

WORKPLACE LEAVE & LACTATION RIGHTS FOR POST-PARTUM PARENTS

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AGENDA

1. Workplace Lactation Rights

Introduction & Definitions

New York State Law

Federal Law

Best Practices for Employees & Employers

2. Post-Partum Leave Programs

Federal Law

New York State Law

The Interaction Between Federal and State Law

Best Practices for Employees & Employers

“If we’re going to recommend that women breastfeed, then we need to create a society in which that is possible to meet that goal.”

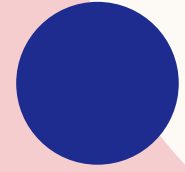
**- Dr. Casey Rosen-Carole,
Medical Director of University of
Rochester’s Medicine Lactation
Services and Program’s**

DEFINITIONS

- **Lactation** - the production and secretion of milk by the mammary glands
- **Breastfeeding/Chestfeeding** - process of feeding human milk to a child
- **Breast Pump** - a suction apparatus for expressing breastmilk
- **Let Down Reflex** - a triggered milk release caused by hormones
- **Mastitis** - inflammation of the breast usually caused by infection



NEW YORK STATE LACTATION LAWS



NEW YORK STATE - BREASTFEEDING LAWS

N.Y. Civil Rights Law § 79(e)-
Permits a mother to breastfeed
her child in any public or
private location

N.Y. Public Health Law §
2505(a)- Creates the
Breastfeeding Mothers Bill of
Rights and requires it to be
posted in a public place in each
maternal health care facility

NEW YORK STATE LABOR LAW SECTION 206-C

Breaktime and Space Requirements --

Right of nursing employees to express breast milk.

(1) An employer shall provide reasonable unpaid break time or permit an employee to use paid break time or meal time to allow an employee to express breast milk for her nursing child each time such employee has reasonable need to express breast milk for up to three years following child birth. No employer shall discriminate in any way against an employee who chooses to express breast milk in the work place.

NEW YORK STATE LABOR LAW SECTION 206-C, CON'T

(2) (a) Upon request of an employee who chooses to express breast milk in the workplace, an employer shall designate a room or other location which shall be made available for use by such employee to express breast milk.

Such room or other location shall be a place that is: (i) in close proximity to the work area; (ii) well lit; (iii) shielded from view; and (iv) free from intrusion from other persons in the workplace or the public.

Such room or other location shall provide, at minimum, a chair, a working surface, nearby access to clean running water and, if the workplace is supplied with electricity, an electrical outlet. The room or location provided by the employer for this purpose shall not be a restroom or toilet stall.

NEW YORK STATE LABOR LAW SECTION 206-C, CON'T

(b) If the sole purpose of function of such room or other location is not dedicated for use by employees to express breast milk, such room or other location shall be made available to such an employee when needed and shall not be used for any other purpose or function while in use by such employee. Employers shall provide notice to all employees as soon as practicable when such room or other location has been designated for use by employees to express breast milk.

NEW YORK STATE LABOR LAW SECTION 206-C, CON'T

(c) Where compliance with the requirements of paragraphs (a) or (b) of this subdivision is impracticable because it would impose an undue hardship on the employer by causing significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business, such employer shall make reasonable efforts to provide a room or other location, other than a restroom or toilet stall, that is in close proximity to the work area where an employee can express breast milk in privacy. Provided, however, nothing in this subdivision shall otherwise exempt an employer from the requirements of subdivision one of this section.

NEW YORK STATE

Applies to all public and private employers regardless of size.

Employers must tell all employees about their right to unpaid pumping breaks upon hiring, once a year after hiring, and when employee returns to work following birth of child.

Employees must notify employer in advance in writing stating anticipated return to work date, details on number of breaks anticipated during the day, and preferred times.

May pump for three years at work following birth of child.

Employer must give at least 20 minutes for each unpaid break but must allow more time, if employees needs it.

Employee can use regular paid break time or meal time but no requirement.

NEW YORK STATE

Employee can take breaks at least once every three hours to pump but employer must accommodate employee if they need more frequent breaks.

If you use unpaid breaks, employer cannot take time away from your regular paid break(s) or meal time.

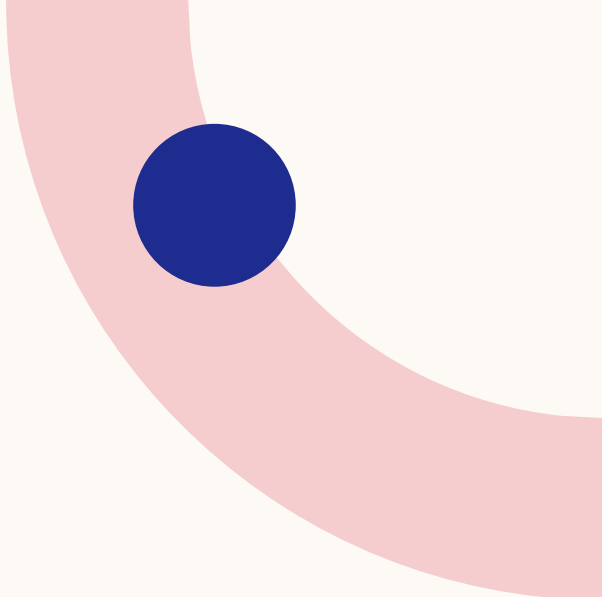
If employee wants to make up the work before or after normal shift, employer is required to allow this as long as time falls within the employer's normal work hours. The employee is not required to make up this time, however.

Employer is not required to pay for breaks, however, they cannot prohibit pumping on meal time or paid breaks.

Employer must respond to a request to pump at work within a reasonable timeframe but not to exceed 5 days.



FEDERAL LAWS



PUMP ACT

Breaktime and Space Requirements –

“An employer shall provide –

- (1) a reasonable break time for an employee to express breast milk for such employee’s nursing child for 1 year after the child’s birth each time such employee has need to express milk; and*
- (2) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”*

PUMP ACT - BREAKTIME GUIDANCE

1. Must provide reasonable break time each time employee needs to pump at work.
2. Employer cannot deny an employee a needed break to pump.
3. The frequency, duration, and timing of breaks will vary depending on factors related to the nursing employee and their child.
4. Location of the space and pump set-up can also affect the duration of time.
5. An employee and employer can agree to a certain schedule based on the nursing employee's need to pump, but an employer cannot require an employee to adhere to a fixed schedule that does not meet the needs of the employee. This schedule may change over time.
6. Telework employees are also eligible.

PUMP ACT - SPACE GUIDANCE

1. Shielded from view
2. Free from intrusion from coworkers and the public;
3. Available each time it is needed by the employees; and
4. Not a bathroom
5. Must ensure employee's privacy (signage, locks)
6. Remote employees allowed same rights, including free from observation by an employer on computer camera, security camera, etc.
7. Space must be functional including a place for employee to sit, flat surface for pump other than floor, able to safely store milk, ideally has access to electricity.

US DOL WHD Field Assistance Bulletin No. 2023-02

“PROVIDING URGENT MATERNAL PROTECTIONS FOR NURSING MOTHERS ACT” (THE “PUMP ACT”)

Some limited federal protections since 2010 under FLSA.

PUMP Act amended FLSA and became effective December 29, 2022 for all private and public workers covered by FLSA (except airline crew members, pilots, flight attendants).

Applies to all employers of all sizes (unless employer has less than 50 employees and it imposes an undue hardship).

Only applies for one (1) year after child’s birth (unlike NYS, which protects lactation employees for THREE (3) years).

Does not preempt state laws.

Enforced by the US DOL Wage and Hour Division (see May 17, 2023 Field Assistance Bulletin).

Private right of action as of April 29, 2023.

NYS AND FEDERAL LAW COMPARISON

	NYS Law	PUMP Act
Protected time post-birth to pump at work	3 years	1 year
Restroom prohibited	YES	YES
Discrimination prohibited	YES	YES
Retaliation prohibited	YES	YES
Notice requirements	YES, NYLL § 206-C (written policy)	YES, 29 CFR § 516.4 (posting)
Agency enforcement	YES	YES
Private Cause of Action	* Under NYS Executive Law, Article 15, Human Rights Law, lactation is considered a “pregnancy-related condition”	YES, remedies include employment, reinstatement, promotion, payment of wages lost and an additional equal amount as liquidated damages, compensatory damages and make-whole relief, punitive damages

PUMP ACT - PRIVATE CAUSE OF ACTION

If the violation involves PUMP Act TIME requirements-

- No waiting time or special procedure for an employee to:
 - File complaint with WHD or
 - Bring a private suit to enforce the reasonable break time requirement.

If the violation involves PUMP Act SPACE requirements-

- Employee must notify the employer of the need for space and allow 10 days for the employer to comply. Employees are not required to provide notice if:
 - The employee was fired for requesting reasonable break/space.
 - The employee was fired for opposing employer conduct re: FLSA pumping at work rights.
 - Where the employer has expressed a refusal to comply.

BEST PRACTICES - EMPLOYEES

Notify employer of need for lactation accommodations prior to return to work in writing.

Utilize breaks appropriately.

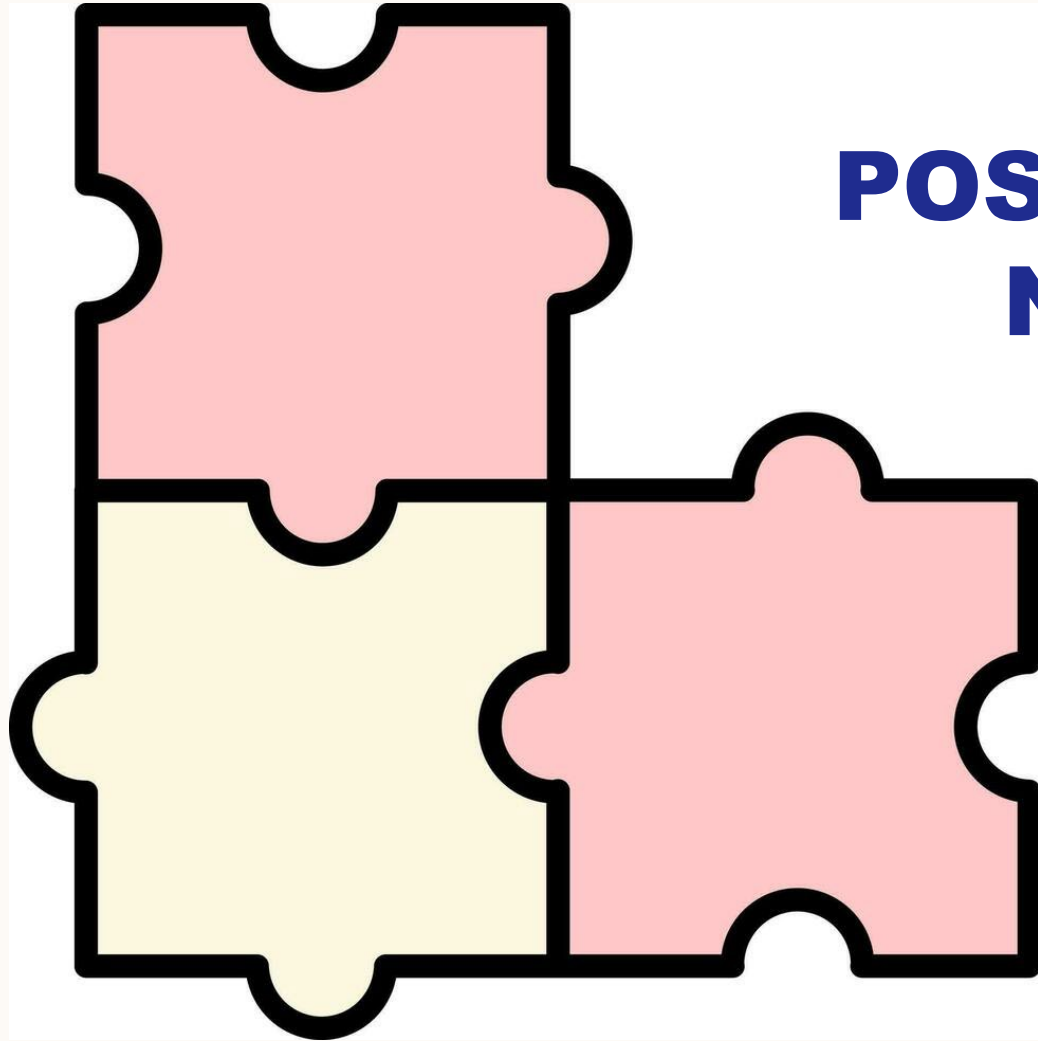
Immediately communicate to employer any problems and follow-up in writing.

BEST PRACTICES - EMPLOYERS

Lactation Policy -
Widely available,
written policy in
place

Manager Training

HR point person -
for nursing employee
to trouble-shoot
problems



POST-PARTUM LEAVE IN NEW YORK STATE

THE LAWS

- Family and Medical Leave Act
- New York State Paid Family Leave
- New York State Short Term Disability
- New York State Paid Sick Leave



FAMILY AND MEDICAL LEAVE

29 U.S.C. § 2601, et seq.
29 CFR Part 825, et seq.

COVERAGE

COVERED EMPLOYERS

- Public agencies and local educational agencies, regardless of the number of employees
- Private sector employers with 50 or more employees for at least 20 workweeks in the current or preceding calendar year

ELIGIBLE EMPLOYEES

- Work for a covered employer
- Have worked 1250 hours during the 12 months prior to the start of leave
- Work at a location where the employer has 50 or more employees within 75 miles
- Have worked for the employer for 12 months

What about remote employees?

REMOTE EMPLOYEES

- Remote employees should be counted based on the office or workplace to which they report or, if none, where their work assignments are generated.
- The count of employees within 75 miles of a worksite includes all employees whose worksite is within that area, including employees who telework and report to or receive assignments from that worksite.
- An employee may be the sole employee working in a particular state, but may still be eligible for FMLA leave.
- For more information, see the U.S. DOL Field Assistance Bulletin No. 2023-1.

RULES AND REGULATIONS

UP TO 12 WORKWEEKS
OF UNPAID LEAVE PER
YEAR

BIRTH AND BONDING
WITH NEWBORN AND
BONDING FOLLOWING
ADOPTION OR FOSTER
CARE PLACEMENT**

CONTINUATION OF
HEALTH BENEFITS

JOB PROTECTION

NOTICE
REQUIREMENTS FOR
BOTH EMPLOYER AND
EMPLOYEE

ENFORCED BY THE US
DOL WAGE AND HOUR
DIVISION

PRIVATE RIGHT OF
ACTION

NO RETALIATION

**FMLA is available for other qualifying reasons, including for an employee's or family member's (including a child's) serious health condition, or for certain qualifying exigencies related to military duty, but this presentation will focus on birth and bonding leave.

BIRTH AND BONDING LEAVE

- Up to 12 workweeks of leave per 12-month period
- Available to both birthing and non-birthing parents
- The employer may choose how to measure the 12-month period
 - Calendar Year
 - Any fixed 12-month period
 - 12-month period measured forward from the date any employee's FMLA leave begins
 - A "rolling" 12-months measured backward from the date any employee uses FMLA leave
- Leave to bond with a newborn or for a newly placed adopted or foster child must end within 12 months after the birth or placement
- For bonding purposes, employees may use leave intermittently or work on a reduced schedule with employer approval

EMPLOYEE PROTECTIONS

- **Continuation of Health Insurance:** Employers must maintain group health benefits during leave as if the employee continued to work instead of taking leave.
 - Employee on unpaid FMLA leave must pay the employee share of premiums during leave or upon return to work
- **Job Protection:** Employers must return employees to the same or equivalent job following leave.
- **No Retaliation:** Employers may not interfere with, restrain, or deny the exercise of, or the attempt to exercise, any FMLA right.
 - Examples: refusing to authorize FMLA leave, discouraging employees from using FMLA leave, taking adverse action against an employee because they requested or used leave

NOTICE AND DOCUMENTATION

- **Employee Notice Requirements**
 - Foreseeable leave: must provide 30-day advance notice of the need to take leave
 - Unforeseeable leave: must provide notice as soon as practicable
 - There are no “magic words,” but an employee must provide sufficient information for an employer to reasonably determine whether FMLA may apply to the request.
- **Employer Notice Obligations**
 - Must post a notice published by the Department of Labor
 - Must include the notice in the employee handbook or distribute the notice upon hire
 - Upon receiving an employee request for leave, must notify the employee of their eligibility to take FMLA leave within 5 business days and inform the employee of their rights and responsibilities under the FMLA
- **No healthcare certification required, although employers may require documentation of the family relationship**

OTHER IMPORTANT INFORMATION

- Employees may elect, or employers may require employees, to use accrued paid leave (vacation, sick time, etc.) for some or all of the FMLA leave period.
- Retroactive designations of FMLA leave are permitted if an employer fails to timely designate leave as FMLA leave as long as the employer gives appropriate notice and the retroactive designation does not cause harm or injury to the employee.
- Spouses who work for the same employer are entitled to a combined 12 weeks of leave in a 12-month period for bonding purposes. Unmarried couples are entitled to separate 12-month periods of leave.
- An employee is not protected from a termination during FMLA leave as long as the termination is unrelated to the employee's use of FMLA leave.



NEW YORK STATE PAID FAMILY LEAVE

N.Y. Workers' Compensation Law § 200, et seq.
12 NYCRR Part 380 et seq.

COVERAGE

COVERED EMPLOYERS

- Most private sector employers with one or more employees who work in New York State for at least 30 days/year

ELIGIBLE EMPLOYEES

- Full-time employees who work a regular schedule of 20 or more hours/week and who have completed 26 weeks of employment
 - This includes domestic workers
- Part-time employees who work a regular schedule of less than 20 hours/week and who have worked 175 days (which do not need to be consecutive)
 - There is an option to opt-out, but only if the employee will not work 175 days in a year or will not be employed for 26 consecutive weeks
- A person whose work is localized in New York State is covered, regardless of where the person lives

RULES AND REGULATIONS

UP TO 12 WEEKS OF
LEAVE PER YEAR, PAID
AT 67% OF AWW, UP TO
A CAP

BONDING WITH
NEWBORN AND
BONDING FOLLOWING
ADOPTION OR FOSTER
CARE PLACEMENT**

CONTINUATION OF
HEALTH BENEFITS

JOB PROTECTION

NOTICE
REQUIREMENTS FOR
BOTH EMPLOYER AND
EMPLOYEE

ENFORCED BY THE NYS
WORKERS'
COMPENSATION
BOARD

NO RETALIATION

**PFL is available for other qualifying reasons, including for a family member's (including a child's) serious health condition, or to assist with family situations arising out of the military service of an employee's spouse, domestic partner, child or parent, but this presentation will focus on bonding leave.

BONDING LEAVE

- Up to 12 weeks of leave per 52-week period, based on a rolling calendar
- Paid at 67% of the employee's average weekly wage, up to a cap of 67% of the New York State Average Weekly Wage (2024 NYSAWW: \$1718.15)
- Funded by employee payroll contributions, set at a rate determined by the New York State Department of Financial Services
- Available to both birthing and non-birthing parents
- Leave to bond with a newborn or for a newly placed adopted or foster child must end within 12 months after the birth or placement
- Leave may be taken all at once or intermittently, but it must be taken in full-day increments

EMPLOYEE PROTECTIONS

- **Continuation of Health Insurance:** Employers must maintain group health benefits during leave as if the employee continued to work instead of taking leave
 - Employees must continue to pay their share of premiums during leave
- **Job Protection:** Employers must return employees to the same or a comparable job following leave
- **No Retaliation:** Employers may not discriminate or retaliate against employees for taking or requesting PFL

NOTICE REQUIREMENTS

- **Employee Notice Requirements**
 - Foreseeable leave: must provide 30-day advance notice of the need to take leave
 - Unforeseeable leave: must provide notice as soon as possible
- **Employer Notice Obligations**
 - Must post a notice published by the NYS Workers Compensation Board
 - Must provide written guidance to employees (e.g., in an employee handbook) on leave eligibility, qualifying reasons to take PFL, length of leave and benefit rate, how to request leave under PFL, continuation of health insurance, how PFL is financed, and waiver information

OTHER IMPORTANT INFORMATION

- Employers may permit employees to use accrued paid time during their PFL leave period, but are not required to do so.
- PFL will run concurrently with designated FMLA leave when the reason for leave qualifies under both PFL and FMLA.
- PFL will generally not run concurrently with New York State Short-Term Disability, and employees may not receive more than 26 combined weeks of STD and PFL in a 52-week period.
- Employers may choose whether to allow spouses to take PFL at the same time for the same qualifying event, or if they must take it separately.
- An employee is not protected from a termination during PFL leave as long as the termination was unrelated to the employee's use of PFL leave.



NEW YORK STATE SHORT TERM DISABILITY

N.Y. Workers' Compensation Law § 200, et seq.
12 NYCRR Part 355 et seq.

COVERAGE

COVERED EMPLOYERS

- Almost all private sector employers with one or more employees who work in New York State for at least 30 days/year

ELIGIBLE EMPLOYEES

- Employment status
 - Work for a covered employer
 - If unemployed for less than four weeks, coverage may be available from the prior employer's insurance carrier
 - If unemployed for more than four weeks and receiving unemployment benefits, coverage may be available from the WCB Special Fund (but cannot collect STD and UI at the same time)
- Disability
 - Must be under the care of a medical provider in order to qualify

POST-PARTUM DISABILITY LEAVE**

- Only available to the birthing parent for a period immediately after the birth of the child
- Employees who give birth are eligible for disability benefits for:
 - Up to six weeks after a vaginal delivery
 - Up to eight weeks after a c-section delivery
 - Up to 26 weeks with documentation from the employee's medical provider
- Employees will receive cash-only benefits, which amount to 50% of the employee's average weekly wage for the last eight weeks worked, up to a current maximum benefit of \$170/week
 - Employers are permitted but not required to take a contribution from employees to offset the cost of providing disability benefits
- No job protection, although protections from disability discrimination, and disability accommodation rights, may apply

***NYS STD is generally available for non-work-related injuries, including pregnancy-related conditions, but only post-partum disability leave will be discussed in this presentation.*

NOTICE AND DOCUMENTATION

- **When an employee notifies their employer of a potential need for short term disability leave, the employer should provide the employee with forms to file a claim with the carrier, as well as the carrier's contact information**
- **Employer Notice Obligations**
 - Must post a notice from the employer's insurance carrier regarding compliance with disability benefits
 - Should provide written information to employees regarding the availability of short term disability leave
- **Employee must submit a medical report stating the disability is due to or related to recovery from delivery. Certain physical and mental health conditions due or related to post-partum recovery may be eligible for benefits.**

OTHER IMPORTANT INFORMATION

- Employers may require employees to exhaust sick time benefits during the seven-calendar day waiting period prior to receiving short-term disability and may permit employees to use any remaining accrued paid time during their leave period.
- New York State Short-Term Disability will generally not run concurrently with PFL, and employees may not receive more than 26 combined weeks of STD and PFL in a 52-week period.



NEW YORK STATE PAID SICK LEAVE

N.Y. Labor Law § 196-B
12 NYCRR Part 196 et seq.

COVERAGE

COVERED EMPLOYERS

- Every private sector employer in New York State

ELIGIBLE EMPLOYEES

- All employees working in New York State

RULES AND REGULATIONS

UP TO 40 OR 56 HOURS OF LEAVE (PAID IF EMPLOYER HAS 5+ EMPLOYEES OR INCOME OVER A CERTAIN THRESHOLD)

MAY BE USED FOR A VARIETY OF SICK LEAVE REASONS**

JOB PROTECTION

NOTICE REQUIREMENTS FOR BOTH EMPLOYER AND EMPLOYEE

ENFORCED BY THE NYS DEPARTMENT OF LABOR

NO RETALIATION

**PSL is available for other qualifying safe leave reasons, but this presentation will focus on sick leave reasons related to the post-partum period.

PAID SICK LEAVE

- **Employers with:**
 - 4 or fewer employees and a net income of \$1 million or less must provide up to 40 hours of unpaid leave
 - 4 or fewer employees and a net income of more than \$1 million must provide up to 40 hours of paid leave
 - 5 – 99 employees must provide up to 40 hours of paid leave
 - 100+ employees must provide up to 56 hours of paid leave
- Leave may be front-loaded or accrued at a rate of 1 hour of sick leave for every 30 hours worked, beginning upon hire
- Leave may be taken for an employee's or family member's illness or health condition, diagnosis/care/treatment, or need for diagnosis or preventive care
- Leave is paid at an employee's regular rate of pay
- Unused leave must be carried over year to year, without limitation
- Leave may be taken in increments of no less than 4 hours and employers may cap usage at 40 or 56 hours per year

EMPLOYEE PROTECTIONS

- Job Protection: Employers must return employees to the same position of employment upon return from sick leave taken
- No Retaliation: Employers may not discriminate or retaliate against employees for taking or requesting PSL

NOTICE REQUIREMENTS

- **Employee Notice Requirements**
 - Employees must provide written or oral notice before their work shift begins
 - Employees may be required to provide supporting documentation after three consecutive days of sick leave
- **Employer Notice and Record Obligations**
 - Must provide written notice or post the policy on sick leave
 - Must provide a summary of the amounts of sick leave accrued and used upon request from an employee

OTHER IMPORTANT INFORMATION

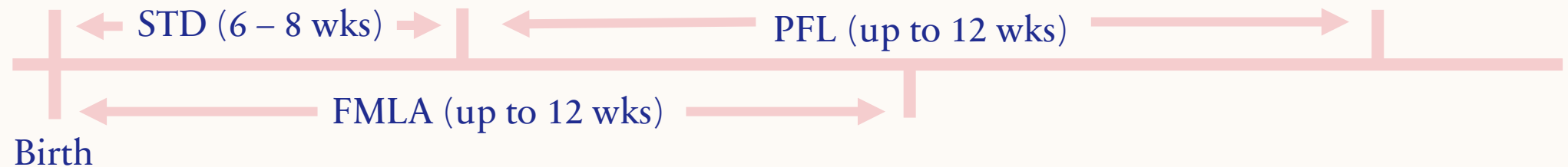
- PSL may be able to be used during other periods of leave to receive pay or to obtain an employee's full salary during that period of leave

COMPARING LEAVES

	FMLA	PFL	STD	PSL
Bonding leave	X	X		
Post-partum recovery/other medical issues	X		X	X
To provide medical care for newborn	X	X		X
Paid leave		X	X	X
Job protection	X	X		X
Continuation of health benefits required	X	X		X
Employee may be required to contribute via payroll deductions		X	X	
Certain eligibility requirements based on employment status	X	X	X	

UNDERSTANDING THE PATCHWORK OF POST-PARTUM PROTECTIONS

If an employee chooses to use all available leave, consecutively and immediately following birth:



A NOTE ON PRE-PARTUM LEAVE

Pre-partum may be available for a number of reasons, including an employee's prenatal care, an employee's incapacity related to pregnancy or other pregnancy-related condition, doctor's appointments, or to care for an employee with a pregnancy-related condition.

Available under the
FMLA

Proposal to include
this under NYS
Paid Family Leave

Available under
NYS Short-Term
Disability

Available under
NYS Paid Sick
Leave

NEW YORK LABOR LAW § 215

- Employers are prohibited from retaliating against employees because an employee has used any legally protected absence pursuant to federal, local, or state law.
 - Protected leave includes FMLA, Paid Family Leave, and Paid Sick Leave
- An employee may bring a civil action against an employer for a violation of this law within 2 years of the violation. Relief may include liquidated damages, costs and reasonable attorneys' fees, reinstatement, lost compensation and damages.
- This has ramifications for:
 - Employee handbooks
 - “Point system” attendance policies

BEST PRACTICES - EMPLOYEES

1

Notify employer of need for leave within required timeframe (and as soon as possible) and comply with employer notice and procedural requirements.

2

Plan ahead and communicate with employer about coverage for work responsibilities.

3

Immediately communicate to employer any concerns or questions.

BEST PRACTICES - EMPLOYERS

Leave Policies - Have a clear written policy, including a defined 12-month period.

Records - Maintain thorough records of all leave-related communications and documentation.

Manager Training - Train on communications regarding leave, anti-retaliation protections, and employer's policies.

HR point person - for employees to bring their questions and to ensure responsibility for tracking employee leave.

Q&A (AND THANK YOU!)

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