

FAQ "Time off to Vote"

1. What elections may an employee get time off to vote under does Election Law 3-110?

Section 1-102 of the Election Law provides that the Election Law, including § 3-110 of the Election Law, shall govern "all elections at which voters of the state of New York may cast a ballot for the purpose of electing an individual to any party position or nominating or electing an individual to any federal, state, county, city, town or village office, or deciding any ballot question submitted to all the voters of the state or the voters of any county or city, or deciding any ballot question submitted to the voters of any town or village at the time of a general election." This includes primary and general elections as well as any special elections called by the Governor. It **does NOT** include school district elections, library district elections, fire district elections or special town elections.

Also, the time off to vote provisions only apply to primary or election days NOT to early voting periods.

2. Are employers allowed to ask for proof of registration and/or proof that the employee voted?

Unlike many other time-off provisions that specify forms of proof an employer may require as evidence leave time was properly used (i.e. a doctor's note), Election Law § 3-110 is silent with respect to whether or not an employer may obtain from an employee proof that the employee is a registered voter or enrolled in a particular party for a primary election.

Election Law § 3-110 is also silent with respect to whether an employer can require that an election inspector sign a statement, stamp a card or provide an "I voted" sticker to prove that an employee voted in an election. However, Election inspectors are tasked with many duties in relation to the administration of elections and providing proof that a person voted is not one of them.

The New York State Civil Service Department has issued guidance regarding New York State employees that their employers are prohibited from asking for such proofs. See https://www.cs.ny.gov/attendance_leave/PolBull19-02a.cfm.

3. May an employer refuse to provide three hours of paid time off, or provide less than three hours of paid time off, if an employee does not need the time to be able to vote before or after work?

§ 3-110 provides that: "(a) registered voter may, without loss of pay for up to three hours, take off so much working time as will enable them to vote(.)"

Per the plain language of the statute, the employee does not automatically receive three hours to vote; rather, the employee is entitled to take off as much time (up to three hours) as will enable the employee to vote. While there is no easy rule as to what constitutes "so much working time as will enable them to vote," the employer alone is not in the best position to make that determination. Voter wait times at the polls and traffic conditions, among other things, can cause the amount of time needed to be more or less. If the employer reduces the time a voter requests under this provision, the employer runs the risk of running afoul of this statute.

4. Does the notice requirement of two "working" days mean two "business" days?

Generally, yes. The statutory language calls for employees to give notice of their intent to take the time off two "working days" prior to the election. "Working day" is not defined in the Election Law, nor is it defined in the General Construction Law. It has been held that "working days" means "days as they succeed each other, exclusive of Sundays and holidays." *Pedersen v Eugster*, 14 F 422, 422 (ED La 1882); *see also* 1915, Op.Atty.Gen. 139. However, it has also been recognized, in contract cases, that there is no general rule with respect to the term "working days," since the term varies in different occupations, and hence, it should be determined in light of the circumstances of the particular case. *See F.J. Mumm Contr. Co. v Vil. of Kenmore*, 104 Misc 268, 268 (Erie Sup Ct 1918). As such, it is the general opinion of the Board that "working days" is determined in light of each individual employer. In other words, "working days" means any day that the employer is operating and/or open for business.

5. If an employee does not have a set schedule, rather they are assigned tasks which consists on average 5-10 hours of piece work projects in which they are requested to complete within a given week being Sunday through Saturday AND they are not required to work on any given day, does the 3 hours of time off apply in these types of situations?

If an employee has a flexible schedule, and is not scheduled to work on Election Day, then § 3-110 of the Election Law does not apply. The employee would not be entitled to paid three hours to vote. However, if a worker, including a "part time" worker, is scheduled to work on Election Day, then they are entitled to take time off to vote.

6. Can an employer require an employee to use their "personal time off" to vote to comply with § 3-110 of the Election Law?

No. The purpose of this statute is "to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote." *Williams v Aircooled Motors*, 307 NY 332, 336 [1954], *quoting Day-Brite Light. Inc. v State of Mo.*, 342 US 421 [1952]. Requiring an employee to use personal time would be contrary to the intent of this statute. Beyond the three hours the employee could potentially use other accruals, and that use would be governed exclusively under the provisions applicable to those accruals.

7. Does § 3-110 of the Election Law override any applicable collective bargaining agreement in relation to time off for voting?

Nothing in § 3-110 of the Election Law would work to impair or diminish any more generous provision as part of a current collective bargaining agreement.

8. What is the penalty for failing to provide time off as required by § 3-110 of the Election Law?

While the Election Law does not provide any special enforcement measures related to "time off to vote," civil enforcement remedies (Election Law § 3-104) or misdemeanor criminal charges in instances of "knowingly and willfully" violating the provision (Election Law § 17-168) are provided for in existing law.