Hedge Up Alert: A Heads-Up on Employment Issues Confronting the Hedge Fund Industry

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"California East": New Employment Laws Further Increase Burdens On New York Firms

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If You Read One Thing...

- New Paid Family Leave Law will impact all New York firms
- New rules regarding NYC's Earned Sick Time Act require changes to firms' approach to employee sick time

Over the past few months, New York lawmakers have accelerated their recent trend of making New York one of the most employee-friendly (and employer-unfriendly) states in the nation. Falling on the heels of other recent state and city legislation (including the "Stop Credit Discrimination in Employment Act," governing credit checks; the "Fair Chance Act;" governing criminal background checks; the amended Equal Pay Act, imposing new obligations and penalties regarding employee wage issues and various other initiatives), lawmakers have imposed yet additional burdens on New York firms. While the state's new $15-per-hour minimum wage (to be phased in over several years) garnered much of the attention, two other developments are likely to have a greater impact on the hedge fund community: the enactment of New York's Paid Family Sick Leave Law and the promulgation of new rules regarding New York City's Earned Sick Time Act.

Paid Family Leave Law Impacts All Firms

Earlier this month, Governor Andrew Cuomo signed legislation enacting New York's Paid Family Leave Law. The comprehensive law covers all firms with at least one employee and will be phased in over a period of four years, beginning in 2018. The law eventually will require firms to offer 12 weeks of leave to eligible employees for a qualifying event. Family leave covered under the law includes leave to (a) care for the employee's child, parent, grandparent, grandchild, spouse or domestic partner with a serious health condition; (b) bond with the employee's child within 12 months of the child's birth, adoption or placement in foster care; and (c) address qualified exigencies that arise out of the military service of an employee's child, parent, spouse or domestic partner. An otherwise eligible employee is entitled to such leave regardless of whether he or she is the primary care giver.

The phase-in of the new law is as follows: Beginning in 2018, firms must offer at least eight weeks of family leave; by 2021, firms must offer the full 12 weeks of such leave. While the leave is “paid” in nature, the benefit will be employee-funded, through a payroll tax, in an amount to be determined by the state’s superintendent of financial services. The amount of an employee’s family leave benefit is capped at a percentage of the “average statewide weekly salary” (and thus is likely to be much less than a hedge fund employee’s regular base pay). In 2018, employees on leave will receive pay at the rate of 50 percent of the lower of the employee’s weekly base pay or the average statewide weekly salary. By 2021, employees on leave must receive pay at the rate of 67 percent of the lower of the employee’s weekly base pay or the average statewide weekly salary.

An employee’s family leave under the new law will run concurrently with other paid time off, including paid sick leave, and, at a firm’s election, any leave available under the federal Family and Medical Leave Act. Employees also will not be able to collect both family leave and disability benefits concurrently. At the conclusion of the leave period, an employee generally must be placed back into the same position that he or she held prior to such leave, or into a comparable position with comparable pay, benefits and other terms and conditions of employment.

NYC’s New Sick Leave Rules Impose Significant Administrative Burdens

Last month, New York City’s Department of Consumer Affairs (DCA) enacted new rules implementing the city’s Earned Sick Time Act (ESTA). These new rules create significant obligations for firms, including in connection with the drafting and promulgation of sick leave policies, the manner in which firms calculate the “accrual” of sick time, and the maintenance of records regarding firms’ compliance with the ESTA.

First, the rules specify new minimum standards for sick leave policies under the ESTA. Among other things, such policies must (a) be in writing; (b) be provided to employees; (c) specify the manner in which sick leave benefits are calculated, including whether an accrual system is used; (d) describe any relevant rules governing the use of sick leave, such as any advance notice requirements, any written verification or documentation requirements, any reasonable minimum increments or fixed periods in which sick time should be taken, and any disciplinary procedures for the misuse of sick time; (e) describe the procedures by which unused sick leave can be carried over from year to year; and (f) describe any applicable payout policy. The promulgation of a written sick leave policy is in addition to—and not instead of —the obligation to directly provide the DCA’s “Notice of Employee Rights” under ESTA to each employee.

The new obligations regarding the accrual of sick time, meanwhile, leave firms with little choice but to eschew an accrual method altogether. In order to properly implement an accrual policy, firms would need to keep track of hours worked by each employee (including **exempt** employees), since employees must be provided with one hour of sick leave for every 30 hours worked (up to a maximum of 40 accrued hours per calendar year), while also complying with various other administrative burdens. Instead, firms should either draft a policy with front-loaded sick time or move to a broader paid time off ("PTO") policy combining a sufficient number of paid sick, vacation and personal days.

In terms of recordkeeping, the new rules require firms to maintain the following records for each employee for a minimum of three years: (a) the employee's name, address, telephone number, employment start and end dates, rate of pay, and whether the employee is classified as exempt from overtime; (b) the hours the employee worked each week, unless the employee is exempt and works 40 or more hours per week; (c) the date, time and amount paid for each instance of sick time used by the employee; (d) any change in "material terms" of the employee's employment; and (e) the date the firm provided the employee with an ESTA "Notice of Employee Rights" and proof of the employee's receipt of such notice.

Thankfully, the ESTA does not contain a private right of action for employees; rather, only the DCA has the authority to enforce the law. But under the recent rules, any noncompliance with the above recordkeeping obligations will create a "reasonable inference" that any relevant facts alleged by the DCA in an enforcement action are true.

The new rules do contain one benefit to firms: they contain a provision affirmatively permitting discipline against employees who abuse employer sick leave policies. The rule provides examples of what may constitute abuse, including: (a) the use of unscheduled sick time on or adjacent to weekends or other days off; (b) the use of scheduled sick time when other leave has been denied; and (c) the use of sick time when an employee is scheduled for an undesirable shift or duties. While, of course, firms always had the ability to discipline employees for dishonesty and abuse of firm policies, New York firms now can point to a specific statutory right for them to take such action.

Take-Away

New York—and, in particular, New York City—is becoming an increasingly complex jurisdiction in which to operate, with numerous traps for the unwary. Firms should remain cognizant of developments impacting their rights and obligations vis-à-vis current and prospective employees, and should review and revise their policies and protocols accordingly.