

New York City Gives Employees the Right to Change Work Schedules Temporarily for “Personal Events”

February 7, 2018

By [Susan Gross Sholinsky](#), [Dean L. Silverberg](#), and [Nancy Gunzenhauser Popper](#)

OVERVIEW

On January 19, 2018, New York City adopted [Int. 1399-A](#) (“Law”), which will require New York City employers to provide most city-based employees with up to two temporary schedule changes (or permission to take unpaid time off) per calendar year due to a “personal event,” such as a caregiving emergency. In essence, the Law establishes a process and timeframe for employees and employers to communicate regarding schedule change requests, provides employees with the right to request other schedule changes in accordance with the Law’s procedures (although these additional requests need not be granted), and protects employees from retaliation for making any such requests. The Law becomes effective on July 18, 2018.

THE DETAILS

Under the Law, a “personal event” triggering the right to a temporary schedule change includes:

- the need for a caregiver to provide care to a minor child or care recipient;¹
- an employee’s need to attend a legal proceeding or hearing for subsistence benefits to which the employee, a family member, or the employee’s care recipient is a party; or
- any circumstance that would constitute a basis for the permissible use of safe time or sick time under New York City’s Earned Safe and Sick Time Act (“ESSTA”).²

¹ “Care recipient” means a person with a disability who (i) is a family member or a person who resides in the caregiver’s household, and (ii) relies on the caregiver for medical care or to meet the needs of daily living.

² For information about the ESSTA, please see the Epstein Becker Green *Act Now Advisory* titled “[NYC Mayor de Blasio Signs Law Expanding Earned Sick Time Act to Include ‘Safe Time.’](#)”

The Law defines a “temporary” schedule change as “a limited alteration in the hours or times that[,] or locations where[,] an employee is expected to work, including, but not limited to, using paid time off, working remotely, swapping or shifting work hours and using short-term unpaid leave.” With a few exceptions, an employer must grant a request for a temporary change to the employee’s work schedule two times in a calendar year for up to one business day per request. The employer may permit the employee to use two business days for one request, in which case, the employer need not grant a second request. Importantly, permission to take the requested temporary schedule change as unpaid leave satisfies the employer’s obligation under the Law.

Employee’s Request Process

An employee who requests a temporary schedule change for a covered personal event must:

- notify his or her employer or direct supervisor as soon as the employee becomes aware of the need for the schedule change and state that the change is due to a personal event;
- make a proposal for the temporary change to the work schedule (unless the employee seeks leave without pay); and
- submit the request in writing; however, the initial request need not be in writing, but such written request must be made as soon as is practicable, and no later than the second business day after the employee returns to work following the conclusion of the temporary change to the work schedule. The written request must state the date for which the schedule change was requested and that it was due to the employee’s personal event.³ If the employee fails to submit the written request, the employer is not obligated to provide a written response (discussed below).

Employer’s Response Process

Upon receiving a proper request for a temporary schedule change due to a covered personal event, an employer must respond “immediately.” The response need not initially be in writing. However, a written response must be provided to the employee as soon as is practicable, but no later than 14 days after the employee submits the request in writing.⁴

An employer’s written response must:

- indicate whether the employer will agree to the temporary change to the work schedule in the manner requested by the employee, or will provide the temporary

³ The employer may require that the request be submitted in electronic form if employees commonly use such electronic form to request and manage leave and schedule changes.

⁴ The employer’s response may be in electronic form if such form is easily accessible to the employee.

change to the work schedule as leave without pay (which does not constitute a denial);

- if the employer denies the request for a temporary change to the work schedule, include an explanation for the denial; and
- indicate how many temporary schedule change requests and how many business days the employee has remaining in the calendar year, taking into account the employer's response to the employee's request.

Exemptions: Grounds for Denying a Temporary Schedule Change

An employer need not grant a request for a temporary change to an employee's work schedule relating to a personal event if the employee has already exhausted his or her two allotted requests in the calendar year (or was granted a schedule change of two business days for one request), or if the employee:

- has been employed by the employer for fewer than 120 days;
- works fewer than 80 hours in New York City in a calendar year;
- is covered by a valid collective bargaining agreement that waives the provisions of the Law and addresses temporary changes to work schedules;⁵ or
- is employed by an employer in the entertainment industry (e.g., movie, theater, television), except for employees:
 - who primarily perform office or non-manual work related to the management or general business operations of the entertainment industry employer or the employer's customers; or
 - whose primary duty is performing routine mental, manual, mechanical, or physical work in connection with the care or maintenance of an existing building or location used by the entertainment industry employer.

Other Provisions: Use of Leave Under the ESSTA

An employee is not required to use leave accrued under the ESSTA before requesting a temporary schedule change under the Law. Moreover, unpaid leave granted for a personal event pursuant to the Law does not run concurrently with ESSTA leave, and the ESSTA may not be used to satisfy the requirements of the Law.

⁵ For employees covered by a valid collective bargaining agreement when the Bill goes into effect on July 18, 2018, the Bill will take effect for them on the termination date of their collective bargaining agreement.

In addition to not affecting employees' rights under the ESSTA, the Law does not impact employees' rights and employers' obligations under any other federal, state, or local law with respect to an employee's entitlement to leave or reasonable accommodation.

Penalties for Violations

Under the Law's non-retaliation provisions, employers may be required to pay aggrieved employees all compensatory damages and other relief "required to make the employee or former employee whole." Also, an employer may be ordered to rescind any discipline issued, reinstate a terminated employee, and pay back pay for any loss of pay or benefits resulting from the discipline or other action taken in violation of the Law. In addition to these compensatory damages, penalties for violations include \$500 for each violation not involving termination and \$2,500 for each violation involving termination.

Further, an employer that fails to provide the written response described above can be fined \$500 and ordered to comply. The fine will not be assessed, however, if the employer cures its failure to provide the response within seven days of being notified of its failure by the Office of Labor Standards ("OLS")⁶ and provides proof to the OLS of same (to the OLS's satisfaction).

Caveat: The Law Will Likely Have Larger Implications for Employers

Notably, one provision of the Law is much broader in scope than may first appear—the Law contains a somewhat vague provision that permits an employee, using the process set forth above, *to request a work schedule change other than the temporary changes covered by the Law*, and requires the employer to follow the "response" process outlined above "to the extent possible" when deciding whether to grant or deny that request. Importantly, however, the Law does not require the employer to grant any such request. The Law also gives the Director of the OLS authority to develop rules governing this process.

When contacted for clarification, a representative for the Law's sponsor, Council Member Debi Rose, advised that the "response" process applies "to the extent applicable," and that the OLS will manage the "response" process through Department of Consumer Affairs' rulemaking procedures. Moreover, the representative stated:

The non-retaliation provisions apply to all requests even beyond the first two [temporary schedule change requests per calendar year] ... whether covered by the right to receive [the temporary schedule change] or not and without limit on number.

Thus, depending upon how the Director of the OLS interprets this provision, the Law could ultimately establish an employer obligation to follow the Law's prescribed process when responding to employee requests for a variety of flexible work arrangements, including permanent ones. Indeed, such an interpretation would be consistent with the

⁶ The OLS is housed within the Department of Consumer Affairs.

Law's original, much broader intent, which was to permit employees to request a wide range of "flexible work arrangements," including a modified work schedule, part-time employment, job-sharing arrangements, and the ability to work from home or another location.⁷

What New York City Employers Should Do Now

- Review, and, if necessary, revise your current policies and procedures on temporary schedule changes to ensure that they are consistent with the procedures set forth above. Also, make certain that the policies and procedures are uniformly applied to all employees' requests for temporary schedule changes relating to personal events.
- Train all managers and supervisors who could receive requests for schedule changes on the requirements of the Law and any changes to your policies and procedures resulting from the Law.
- When reviewing and/or revising your current policies and procedures, take into consideration the possibility that the Law may be liberally interpreted by the Director of the OLS. (We will provide an update if and when the Director of the OLS issues rules on this Law.)

For more information about this Advisory, please contact:

Susan Gross Sholinsky
New York
212-351-4789
sgross@ebglaw.com

Dean L. Silverberg
New York
212-351-4642
dsilverberg@ebglaw.com

**Nancy Gunzenhauser
Popper**
New York
212-351-3758
npopper@ebglaw.com

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

⁷ See [Int. No. 1399](#).