



OVERVIEW OF RECENT TRENDS IN EMPLOYMENT LAW

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TOPICS

- Legal developments following the #MeToo movement
- Tips on addressing sexual harassment issues in the workplace
- New York State Paid Family Leave Law
 - Interactions with federal law and employment policies
- Workplace accommodations
- Recent wage & hour developments
 - Off-the-clock litigation

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LEGAL DEVELOPMENTS IN THE #METOO ERA

- Transformation of workplace culture
- Stringent workplace sexual harassment laws passed by New York State and New York City
- Annual sexual harassment training requirements
- Sexual harassment policies
- Sexual harassment complaint forms
- Required notices

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NEW YORK STATE LAWS ON SEXUAL HARASSMENT



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NEW YORK STATE REQUIREMENTS

- On April 12, 2018, Governor Cuomo signed into law the 2019 New York State Budget, updating the State's sexual harassment laws.
- New laws:
 - Sexual harassment prevention policy
 - Sexual harassment complaint form
 - Sexual harassment training
 - Non-employees protected in the workplace
 - Independent contractors
 - Subcontractors
 - Vendors
 - Consultants
 - Others providing services in the workplace

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SEXUAL HARASSMENT PREVENTION POLICY

- As of October 2018, employers must adopt a sexual harassment prevention policy that meets or exceeds the law's minimum standards.
 - Prohibit sexual harassment consistent with guidance issued by the DOL and the Division of Human Rights
 - Provide examples of conduct that would constitute unlawful sexual harassment
 - Include information concerning the federal and state laws concerning sexual harassment, remedies available, and a statement that there may be local laws
 - Include a complaint form

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SEXUAL HARASSMENT PREVENTION POLICY (CONT.)

- Include a procedure for the timely and confidential investigation of complaints
- Inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially
- State that sexual harassment is considered a form of employee misconduct and sanctions will be enforced against perpetrators of sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue
- Retaliation against individuals who complain or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful

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SEXUAL HARASSMENT PREVENTION POLICY: MODEL POLICY

- New York State has published a model policy on its website
- Policy must be in writing
- Best practices: obtain an acknowledgment form from employees
- Employers may provide their policy to employees in writing, but employees must be able to access the policy on an employer-provided computer and be able to print a copy for their records.

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SEXUAL HARASSMENT TRAINING UNDER NYS LAW

- As of October 9, 2018, employers are required to provide ALL employees with **interactive training** on an **annual basis**.
 - Includes temporary, part-time, and seasonal employees
- For this year, all employees must complete the training by October 9, 2019.
- As employers may be liable for the actions of employees immediately upon hire, the State encourages training as soon as possible.

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SEXUAL HARASSMENT TRAINING: WHAT IS INTERACTIVE?

- New York State has defined “interactive” to mean requiring some form of employee participation
 - Examples:
 - Web-based training with questions for employees to answer, which they must answer correctly
 - Web-based training where employees have an option to submit a question online and receive an answer immediately or in a timely manner
 - Live training with Q&A session
 - Web-based or live training that require feedback from employees about the training and the materials presented



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RELATED STATE LAWS

- **Nondisclosure Agreements Regulated**
 - Since July 11, 2018, agreements settling claims of sexual harassment cannot include non-disclosure provisions unless the condition of confidentiality is the employee's "preference."
 - Employees must be given 21 days to consider any settlement agreement and to decide whether they prefer that it contain a non-disclosure provision, and then given 7 days to revoke the agreement.
- **Arbitration Provisions**
 - Since July 11, 2018, most new employment contracts cannot require employees to submit to mandatory arbitration to resolve any allegation or claim of sexual harassment.

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NEW YORK CITY LAWS ON SEXUAL HARASSMENT

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NYC REQUIREMENTS

- On May 9, 2018, Mayor Bill de Blasio signed the “Stop Sexual Harassment in NYC Act.”
- This Act is a comprehensive legislative package aimed at addressing and preventing sexual harassment in the workplace.
- **Expands the NYC Human Rights Law**
- **Required notices**
- **Distribution of sexual harassment factsheet**
- **Annual training requirements**

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NYC: EXPANDED PROTECTIONS

- **NYC Human Rights Law expanded in cases of gender-based harassment**
 - Statute of limitations increased from 1 to 3 years
 - Expands protections to all employees
 - Size of employer does not matter

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NYC: REQUIRED NOTICE

All employers required to display anti-sexual harassment rights and responsibility notices in both English and Spanish.

STOP SEXUAL HARASSMENT ACT NOTICE

All employers are required to provide written notice of employees' rights under the Human Rights Law both in the form of a displayed poster and as an information sheet distributed to individual employees at the time of hire. This document satisfies the poster requirement.

The NYC Human Rights Law

The NYC Human Rights Law, one of the strongest anti-discrimination laws in the nation, protects all individuals against discrimination based on gender, which includes sexual harassment in the workplace, in housing, and in public accommodations like stores and restaurants. Violators can be held accountable with civil penalties of up to \$250,000 in the case of a willful violation. The Commission can also assess emotional distress damages and other remedies to the victim, require the violator to undergo training, and mandate other remedies such as community service.

Sexual Harassment Under the Law

Sexual harassment, a form of gender-based discrimination, is unwelcome verbal or physical behavior based on a person's gender.

Some Examples of Sexual Harassment

- unwelcome or inappropriate touching of employees or customers
- threatening or engaging in adverse action after someone refuses a sexual advance
- making lewd or sexual comments about an individual's appearance, body, or style of dress
- conditioning promotions or other opportunities on sexual favors
- displaying pornographic images, cartoons, or graffiti on computers, emails, cell phones, bulletin boards, etc.
- making sexist remarks or derogatory comments based on gender

Retaliation Is Prohibited Under the Law

It is a violation of the law for an employer to take action against you because you oppose or speak

out against sexual harassment in the workplace. The NYC Human Rights Law prohibits employers from retaliating or discriminating "in any manner against any person" because that person opposed an unlawful discriminatory practice. Retaliation can manifest through direct actions, such as demotions or terminations, or more subtle behavior, such as an increased work load or being transferred to a less desirable location. The NYC Human Rights Law protects individuals against retaliation who have a good faith belief that their employer's conduct is illegal, even if it turns out that they were mistaken.

Report Sexual Harassment

If you have witnessed or experienced sexual harassment inform a manager, the equal employment opportunity officer at your workplace, or human resources as soon as possible.

Report sexual harassment to the NYC Commission on Human Rights. Call 718-722-3131 or visit NYC.gov/HumanRights to learn how to file a complaint or report discrimination. You can file a complaint anonymously.

State and Federal Government Resources

Sexual harassment is also unlawful under state and federal law, where statutes of limitations vary. To file a complaint with the New York State Division of Human Rights, please visit the Division's website at www.dhny.gov.

To file a charge with the U.S. Equal Employment Opportunity Commission (EEOC), please visit the EEOC's website at www.eeoc.gov.

NYC Commission on Human Rights
BILL DE BLASIO Mayor
CARMELYN P. MALAIS Commissioner/Chair

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NYC: DISTRIBUTE FACTSHEET

All employers required to distribute a factsheet to individual employees at the time of hire, which may be included in the employee handbook.

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NYC Commission on Human Rights
BILL DE BLASIO Mayor
CARMELYN P. MALAIS Commissioner/Chair

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NYC: ANNUAL TRAINING

- Employers with 15 or more employees must conduct annual anti-sexual harassment training for **all employees**.
- Effective April 2019, employers have one (1) year to implement training for **all employees** and must ensure employees are trained annually for each following year.

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NYC: ANNUAL TRAINING CRITERIA

- Explain that sexual harassment is a form of unlawful discrimination under the laws;
- A description of what sexual harassment is, using examples;
- Internal complaint process available to employees;
- The complaint process available through the NYC Commission, the NYS Division of Human Rights and the EEOC, including contact information;
- The prohibition of retaliation including examples;
- Information concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention; and
- The specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation, and measures that such employees may take to appropriately address sexual harassment complaints.

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NYC: ANNUAL TRAINING RECORDS

- Employers must keep records of:
 - All trainings
 - Signed employee acknowledgment
- Records may be kept electronically



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TIPS FOR ADDRESSING WORKPLACE HARASSMENT

- **Develop and communicate a comprehensive policy**
- **Train all employees**
 - Specialized training for managers and supervisors
 - Emphasize personal liability
- **Establish an objective reporting and investigation process**
- **Maintain general objectivity**
 - Avoid coming to any conclusions until investigation is complete
- **No retaliation**
- **Interview witnesses and those involved**
- **Look for corroboration or contradiction**
- **Document everything!**
- **Disciplinary action against harassers**

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NEW YORK STATE PAID FAMILY LEAVE



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PAID FAMILY LEAVE (PFL)

In 2019, PFL gives eligible employees the right to take a leave of absence for up to 10 weeks for specified reasons and receive time off and wage replacement benefits during leave, paid by employee payroll contributions.

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PAID FAMILY LEAVE ELIGIBILITY

Eligible Employees

- Full-Time Employees
 - Employees who regularly work 20+ hours per week after 26 consecutive weeks of employment
- Part-Time Employees
 - Employees who regularly work less than 20 hours per week after working 175 days of employment (non-consecutive)

Reasons for Leave

- Bond with a newly born, adopted, or fostered child
- Care for a family member with a serious health condition
- Assist a family member who is deployed on active military service

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PAID FAMILY LEAVE (PFL)

Employee Requirements

- Must request leave 30 days in advance when the leave is foreseeable
- Must provide notice as soon as possible when the leave is unforeseeable
- Must submit their completed request package to the insurance carrier within **30 days after** the start of leave
- Employees must make payroll contributions for PFL benefits

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PAID FAMILY LEAVE (PFL)

Employer Responsibilities

- Must have PFL insurance
- Must withhold employee payroll contributions for PFL benefits
- Must complete Request for Paid Family Leave Form (Form PFL-1) and return to employee within **3 business days** of receipt
- Must restore employee to original or equivalent job upon return
- Must not fire or discriminate against any employee for using PFL rights

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PAID FAMILY LEAVE: WAIVERS

Employer Responsibilities

- Identify employees who qualify for a **waiver**.
- Employees who qualify for a waiver:
 - regularly work less than 20 hours per week and will not work 175 days in a year, or
 - regularly work 20 or more hours per week, but are not employed for 26 consecutive weeks.
- Provide employees qualifying for a waiver with the PFL Waiver Form

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PAID FAMILY LEAVE: WAIVERS

Employer Responsibilities (cont.)

- If employees waive coverage, they will not make payroll contributions and are not eligible for PFL
- Keep a copy of fully-executed waivers on file for as long as the employee remains in employment with the covered employer.
- If an employee's schedule changes such that they will meet the minimum eligibility requirements for eligibility, waiver is automatically revoked. Employees can voluntarily revoke waiver at any time.
- If a waiver is revoked (either automatically or by the employee) you may begin taking payroll deductions and may retroactively collect deductions from the date the waiver was signed.

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PAID FAMILY LEAVE: WAIVERS

PAID FAMILY LEAVE
EMPLOYEE OPT-OUT OF PAID FAMILY LEAVE BENEFITS

Information on the option to opt-out of paid family leave and decisions for completing this form can be found on page 2.

Employer Information
 1. EMPLOYER'S NAME, INCLUDING DBA/TRADE NAME
 2. ADDRESS
 3. CITY, STATE AND ZIP CODE
 4. EMPLOYER'S PHONE NUMBER
 5. TELEPHONE NUMBER

Employee Information
 6. EMPLOYEE'S NAME
 7. HOME ADDRESS
 8. CITY, STATE AND ZIP CODE
 9. TELEPHONE NUMBER

Employment Information
 10. AVERAGE NUMBER OF HOURS WORKED PER WEEK BASED ON LAST 8 WEEKS (17.5 HRS. IS 35 HRS. BIWEEKLY)
 11. YES OR NO CONCERNING THE JOB EXPECTED TO LAST?

Employee Affirmation
 I certify that the above information is true to the best of my knowledge.
 I regularly work 20 hours or more per week, but will not work 20 consecutive weeks (5 months) for this employer.
 I regularly work less than 20 hours per week, but will not work 17.5 days in 32 consecutive weeks (9 years) for this employer.
 2. I understand that this waiver is **OPTIONAL AND REVOCABLE**.
 (a) I understand that my work schedule changes and it anticipated full weeks less than 20 hours per week for 8 months, or will work less than 20 hours per week for at least 17.5 days in a 32 consecutive week period (7 years).
 (b) I agree to make this waiver effective on the date indicated below.
 (c) I agree to make this waiver effective on the date indicated below.
 (d) I agree to make this waiver effective on the date indicated below.
 3. I understand that this waiver is **OPTIONAL AND REVOCABLE**.
 (a) My employer may not have me to opt out of paid family leave benefits.
 (b) I agree to make this waiver effective on the date indicated below.
 4. I understand that this waiver is **OPTIONAL AND REVOCABLE**.
 (a) I understand that my work schedule changes and it anticipated full weeks less than 20 hours per week for 8 months, or will work less than 20 hours per week for at least 17.5 days in a 32 consecutive week period (7 years).
 (b) I agree to make this waiver effective on the date indicated below.
 (c) I agree to make this waiver effective on the date indicated below.
 (d) I agree to make this waiver effective on the date indicated below.

Declaration
 I certify to the best of my knowledge the foregoing statements are complete and true.
 Employer's Signature: _____ Date: _____
 Employee's Signature: _____ Date: _____

Please note: Employer must keep a copy of the fully executed waiver on file for as long as the employee remains in employment with the covered employer.

PFL-WAIVER (8-17)
 2/16/18 4/18

If you need assistance, contact the Paid Family Leave Helpline at (844) 337-6333.

Opting Out of Paid Family Leave (NYCRR 302.6)

(a) An employee of a covered employer shall be provided the option to file a waiver of family leave benefits:
 (i) When his or her regular employment schedule is 20 hours or more per week and the employee will not work 20 consecutive weeks, or
 (ii) When his or her regular employment schedule is less than 20 hours per week and the employee will not work 17.5 days in 32 consecutive weeks period.
 (b) Within eight weeks of any change in the regular work schedule for an employee that requires the employee to continue working for 20 consecutive weeks or 17.5 days in a 32 consecutive week period, any waiver filed under this section shall be deemed revoked. An employee of a covered employer whose waiver has been revoked shall be obligated to begin making contributions to the cost of family leave benefits, including any retroactive amounts due from date of hire, pursuant to Section 200 of the Workers' Compensation Law, as soon as the employee is notified by the covered employer of such obligation.
 (c) The covered employer shall keep a copy of the fully executed waiver on file to be produced at the request of the Chief. For as long as the employee remains in employment with the covered employer.
 (d) An employee as described in Subsection (a) of this Section who elects not to enter into a waiver shall make regular family benefit contributions for the full duration of his or her employment with the covered employer, and the covered employer shall be obligated to provide family leave benefits for such employee when he or she is eligible pursuant to this Title.

Calculating Average Hours/Days Worked

To determine the average number of hours worked per week:
 Add all hours worked for the past 8 weeks then divide the total by 8.
 To determine the average number of days worked per week:
 Add all days worked for the past 8 weeks then divide the total by 8.

Example:

Week Worked	Hours Worked	Days Worked
Week 1	20	2
Week 2	24	3
Week 3	16	2
Week 4	16	2
Week 5	8	1
Week 6	24	3
Week 7	16	2
Week 8	24	3
Total	152	18
	Divide by 8	Divide by 8
Average Per Week	19	2.25

PFL-WAIVER (8-17)
 2/16/18 4/18

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PAID FAMILY LEAVE BENEFITS

- Employees' wage benefit is a percentage of their Average Weekly Wage (AWW), capped at the Statewide Average Weekly Wage (SAWW).
- The SAWW is updated annually by the State.
- The 2019 SAWW is \$1,357.11.

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PAID FAMILY LEAVE BENEFITS

Year	Weeks	Benefit
2018	8 weeks	50% of employee's AWW, up to 50% of SAWW
2019	10 weeks	55% of employee's AWW, up to 55% of SAWW
2020	10 weeks	60% of employee's AWW, up to 60% of SAWW
2021	12 weeks	67% of employee's AWW, up to 67% of SAWW

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PAID FAMILY LEAVE NOTICE

- Must display a notice of PFL rights and employer's compliance conspicuously.
- Notice of Compliance (Form PFL-120) is provided by insurance carrier.

Paid Family Leave

NOTICE TO EMPLOYEES

Paid Family Leave Insurance Coverage Provided by: _____

Covering Employees of: _____

Paid Family Leave is insurance that provides job protection paid time off to:

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

How to File:

- Notify your employer at least 30 days in advance, if foreseeable, or as soon as possible
- Submit the Request for Paid Family Leave form to your employer
- Complete and attach the additional documentation as instructed on the request form and submit to the insurance carrier listed below

Employers should NEVER discriminate or retaliate against anyone who requests or takes Paid Family Leave

FOR MORE INFORMATION AND HELP:
Visit ny.gov/PaidFamilyLeave or call (844) 337-6303

You can get forms to take Paid Family Leave from:

- Your employer,
- The insurance carrier below, or
- ny.gov/PaidFamilyLeave

Policy # _____ Effective Date: _____ To: _____

By Signature: _____ Title: _____ Date of Agreement: _____

NOTICE OF COMPLIANCE
YOU MAY BE ENTITLED TO PAID FAMILY LEAVE BENEFITS

PREPARED BY THE CHIEF WORKERS' COMPENSATION BOARD
THIS NOTICE MUST BE POSTED CONSPICUOUSLY IN AND ABOUT THE EMPLOYER'S PLACE OR PLACES OF BUSINESS.
NY-050-0193

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PAID FAMILY LEAVE NOTICE

- Must provide information about PFL rights to employees through employee handbook or written policy.
- Must have Statement of Rights available for employees.

Paid Family Leave

2019 STATEMENT OF RIGHTS FOR PAID FAMILY LEAVE

IF YOU NEED TO TAKE TIME OFF FROM WORK TO CARE FOR A FAMILY MEMBER, YOU MAY BE ENTITLED TO PAID FAMILY LEAVE BENEFITS

Paid Family Leave is employee-funded insurance that provides job-protected paid time off 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 spouse, domestic partner, child or parent is called to active military service abroad.

Eligibility:

- Employees with a regular work schedule of 20 or more hours per week are eligible after 26 consecutive weeks of employment.
- Employees with a regular work schedule of less than 20 hours per week are eligible after 104 hours worked.

Eligibility on migration status is not a factor in your eligibility.

Benefits in 2019: you can take up to 10 weeks of Paid Family Leave and receive 55% of your average weekly wage, capped at 55% of the New York State average weekly wage. Generally, your average weekly wage is the average of your last eight weeks of pay prior to starting Paid Family Leave.

Rights and Protections:

- Job Protection: Return to the same or comparable job after you take leave.
- Health Insurance: You keep your health insurance while on leave (you may have to continue paying your portion of the premium costs, if any).
- Your employer is prohibited from discriminating or retaliating against you for requesting or taking Paid Family Leave.
- You do not have to exhaust sick leave or vacation accruals before using Paid Family Leave.

Paid Family Leave Request Process:

- Notify your employer at least 30 days in advance, if foreseeable, or as soon as possible.
- Complete and submit the Request for Paid Family Leave form (PFL-DC-18) to your employer.
- Complete and attach the additional forms as required and submit to the insurance carrier listed below within 30 days of starting your leave, to avoid losing benefits.
- In most cases, the insurance carrier must pay or deny benefits within 38 calendar days of receiving your completed request or your last day of leave, whichever is later.

Dispute: If your Paid Family Leave claim is denied, you may request to have the denial reviewed by a neutral arbitrator. The insurance carrier listed below will provide you with information about requesting arbitration.

Discrimination Complaints:

- If your employer terminates your employment, reduces your pay and/or benefits, or disciplines you in any way as a result of you requesting or taking Paid Family Leave, you may request to be reinstated by filing these steps:
- Complete the *Request for Reinstatement Regarding Paid Family Leave Form (PFL-DC-18)*
- Send your request to your employer and a copy of the completed form to Paid Family Leave, P.O. Box 9300, Bunkley, NY 11970-9300.
- If your employer does not reinstate you or take other corrective action within 30 days, you may file a discrimination complaint with the Workers' Compensation Board using the Paid Family Leave Discrimination/Retaliation Complaint Form (PFL-DC-020) available at PFLandLeave.ny.gov/Forms. The Workers' Compensation Board will assemble your case and schedule a hearing.
- There are other steps available to help protect employees from discrimination. Additional information is available at PFLandLeave.ny.gov.

For more information, forms, and instructions, visit PFLandLeave.ny.gov or call (844) 337-6303.

This information is a simplified presentation of your rights and responsibilities. Section 215-b of the Constitution and the Family Leave Benefits Law, Your employer's Paid Family Leave benefits insurance carrier.

PREPARED BY THE CHIEF WORKERS' COMPENSATION BOARD

NY-050-0193 (Revised as of October 2018) NY Paid Family Leave - PFL DC 020 - End User NY 10/18
PFL Number: 0461 10/18/018 - PFLandLeave.ny.gov

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PAID FAMILY LEAVE AND FMLA

Review of Family and Medical Leave Act (FMLA)

- Federal law that provides job-protected, unpaid leave for employees for qualified medical and family reasons

Interaction with Family and Medical Leave Act (FMLA)

- If the reason for an employee's leave qualifies for leave under both FMLA and PFL, the employer can require them to run **concurrently**.
- Employer must notify the employee that the leave qualifies for both FMLA and PFL and that it will designate the leave as both FMLA and PFL leave.
- Best practices: document the designation in your timekeeping system.

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PAID FAMILY LEAVE AND INTERNAL POLICIES

Maternity/Paternity Leave

- Spouses with the same employer who want to take PFL at the same time to bond with the same child, care for the same family member, or in connection with the same family member deployed abroad may take PFL at the same time, unless employer objects
- Employers may not prevent an employee and his/her spouse from taking PFL at different times

Sick and/or Vacation Time

- Employers may not require employees to take sick/vacation time concurrently with PFL
- Employers may give employees the option to take sick/vacation time concurrently with PFL to allow employees to receive their full salary for all or part of the leave
- An employee may not receive more than full wages while receiving PFL benefits
- Employees may keep health insurance during PFL
- Employees have the right to be reinstated to the same job (or comparable job) when they return from leave

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WORKPLACE ACCOMMODATIONS



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DISABILITY DISCRIMINATION

Laws Against Discrimination Based on Disability

- Americans with Disabilities Act of 1990 (ADA)
- Pregnancy Discrimination Act (PDA)
- New York State Human Rights Law (NYSHRL)
- New York City Human Rights Law (NYCHRL)

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DISABILITY DISCRIMINATION

Prohibition on discrimination on the basis of disability when it comes to any aspect of employment, including:

- hiring,
- firing,
- pay,
- job assignments,
- layoffs, training,
- fringe benefits, such as leave and health insurance, and
- any other term or condition of employment.

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REASONABLE ACCOMMODATION

- Qualified employees or job applicants with a disability may need a reasonable accommodation to perform their job functions.
- **Reasonable accommodation** = any change in the work environment or in the way things are typically done that allows a qualified individual with a disability to perform the duties of the job.
- Leave is a type of reasonable accommodation.
- Other forms of reasonable accommodations include:
 - Part-time or modified work schedules;
 - Modifying equipment;
 - Making existing facilities accessible;
 - Alternative assignments
- The employer does not need to provide the exact accommodation requested by an employee.

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INTERACTIVE PROCESS

- Under federal and state laws, employers are required to engage in a conversation, or “**interactive process**,” with any employee who requests a disability accommodation.
- Purpose?
 - To determine:
 - (1) the nature of the disability,
 - (2) whether there is a reasonable accommodation for the disability, and
 - (3) whether there is an undue burden on the employer to accommodate the disability.
- The conversation may be informal and verbal, but **the Company should document all discussions with the employee.**
 - Demonstrate a good faith effort to provide the employee with a reasonable accommodation.
- “Undue hardship” = significant difficulty, disruption, or expense, or something that would fundamentally alter the nature or operation of the business.
 - The law takes into consideration the size and resources of the Company.

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NYC: COOPERATIVE DIALOGUE

- As of October 15, 2018, all employers covered by the New York City Human Rights Law (NYCHRL) must engage in a **cooperative dialogue** with individuals who may be entitled to a reasonable accommodation.
 - Employers with four (4) or more employees
- Similar to the interactive process, but with additional requirements
- “**Cooperative dialogue**” is the process by which a covered entity and a person entitled to (or who may be entitled to) an accommodation under the law engage in a good faith written or oral dialogue concerning:
 - Individual’s accommodation needs
 - Potential accommodations that may address the accommodation needs
 - Alternatives to a requested accommodation
 - Difficulties that such potential accommodations may pose for the employer

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NYC: COOPERATIVE DIALOGUE

- **Document** all conversations, including verbal communications
- **Final written determination**
 - After engaging in the cooperative dialogue and reaching a final determination of whether or not a reasonable accommodation is available, provide the employee with a **written final determination** identifying any accommodation granted or denied.

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WAGE AND HOUR UPDATE: OFF-THE-CLOCK LITIGATION

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“OFF-THE-CLOCK” WORK

- Recently, there has been a trend of increasing wage and hour litigation concerning “off-the-clock” work.
- Class and collective actions throughout the country.
- According to the Fair Labor Standards Act (FLSA), work that is “off-the-clock” is the same as overtime not compensated by an employer at a standard hourly wage.

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NYC COUNCIL “RIGHT TO DISCONNECT” PROPOSAL

- On March 22, 2018, NYC Council proposed a bill nicknamed the “Right to Disconnect Bill,” seeking to bar private employers from requiring their employees to access work-related electronic communications beyond their usual work hours.
 - *If passed*, the bill would make NYC the first American city to enact such a law.
- Would not ban employers from contacting employees after they clock out.
- Bans employers from requiring employees to access or respond to the employer’s after-hours communication.
- Narrow exception provided for an “emergency,” defined as a “sudden and serious event, or an unforeseen change in circumstances, that calls for immediate action to avert, control or remedy harm.”

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NYC COUNCIL “RIGHT TO DISCONNECT” PROPOSAL

- *Employers:* Would apply to employers with more than 10 employees
- *Employees:* **Any** part-time or full-time employee hired within NYC to work more than 80 hours in a calendar year
 - Includes employees who work in a transitional job program under Section 336-c of the Social Services Law
 - Does not include:
 - ▲ work performed as a participant in a work experience program under Section 336-c of the Social Services Law;
 - ▲ employees who are employed by the U.S. government;
 - ▲ employees of NYS, including any office, department, independent agency, authority, institution, association, society or other body of the state including the legislature and the judiciary;
 - ▲ employees of NYC or local government

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NYC COUNCIL “RIGHT TO DISCONNECT” PROPOSAL

- The bill would require employers to adopt written policies regarding the use of electronic devices for work.
- Written policies must include:
 - (1) the usual work hours for each class of employee; and
 - (2) the categories of paid time off (e.g., vacation days, personal days) to which employees are entitled.
- Exceptions:
 - employees whose terms of employment require them to be on call 24 hours/day;
 - employees in work study programs;
 - employees compensated through scholarships; and
 - independent contractors.
- Not yet passed, so stay tuned for updates on the law.

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“OFF-THE-CLOCK” LESSONS

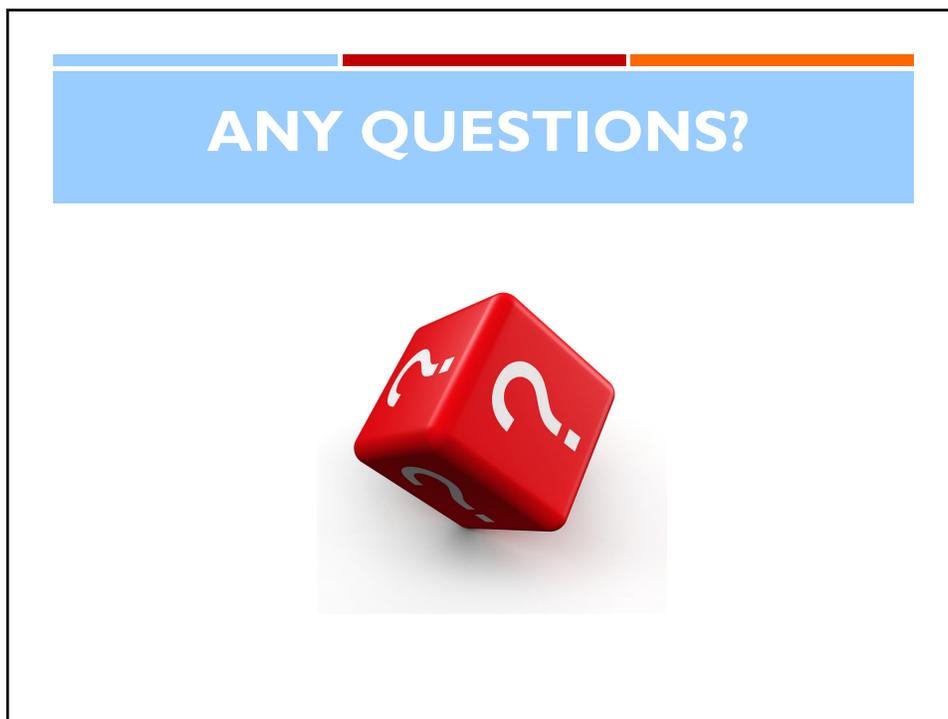
- It is illegal to overlook or encourage off-the-clock work for non-exempt employees.
- Does not matter whether employer has a written policy against off-the-clock work.
 - Lawsuits target defacto or unwritten policies
- Timekeeping systems that auto-deduct time may be problematic and result in inaccurate timekeeping.

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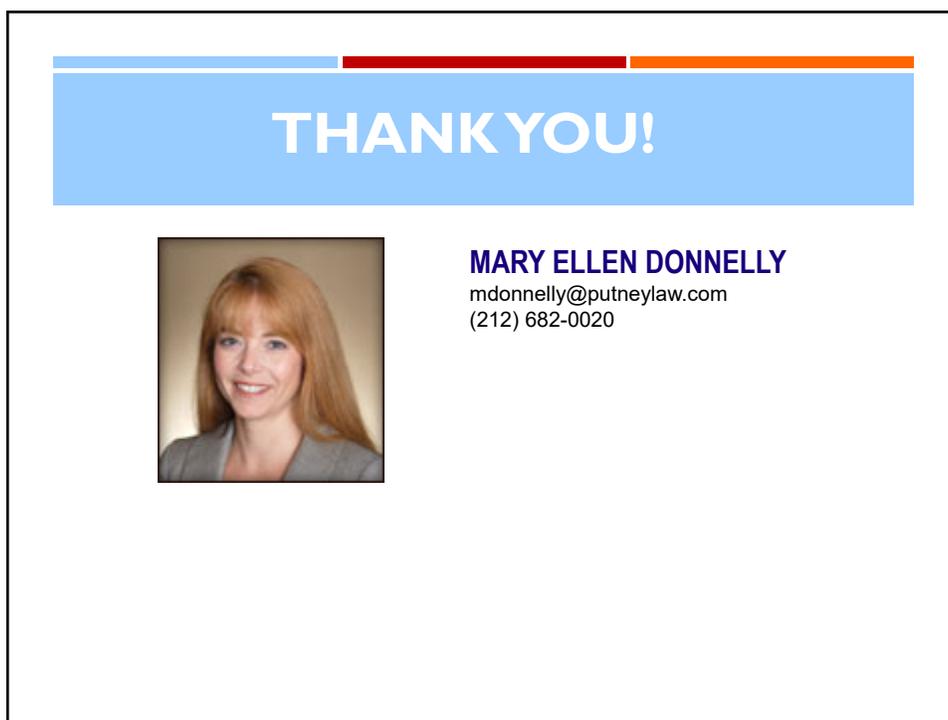
“OFF-THE-CLOCK” LESSONS

- Train managers to resist pressures to allow or encourage off-the-clock work.
 - Any variance from written timekeeping policies can lead to collective-action lawsuits and other serious legal consequences.
- Maintain written policies regarding overtime, off-the-clock work, and timekeeping.
 - Specify that non-exempt employees must obtain prior authorization before working overtime hours
 - Specify disciplinary action taken for failing to accurately record hours
- Retain employee timekeeping records (NYS requires 6 years).

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