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MEMORANDUM

CONFIDENTIAL

DATE: October 21, 2013

TO: Kane Kessler Clients

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 Law¹ 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. <mailto:rsacks@kanekessler.com>

Please do not hesitate to contact [David R. Rothfeld](#), [Judith A. Stoll](#), [Robert L. Sacks](#), [Niki Franzitta](#), [Lois Traub](#), or [Alexander Soric](#) if you have any questions.