

Employee Leave in New York

Navigating Legal Requirements and Practical Challenges

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Presented by

HORTON
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Leave Circumstances

- Employee's medical condition
- Family member's medical condition
- Pregnancy
- Military service
- Vacation
- Bereavement
- Miscellaneous

Common Protected Leaves

- ▶ NY Paid Sick Leave
- ▶ NY Paid Family Leave
- ▶ NY Paid COVID-19 Leave
- ▶ FMLA
- ▶ Various other specific New York leave laws
- ▶ Accommodation under the ADA or NYHRL
- ▶ Employer's discretion



FMLA / PFL

Family and Medical Leave Act

- ▶ Signed by Pres. Clinton on Feb. 5, 1993
- ▶ Provides unpaid leave to eligible employees with qualifying circumstances
- ▶ Covers all public employers
- ▶ Covers private employers with 50+ employees
- ▶ Covered employer may not have any covered employees

Eligible Employees

- ▶ Employed for at least 12 months
- ▶ Worked at least 1,250 hours in the past 12 months
- ▶ Works at a worksite where the employer employs at least 50 employees within 75 miles

Qualifying Reasons for FMLA Leave

Birth or caring for a newborn child

Placement of a child for adoption or foster care

Caring for the employee's spouse, child, or parent with a serious health condition

Serious health condition that makes the employee unable to perform the functions of their job

Qualifying exigency arising from the employees' spouse, child, or parent as a military member on covered active duty or call to active duty status

Caring for covered servicemember (spouse, child, parent, next of kin) with a serious injury or illness



Serious Health Condition

- ▶ Illness, injury, impairment or physical or mental condition
- ▶ Involves either:
 - ▶ Inpatient care, or
 - ▶ Continuing treatment by a health care provider

Continuing Treatment

- ▶ Incapacity and treatment
- ▶ Pregnancy or prenatal care
- ▶ Chronic conditions
- ▶ Permanent or long-term conditions
- ▶ Conditions requiring multiple treatments

Incapacity & Treatment

- ▶ Incapacity that lasts more than 3 consecutive days
- ▶ Plus, either:
 - ▶ Treated at least 2 times by a healthcare provider within 30 days of first day of incapacity; or
 - ▶ Treated by healthcare provider at least once resulting in regimen of continuing treatment supervised by a healthcare provider

Qualifying Military Exigencies

- ▶ Short-notice deployment
- ▶ Military events and related activities
- ▶ Childcare and school activities
- ▶ Financial or legal arrangements
- ▶ Counseling
- ▶ Post-deployment activities
- ▶ Rest and Recuperation
- ▶ Parental care



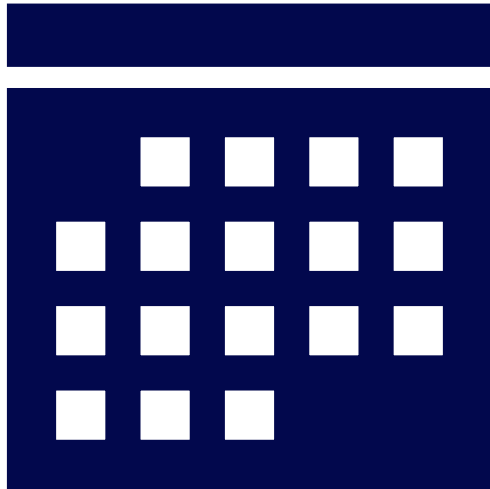
Serious Injury/Illness (Active)

- ▶ Incurred in the line of duty on active duty in the Armed Forces or aggravated by service in the line of duty, and
- ▶ May render the member medically unfit to perform the duties of the member's office, grade, rank, or rating

Serious Injury/Illness (Veteran)

- ▶ A continuation of a serious injury/illness that incurred or was aggravated during service
- ▶ A physical or mental condition with a VASDR of at least 50%
- ▶ A physical or mental condition that substantially impairs ability to work or would absent treatment
- ▶ An injury on the basis of which the veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers

Leave Allowance



- ▶ 12 weeks per year
- ▶ 26 weeks in single 12-month period for covered servicemember leave

Employer Notices

- ▶ Employee rights notice (posting & distribution)
- ▶ Eligibility/Rights/Responsibilities notice within 5 days of employee notice of need to take leave
- ▶ Designation notice



Employee Notice

- ▶ No “magic words”
- ▶ More than “sick”
- ▶ At least 30 days in advance if foreseeable
- ▶ As soon as practicable if not foreseeable
- ▶ Return certifications within 15 days

Intermittent Leave

- ▶ Allowed when medically necessary or for military-related qualifying exigencies
- ▶ Employer may permit for birth or placement of child
- ▶ Significant PFL distinction

Maintenance of Health Benefits

- ▶ Employee remains eligible for same health insurance benefits while on FMLA leave
- ▶ Employer must continue to pay premiums
- ▶ Employee must continue contributions
- ▶ If employee drops coverage during leave, must be permitted to reinstate it upon return to work

Reinstatement

- ▶ Employees retain all benefits and seniority that were accrued prior to the leave, but FMLA doesn't require that they accrue additional seniority or benefits during the leave period.
- ▶ Employees returning from FMLA leave are entitled to be restored to the same position they held when the leave commenced or to an equivalent position with equivalent pay benefits and other terms and conditions of employment.

Exceptions to Reinstatement

- ▶ Key employee, where reinstatement would cause “substantial and grievous economic injury”
 - ▶ Salaried employee
 - ▶ Among highest paid 10% of employer’s employees within 75 miles)
- ▶ Employee not required to maintain employment that would have ended or changed for reason other than FMLA leave

New York Paid Family Leave

- ▶ Took effect January 1, 2018
- ▶ Job protection and health insurance continuation like FMLA
- ▶ Adds partial wage replacement



Covered Employers

- ▶ All private companies
- ▶ Public (government) entities could opt in

Covered Employees

- ▶ Full-time employees who work a regular schedule of 20 or more hours per week are eligible after 26 consecutive weeks of employment
- ▶ Part-time employees who work a regular schedule of less than 20 hours per week are eligible after 175 days, which do not need to be consecutive
- ▶ Some employees of non-profit organization may be excluded

Non-Profit Exclusions

- ▶ Clergy and members of religious orders that are performing religious duties
- ▶ People engaged in a professional or teaching capacity in or for a nonprofit institution designated under the IRS tax code as a religious, charitable, or educational organization
- ▶ Compensated executive officers of a not-for-profit corporation or unincorporated association, if designated under the IRS tax code as a religious, charitable, or educational organization
- ▶ Persons receiving charitable aid from a religious or charitable institution who perform work in return for such aid and who are not under any express contract of hire, and certain persons receiving rehabilitation services in a sheltered workshop

Out-of-State Employers & Employees

- ▶ Employers with one or more employees in employment in NYS for 30 or more days in a calendar year must obtain disability and PFL coverage for those employees
- ▶ An employee who usually works outside NYS but occasionally comes into NYS for work is likely exempt from NYPFL
- ▶ An employer located outside of NYS does not need to cover employees who live in NYS but work outside of NYS

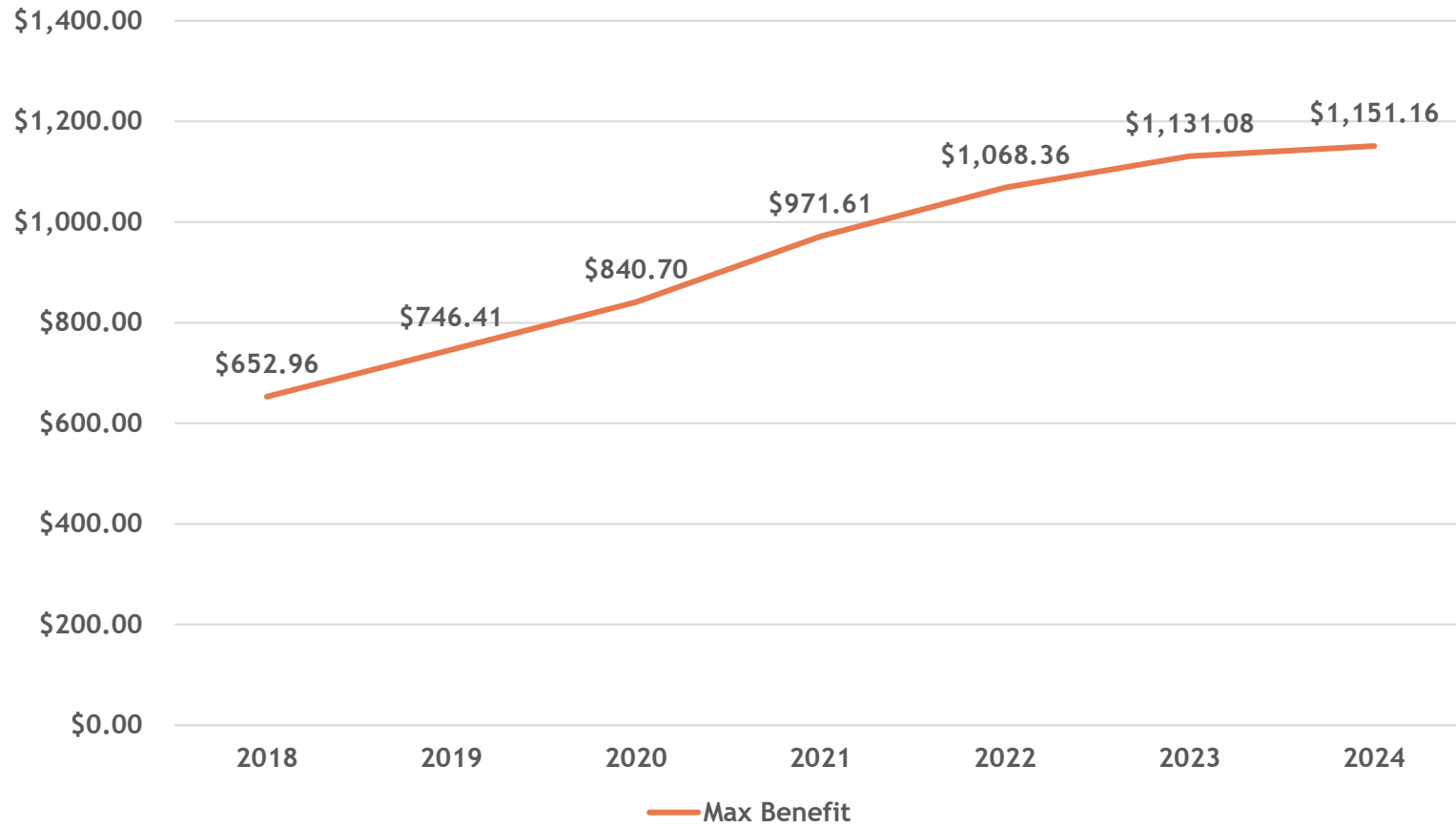
Coverage Waivers

- ▶ Employers must offer employees who will not meet the minimum eligibility requirements opportunity to waive PFL coverage
- ▶ Coverage can only be waived if the employee **will not meet** the minimum time requirements
- ▶ If an employee waives coverage, they will not make contributions and will not be eligible for PFL benefits

PFL Benefits

- ▶ 67% of average weekly wage
- ▶ Capped at 67% of the current New York State Average Weekly Wage (NYSAWW)
- ▶ 2024 NYSAWW: \$1,718.15
- ▶ 2024 max. weekly benefit: \$1,151.16
- ▶ Up to 12 weeks per year (across all employers)

Max Weekly Benefit



2024 Employee Contributions

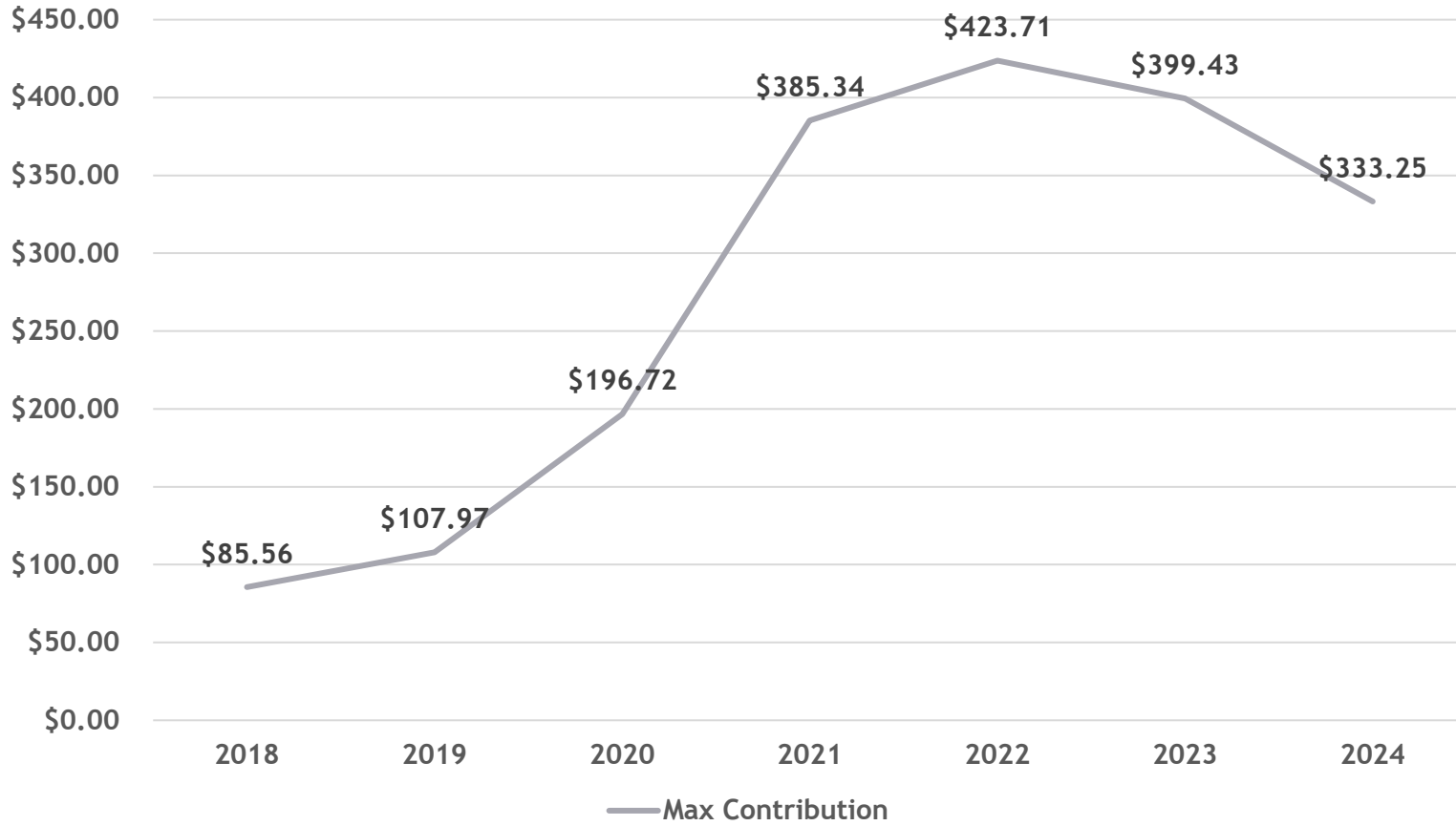


For 2024, employees will contribute 0.373% of their gross wages per pay period



The maximum annual contribution for 2024 is \$333.25

Max Annual Contribution





Qualifying Circumstances

- ▶ Bonding for birth, adoption, and foster care within 12 months of child's birth, adoption, or foster placement
- ▶ To care for a family member with a serious health condition
- ▶ To assist loved ones when a family member is deployed abroad
- ▶ In some situations when an employee or their minor dependent child is under an order of quarantine or isolation due to COVID-19

Workers' Compensation

- ▶ Applies to work-related injuries/illnesses
- ▶ Provides compensation for lost work time and payment of medical bills
- ▶ Doesn't directly entitle employee to time off
- ▶ Employer can't retaliate against employee for seeking or obtaining workers' comp. benefits

Disability Insurance

- ▶ NYS requires most employers to provide short-term disability insurance
- ▶ Typically for non-work injuries/illnesses
- ▶ Doesn't directly entitle employee to time off
- ▶ Employer can't retaliate against employee for seeking or obtaining disability insurance benefits

Covered Family Members

- ▶ Spouse
- ▶ Domestic Partner
- ▶ Child/Stepchild
- ▶ Parent/Stepparent
- ▶ Parent-in-law
- ▶ Grandparent
- ▶ Grandchild
- ▶ **Siblings (added in 2023)**



Employer Notice Requirements

- ▶ Include PFL policy in your written materials distributed to your employees, such as employee handbooks
- ▶ If there is no handbook, provide written PFL guidance to employees, including how to request PFL leave and benefits
- ▶ Post notice of compliance

Employee Notice Requirements

- ▶ 30 days' advance notice of intent to use PFL if foreseeable
- ▶ If not foreseeable, must notify as soon as possible
- ▶ Employees are responsible for submitting their requests directly to the insurer

Approval Process

- ▶ Insurance carrier, not employer, determines benefit eligibility
- ▶ Must pay or deny the employee's request within 18 calendar days of receiving the completed request for PFL or the employee's first day of leave, whichever is later
- ▶ Employees can appeal insurer determinations to arbitration
- ▶ Employer's role???

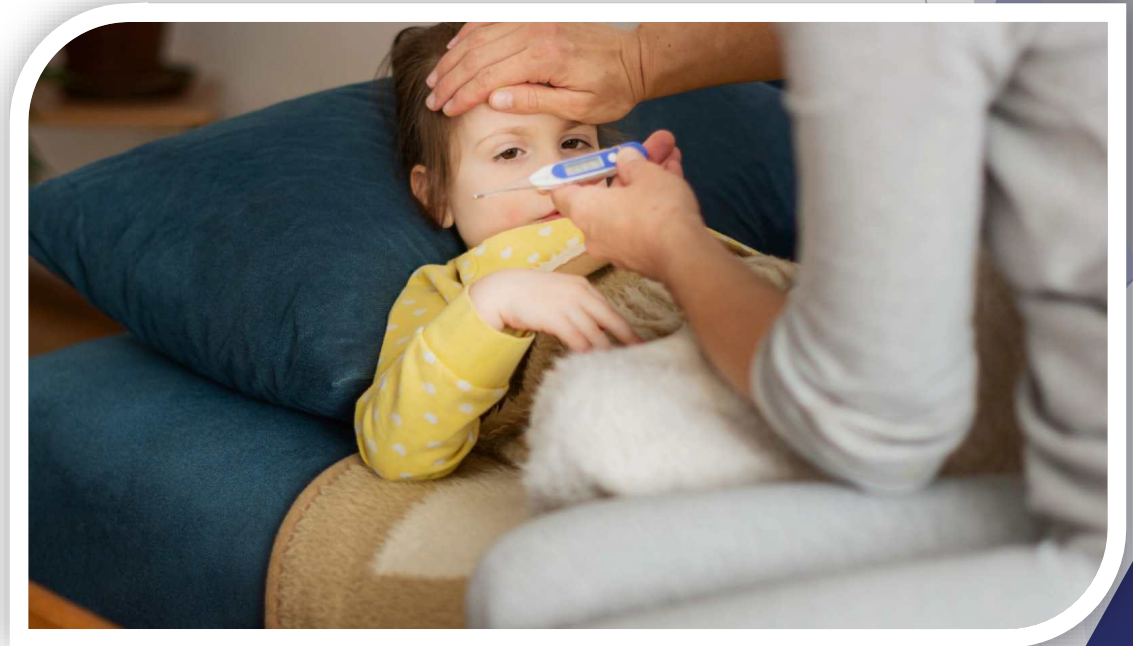
NYPFL & FMLA

- ▶ With proper designation, employers can run an eligible employee's qualifying FMLA leave and NYS PFL concurrently
- ▶ If an eligible employee declines to apply for PFL while on FMLA, the time may be deducted from PFL eligibility anyway

NYPFL & Short-term Disability

- ▶ Employees with a non-work injury or illness may be eligible for short-term disability benefits
- ▶ PFL does not replace disability benefits coverage
- ▶ After giving birth, a worker may be eligible for both short-term disability benefits and Paid Family Leave.
 - ▶ cannot be taken at the same time
 - ▶ eligible employees can choose what to use
- ▶ Employees cannot take more than 26 weeks of combined DBL and PFL benefits in a 52-week period

NY Paid Sick Leave



New York Paid Sick Leave

- ▶ Doesn't apply to public (governmental) employers/employees
- ▶ Accrual began September 30, 2020
- ▶ Leave began January 1, 2021

Leave Requirements

- ▶ Up to 56 hours of paid leave per year based on employer size
- ▶ Accrue at least 1 hour per 30 hours physical worked within New York
- ▶ Can be combined with other leaves (e.g., PTO)

Annual Max. Leave

- ▶ Under 5 employees – 40 hours (unpaid, unless employer net income > \$1 million)
- ▶ 5-99 employees – 40 hours, paid
- ▶ 100+ employees – 56 hours, paid
- ▶ Employers must allow employees to carryover unused time from year-to-year

Payout

- ▶ No requirement to pay unused sick leave at end of employment (or any other time)
- ▶ But must have clear policy on this
- ▶ “Seasonal employees” maintain accrued leave despite normal breaks in employment

NYS Paid Sick Situations

- ▶ Absences related to mental or physical illness, injury, or health condition of either employee or an employee's family member, regardless of whether such illness, injury or health condition has been diagnosed or requires medical care at the time leave is requested
- ▶ Diagnosis, care, or treatment of a mental or physical illness, injury, or health condition of, or need for medical diagnosis of, or preventative care for either the employee or an employee's own family member
- ▶ Absences related to domestic violence

Family Member



- ▶ Child
- ▶ Spouse
- ▶ Domestic Partner
- ▶ Parent
- ▶ Sibling
- ▶ Grandchild
- ▶ Grandparent
- ▶ Child/parent of spouse/domestic partner

Safe Leave

- ▶ Obtain services from a domestic violence shelter, rape crisis center, or other services program
- ▶ Participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or their family members
- ▶ 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
- ▶ File a complaint or domestic incident report with law enforcement
- ▶ Meet with the district attorney's office
- ▶ Enroll children in a new school
- ▶ Take any other actions necessary to ensure the health or safety of the employee or a family member or to protect those who associate or work with the employee

Notice

- ▶ Employee only has to request sick leave before taking time off
- ▶ No minimum time required/permitted
- ▶ Employers may allow employees to use leave even without prior notice
- ▶ Can't require employee to disclose confidential medical information or information related to safe leave circumstances as condition of taking sick leave

Leave Increment

- ▶ Must be “reasonable”
- ▶ Minimum increment can't be longer than 4 hours
- ▶ Must provide written notice of any restrictions regarding increments and total annual utilization



Prenatal Leave

- Takes effect January 1, 2025
- Employees entitled to 20 hours of paid prenatal leave during any 52-week calendar period
- Beyond existing sick leave entitlement
- Used for “health care services received by an employee during their pregnancy or related to such pregnancy, including physical examinations, medical procedures, monitoring and testing, and discussions with a health care provider related to the pregnancy”
- Available in hourly installments

COVID-19 Leave





Paid COVID-19 Leave

- Existing law expires July 31, 2025
- Some uncertainty whether it's still practically available in most cases due to current guidelines

Leave Parameters

- ▶ Applies to all New York public and private employers of any size
- ▶ Limited to employees unable to work because of **quarantine/isolation orders**
- ▶ Employee benefits vary based on size of business (5-14 days, paid or unpaid)
- ▶ NYS DOL allows up to 3 such leaves; 2nd and 3rd must be based on positive test

Leave as an Accommodation



Federal Accommodation Rights

- Disability (ADA)
- Religion (Title VII)
- Pregnancy, Childbirth, or Related Medical Conditions

NYS Accommodation Rights

- Religion
- Disability
- Pregnancy-related Condition
- Victim of Domestic Violence

NYC Accommodation Rights

- Religion
- Disability
- Pregnancy, Childbirth, or Related Medical Conditions (including lactation needs)
- Status as a Victim of Domestic Violence, Sex Offense, or Stalking

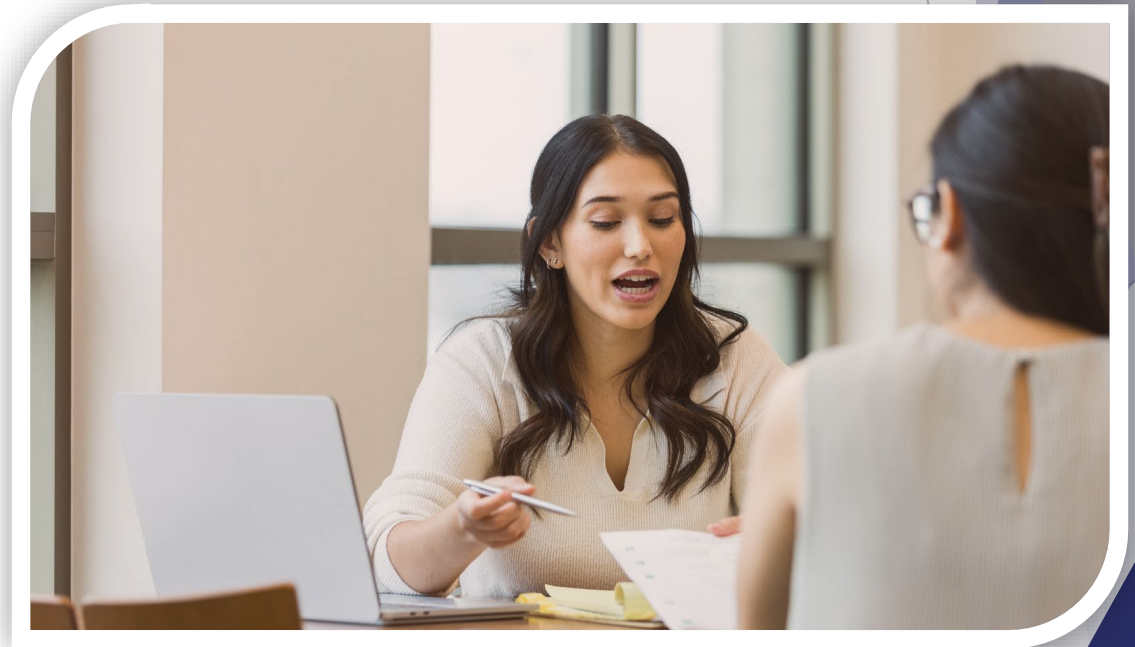
Leave Accommodations

- Both the ADA and HRL regulations recognize that “modified work schedules” might be a reasonable accommodation in some cases
- Both the EEOC and NYS Division of Human Rights take the position that some period of time off might qualify
- Like other accommodations, must weigh factors to determine whether leave poses an undue hardship to the employer
- Satisfying FMLA, paid sick leave laws (where applicable), etc., does not preclude possibility that additional leave would be considered reasonable

Maximum Leave Policies

- Historically, EEOC has opposed employer policies that dictate that an employee's employment will automatically end after a specified period of leave
- Periods as long as 6 or 12 months (or even longer) remain questionable
- Safer approach is to have guideline maximum with possibility of extension for reasonable additional time period

Best Practices



Managing Employee Leave Requests

- Update and follow policies consistently
- Train supervisors on procedures
- Get them the right person ASAP
- Handle medical issues carefully
- Assume leave will be available, but consider all necessary requirements and conditions



Documenting Employee Leave

- FMLA and PFL have formal documentation
- Various ways to communicate other leave requests
- Medical records may be necessary in some cases
- Confidentiality should be maintained

Terminating Employees on Leave

- Seek legal advice
- Many potential protections, but employees don't have the right to be away from work as long as they want
- Avoid retaliation/discrimination
- Be careful with documentation

Leave Discrimination

- ▶ NY Labor Law expressly prohibits adverse action based on employee's use of "any legally protected absence pursuant to federal, local, or state law"
- ▶ Prohibited conduct includes "assessing any demerit, occurrence, any other point, or deductions from an allotted bank of time, which subjects or could subject an employee to disciplinary action, which may include but not be limited to failure to receive a promotion or loss of pay"
- ▶ Aims to eliminate "no-fault" attendance policies

Questions?



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