

New York Employees Entitled to COVID-19 Vaccination Leave

Under a new law, which went into effect on March 12, 2021, New York employers are required to provide private employees and certain public employees with up to “four hours per vaccine injection” to be vaccinated for COVID-19. Employees are not automatically entitled to four hours per injection, but *up to* four hours, depending upon the need of the particular employee and the amount of work missed. Employees may be entitled to more than four hours per injection if a collective bargaining agreement or their employer provides a greater number of hours.

The total amount of leave to which an employee is entitled necessarily depends on which vaccine the employee is receiving – for example, an employee receiving Johnson & Johnson’s single dose vaccine is entitled to up to four hours of leave, whereas an employee receiving Pfizer’s or Moderna’s two dose vaccine is entitled to up to eight hours of leave. Employees may be entitled to additional leave if a booster shot or a variant-specific vaccine is later required.

In the absence of any further guidance to the contrary, our present interpretation of the law is that leave is only available for absences from scheduled work, given references in the law to “excused” leave and leave of “absence.” Accordingly, it is unlikely that employees can take vaccination leave for hours that they were not otherwise scheduled to work.

We currently recommend against employers asking employees to receive a specific vaccine, *i.e.*, the Johnson & Johnson vaccine, in order to provide employees with a lesser leave entitlement. Doing so could be seen as an attempt to circumvent the law’s leave requirements. However, it is likely permissible to request that employees reasonably attempt to schedule vaccine appointment(s) in a manner that does not interfere with their work responsibilities, assuming it does not result in anything other than a *de minimis* delay in vaccination. Of course, given the

limited availability of vaccine appointments currently, it may be difficult to coordinate exactly when an employee could obtain the vaccine.

Vaccination leave is paid at the employee’s regular rate of pay at the time of the absence, and, importantly, cannot be charged against any other leave to which an employee may be entitled, such as accrued sick leave under New York State’s Sick Leave Law or New York City’s Earned Safe and Sick Time Act, or any leave provided pursuant to a collective bargaining agreement.

The law also prohibits discrimination or retaliation against any employee who exercises his/her rights under the law, including by requesting or obtaining a leave of absence to get vaccinated.

The law does not specifically address whether employers can request documentation to process leave, such as proof of vaccination. However, at least according to guidance from the U.S. Equal Employment Opportunity Commission, employers can request proof of vaccination without concern that the request is a disability-related inquiry. Still, employers are encouraged to warn employees not to provide any medical information as part of their proof to avoid implicating the Americans with Disabilities Act.

While the law itself does not contain a specific notice requirement, employers are reminded that the New York Labor Law broadly requires employers to notify employees of their policies on leaves in writing or through a public posting. Notice of COVID-19 vaccination leave may be accomplished, for instance, via a COVID-19 vaccine policy or other standalone written communication or posting made available to employees.

It remains to be seen if the New York State Department of Labor or any other agency will put out any guidance on COVID-19 vaccination leave, but

employers should monitor New York State's website for official guidance.

The law automatically expires on December 31, 2022.

If you have further questions regarding this topic, please contact any member listed below or your usual Tannenbaum Helpert contact.

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