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the LEGAL UPDATE

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## Labor and Employment Update

*A portion of sick leave may now be used to take care of certain relatives*

Until now, Puerto Rico law only provided paid sick leave to the employee when he or she was ill. This benefit was, and is, available through Law No. 180 of June 27, 1998. There was no local law providing leave, paid or unpaid, to take care of an ill relative. To fill the void, employers often allowed employees to use accrued vacation, a questionable practice given Law 180 express conception of vacation as a time for personal enjoyment. Employees could also avail themselves of unpaid leave under the federal Family and Medical Leave Act, which applies to employers with 50 or more employees and only if the employee has worked at least a year for the employer and has accrued a minimum of 1250 hours.

This scenario changed with the approval of Law 251 last December 31, 2015. Under Law 251, which amended Law No. 180, employees can now use up to five (5) days of their accrued sick leave to care for a sick son, daughter, spouse, mother or father. Leave is also available to care for an ill minor, a disabled person or a person sixty (60) age years of age or older, over who the employee has legal custody or guardianship. Leave is available as long as the employee maintains a balance of at least five (5) days of sick leave in his or her account. Significantly, this amendment does not create additional leave. Instead, it allows already existing leave to be used for a new purpose. Unlike traditional sick leave, however, only employers with fifteen (15) or more employee are required to grant this leave. The law also allows employers to request medical certification to justify the absence.

The law does not define what it means to “care for” of a person. It is likely that courts will look for guidance to the definition of the analogous term under the FMLA.

At least the definition of what is a disabled person is familiar, since Law 251 uses the criteria developed under the Americans with Disabilities Act. Unfortunately, applying said definition under the ADA has been a historically difficult task. Accordingly, adopting this definition under Law 251 can only import the same difficulties onto paid sick leave analysis, with the aggravation that Law 251 provides no legal framework to enable the employer to implement that definition. This contrasts with the interactive process framework developed under the ADA to identify if a person has a disability and needs a reasonable accommodation, or the medical certification and second opinion tools created by the FMLA to determine if an employee has a serious medical condition.

Along the same lines, the medical certification provision of Law 251 does not outline what kind of information an employer can request from the employee or the relative’s practitioner. The lack of guidelines is most critical when it comes to certifying not only that the relative was ill, but that the employee was needed to care for him or her. Whether courts will look towards the ADA, the FMLA or their

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own idiosyncrasies in setting applicable standards, remains to be seen.

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