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UPDATED Legal Alert: Employers Must Grant Schedule Changes under NYC's Fair Work Leave Law

Effective July 18, 2018, New York City employers must permit most employees to "temporarily change" their work schedule to attend to certain "personal events," and must consider requests for schedule changes for any other reason, following amendments to the city's Fair Work Leave Law. The law imposes a specific process for employee requests and employer responses. The New York City Department of Consumer Affairs, which enforces this law, has just issued materials interpreting the law, including an overview for employers and employees (https://www1.nyc.gov/assets/dca/downloads/pdf/workers/TemporaryScheduleChange-Overview.pdf) and a detailed FAQ (https://www1.nyc.gov/assets/dca/downloads/pdf/workers/FAQs-TemporaryScheduleChangeLaw.pdf).

Employers are required to post a notice about the law in English as well as in any language spoken by at least twenty per cent of the workforce. The English version can be found here:

https://www1.nyc.gov/assets/dca/downloads/pdf/workers/TemporaryScheduleChange-Notice-English.pdf

A "temporary change" is a limited alteration in time or location, including, but not limited to:

- Using paid time off;
- Working remotely;
- Swapping or shifting work hours; and
- Using short-term unpaid leave.

"Personal events" under the Fair Work Leave Law include:

- The need for a caregiver to provide care to a minor child[1] or care recipient[2];
- Attendance at a legal proceeding or hearing involving subsistence benefits to which the employee's family member or the employee's care recipient is a party; or
- Safe or sick time pursuant to New York City's Earned Safe and Sick Time Act ("ESSTA")[3].

[1] "Minor child" means a child who is under 18 years old.
[2] "Care recipient" means a disabled person residing in the employee's home who relies on the employee for medical care or the needs of daily living.
[3] ESTA has also been amended to expand the definition of family member, and to provide for "safe time." See http://www.lawyersalliance.org/pdfs/news_legal/New_York_City_Earned_Sick_Time_Act_Legal_Alert_May_2018_FINAL.pdf

Employers must grant schedule changes of up to one business day per request, no more than twice per calendar year, for specified personal events, and may grant such requests for other reasons. An employer also fulfills its obligation by permitting an employee to use two business days for one request. Employers must grant requests in most cases; there is no "undue hardship" defense.

Note: Temporary schedule changes for personal events must be granted **in addition to** time off under the ESSTA, although events that qualify for safe or sick time under ESSTA also qualify for a temporary schedule change.

EMPLOYEE REQUEST REQUIREMENTS:

To request a schedule change, employees must:

- Notify their employer or direct supervisor as soon as they become aware of their need for a temporary change to their work schedule resulting from a personal event (this initial request *does not* need to be in writing);
- Propose a temporary change to their work schedule (unless they seek leave without pay); and
- Submit a request in writing (as soon as is practicable), and no later than the second business day after they return to work, indicating the date for which the change was requested and that it was due to a personal event. If the employee fails to do this, an employer need not grant the request.
    - "Writing" can include electronic communications normally used by the employer and employee.
- IMPORTANT: An employee's failure to submit the request in writing does not relieve the employer from granting the request if the employee is eligible. It merely means that the employer is relieved of its obligation to respond in writing.

EMPLOYER RESPONSE REQUIREMENTS:

An employer that receives a request for a schedule change must respond "immediately," but need not put this initial response in writing. However, as soon as is practicable, and no later than 14 days after an employee submits the request in writing, the employer must provide a written response, which may be in electronic form if such form is easily accessible to the employee and must include:

- Whether the employer will agree to the temporary schedule change in the manner requested by the employee, or will provide the temporary change to the work schedule as leave without pay (which does not constitute a denial);
    - IMPORTANT Employers cannot force an employee to take a temporary schedule change in some way other than that suggested by the employee. An employer may only grant the temporary schedule change as requested by the employee, or grant unpaid time off.

- If the employer denies the request for a temporary change to the work schedule, an explanation for the denial; and
- How many temporary change requests and how many business days the employee has left in the calendar year after taking into account the employer's decision contained in the written response.

Exceptions:

An employer may deny requests for temporary schedule changes ONLY if the employee:

- has already exhausted his or her two allotted requests in the calendar year;
- has been employed by the employer for fewer than 120 days;
- works fewer than 80 hours in the city in a calendar year;
- is covered by a valid collective bargaining agreement that waives the aforementioned rights and addresses temporary changes to work schedules; or
- performs certain exempt work for certain employers in the entertainment industry.

As with all other employee protective laws, employers may not retaliate against employees who have requested or received temporary schedule changes.

Remedies

Employers that fail to grant requests for temporary schedule changes may be assessed with civil penalties of $500 per violation, payable to the employee, who may also be reinstated with back pay if terminated. Employers whose only violation is a failure to provide written notice will be given an opportunity to cure by the city's Office of Labor Standards, which will enforce the law.

What This Means for Employers

New York City employers should:

- Post the notice in a place where employees are likely to see it;
- Review existing employee handbooks, reasonable accommodation processes, personal leave rules and forms;
- Develop a system to track requests and responses; and
- Train supervisors about the need to respond in writing to an employee's request for a temporary schedule change because of a "personal event" or other reasons.

Note that New York State is in the process of finalizing its own rules related to scheduling employees. Lawyers Alliance will provide an alert on the state's rules as soon as available.

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Judith Moldover at (212) 219-1800 ext. 250 or visit our website at www.lawyersalliance.org for further information.

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