

THE NEW ELECTION LEAVE LAW: A REMINDER AND SOME RECOMMENDATIONS

Hodgson Russ Municipal and Education Alert
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Legislation enacted in April 2019 amended Section 3-110 of the New York State Election Law to now entitle all employees to leave with pay during working hours for purposes of voting in certain elections. This amendment expanded existing law which required time off from work only if the employee did not have sufficient time during non-working hours within which to vote. The law applies to primary and general elections, as well as special elections called by the governor. It does not apply to school district elections. The law covers employees who are scheduled to work on a qualifying election day, and, based on guidance from the New York State Board of Elections, appears to apply to election day only, and not to early voting periods. It does not appear that employers may compel employees to use available paid leave accruals in conjunction with this leave.

The components of the new election leave entitlement are as follows:

- Only registered voters are entitled to this leave.
- The leave is to be used solely for purposes of voting in a primary, special or general election.
- The employee is entitled to paid leave for up to three hours, at the beginning or end of the employee's work shift as either designated by the employer or mutually agreed.
- An employee must provide notice to the employer no less than two working days prior to the day of the election if the employee wishes to use this election leave.

In addition, employers have a notice obligation that must be satisfied by no later than Tuesday, October 22, 2019 for the upcoming general election. The notice obligation requires employers to post a required notice “conspicuously in the place of work where it can be seen as employees come or go to their place of work.” The notice must be kept posted until the close of the polls on election day, and must set forth the above-referenced provisions of Section 3-110. The New York State Board of Elections website provides a model notice for this purpose. Although the model notice notably says that employees must notify employers two days prior to the election if they wish to use this election leave entitlement, the actual requirement is that the employees provide such notice no later than two working days prior to election day. If you are using the model notice to satisfy your notice obligation, the

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reference to working days should be included with regard to the employee notice.

There are a number of open questions regarding the implementation of this new election leave law. For instance, inasmuch as the law specifically is applicable solely to employees who are “registered voters,” and solely for purposes of permitting such employees paid time off to “enable him or her to vote,” may an employer ask an employee for proof of voter registration prior to approving leave, or ask the employee for proof that the employee actually voted? The law itself is silent on these questions. However, the New York State Civil Service Department issued a bulletin stating (without any citation to legal authority) that employers “may **not** require proof of voter registration or proof that an employee actually voted [*emphasis in original*].” In any event, voter registration, and whether a registered voter voted in a primary or general election, are matters of public record, and it is not necessary for employers to obtain confirmation directly from employees. Indeed, doing so may lead to a claim that the employer is trying to intimidate or deter employees from exercising their right to vote under Section 3-110. However, employers may wish to consider notifying employees in the posted notice or otherwise that the election leave entitlement is available solely to registered voters for purposes of enabling such employees to vote, and that any employee who uses the election leave benefit who is not a registered voter and/or who does not actually vote in conjunction with such leave may be subject to administrative or disciplinary actions. Of course, any such approach by an employer may have legal consequences, including with regard to collective bargaining obligations, so employers should carefully evaluate this implementation issue and consider whether to consult with legal counsel.

A further question is the extent to which employers may establish an expectation that employees will take only so much of the three hour maximum leave period reasonably necessary to actually vote. Again, the law is clear that the leave entitlement is for “up to three hours” of paid leave, and solely for the purpose of enabling the employee to vote. Accordingly, the expectation of how much leave is reasonably necessary for an employee who has a voting location within a few blocks of the workplace may be very different than the expectation with regard to an employee who has a voting location that is a considerable distance from the workplace. Employers may wish to consider reminding employees of this standard, and may also wish to request that employees provide as much advanced notice as is practical, but in no case less than the two working days advance notice that is required. Further, employers should consider being explicit in the posted notice as to whom or by what procedure employees should provide such notice.

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Employers should also consider how to exercise the right to designate whether qualified employees will take election leave at the beginning or end of the work shift (employers appear to have authority to address this on an employee-by-employee basis). For instance, designating employees to take election leave at the start of their work shift may allow the employer to more safely implement its expectation that the employee will only use so much of the three hour maximum leave as is necessary to vote. Trying to do so with regard to employees who are approved for election leave at the end of their working shift risks unexpected traffic delays, polling place delays, etc., which may not actually allow an employee to vote prior to the conclusion of the employee's work shift.

In addition to the above considerations, employers are encouraged to modify their workplace policies to recognize the election leave entitlement and address some or all of the implementation issues identified above. Employees with supervisory responsibilities should also be trained to handle and process requests from employees who wish to vote in upcoming elections. Lastly, employers should specifically plan for the impact that employee use of election leave may have on staffing levels and employer operations.

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