

# How New York City Employers Can Avoid Trouble under Mayor de Blasio's New Employment Laws

VENABLE LLP

May 14, 2014

8:30 a.m. – 10:00 a.m.

## SPEAKERS

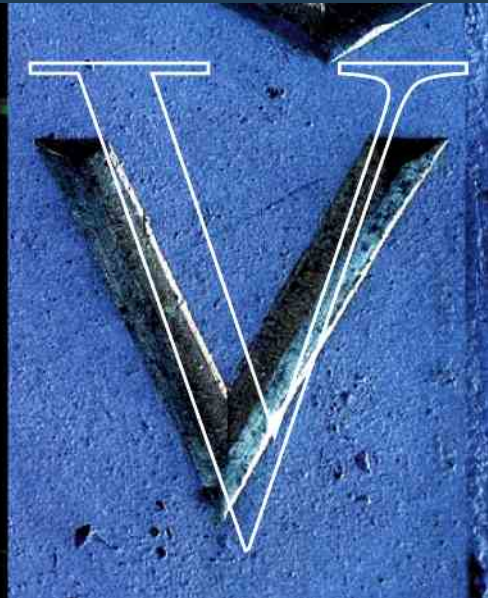
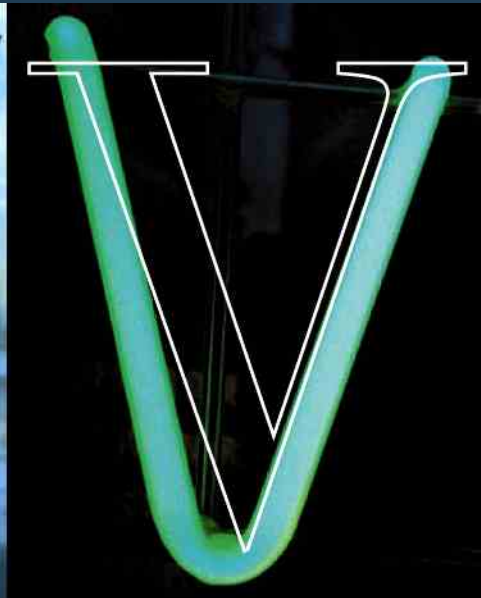
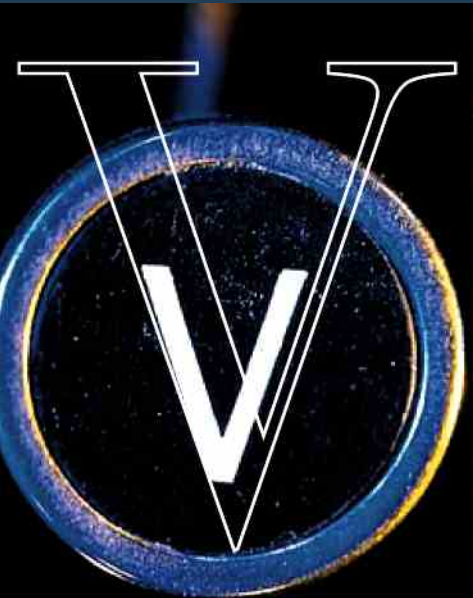
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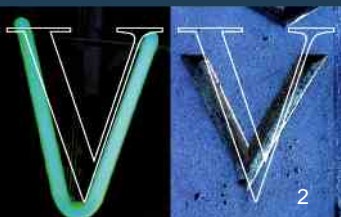
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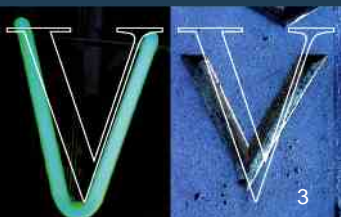
# Overview of Today's Program

- **Recently Enacted New York City Employment Laws**
  - Earned Sick Time Act
  - Pregnancy Accommodations Under Amendments to New York City Human Rights Law
  - Anti-Discrimination Protections for Interns
- **Tips for Minimizing the Risk of Litigation**
- **Questions**



# The Earned Sick Time Act

- Who is covered?
- How does sick time accrue?
- For what purposes may an employee use sick time?
- Should an employer pay for unused accrued sick time at the end of the year?
- How does the ESTA affect an employer's other paid time off policies?
- What penalties might an employer face for violations?
- Do's and Don'ts of a sick time policy



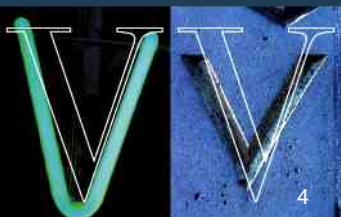
# Who is Eligible for Sick Time?

## ■ Covered Employers:

- All employers covered, regardless of number of employees
- Employers with 5 or more employees must provide paid sick time
- Telecommuting employees in NYC will count
- 30% stake threshold for common ownership or principal

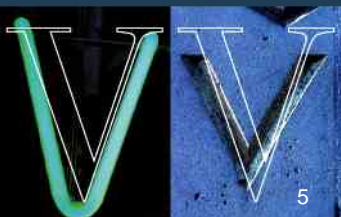
## ■ Eligible Employees:

- Employee must work at least 80 hours in a calendar year
- “Calendar year” may be defined by the employer, so long as a consecutive 12-month period and same for all employees



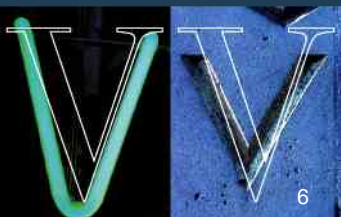
# How Sick Time Accrues

- 1 hour for every 30 hours worked, up to a maximum of 40 hours per calendar year
- Employer must pay wage rate in effect at the time employee takes leave
  - Tipped employees
  - Sales commission employees
- **Note: sick time accrues immediately, but employees may not take sick leave until July 31, 2014 or 120 days after their date of hire, whichever is later**



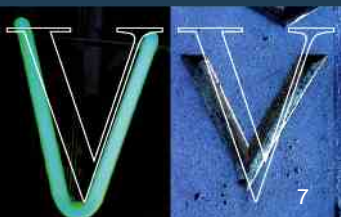
# Permissible Uses of Sick Time

- **Broad range of permissible uses:**
  - Employee's mental or physical illness, injury, or health condition
  - Employee's need for medical diagnosis, treatment, or preventative care
  - Time off to care for a spouse, domestic partner, children, parents (including in-laws), grandparents, grandchildren, and siblings
- **Employee notice required, if foreseeable**
  - Up to 7 days notice may be required, but the need to use leave will often be unforeseeable
- **Minimum increments ok, but no more than 4 hours**



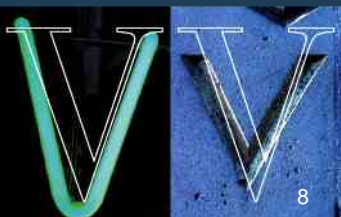
# Unused Accrued Sick Time

- **To pay or not to pay?**
  - Employers may choose: either pay for unused accrued sick time or permit employees to use the time in subsequent years
  - Nothing permits an employee to use more than 40 sick time hours in a calendar year
  - Typically recommend employers permit carry over into subsequent calendar year in lieu of payment



# How Does the ESTA Affect Other Paid Time Off Policies?

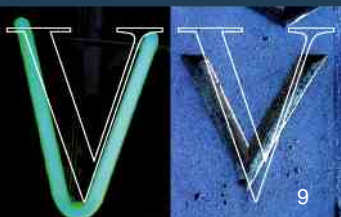
- **General paid time off, e.g., vacation time, personal days, etc., may satisfy paid sick time requirement**
  - Employer must provide at least 40 hours per calendar year (or 1 hour per 30 work hours)
  - Employee must be permitted to use the paid time off for the same reasons identified in the ESTA





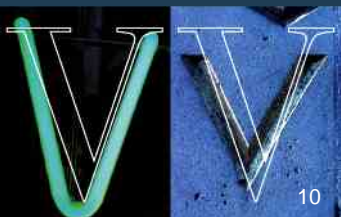
# Notice Requirements

- **New hires must be notified of ESTA rights upon commencement of employment:**
  - How sick time accrues
  - Permitted uses for sick time
  - Applicable calendar year
  - No retaliation
  - How to file a complaint with the Department of Consumer Affairs
- **English and primary language (if different)**
- **Posted in conspicuous location readily accessible to employees**



# Enforcement and Potential Penalties

- **Two-year statute of limitations to file complaint with Department of Consumer Affairs**
- **Treble wages or \$250, whichever is greater, for failure to provide sick time**
- **\$500 penalty for improper denial of sick time request or condition for use of sick time**
- **Back pay, benefits, equitable relief, and \$500 – \$2500 penalty for retaliation for exercise of ESTA rights**
- **Separate Department of Consumer Affairs penalties from \$500 – \$1000**



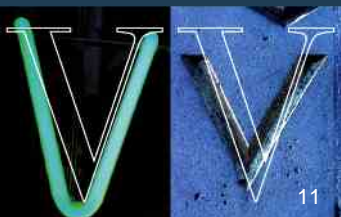
# Do's and Don'ts of Sick Time Policy

## ■ Do:

- Ask for physician's certification if employee out for more than 3 consecutive days
- Establish minimum increments for the use of sick time (no more than 4 hours)
- Either pay for unused accrued sick time at end of calendar year or permit employees to carry over time into subsequent calendar year

## ■ Don't:

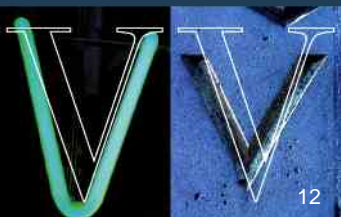
- Ask for multiple physician notes
- Require employees to find replacement employee before sick time may be used
- Require employees to work additional hours after they use sick time
- Retaliate against employees because they used sick time



# *The New York City Human Rights Law (“NYCHRL”)*

## *Pregnancy Accommodation Amendment Overview*

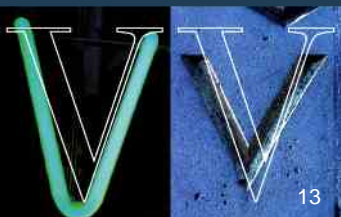
- Purpose
- Related Federal and State Laws
- The Current NYCHRL and the New Pregnancy Accommodation Amendment
- Important Takeaways



## *The NYCHRL Pregnancy Accommodation Amendment*

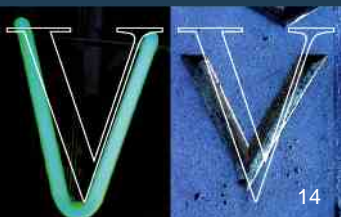
**“It shall be an unlawful discriminatory practice for an employer to refuse to provide a reasonable accommodation ... to the needs of an employee for her pregnancy, childbirth, or related medical condition that will allow the employee to perform the essential requisites of the job, provided that such employee’s pregnancy, childbirth, or related medical condition is known or should have been known by the employer.”**

**[N.Y.C. Admin. Code § 8-107 (22)]**



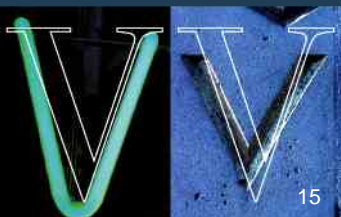
## *Purpose of the Pregnancy Accommodation Amendment*

- **To broaden the protections given to pregnant employees under the existing federal, state, and city disability and discrimination laws.**
- **The effect? Under the amendment, a pregnant employee will be considered disabled for purposes of compliance with New York City's disability law.**



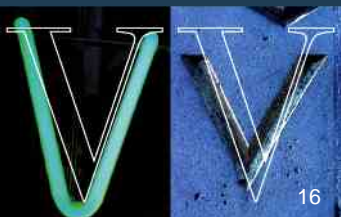
## *Related Federal and State Disability and Discrimination Laws*

- **Americans with Disabilities Act (“ADA”)**
  - The ADA only covers pregnancy-related impairments or complications under its definition of disability.
- **Pregnancy Discrimination Act (“PDA”) and New York State Human Rights Law (“NYSHRL”) disability provisions**
  - If an employee has a pregnancy-related impairment, the employer must accommodate the employee as it would other non-pregnant disabled employees.
  - Not all pregnant employees are necessarily disabled for purposes of federal and state laws, however.



# NYCHRL Discrimination Provisions

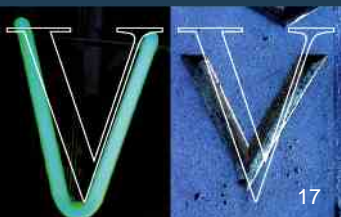
- Compared to federal and state laws, the NYCHRL has historically provided broader protections for pregnant employees.
- A “disability” under the NYCHRL includes “any physical, medical, mental, or psychological impairment, or a history or record of such impairment.”
- Before the pregnancy accommodations to the NYCHRL, a healthy pregnant employee might not have met the definition of disabled.





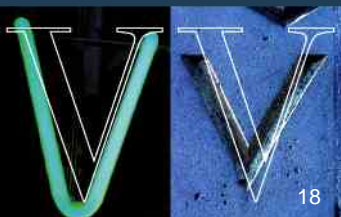
# The New Amendment to the NYCHRL Discrimination Provision

- Effective January 30, 2014, NYCHRL was amended to expand anti-discrimination protection to all pregnant employees, regardless of whether the pregnancy previously qualified as a disability.
- Applies to employers with four or more employees.
- Employers must provide reasonable accommodations to the needs of an employee for her pregnancy, childbirth or related medical condition, provided the employer knew about the condition (or should have known about it).



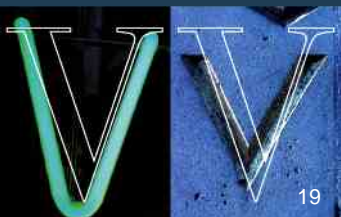
# What is a “reasonable accommodation” under the NYCHRL?

- All accommodations are reasonable unless the employer can show that the accommodation causes undue hardship.
- Undue hardship is determined by a factor test which includes, but is not limited to:
  - The nature and cost of the accommodation
  - The overall financial resources of the employer
  - The number of employees
  - The effect on expenses and resources
  - The impact on the employer’s operation



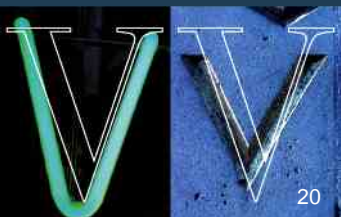
# Examples of Reasonable Accommodations

- Bathroom breaks
- Breaks to facilitate increased water intake
- Periodic rest for those who are required to stand for long periods of time
- Assistance with manual labor
- Lighter workloads/shorter hours
- Leave for a period of disability as a result of childbirth



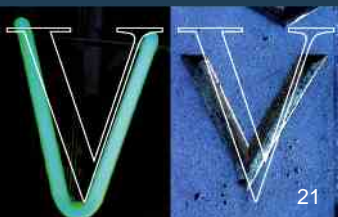
# Affirmative Defense Available to Employers in Discrimination Cases

**As a defense against discrimination claims, employers have the option to prove that the employee could not satisfy the essential functions of the job with a reasonable accommodation.**



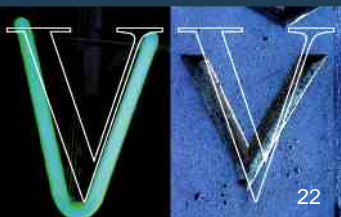
# Notice and Posting Requirements

- Employers are required to provide written notice of employees' rights under the NYCHRL pregnancy accommodation amendment:
  - Upon hire for all new hires
  - To existing employees by May 30, 2014
- Employers are encouraged to conspicuously post a notice in a place accessible to employees.
- The New York City Commissioner on Human Rights is expected to issue more specific guidance on the notice requirements in the near future.



# Important Takeaways

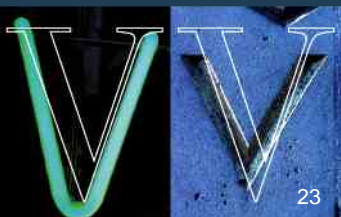
- **Update orientation presentations and new hire materials to include the required written notice.**
- **Distribute written notices to existing employees by May 30, 2014.**
- **Although not required, it is good practice to maintain records of an employee's receipt of the notice, such as a written or electronic acknowledgment.**
- **Review the company's accommodation policies and procedures and revise as necessary.**
- **Train supervisors and managers on how to handle accommodation requests.**



# Interns & Workplace Protections

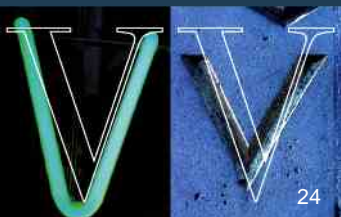
## Topics for Discussion:

- Employment discrimination and New York City's Human Rights Law ("NYCHRL")
- *Wang v. Phoenix Satellite Television US, Inc.*
- New protections initiated by the New York City Council after *Wang v. Phoenix Satellite Television US, Inc.*
- Understanding the relevance of Int. No. 173-A
- Preparing for compliance with Int. No. 173-A



## Workplace Discrimination

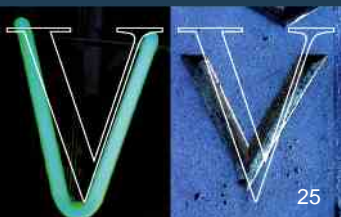
- **The New York City Human Rights Law (“NYCHRL”), as well as the New York State Human Rights Law (“NYSHRL”), and Title VII of the Civil Rights Act of 1964 prohibit employment discrimination.**
- **Protections, however, previously applied only to “employees.” The term “employee” has been construed to mean someone who receives compensation for their work.**
- **Previously, interns did not receive the same discrimination protections as “employees” under the NYCHRL.**





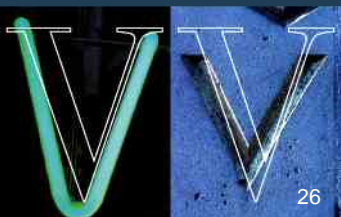
# *Wang v. Phoenix Satellite Television US, Inc.*

- The Facts
- Plaintiff's Claims:
  - i. Quid pro quo and hostile work environment  
sexual harassment
  - ii. Retaliation
  - iii. Discriminatory failure to hire
- The Court's Decision and Reasoning in *Wang*:
  - i. Wang found not to be an “employee” under  
the NYCHRL
  - ii. The court found that the NYCHRL's  
legislative history indicated that interns were  
not covered by the NYCHRL
- Expanding statutory protections to interns after  
the *Wang* decision



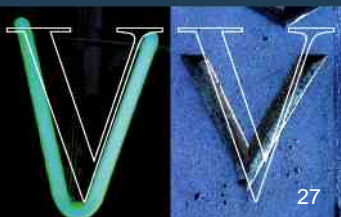
## Amendments to the NYCHRL

- Following the *Wang* decision, the New York City Council acted to change local anti-discrimination laws and passed legislation (Int. No. 173-A) to amend the NYCHRL on March 26, 2014.
- On April 15, 2014, Mayor de Blasio signed the bill into law.
- The law takes effect on June 14, 2014.



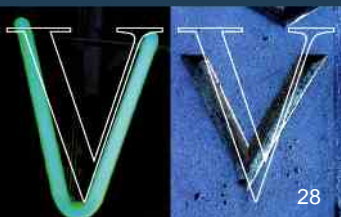
## New Protections Under the NYCHRL

- Under Int. No. 173-A, all interns, regardless of whether they are paid or unpaid are protected from employment discrimination and workplace harassment.
- Expressly provides that NYCHRL's provisions "relating to employees shall apply to interns."
- Interns will now be protected against discrimination on the basis of their protected characteristics, including: age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation, alienage, or citizenship status.



## Employer Compliance

- **Revising anti-discrimination and anti-harassment policies**
- **Greater distribution of employee handbook acknowledgment forms**
- **Review internal complaint procedures**
- **Training intern supervisors**
- **Common intern-specific issues**
  - **Friendships/romantic relationships among interns or full-time employees**
  - **Social media**
  - **Employer-sponsored events outside the workplace**



# Questions?

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