

**COOPERMAN LESTER MILLER CARUS LLP**  
**ATTORNEYS-AT-LAW**  
1129 NORTHERN BOULEVARD • MANHASSET, N.Y. 11030  
(516) 365-1400  
FAX: (516) 365-1404

SYMA SHULMAN LEVINE  
Direct Dial: 516-365-1400, Ext. 112

e-mail address: [slevine@clmclaw.com](mailto:slevine@clmclaw.com)

NEW YORK CITY OFFICE  
767 THIRD AVENUE  
NEW YORK, N.Y. 10017  
(212) 688-7000  
FAX: (212) 371-7634

**EMPLOYMENT LAW UPDATE:**

**SUCCESSFUL CHALLENGE TO NYC PAID SICK LEAVE ACT**

Cooperman Lester Miller Carus LLP continues to push boundaries and accomplish legal feats with its major success in the first challenge to New York City's Paid Sick Leave Act (the "Act") by maintaining, on behalf of its corporate client, the exemption of certain therapists from the Act as "hourly professional employees." Syma Shulman Levine, along with Talia Shulman, successfully argued that the therapists do not qualify for Paid Sick Leave in our representation of a large privately held corporation that provides therapy services (the "Corporation") throughout New York City. At the New York City Department of Consumer Affairs (the "DCA") audit/hearing, the Corporation was charged with violating the Act by failing to provide notice of paid sick leave and paid sick leave to its therapist employees. The Corporation faced substantial monetary penalties and payment of unpaid paid sick leave, steep sums that the Corporation could not truly afford with its present generous pay structure for the employed therapists.

In our representation of a women-owned company that has made compliance with the law, alongside generous and fair treatment of its employees, its guiding principles, we shed light on the origin of the law and its exemption. We argued that the particular therapists fall under an exemption found in Section 20-913(f) of the New York City Administrative Code which provides that the provisions of the Act do not apply to "hourly professional employees." Section 20-912(j), defines "hourly professional employee" as:

*[A]ny individual (i) who is professionally licensed by the New York State Education Department, Office of Professions, under the direction of the New York State Board of Regents under Education Law sections 6732, 7902 or 8202, (ii) who calls in for work assignments at will determining his or her own work schedule with the ability to reject or accept any assignment referred to them and (iii) who is paid an average hourly wage which is at least four times the federal minimum wage for hours worked during the calendar year.*

The Corporation easily demonstrated that the individual therapists met the first and third criteria. The challenge was demonstrating that the therapists met the second criteria. Although the Corporation's therapists had the absolute ability to accept or reject their assignments initially, once an assignment was accepted, it was relatively long-term and the therapists were expected to adhere to fixed schedules unless they chose to terminate the assignment. The matter was complicated by individual employment agreements with varying language on schedules, termination, etc.

Scant guidance was provided by the DCA. Thus, we searched further and located the testimony that was presented in support of the exemption to the Act. We emphasized the reasons for the exemption and the business models involved. While recognizing a common sense interpretation of "calling in", we argued that the only possible practical implementation of the therapist's schedule required compliance with an agreed-upon schedule. Further, we argued for creative reliance on common law concepts determining an employee's status based on many factors, including control over schedule. We vigorously maintained that analogous case law confirms that the requirement of "determining one's own schedule" is not defeated by the worker being obligated to keep his appointments once he accepted them. We maintained that if the DCA found that the therapists were not exempt, it would violate the letter and spirit of the law.

Fortunately, the DCA returned with a decision that it did not have jurisdiction over the therapists since they were exempt from the Act under the "hourly professional employee" exemption. The decision saved the Corporation significant sums in penalties and paid sick leave. Ultimately, the Corporation was able to continue "business as usual" to the benefit of its highly paid professionals who kept their present business model, as desired by the Corporation.

If you have questions regarding the Act (including its application to your business) or other employment law matters, please feel free to contact us.