

TIME OFF AND LEAVES OF ABSENCE OVERVIEW

for the New York Hospitality Employer

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CHAPTER 2

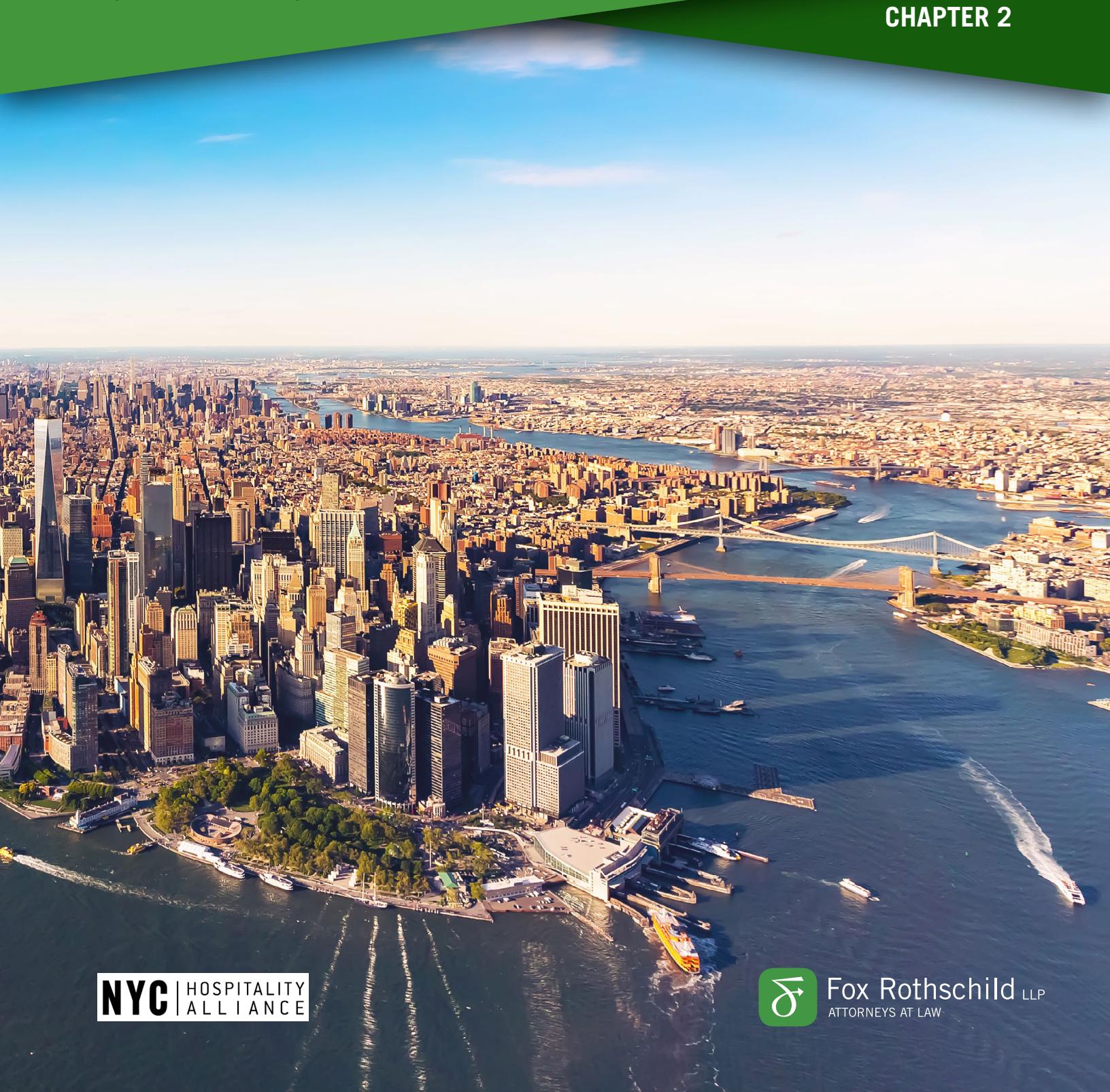


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OVERVIEW

Am I Required to Give My Employees Paid Time Off?

As of January 1, 2021, large employers in New York State (those with more than 99 employees) are required to provide up to 56 hours (seven days) of paid sick and safe leave per year to their employees; small employers (those with 99 employees or less) are required to provide up to 40 hours (five days) of sick and safe leave. In addition, certain jurisdictions in New York State have passed laws requiring employers to provide certain types of paid leave to employees. New York State has also implemented a Paid Family Leave program that provides employees with a partially paid leave of absence for an employee to care for a family member with a serious health condition, bond with a new child, or assist a loved one when a family member is deployed in military service. New York has also enacted paid sick leave requirements for employees impacted by COVID-19.

What is Paid Family Leave?

New York State's Paid Family Leave law requires employers to provide employees with job-protected time off in order to:

- Bond with a newly born, adopted or fostered child;
- Care for a family member with a serious health condition; or
- Assist loved ones when a family member is deployed abroad on active military service.

The time off is paid through insurance coverage most private employers in New York are required to carry that is typically added to the employer's existing disability benefits policy. Employees are paid a percentage of their salary while on Paid Family Leave. Costs of this insurance policy and the payments are covered by deductions from employee paychecks.

As of January 1, 2021, employees are entitled to up to 12 weeks of Paid Family Leave and to receive payment of up to 67% of the employee's Average Weekly Wage, up to 67% of the New York State Average Weekly Wage.

Full-time employees who work a regular schedule of 20 or more hours per week are eligible to take Paid Family Leave after 26 consecutive weeks of employment with their employer. Part-time employees who work a regular schedule of less than 20 hours per week are eligible for Paid Family Leave after working 175 days for their employer, which do not need to be consecutive.

Family members covered by Paid Family Leave for whom an employee may take leave to provide care for are the employee's spouse, domestic partner, child/stepchild, parent/stepparent, parent- in-law, grandparent, or grandchild.

What is Paid Sick Leave and How Do I Track it?

New York City and Westchester County both require that employers provide paid sick and safe leave to employees. As of January 1, 2021, New York State also requires that employers provide paid sick and safe leave to employees. While both sick and safe leave laws are discussed more fully below, it should be noted that New York City and Westchester employers may have one uniform sick and safe leave policy that also complies with New York State's sick and safe leave law.

New York State Paid Sick Leave

New York State recently enacted a paid sick leave law that requires employers to provide sick leave to their employees. The amount of paid sick leave that employers will be required to provide depends on the number of employees that they have during each calendar year:

- Employers with four (4) or fewer employees and a net income of \$1 million or less in the prior tax year shall provide employees with a minimum of five (5) days of unpaid sick leave each calendar year.
- Employers with four (4) or fewer employees and a net income greater than \$1 million in the prior tax year shall provide employees with a minimum of five (5) days of paid sick leave each calendar year.
- Employers with five (5) to 99 employees shall provide employees with a minimum of five (5) days of paid sick leave each calendar year.
- Employers with 100 or more employees shall provide employees with a minimum of seven (7) days of paid sick leave each calendar year.

Under the state law, an employee will be able to take sick leave for the following reasons:

- For a mental or physical illness, injury or health condition of such employee or such employee's family member, regardless of whether such illness, injury or health condition has been diagnosed or requires medical care at the time that such employee requests such leave;
- For the diagnosis, care or treatment of a mental or physical illness, injury or health condition of, or need for medical diagnosis of, or preventive care for, such employee or such employee's family member; or
- For an absence from work due to any of the following reasons when the employee or employee's family member has been the victim of domestic violence pursuant to subdivision 34 of section 292 of the executive law, a family offense, sexual offense, stalking or human trafficking:
 - To obtain services from a domestic violence shelter, rape crisis center or other services program;
 - To participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members;
 - To meet with an attorney or other social services provider to obtain information and advice on, and prepare for or participate in any criminal or civil proceeding;
 - To file a complaint or domestic incident report with law enforcement;
 - To meet with a district attorney's office;
 - To enroll children in a new school; or
 - To take any other actions necessary to ensure the health or safety of the employee or the employee's family member or to protect those who associate or work with the employee.

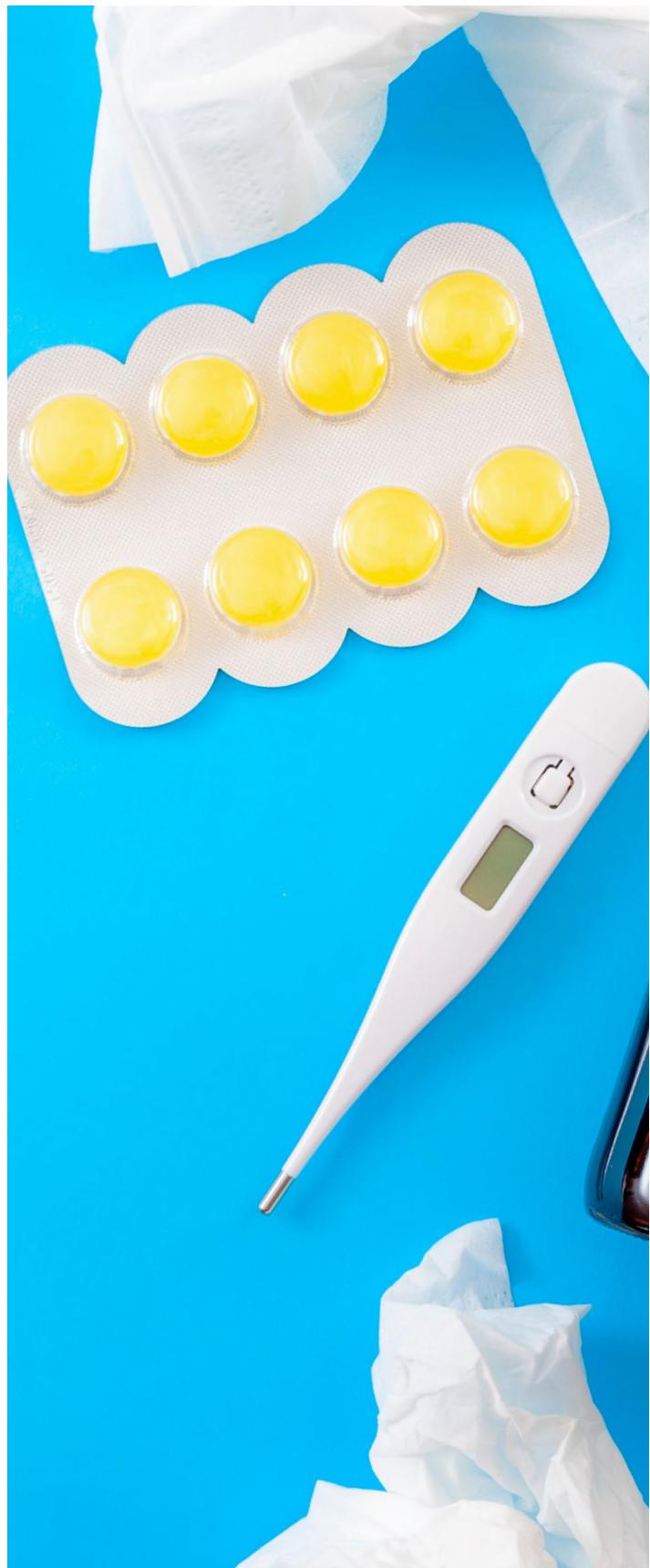
The term “family member” is defined under the law to include the employee’s child, spouse, domestic partner, parent, sibling, grandchild or grandparent, as well as the child or parent of an employee’s spouse or domestic partner. “Parent” is further defined to mean a biological, foster, step- or adoptive parent, or a legal guardian of an employee, or a person who stood in loco parentis when the employee was a minor child. “Child” is further defined to mean a biological, adopted or foster child, a legal ward, or a child of an employee standing in loco parentis.

Employees began accruing sick leave as of September 30, 2020 or at the commencement of their employment, whichever is later, at a rate of one hour of sick leave for every 30 hours worked. Employers have the option of front-loading the sick leave at the beginning of the calendar year so long as they do not reduce or revoke any leave based on the hours that the employees actually worked.

Employees may take any accrued sick leave upon accrual. Employees will be permitted to take sick leave in partial-day increments, and employers may set a reasonable minimum increment for the use of sick leave, provided it is no greater than four hours. Employers may not require employees to disclose certain confidential information in order to take the leave. Employees must be paid their regular rate of pay (or the minimum wage, if greater) when taking sick leave.

Upon returning to work, employees must be restored to the position that they held prior to the sick leave with the same pay and other terms and conditions of employment. As is typical with employment law statutes, there is a provision prohibiting employers from discriminating or retaliating against employees for exercising their rights to sick leave. Employers must allow employees to carry over any unused sick leave to the following calendar year. However, if an employer has fewer than 100 employees, the employer can limit the use of sick leave to 40 hours per calendar year, and if an employer has 100 or more employees, the employer can limit the use of sick leave to 56 hours per calendar year. Employers are not required to pay employees for unused sick leave upon their separation from employment.

The law also requires employers to provide information to employees about the amount of sick leave they have accrued and used on three (3) business days’ notice. Additionally, employers must ensure that their payroll records show the amount of sick leave provided to each employee for each week worked. Such records must be maintained for at least six years.



New York City Earned Safe and Sick Time

New York City's Earned Safe and Sick Time Act ("ESSTA") requires that employers provide employees with paid or unpaid safe and sick leave. ESSTA was amended in September 2020 to mirror many of the requirements of the New York State Paid Sick Leave Law. As with the New York State Paid Sick Leave law, the amount of sick leave an employer must provide under ESSTA will depend on the number of employees and revenue:

- Employers with four or fewer employees and net income of less than \$1 million must provide 40 hours of unpaid sick leave each calendar year.
- Employers with four or fewer employees and net income greater than \$1 million or 5-99 employees must provide 40 hours of paid sick leave each calendar year.
- Employers with 100 or more employees must provide 56 hours of paid sick leave each calendar year.

Employees must be allowed to use this leave time for any of the following reasons:

- As a result of the employee's own illness, injury or medical condition, diagnosis, or for preventative medical care;
- To care for the employee's family member who needs medical diagnosis, care or treatment for an illness or medical condition or who needs preventative medical care;
- As a result of closure of the employee's place of business by order of a public health official due to a public health emergency or such employee's need to care for a child whose school or childcare provider has been closed by order of a public health official due to a public health emergency;
- To obtain services from a domestic violence shelter, rape crisis center, or other shelter or services program for relief from a family offense matter, sexual offense, stalking, or human trafficking;
- To participate in safety planning, temporarily relocate, or take other actions to increase the safety of the employee or employee's family members from future family offense matters, sexual offenses, stalking, or human trafficking;
- To meet with a civil attorney or other social service provider to obtain information and advice on, and prepare for or participate in, any criminal or civil proceeding, including, but not limited to, matters related to a family offense matter, sexual offense, stalking, human trafficking, custody, visitation, matrimonial issues, orders of protection, immigration, housing, discrimination in employment, housing, or consumer credit;
- To file a complaint or domestic incident report with law enforcement where the employee or an employee's covered family member has been the victim of a family offense matter, sexual offense, stalking or human trafficking;
- To meet with a district attorney's office where the employee or an employee's covered family member has been the victim of a family offense matter, sexual offense, stalking or human trafficking;
- To enroll children in a new school where the employee or an employee's covered family member has been the victim of a family offense matter, sexual offense, stalking or human trafficking; or
- To take other actions necessary to maintain, improve, or restore the physical, psychological, or economic health or safety of the employee or employee's family member or to protect those who associate or work with the employee where the employee or an employee's covered family member has been the victim of a family offense matter, sexual offense, stalking or human trafficking.

For purposes of ESSTA, the term “family member” means an employee’s child, parent, spouse, domestic partner, sibling, grandparent, grandchild, the child or parent of an employee’s spouse or domestic partner, any other individual related to the employee by blood, and any other individual whose close association with the employee is the equivalent of a family relationship.

Sick leave may be provided all at once to employees at the beginning of the year or accrue over time. Employees must accrue safe and sick time at a rate of no less than one hour of leave accrued for every thirty hours worked. Employers must inform employees of the amount of leave used and accrued each pay period and the employee’s leave balance on a document issued each pay period (e.g., a pay stub). Employees must be allowed to use safe and sick leave in “reasonable” minimal daily increments, but such increments cannot be more than four hours per day. As discussed in more detail below, an employer may only ask for a doctor’s note or other documentation for an employee using time under ESSTA after that employee has been absent for more than three consecutive working days.

Westchester County Safe Leave

Westchester County’s Earned Sick Leave Law has been pre-empted by New York State’s Paid Sick Leave Law. Westchester County also requires employers to provide safe leave to employees. Employees who are victims of domestic violence or victims of human trafficking are entitled to 40 hours of paid leave, in any calendar year or consecutive 12-month period, to be defined by the employer, in order to attend/testify in criminal and/or civil court proceedings relating to domestic violence or human trafficking and/or to move to a safe location. The 40 hours of paid leave can be utilized in full days and/or increments. The law does not provide employers the right to set minimum increments for use of safe leave.

Are my Employees Entitled to Time Off to Vote?

Yes. Under New York State Election Law § 3-110, New York employees must be allowed to take up to two hours of paid time off from work to vote in any election (this includes local, state or federal) if the employee does not have sufficient time to vote on the day of the election. An employee will be deemed not to have sufficient time to vote if the time between when the polls open and the start of the employee’s shift is less than four hours or if the time the employee’s shift ends and the closing of the polls is less than four hours. The employee may be granted such time off at the beginning or end of their shift as the employer may designate. If an employee requires time off to vote, the employee must notify the employer not less than two working days before the day of the election. Employers must post a notice conspicuously in the workplace setting forth the provisions of New York State Election Law § 3-110 at least ten working days before every election and keep such notice posted until the close of polls on election day.



Does an Employer Have to Provide Employees with Vacation or Personal Leave?

No. New York law does not require that employers provide employees with vacation or personal leave.

What Happens if an Employee is Called to Jury Duty?

Do I Have to Let My Employees Serve on a Jury?

Yes, New York employers must allow employees time off from work to serve as a juror. Employees are not limited in the amount of time they may take off from work to serve as a juror. If, for example, an employee is selected for a jury on a lengthy trial, the employer must provide the employee with time off to serve on the jury for the length of that trial.

Can I Ask Employees to Work a Different Schedule When They are on Jury Duty?

Employers may change an employee's schedule to accommodate the employee's obligation to serve as a juror, but cannot change the schedule to penalize that employee. Employers also may not require an employee who serves as a juror to work on days they are normally not scheduled to work in order to make up time, nor can an employee who has reported or served for a full day of jury service be required to then work a full evening or night shift.

Do I Have to Pay My Employees While They Are On Jury Duty?

Employers are not required to pay an employee's full daily wage while the employee is reporting to serve as a juror. Employers of more than 10 employees must pay jurors a jury fee of \$40 or the employee's wage (whichever is lower) each day for the first three days of jury service. After three days, New York State pays the jury fee to jurors who are not paid at least the jury fee by their employers. Employers may not require an employee to take vacation or other paid leave while serving.



What Other Kinds of Leave Should I Be Concerned With?

Military Leave

New York employees are entitled to leave in order to fulfill their obligations to the armed forces, national guard and military reserves. This includes participation in drills and other equivalent training, reserve training, instruction, annual full-time training duty, active duty for training or other annual training. The law does not place a limitation on the amount of leave that an employee may take.

Federal FMLA

The federal Family and Medical Leave Act (“FMLA”) applies to employers in New York State if those employers have 50 or more employees. Employers must provide an eligible employee with up to 12 weeks (26 weeks to care for certain covered service members) of unpaid leave each year for any of the following reasons:

- For the birth and care of the newborn child of an employee;
- For placement with the employee of a child for adoption or foster care;
- To care for an immediate family member (i.e., spouse, child, or parent) with a serious health condition;
- To take medical leave when the employee is unable to work because of a serious health condition;
- To care for certain service members of the Armed Forces or National Guard; or
- For certain qualifying exigencies due to the employee's spouse, parent, or child being called to active duty in the Armed Forces.

Employees are eligible for leave if they have worked for their employer at least 12 months, at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles.

If an employee qualifies for a leave of absence under both the New York Paid Family Leave law and the FMLA, an employer may require the employee to use both leaves concurrently but must inform the employee of this designation. Please note, however, that there are certain types of leave that are available under FMLA but not under PFL, such as leave to care for the employee's own serious health condition. Employers need to be sure to track both PFL and FMLA time separately to ensure compliance with both laws.

Crime Victim/Witness Leave

All employees in New York State who are victims of a crime, including those who are the victim of domestic violence, or who are subpoenaed as a witness in a criminal proceeding are eligible for certain leave. The law does not specify the minimum or maximum amount of leave than an employee can take. Eligible employees are eligible for leave to appear as witnesses, consult with the district attorney, or exercise other rights under the law. “Victims” include:

- The aggrieved party;
- The aggrieved party's next of kin, if the aggrieved party died because of the crime;
- The victim's representative (for example, an attorney, guardian or parent of a minor);
- Good Samaritans; and
- Any person applying for or seeking to enforce an order of protection under the criminal procedure law or the family court act.

Family Military Leave

New York State employers with 20 or more employees working in at least one site must give an employee who works an average of twenty (20) or more hours per week and whose spouse or domestic partner is a military serviceman or servicewoman deployed during a period of military conflict up to ten (10) days of leave during the period their spouse or domestic partner is on leave from deployment.

Blood Donation Leave

New York State employers with 20 or more employees working in at least one site must provide eligible employees with time off to donate blood. An employer must either (a) grant an employee three (3) hours off work per calendar year to donate blood; or (b) allow employees to donate blood during working hours at least twice each year at a convenient time and place set by the employer, which includes at a blood drive at the employee's place of employment.

Bereavement Leave

New York State employers may, but are not required to, provide employees with funeral or bereavement leave for the death of an employee's spouse or child, parent or other relative of the spouse. If the employer chooses to provide bereavement leave, certain state law requirements apply.

Bone Marrow Donation Leave

New York State employers with 20 or more employees working in at least one site must provide eligible employees with leave time to donate bone marrow. The law applies to employees who work an average of 20 or more hours per week. Employees may take leave in order to donate bone marrow, to recover from the procedure and for resulting medical care. The employee's physician will determine the amount of leave required by the employee. However, the leave need not exceed 24 work hours unless additional leave is agreed to by the employer. There is no limitation on how frequently an employee may take such leave.

Emergency Responder Leave

Employees in New York State who are volunteer firefighters or an enrolled member of a volunteer ambulance service are entitled to a leave of absence while the employee is engaged in the performance of their duties as an emergency responder following a declaration of a state of emergency. However, an employer is not required to grant such leave if the employee's absence would impose an undue hardship on the conduct of the employer's business. The law does not provide a minimum or maximum amount of time that an employee may take. However, such leave may only be taken during a declared state of emergency.

Leave As an Accommodation

A leave of absence may be necessary as a reasonable accommodation for an employee's disability under the New York State and New York City Human Rights Laws, even if the employee would not otherwise be entitled to leave time under any applicable federal, state, or local law, or the employer's other leave policies.



Are My Employees Entitled to a Day of Rest (e.g. Time Off During the Week)?

Certain employees in New York State must be provided with at least 24 hours of rest within any calendar week. Covered employers include hotels and restaurants and employers operating factories, mercantile establishments, or freight or passenger elevators. Additionally, the following employers must provide 24 hours of rest in a given calendar week:

- For employers operating places where motion pictures are shown: projectionists, operators, engineers, or firemen.
- For employers operating a place where legitimate theater productions are shown: engineers and firemen; all other employees unless motion pictures, vaudeville, incidental stage presentations or a combination thereof are regularly given throughout the week as established policy of such place.
- For employers who are the owner, lessee and operator of a dwelling, apartment, loft and office building, garage, storage place and building: watchman or watchmen or engineer or fireman.
- For employers who are the owner, lessee or operator of a warehouse, storagehouse, office, dwelling, apartment, loft and any other building or structure: janitor, superintendent, supervisor, manager, engineer or fireman.

The following are exceptions to the requirement that the above-listed employees be provided with at least 24 consecutive hours of rest in a week:

- Foreman in charge.
- Employees in dairies, creameries, milk condenseries, milk powder factories, milk sugar factories, milk shipping stations, butter and cheese factories, ice cream manufacturing plants and milk bottling plants, where not more than seven persons are employed
- Employees engaged in an industrial or manufacturing process necessarily continuous, in which no employee is permitted to work more than eight hours in any calendar day, if approved by the State.
- Employees whose duties include not more than three hour's work on Sunday in setting sponges in bakeries, caring for live animals, maintaining fires, or making necessary repairs to boilers or machinery.
- Employees in resort or seasonal hotels and restaurants in rural communities and in cities and villages having a population of less than fifteen thousand inhabitants.
- Employees in dry dock plants engaged in making repairs to ships.

What Documents Can I Require from an Absent Employee? Can I Require a Return to Work Certificate or Medical Note from an Employee that is Absent from Work?

New York State generally does not have any requirements about the documents you can require from an absent employee. The various leave laws discussed above have different requirements.

New York State Paid Family Leave

Employees must submit a Request for Paid Family Leave form and a certification from a health care provider, documentation concerning the birth, adoption, or fostering of a child, and/or copies of duty papers or other supporting documentation concerning military deployment.

New York State Paid Sick Leave Law

The text of the New York State Paid Sick Leave Law does not address if, or under what circumstances, an employer can request documentation from an employee that supports the employee's need to take leave. Under proposed regulations that have not been enacted as of the time of this publication, employers may request a written statement from the employee that the employee needed to take leave for an eligible reason only when the employee has taken leave for more than three consecutive previously scheduled workdays or shifts. These regulations would also prohibit employers from requesting documentation from an employee's health care provider supporting the employee's need to take sick leave unless the employee has taken leave for more than three consecutive previously scheduled workdays or shifts. If an employer is permitted to request such documentation, the employer has to pay all costs/fees incurred by the employee in obtaining the documentation. Further, the documentation can only state that the employee needed to take sick leave, the duration of the leave, and when the employee can return to work; it cannot provide confidential information about the employee or any family member.

New York City Earned Safe and Sick Time Leave Law

Employers cannot require that an employee provide documentation supporting the employee's need for such leave until the employee has been absent for more than three consecutive work days and the employer has a written policy in place prior to the employee's taking of the leave that requires that such documentation be produced. For the use of sick leave, employers can require the employee to provide written documentation signed by a licensed health care provider confirming both (1) the need for the amount of sick leave taken and (2) that the use of sick leave was for a purpose authorized under the law. For the use of safe leave, the employer can require "reasonable documentation" which may include a document from a social service provider, legal service provider, or member of the clergy, a copy of a police report, court record, or a notarized letter written by the employee indicating the need for safe leave.

The documentation need only verify that there is a need to take safe leave; employers cannot require an employee to

provide the specific details of any act or threat for which the employee needs to take safe leave. Employees must be given seven days from the date they return to work to submit any requested documentation. In New York City, if an employer requires that an employee provide documentation after an absence of more than three days the employer must reimburse the employee for the costs/fees of obtaining such documentation.

Westchester County Safe Time Leave

If an employee is requesting safe time leave, the employer may request reasonable documentation demonstrating that the safe time leave has been used for a qualified purpose. The law requires that documentation and information about an employee or family member be kept confidential and not disclosed without written permission from the employee, unless such disclosure is otherwise required by law.

Can I Fire an Employee for Being Late?

There is no law in New York State that specifically prohibits an employer from terminating employees for being late. Employers must ensure, however, that the employee's lateness would not be considered protected under any of the aforementioned leave laws, or if a schedule change may be needed as an accommodation for that employee's disability, before taking any disciplinary action for a late employee. Employers must also ensure that they do not discipline employees for lateness in a discriminatory manner based on a protected class.

Can I Fire an Employee for "No-Call No-Show"?

There is no law in New York State that specifically prohibits an employer for terminating an employee who is a "no-call no-show" for a shift. Employers must ensure, however, that the employee's absence is not one that is considered protected under any of the aforementioned leave laws, or if the absence would be necessary as a reasonable accommodation for that employee's disability. For example, if an employee is unable to follow an employer's established call-in procedures because that employee has been hospitalized, employers should be prepared to excuse that absence.

Are There Any Leave Laws that Address Employees Impacted by COVID-19?

COVID-19 Sick Leave

New York State requires that employers provide sick leave for any employee “who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19.”

The amount and type of leave that must be provided depends on the number of employees an employer had as of January 1, 2020 and, for small employers, their 2019 net income:

- Employers who had ten or fewer employees as of January 1, 2020 and a 2019 net income of less than \$1,000,000 must provide unpaid sick leave and any other benefit as provided by any other provision of law to an employee under quarantine or isolation until the termination of any order of quarantine or isolation. During quarantine or isolation, employees will be eligible for New York State Paid Family Leave (PFL) and short-term disability benefits.
- Employers who had 10 or fewer employees as of January 1, 2020 and a 2019 net income greater than \$1,000,000, must provide at least five days of paid sick leave, and unpaid leave until the termination of any order of quarantine or isolation. After five days, the employee is eligible for PFL and short-term disability benefits.
- Employers who had between 11 and 99 employees as of January 1, 2020 must provide at least five days of paid sick leave, and unpaid leave until the termination of any order of quarantine or isolation. After five days, the employee is eligible for PFL and short-term disability benefits.
- Employers with 100 or more employees as of January 1, 2020 must provide at least 14 days of paid sick leave.

Sick leave required by this new law must be provided without loss of an employee's accrued sick leave. That is, this leave required for quarantined employees must be provided on top of any other sick leave already provided by an employer. To the extent any provisions of the New York law overlap with any federal law, the federal law shall apply, provided that if the provisions of New York law provide benefits in excess of federal law then employees will be able to claim such additional sick leave or benefits in the amount of such difference.

The provisions of the law do not apply in cases where an employee is deemed asymptomatic or has not yet been diagnosed with any medical condition and is physically able to work while under a mandatory quarantine through remote access or other means. Employees are also not eligible for leave under the law if the employee is subject to quarantine because: (1) the employee returned to the United States after traveling to a country for which the CDC has issued a level two or three health notice; (2) travel to that country was not taken as part of the employee's employment or at the direction of the employer; and (3) the employee was provided notice of the travel health notice and the limitations of the law prior to travel. However, such employee will still be eligible to use other accrued leave available under an employer's policy or unpaid sick leave for the duration of the quarantine or isolation.

COVID-19 Vaccine Leave Policy

Until December 31, 2022, New York State requires that employers provide paid leave to its employees for “a sufficient period of time” not to exceed four (4) hours, for each COVID-19 vaccine injection. For approved vaccines that require two injections, employees will be entitled to two separate leaves of absence (one period of leave for each injection, with each leave periods not to exceed four hours).

COVID-19 vaccination paid leave must be provided without loss to an employee's accrued sick leave.

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