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Guidance on NYC Temporary Schedule Change Law Released

August 08, 2018 | Blog | By **Michael S. Arnold**

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The Office of Labor Policy & Standards, the office responsible for enforcing NYC's employment laws, recently released guidance on the new Temporary Schedule Change Law. The law, which took effect on July 18, 2018, was passed with little fanfare, but left employers asking many questions about how to effectively implement its requirements. In particular, employers were left scratching their heads over the law's "shoot first, ask questions later" procedural requirements and an employee's nearly unhindered ability to disrupt their operations at a moment's notice.

The law also came on the heels of the passage of several other New York State and New York City laws aimed at accommodating employees' personal obligations and improving work-life balance, including laws providing for paid sick and safe leave, paid family leave, fair workweek and scheduling requirements, protection against caregiver and familial discrimination, and the requirement to accommodate pregnancies, disabilities and other personal obligations. The newly-released guidance is likely to intensify employer concerns, but with the law now in effect employers must work (once again) to update their policies, procedures and practices as necessary not only to comply with its requirements, but to minimize disruption to their operations.

A Brief Primer on the Temporary Schedule Change Law

The Temporary Schedule Change Law amends the City's Fair Workweek Law and requires employers to twice a year grant an employee's request for a temporary change to the employee's usual work schedule because of a qualifying "personal event." A qualifying "personal event" generally means (i) the need to care for a child or a disabled family or household member who relies on the employee for care or assistance with daily living; (ii) to attend a legal proceeding or hearing regarding public benefits; and (iii) any reason that would qualify for leave under the sick and safe time law.

Temporary schedule changes include changes in the hours, times, or locations an employee is expected to work and include using short-term unpaid leave, paid time off, working remotely or swapping or shifting working hours with a co-worker. Nearly all workers are covered by the law once they have worked more than 80 hours in NYC and have been employed more than 120 days. Employees may seek schedule changes on two separate occasions (for one business day each) or on one occasion spanning two business days, and must inform their employer that the change is required due to a personal event.

Our full rundown of the law is accessible here.

The Guidance Confirms That Employers Are Limited in Their Ability to Deny or Otherwise Limit Schedule Change Requests

The law requires the employee to request the schedule change "as soon as the employee becomes aware of the need for a temporary schedule change." At that point, the employer has two choices: immediately grant the request, or require the employee to take leave without pay – but in either case, an accommodation must be made. The law does not contain a minimal notice requirement; it says nothing about an employer's ability to deny requests where it may cause the employer undue hardship; it does not provide the employer with the ability to discuss an alternative proposal that could be more effective; nor does it require employees to verify the need for the change through appropriate documentation. To be clear: we are not saying flexibility in the workplace is necessarily a bad thing; in fact, it can be a very good thing; but the law as drafted appears, ironically, to dispense with a flexibility concept in favor of a rigid one that may have unintended and unnecessary negative consequences.

So, in theory, and likely in practice, employers could face situations where employees in critical roles or in time-sensitive situations force a schedule change because of a "personal event," leaving their employers in a difficult situation. For example, if an employer's deadline to submit its proposal on an RFP – a potential engagement that could make or break its fiscal year – falls on a Friday, and on Thursday night

the employee responsible for drafting and submitting the proposal requests a temporary schedule change to take off that Friday, the law requires the employer to grant the request, even if this unplanned absence greatly impacts its ability to meet the deadline or to submit an effective proposal. Not only does the law prevent the employer from denying the schedule change request, it also prohibits the employer from taking any disciplinary action against the employee.

The recently-released guidance confirms that this type of scenario may be a reality for employers. The OLPS says employers cannot require employees to make a request within a specific timeframe or prohibit employees from making requests on specific days. The guidance also does not permit employers to engage in any sort of interactive process to reach agreement on an acceptable alternative schedule change that may accommodate the needs of both the employer and employee. And, of course, if the employer seeks to discipline the employee in any way for his or her disruption to their operations as a result of an ill-timed request, the employer may be subject to a claim for retaliation.

Worse yet, the guidance states that employers cannot ask the employee for any documentation to help substantiate the request, either before or after the request is made. All the guidance provides is that an employer may discipline an employee if the employer "later learns that employees did not have a 'personal event' but represented that they did." Yet an employer typically would not "learn" whether an employee misrepresented his or her need for a temporary schedule change without asking for appropriate documentation. The guidance is particularly disappointing on this point, yet not surprising, as the City's paid sick and safe leave law includes similar limitations on an employer's ability to verify those types of requests.

The Guidance Confirms the Law's Unusual Schedule Change Request Procedural Requirements Will Remain … Unusual

The law permits employees to communicate the schedule change request orally or in writing and requires that the employer immediately grant or deny the request. If made orally, the law directs the employee to put the request in writing within two days *after* returning to work. Then the employer has fourteen days to provide the employee with its formal written response, despite the fact that it already granted or denied the request. If the employee does not put the request in writing – and there is no penalty if they don't – the employer has no written response obligation, but still must grant the request.

This process, presumably, is designed to ensure requests will be processed without delay, but we wonder why employers cannot implement a policy requiring submission of requests in writing in a specific manner in order to minimize the administrative burden and disruption to the employer's business. At best, the guidance provides that an employer can require employees who do submit written requests to submit them in "electronic form" but only if "employees commonly use electronic communication to request and manage leave and schedule changes." But that's as far as the law goes and the guidance doesn't take it any further. As a result, employers will have to make sure their supervisors are well-versed in the law's requirements and promptly communicate schedule change requests to human resources.

There is a Posting Requirement, But No Requirement to Include in Handbook

The OLPS also released a notice for posting entitled "You Have a Right to Temporary Changes to Your Work Schedule," which you can access **here**. Employers must post an 11"x17" copy of the English version of the notice along with a copy of the notice in any language that is the primary language of at least 5% of the workers at the workplace, if the translation is available on the OLPS website. Currently only the English notice is available, but other translated versions may be released soon.

This dual-language requirement is similar to the dual-language posting requirements of other laws like the pay notice, sick and safe leave, and harassment notice laws. Now that we have approached a critical mass of laws with these dual-language requirements, employers should consider how they will learn about their employees' primary (not first!) language during the onboarding process, while guarding against the possibility that an employee may later point to that disclosure to support a discrimination claim. In particular, employers will want to make sure that only a small subset of the employee population with a need to know (i.e., HR team members only) can acquire and store this information.

The guidance also confirmed that employers do not have an obligation to include a Temporary Schedule Change Law policy in their employee handbook or as a stand-alone policy. Whether it's a good idea to do so is another story and will depend on a number of factors specific to each employer.

Takeaways

1. Many employers already work with their employees to build some level of flexibility into their schedules or accommodate them in urgent or unexpected care situations. But now, probably 1-2x per year, employers will have to offer some schedule flexibility to their employees *on the employee's terms* – which represents a shift in how employers are typically permitted to run their workplace. We encourage employers therefore to proactively engage with their workforce on this issue so that their employees, while having the statutory right to this flexibility, will operate as constructive partners in minimizing operational disruption.

2. In light of this new law, other recently passed ones, and new ones still coming down the pike (i.e., we are waiting to see if Governor Cuomo will sign a proposed law providing for bereavement leave under the NYS Paid Family Leave Law) – each designed in part to promote a better work-life balance – New York, and in particular, New York City employers must ensure that they are building and implementing policies, practices and procedures that are not only in compliance with this full suite of leave and accommodation laws, but which are fully integrated with each other and which collectively, along with the employer's own leave and accommodation policies (i.e. parental leave), effectively allow the employer to compete for talent in the marketplace and retain their existing talent.
3. Employers must account for the law's new procedural requirements and devise a system to streamline, track, and maintain records of the schedule request and response process, as well as how many requests each employee has made and has remaining. Employers will also need to educate their supervisory and managerial employees on how to identify and help process schedule change requests consistent with the law's requirements.
4. Employers should make sure to post the required notice in English and determine whether a sufficient number of their employees speak an alternative primary language such that they must post a notice in another language as well.
5. Finally, employers should consider whether to add a new policy to their handbooks accounting for this law, and if they do so, they must ensure that it adequately explains to employees the law's oral and written request requirements, and further, that it aligns with their other leave and accommodation policies.

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