly Medicare tax credit.

AEIs include those who (1) are eligible for COBRA coverage during all or part of the Subsidy Period due to either involuntary termination of employment (for reasons other than gross misconduct) or a reduction in hours; and (2) elect COBRA coverage during the Subsidy Period or are already enrolled in COBRA on April 1, 2021. Also, an individual who would otherwise qualify as an AEI but who failed to elect, or discontinued, COBRA coverage before April 1, 2021 is eligible. However, such individuals must elect coverage within 60 days of being notified of the new election period. Employees who voluntarily resign their employment are not eligible for the subsidy.

While ARPA creates a new election period for certain individuals, it does not extend the COBRA coverage period. An individual's status as an AEI ends upon the earlier of the following dates: (1) the date the individual becomes eligible for another group health plan (other than excepted benefits, flexible spending accounts, or qualified small employer health reimbursement arrangements) or Medicare; or (2) the date following the expiration of the individual's COBRA coverage period measured from the original qualifying event. An AEI must notify their group health plan when they are no longer eligible for a subsidy due to becoming eligible for another group health plan or Medicare.

ARPA imposes the following notice requirements on employers/plan administrators:

- ***Election Notice***: AEIs who (1) previously failed to elect COBRA, (2) discontinued COBRA coverage, or (3) have yet to elect COBRA coverage but remain eligible under the usual COBRA rules must be notified of their rights by May 31, 2021. The Department of Labor ("DOL") must issue a model Election Notice by April 10, 2021.
- ***Premium Assistance Notice***: If an AEI becomes COBRA eligible during the Subsidy Period, a COBRA election notice must be sent within the normal notice requirements but must include detailed information about the subsidy. The DOL must issue a model Premium Assistance Notice by April 10, 2021.
- ***Subsidy Termination Notice***: Plan administrators must notify individuals that the Subsidy Period is ending at least 15 days but no more than 45 days in advance of the termination date. Notice is not required if the subsidy will terminate due to the individual's eligibility for other coverage. The DOL must provide model notices for this provision by April 25, 2021.

Employers/plan administrators will need to rapidly begin preparing for compliance with these new

COBRA requirements and should consult with their health insurers or third-party administrators. As employers navigate these issues, our Firm's labor and employment attorneys listed below are standing by to provide legal advice.