



New York State Department of Labor
David A. Paterson, Governor
M. Patricia Smith, Commissioner

October 19, 2009



Re: Request for Opinion
Unpaid Sick Leave
RO-09-0127

Dear [REDACTED]:

I have been asked to respond to your letter of September 14, 2009 in which you state that your corporate policies do not allow unpaid sick/vacation time, that any employee who needs time off without pay and qualifies for FMLA is placed on FMLA, and that you have a few employees who use their sick and vacation time very liberally and may have little or no time left. You then ask "if these employees become ill or their children become ill, how do we handle those illnesses that may take up to one week to resolve?" You also state that your full-time employees should be eligible for FMLA in these situations, but your part-time employees would not qualify.

The answer to your question under the New York State Labor Law is that an employer is not obligated to provide any paid sick/vacation time to any employee, but that if an employer has a policy of providing such paid sick/vacation time it must notify its employees of such policy and then adhere to it. Labor Law §195(5) requires that employers notify their employees of the employer's policy on sick leave, vacation, personal leave, holidays and hours either in writing or by publicly posting such policy. Furthermore, such a policy is enforceable upon employers through Labor Law §198-c, which requires that employers abide by the terms of agreements, and policies, to provide benefits or wage supplements. (*See, Glenville Gage Co. v. Industrial Bd. of Appeals of New York, Dep't of Labor*, 70 A.D.2d 283 (3rd Dep't 1979).)

Please be advised that on August 19, 2009 the Secretaries of Homeland Security, Commerce, Labor, and Health and Human Services issued a joint letter requesting employers adopt plans to encourage workers with flu-like symptoms to stay home without penalty and to institute flexible workplace and leave policies so as to help reduce the damage that the H1N1 influenza may cause. A copy of that letter is enclosed for your review.

Tel: (518) 457-4380, Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

Additionally, please be advised that the State Human Rights Law may restrict adverse employment action taken against an employee and/or discrimination based on the fact that the employee contracted influenza or another disease. Please do not hesitate to contact the New York State Division of Human Rights for more information regarding the employer's obligations under the State Human Rights Laws. The Division may be reached in writing or by telephone at:

New York State Division of Human Rights
One Fordham Plaza, 4th Floor
Bronx, New York 10458

Tel: (718) 741-8400

Please further note that while the Family Medical Leave Act (FMLA) may impose additional requirements on employers in the fact situation you describe, it is not for the New York State Department of Labor to express an opinion on what those additional requirements may be. The FMLA is a federal law enforced and interpreted by the United States Department of Labor. Therefore, you should direct any questions regarding the requirements or proper interpretation of the FMLA to the United States Department of Labor, Wage and Hour Division in writing or by telephone at:

US Dept. of Labor
ESA Wage & Hour Division
130 S. Elmwood Avenue—Room 534
Buffalo, NY 14202

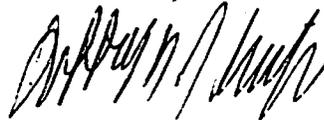
Tel: (716) 842-2950
1-866-4-USWAGE

This opinion is based on the information provided your letter dated September 14, 2009. A different opinion might result if the circumstances stated therein change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By:



Jeffrey G. Shapiro
Associate Attorney

JGS:mp
cc: Carmine Ruberto
Enclosure