KANE KESSLER, P.C.

1350 Avenue of the Americas
New York, N.Y. 10019
(212)541-6222
fax (212) 245-3009
Direct dial (212) 519-5165
jstoll@kanekessler.com

MEMORANDUM

CONFIDENTIAL

DATE: October 21, 2013

TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Controllers and Human Resource Directors

FROM: Kane Kessler, P.C.
Labor & Employment Dept.

RE: New York City Human Rights Law and Leaves of Absence

It has long been the established law under the Americans with Disabilities Act ("ADA") and the New York State Human Rights Law that a request for a leave of absence of indefinite duration is per se unreasonable. We have heretofore advised employers that if an employee has been out on a medical leave for several months and is unable to provide a definite return to work date, the employee may be terminated.

Over the past few years, the courts have begun to interpret the New York City Human Rights Law[1] as intending to accomplish a broad remedial purpose and its provisions have been construed broadly in favor of discrimination plaintiffs to the extent that such a construction is reasonably possible. Unlike federal and state law, under the City Human Rights Law, the burden is on the defendant employer to prove that a requested accommodation is not reasonable and/or is unduly burdensome.

In a case decided on October 10, 2013 by the New York Court of Appeals, Romanello v. Intesa Sanpaolo, S.p.A., the plaintiff had been absent from work due to his disability for in excess of five (5) months and could not anticipate a return date, although he stated that it was not his intention to abandon his job. After the employer terminated his employment, he sued under the New York State and New York City Human Rights laws. The Court of Appeals upheld the dismissal of the State claim, but held that dismissal of the City claim was not proper because the employer had failed to plead and prove on its motion that the plaintiff could not perform his essential job functions with an accommodation.

[1] The New York City Human Rights Law covers entities with four (4) or more employees.

In summary, an indefinite leave of absence is NOT considered per se unreasonable under the City Human Rights Law. Instead, the employer must prove that it is unreasonable under the circumstances.

We are advising our New York City clients that if an employee notifies you after a lengthy absence that he/she does not know when he/she will be able to return, you can no longer assume that it is lawful to terminate that employee. Please contact us to discuss the available and appropriate options for responding to such a situation.

In addition, please consult with us if you are planning to enter into an Employment Agreement that provides for automatic termination in the event of disability, so that we can ensure that such provision contains language waiving a claim of disability discrimination.

This decision may also have an impact on the medical leave provision of the Industry Wide Agreement, Article 23 (B). We are advising Hotels to consult with us before terminating an employee whose leave has exceeded 52 weeks.

If you have any questions, do not hesitate to contact David R. Rothfeld, Judith A. Stoll, Niki J. Franzitta, Lois M. Traub, Alexander Soric or Robert L. Sacks.

cc: Joseph E. Spinnato, Esq.
Geoffrey A. Mills, Chairman