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**CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED INFORMATION**

**DATE:** February 29, 2016

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

**FROM:** Kane Kessler, P.C.  
Labor and Employment Law Practice Group

**RE:** MOU Sick Leave Clarification and New Rules Regarding New York City's Earned Sick Time Act

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As discussed at the most recent Human Resources Directors meeting on February 22, 2016, this memorandum advises Hotels on the administration of sick leave for first year employees pursuant to both Article 54(A) of the Industry Wide Agreement (“IWA”) and the Memorandum of Understanding (“2015 MOU”) between the Hotel Association of New York City, Inc., and the New York Hotel Trades Council, AFL-CIO in which the parties agreed to renew and extend the IWA through June 30, 2026. This memo also addresses new rules issued by the Department of Consumer Affairs (“DCA”) relating to the New York City Earned Sick Time Act (“ESTA”) and the effect these rules may have on the Hotel industry.

**Sick Leave for First Year Employees under the IWA**

The 2015 MOU modified Article 54(A) of the IWA to include the following:

“Employees employed less than one (1) year will accrue one (1) hour for every thirty (30) hours worked, up to a maximum of forty (40) hours of paid sick leave per calendar year, until they become entitled to benefits pursuant to Article 54.”

Up until the 2015 MOU, employees were not entitled to paid sick days under Article 54 until the completion of one (1) year of continuous employment. As of June 5, 2015, the effective date of the 2015 MOU, employees with less than one (1) year of service are permitted to use accrued sick time calculated using the employee’s date of hire. Consistent with the law, Hotels may require that employees with less than one (1) year of service wait until one hundred twenty (120) calendar days after the employee’s date of hire to begin using accrued sick time. If an employee begins work with less than one hundred twenty (120) days remaining in the calendar

year, any time accrued is subject to the payout and carryover provisions of the IWA.

The remaining provisions of Article 54 remain unchanged. Thus, employees, including employees with less than one (1) year of service, may elect to be paid out for unused sick time at the end of the calendar year by providing the Hotel two (2) weeks' notice in advance of the second payroll week of each December. In the alternative, employees may elect to carry over sick time into the next calendar year. Under IWA Article 54(A)(6) no employee is permitted to accumulate more than fifteen (15) unused sick days at any time.

Also consistent with Article 54(C), "an employee absent from work due to illness on a scheduled workday immediately before and/or on the scheduled workday immediately after a holiday or vacation period shall not be eligible for sick pay for said absent workday or workdays".

### **New Rules to Clarify and Provide Guidance on the ESTA**

In December 2015, the New York City DCA issued proposed rules which sought to clarify and provide guidance on the ESTA. *These rules will go into effect on March 4, 2016.* Thus, it is important to note the rules that are not covered by Article 54 of the IWA, but that may nevertheless apply to the industry.

Under the new rules, multiple employers who exercise "some control" over the work or working conditions of an employee will be considered "joint employers". However, the rules do not provide further guidance as to what a "joint employer" is. Still, if commonly owned or managed Hotels (or concessionaires, etc.) share employees, this provision suggests that any hours worked for either Hotel should be added together for the purpose of calculating an employee's sick time accrual. Therefore, related entities should come to an understanding in advance regarding the allocation of responsibility for paid sick leave of jointly employed workers.

The new rules prevent employers from requiring an employee to appear in person or provide any documentation prior to using sick time when the need to use sick time is unforeseeable. The rules also prohibit employers from denying sick time or payment of sick time for failure to comply with the Hotel's policy if the policy was not distributed to employees in writing. Thus, if your Hotel does not presently distribute a written policy on sick leave, we recommend doing so. Written policies must contain, at a minimum:

- All requirements for an employee to provide notice of a need to use sick time,
- All requirements for written documentation or verification of the use of sick time,
- Any reasonable minimum increment or fixed period for the use of accrued sick time,
- Any policy regarding employee discipline for misuse of sick time,
- The employer's policy regarding carry-over of unused sick time, and
- The amount of front-loaded sick leave the employer has elected to provide.

In order to avoid a bargaining obligation with respect to the Hotel's policy (including matters such as discipline), the policy should state that any terms regarding the administration of

sick leave that are not covered by the IWA shall be treated in a manner consistent with the Hotel's existing practice.

As mentioned earlier in this memorandum, the industry's rules regarding carryover can be found in IWA Article 54(A)(6).

One of the purposes of the rules is to clarify accrual. Of particular import to the industry is the provision of the rules providing that if a former employee who had not reached one hundred twenty (120) calendar days of service at the time of separation is rehired within six (6) months, she or he would be credited with any calendar days accrued during the prior period of employment.

Finally, the rules add that if an employee is compensated for an on-call shift, regardless of whether the employee works, the scheduled time constitutes hours worked for the purposes of accrual.

If you have any questions, please do not hesitate to contact David R. Rothfeld, Lois M. Traub, Alexander Soric, Jennifer Schmalz, Jaclyn Ruocco, Robert L. Sacks, or Michael C. Lydak.

cc: Joseph E. Spinnato, Esq.  
Vijay Dandapani, Chairman

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*This memo is provided for informational purposes only.  
It is not intended as legal advice and readers should consult counsel to discuss how these matters relate to their individual circumstances.*