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ALERT

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Arbitration and Class/Collective Action Waivers Held Enforceable and New York City Paid Safe Leave Obligations

A recent United States Supreme Court decision regarding individualized arbitration agreements and class/collective action waivers provides opportunities for all U.S. employers, and new paid time off requirements for New York City employers require them to take immediate action.

U.S. Supreme Court Rejects Latest Challenge to Arbitration Agreements That Bar Class and Collective Actions

On May 21, 2018, in a case called *Epic Systems Corp. v. Lewis*, the United States Supreme Court ruled that employer-employee contracts that require individualized arbitrations to resolve disputes are enforceable. While the implications of this decision are still being sorted out, the Court's ruling gives employers at least one potential strategy to combat potentially crippling class or collective action lawsuits for allegedly unpaid wages: arbitration agreements with employees containing class and collective action waivers.

The Court framed the question as follows: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?" Under the Federal Arbitration Act ("FAA") the Supreme Court has repeatedly held that arbitration agreements are enforceable in a variety of contexts. This case presented the issue of whether language in the National Labor Relations Act ("NLRA") required a different result. Drawing on the language of the NLRA, history, rules of statutory interpretation and other justifications, the Court ruled in favor of the employers and upheld the arbitration agreements. As one commentator explained, "the decision was a huge victory for employers, because it could significantly reduce the number of claims against them." Amy Howe, *Opinion Analysis: Employers Prevail in Arbitration Case (Updated)*, SCOTUSblog (May 21, 2018, 3:30 PM),http://www.scotusblog.com/2018/05/opinion-analysis-employers-prevail-in-arbitration-case/. However, to take advantage of this ruling, employers will need to negotiate appropriate arbitration agreements with their employees.

New York City's Earned Safe and Sick Time Act

Amendments to the Earned Safe and Sick Time Act (the "Act") took effect on May 5, 2018 to afford all New York City employees paid or unpaid time off to seek assistance or

take safety measures where the employee or a family member is the victim of any act or threat of domestic violence or unwanted sexual contact, stalking or human trafficking. It is imperative that New York City employers familiarize themselves with the Act and comply with it.

Accrual of Time Off

New York City employers with five (5) or more employees are required to provide their employees who work in excess of eighty (80) hours per calendar year with up to forty (40) hours of paid safe and sick leave (which should be paid at the employee's straight time rate). Employers with fewer than five (5) employees must provide employees with up to forty (40) hours of unpaid safe and sick leave per calendar year. Pursuant to the Act, employees will accrue one (1) hour of safe and sick leave for every thirty (30) hours worked. Additionally, employees may carry over up to forty (40) hours of unused safe and sick leave to the following calendar year; however, employers need not permit them to accrue additional safe and sick leave beyond forty (40) hours until all time from the previous year has been used.

Qualifying Events

New York City employers must provide both safe and sick leave under the Act. An employee is permitted to use sick leave for absence from work due to: (a) such employee's mental or physical illness, injury or health condition or need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or need for preventive medical care; or (b) care of a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or who needs preventive medical care; or (c) closure of such employee's place of business by order of a public official due to a public health emergency or such employee's need to care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency.

When an employee or a family member has been the victim of a family offense matter, sexual offense, stalking, or human trafficking the employee is entitled to use safe leave for any of the following reasons: (a) to obtain services from a domestic violence shelter, rape crisis center, or similar program for relief; (b) to participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members; (c) to meet with a civil attorney or other social service provider to obtain information and advice on, and prepare for or participate in any criminal or civil proceeding; (d) to file a complaint or domestic incident report with law enforcement; (e) to meet with a district attorney's office; (f) to enroll children in a new school; or (g) to take other actions necessary to maintain, improve, or restore the physical, psychological, or economic health or safety of the employee or the employee's family member or to protect those who associate or work with the employee.

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Mr. Trafimow, a partner with the firm, heads the firm's employment practice where he represents employers in all areas of discrimination, retaliation, harassments and civil rights claims, and class actions. He also routinely advises employers on compliance employment laws and regulations.

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Notice

Where the use of safe or sick leave is foreseeable, employers may require employees to provide up to seven (7) days' prior notice. Where such leave is not foreseeable, notice should be given as soon as practicable. Furthermore, where employees will use safe or sick leave spanning more than three (3) consecutive workdays, employers can require that employees provide documentation (less any details thereof) for such leave.

As of June 4, 2018, all New York City employers are required to provide employees with a written notice, published by the New York Department of Labor, detailing their right to leave under the Act.

Implications for Employers

The Supreme Court's decisions creates options and opportunities employers should assess to determine whether they make sense for them. The change to the New York City law requires affected New York City employers to distribute the required notice and to update their employment practices and policies. MHH can assist you in understanding and addressing these issues, including reviewing and updating your policies.

Any issues raised in this Alert may be addressed to Mr. Trafimow who can be reached at: (516) 873-2000 or by email at jtrafimow@moritthock.com.

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