

Explaining New York's 2023 Bail Reform Amendments

By Krystal Rodriguez and Michael Rempel

Editor's Note:

Once again, the bail laws in New York State have been changed. The following two pieces have been shared with us with permission by the Data Collaborative for Justice at John Jay College.

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On May 2, 2023, Governor Kathy Hochul signed New York's fiscal year 2024 state budget, which included changes to the state's bail reform law. Driven by an effort to reduce the number of people held in pretrial detention and address persistent economic and racial disparities¹ in New York's jail population,² bail reform initially passed in 2019 and has now been amended on three separate occasions.

A Brief History

In April 2019, legislators passed the first major reform to New York's bail statute since the 1970s. Bail reform limited the use of cash bail and pretrial detention mainly to violent felony offenses; established a presumption of release on recognizance for all cases except when a "risk of flight" is present; and required consideration of people's "individual financial circumstances" when contemplating bail. The reform went into effect in January 2020.

- **First round of amendments (2020):** After three months of full implementation, legislators amended the statute in April 2020 to make more charges (mostly nonviolent felonies) and circumstances legally eligible for cash bail and pretrial detention. Perhaps most notably, legislators added what is known as the "harm to harm" provision, making individuals charged with an offense alleging "harm to an identifiable person or property" eligible for bail if they already had a pending case meeting the same criteria. These amendments went into effect July 2020.
- **Second round of amendments (2022):** In April 2022, legislators amended the statute again, adding specific gun offenses to the bail-eligible list and clarifying that petit larceny (shoplifting) involves "harm to property" except when the alleged offense is "negligible" and not intended to further other criminal activity. These changes went into effect May 2022.

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- **Third round of amendments (2023):** In May 2023, legislators amended the bail statute again. This publication highlights these most recent changes, effective June 2023.

Major 2023 Changes to the Bail Reform Law

Replacing the ‘Least Restrictive Condition’ Standard

The 2019 reform law included language requiring judges to set the “least restrictive” pretrial conditions necessary to “reasonably assure” the accused individual’s return for future court dates. The 2023 changes eliminated the “least restrictive” standard and replaced it with language similar to what had existed before bail reform. The language requires judges to base pretrial conditions on “the kind and degree of control or restriction necessary to reasonably assure the principal’s return to court.” (C.P.L. § 510.10[1]).

The legally prescribed purpose of imposing pretrial conditions remains the same: to ensure return to court. In addition, the replacement language ostensibly has the same meaning as the “least restrictive condition” phrasing. Since courts can only impose a degree of control that is “necessary,” judges may interpret that if a less restrictive condition is sufficient to achieve the individual’s return to court, the more restrictive options of bail or pretrial detention are *unnecessary* and, accordingly, may not be imposed. This interpretation would suggest legislators did not alter the literal meaning of the law.

On the other hand, the elimination of the more concise and, arguably, clearer “least restrictive condition” mandate may influence some judges to impose more onerous conditions, including cash bail when permissible, than they would have previously—especially given the widely publicized intention of giving judges more discretion to set bail and detain people before trial.

The impact of this change will rely on each individual judge’s interpretation and application of the provision, making it challenging to project any future impact on bail-setting (although researchers will be able to provide answers in time).

Notably, this change applied to *all criminal offenses and circumstances*, not limited to bail-eligible cases. In cases for which cash bail is not permitted, courts no longer must set the “least restrictive” of possible *non-monetary conditions* (though, as quoted above, the judge must still deem any non-monetary conditions imposed to be “necessary”).

Limiting the Presumption of Release on Recognizance

The 2019 reform law established an explicit presumption directing courts to release people pretrial *unless* the judge has reason to believe they pose a credible risk of fleeing the court process. This presumptive language stated, “the court shall release the principal pending trial on the principal’s own re-

cognizance, unless it is demonstrated and the court makes an individualized determination that the principal poses a risk of flight to avoid prosecution.”

The 2023 changes weakened this language in a part of the statute having general applicability to all offenses (C.P.L. § 510.10[1]), but seemingly maintained the presumption of release specifically for cases that remain *ineligible for bail*. (C.P.L. § 530.40[3]) Therefore, in cases currently ineligible for bail, judges must continue to make release on recognizance their presumptive default option *unless* demonstrable evidence exists pointing to a need for non-monetary conditions to assure return to court.

In *bail eligible cases*, the law still requires judges to make “an individualized determination as to whether the principal poses a risk of flight”—but judges do not have to begin from a default presumption of release on recognizance that must be overcome through evidence of a flight risk before pretrial conditions may even be considered. Much like the replacement of the “least restrictive condition” phrasing, it is unclear how much impact this change will have in everyday decision-making, especially considering prior research³ that at least some judges were already setting bail in cases not appearing to pose a flight risk.

Adding a Cash Bail PLUS Non-Monetary Conditions Option

The 2023 amendments added a new pretrial option explicitly allowing courts to order *both cash bail and non-monetary conditions on the same case*. While the bail statute did not expressly disallow the simultaneous use of these conditions prior to the 2023 changes, it was a matter up for legal interpretation. Legislators’ presumed intention is to allow judges to order someone to be detained pretrial pending their bail payment, while also ensuring that if they pay bail, they will then be subject to further non-monetary conditions such as pretrial supervision, beyond the monetary incentive already leveraged through cash bail.

Presumably, judges will set a combination of bail plus non-monetary conditions more often than previously in response to this change. It is also conceivable that judges may lower their bail amounts and facilitate higher rates of bail payment when they know that other types of conditions will be in effect should the individual post bail.

A related empirical question is how long it will take between when an individual posts bail and when they begin participating in the non-monetary conditions assigned—i.e., completes an intake with their county’s pretrial services agency in cases where the non-monetary conditions involve pretrial supervision.

Specifying Mental Health and Drug Treatment Within the Mandatory Programming Option

The 2019 reform law added more pretrial conditions beyond the limited options of release on recognizance and cash bail. In turn, the 2020 amendments added “mandatory programming” as an available non-monetary condition and defined such programming to include “counseling, treatment, and intimate partner violence intervention programs.” The 2023 amendments further clarified that “treatment” includes “mental health and chemical dependence treatment,” as well as gave judges the option to refer people to crisis stabilization centers.

The prior 2020 language allowing judges to order mandatory programming that can include “treatment” ostensibly encompasses mental health and drug treatment already. While the 2023 amendments inserted these two forms of treatment into the statutory language, it remains to be seen how often judges will order these options, as mandatory programming has not been widely used throughout the state so far.

Expanding Considerations When Addressing Noncompliance With Pretrial Conditions

The 2023 amendments introduced new options for judicial responses to noncompliance with ordered pretrial conditions. According to the original 2019 reform, judges may set bail when an individual has a pending case and has been non-compliant specifically by: (1) violating an order of protection, (2) engaging in alleged witness intimidation or tampering, or (3) allegedly committing a felony while released on a pending felony case.

The 2023 amendments clarified that judges may set bail either on its own or in combination with non-monetary conditions in response to these three forms of noncompliance. The amendments also added additional criteria guiding the court’s decision on noncompliance matters, including previous instances of pretrial noncompliance.

Adding New Data Reporting Requirements To Better Track the State’s Jail Population

The 2019 reforms imposed public reporting requirements on the state’s Office of Court Administration (OCA), significantly expanded a year later in the 2020 amendments.⁴ Updated semi-annually, OCA now provides on its website a de-identified public dataset⁵ that can be used to analyze pretrial decisions, bail payment, failure to appear, and pretrial re-arrest rates, with breakdowns by county, demographics, charges, and criminal history for cases originating 2020 or later. The state’s Division of Criminal Justice Services provides similar data annually and includes 2019 cases.

The 2023 amendments introduced a new requirement that OCA provide monthly data on pretrial jail commitments, in-

cluding breakdowns by county, age, gender, race, ethnicity, top arrest and arraignment charge, whether the jail admission stemmed from an inability to pay bail or a remand order, and any prior release from jail on the current case. For people discharged from pretrial detention, the data must make it possible to estimate their admission and discharge dates and total days in custody before trial.

This new requirement will facilitate tracking monthly changes in statewide and county jail populations, including their demographic and charge composition and people’s length of stay during the pretrial period while they are presumed innocent of a crime.

Major Bail Reform Provisions That Remained the Same

The 2023 changes were significantly more modest than those originally proposed⁶ by Governor Kathy Hochul. The governor had at first proposed eliminating return to court as the governing consideration in whether judges can set bail or detain someone. But in the final legislation, the purpose of pretrial decisions remained the same—to ensure court attendance. The 2023 amendments did not add dangerousness or public safety considerations to pretrial decision-making.

Despite the removal of “least restrictive condition” wording, the 2023 amendments continue to constrain judicial discretion by requiring judges to determine that the “degree of control” they impose is “necessary” for assuring court attendance, and judges must still explain such a conclusion orally or in writing. Additionally, there was no change in language specifying criteria for when judges may set electronic monitoring in legally eligible cases. The law still strictly states that such monitoring may only be set if “no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure a principal’s return to court.”

Perhaps most significantly, Governor Hochul did not seek, and legislators did not approve, changes to the charges or circumstances distinguishing cases legally eligible and ineligible for bail. Cases for which bail and pretrial detention were flatly off-limits remain so. When judges wish to set bail in bail-eligible cases, there was also no change in the requirement that they consider people’s “individual financial circumstances” and whether bail would pose “undue hardship.”

The Upshot

Judges overseeing individual arraignments are at the helm of interpreting and implementing the bail statute. Their interpretation, application, and ultimate decisions will directly impact jail populations across the state. While the recent amendments steer judges away from the more deliberative process of first determining whether there is a risk of flight to avoid prosecu-

tion and, if so, contemplating what would be the least restrictive condition to assure court attendance, judges continue to be guided to choose conditions that are “necessary” and well suited for the level of flight risk demonstrated by the individual before them.

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Endnotes

1. <https://datacollaborativeforjustice.org/work/racial-justice/racial-disparities-in-the-use-of-jail-across-new-york-city-2016-2021/>.
2. criminaljustice.ny.gov/jail_population.pdf.
3. <https://www.innovatingjustice.org/publications/bail-NYS-one-year>.
4. https://www.innovatingjustice.org/sites/default/files/media/document/2020/Bail_Reform_Revisited_050720.pdf#page%3D11.
5. <https://ww2.nycourts.gov/pretrial-release-data-33136>.
6. <https://nysfocus.com/2023/02/01/bail-reform-hochul-budget>.

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Bench Card
**New York's Bail Statute:
 Pretrial Options**

Updated May 2023

After [New York's 2019](#) reforms and subsequent amendments, courts must base pretrial decisions on an individualized determination of whether the accused person poses a risk of flight to avoid prosecution, and courts must choose the kind and degree of control or restriction necessary to ensure the individual will return to court. This bench card summarizes pretrial options, incorporating the [April 2020](#), [April 2022](#), and [May 2023](#) amendments.

Offenses	ROR ¹	Non-Monetary Conditions ^{2,3}	Electronic Monitoring ⁴	Money Bail ⁵	Remand
MISDEMEANORS					
Misdemeanors generally, <i>exceptions below</i>	✓	✓	NO	NO	NO
Domestic Violence Offenses generally, <i>exceptions below</i>	✓	✓	✓	NO	NO
VFO Conviction in Past 5 Years, <i>as defined in PL 70.02</i>	✓	✓	✓	NO	NO
Sex Offenses, <i>as defined in PL Art. 130⁶</i>	✓	✓	✓	✓	NO
Criminal Contempt and Criminal Obstruction of Breathing or Blood Circulation, <i>PL 215.50(3) and 121.11, if underlying charge is a domestic violence offense⁷</i>	✓	✓	✓	✓	NO
Endangering the Welfare of a Child, <i>PL 260.10, if the individual is required to be registered as a sex offender and is designated a Level 3 offender</i>	✓	✓	✓	✓	NO
Bail Jumping 3rd and Escape 3rd, <i>PL 215.55 and PL 205.05</i>	✓	✓	✓	✓	NO
DRUG FELONIES					
Drug Felonies generally, <i>exceptions below</i>	✓	✓	✓	NO	NO
Operating as a Major Drug Trafficker, <i>PL 220.77</i>	✓	✓	✓	✓	✓
Criminal Possession of a Controlled Substance 1st, <i>PL 220.21</i>	✓	✓	✓	✓	✓
Criminal Sale of a Controlled Substance 1st, <i>PL 220.43</i>	✓	✓	✓	✓	✓
GUN FELONIES					
Criminal Possession of a Weapon on School Grounds, <i>PL 265.01-a</i>	✓	✓	✓	✓	✓
Criminal Possession of a Weapon 3rd, Subsection 3, <i>PL 265.02(3)⁸</i>	✓	✓	✓	✓	✓
Criminal Sale of a Firearm to a Minor, <i>PL 265.16</i>	✓	✓	✓	✓	✓

Offenses	ROR ¹	Non-Monetary Conditions ^{2,3}	Electronic Monitoring ⁴	Money Bail ⁵	Remand
NONVIOLENT FELONIES					
Nonviolent Felonies generally, exceptions below	✓	✓	✓	NO	NO
Incest⁹ and Sex Offenses, PL 255.25, 255.26, and sex offenses as defined in PL Art. 130 and in PL 70.80¹⁰	✓	✓	✓	✓	✓
Criminal Contempt and Unlawful Imprisonment 1st, PL 215.51(b)(c)(d), 215.52 and 135.10, if underlying charge is a domestic violence offense¹¹	✓	✓	✓	✓	✓
Witness Intimidation and Tampering, PL 215.11, 215.12, 215.13, and 215.15	✓	✓	✓	✓	✓
Conspiracy to Commit Murder, PL 105.15	✓	✓	✓	✓	✓
Money Laundering in Support of Terrorism, PL 470.21, 470.22, 470.23, and 470.24¹²	✓	✓	✓	✓	✓
Offenses involving Sexual Performance by Children, PL 263.30, 263.05, 263.10, 263.15, and 120.70(1)	✓	✓	✓	✓	✓
Assault 3rd and Arson 3rd, PL 120.00 and PL 150.10, if committed as a hate crime, pursuant to PL 480.05¹³	✓	✓	✓	✓	✓
Vehicular Assault 1st and Aggravated Vehicular Assault, PL 120.04, 120.04-a	✓	✓	✓	✓	✓
Aggravated Assault Upon a Person Less Than 11 years old, PL 120.12	✓	✓	✓	✓	✓
Grand Larceny 1st, PL 155.42	✓	✓	✓	✓	✓
Enterprise Corruption, PL 460.20	✓	✓	✓	✓	✓
Money Laundering 1st, PL 470.20	✓	✓	✓	✓	✓
Failure to Register as a Sex Offender, Corr. Law 168-t, if the individual is required to be registered as a sex offender and is designated a Level 3 offender	✓	✓	✓	✓	✓
Bail Jumping and Escape, PL 215.56, 215.57, 205.10, and 205.15	✓	✓	✓	✓	✓
Sex Trafficking, PL 230.34¹⁴	✓	✓	✓	✓	✓

Chart continued on page 3

Offenses	ROR ¹	Non-Monetary Conditions ^{2,3}	Electronic Monitoring ⁴	Money Bail ⁵	Remand
VIOLENT FELONY OFFENSES cont'd					
Burglary 2nd degree, Subsection (2), PL 140.25(2), if IN the living area of a dwelling	✓	✓	✓	✓	✓
All Other Violent Felony Offenses, as defined in PL 70.02, including violent felony sex offenses and gun offenses¹⁶	✓	✓	✓	✓	✓
CLASS A FELONIES					
Class A Felonies other than A-II drug felonies	✓	✓	✓	✓	✓
BROAD CATEGORIES					
Any Crime Causing the Death of Another Person, e.g. PL 125.10, 125.11, 125.12, 125.13, 125.14, 125.15, 125.20, 125.21, 125.22, and VTL 600(2)(c)¹⁷	✓	✓	✓	✓	✓
Any felony offense committed while on probation or post release supervision, CPL 510.10(4)(r)	✓	✓	✓	✓	✓
Any felony offense where the individual would qualify as a persistent felony offender if sentenced on the current charge, pursuant to PL 70.10, CPL 510.10(4)(s)	✓	✓	✓	✓	✓
Any felony or Class A misdemeanor involving either harm to an identifiable person or property OR criminal possession of a firearm, PL 265.01-b, that occurred while RELEASED on a felony, Class A misdemeanor, or while awaiting arraignment on a DAT involving harm to an identifiable person or property OR criminal possession of a firearm, PL 265.01-b. DEFINITION: Harm to property includes theft, UNLESS the theft is negligible and not in furtherance of another crime. CPL 510.10(4)(t)¹⁸	✓	✓	✓	✓	✓

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Endnotes

1. Individuals who are released on their own recognizance (ROR) will receive court appearance reminders from the court or a pretrial service agency. However, if the individual intentionally declines to provide contact information, they are forfeiting the notification. Any failure of the court or pretrial service agency to provide such a notification is not a basis for the individual to miss their court appearance. [CPL 510.43(1)-(2)]

2. For all cases, non-monetary conditions should be based on an individualized determination of **whether the accused person poses a risk of flight to avoid prosecution, and courts must choose the**

kind and degree of control or restriction necessary to ensure the individual will return to court and comply with court conditions. [CPL 500.10(3-a); CPL 510.10(1)] For the offenses that do not qualify for cash bail (mostly misdemeanors and nonviolent felonies), non-monetary conditions can be used where the court finds that the individual poses a risk of flight [CPL 510.10(3)]. For bail eligible offenses, or “qualifying offenses,” the court may choose to release an individual on their own recognizance, impose non-monetary conditions, set bail, set bail in conjunction with non-monetary conditions, or, if the charge is a felony, order that the individual be held without bail. Non-monetary conditions include contact and supervision by a pretrial service agency, restricting travel, and prohibiting possession of a firearm or other dangerous weapon. The amended reforms of 2020 added several non-monetary conditions, including: mandatory programming through a pretrial service agency (amended in May 2023 to specify mental health and chemical dependency treatment as types of programming the court may order); hospitalization pursuant to Mental Health and Hygiene Law, Section 9.43; maintaining housing, employment and education; refraining from association with victims, witnesses, and co-defendants; in domestic violence cases, conditions addressing victim safety and obeying an order of protection. Non-monetary conditions can be used singularly or in combination, so long as it is reasonable under the circumstances [CPL 500.10(3-b)]. Non-monetary conditions can also be used in conjunction with cash bail, as of the May 2023 amendments [CPL 510.10(4)].

3. Pretrial supervision is one of the non-monetary conditions listed in the statute as a non-monetary condition [CPL 510.10(d)].

4. Electronic monitoring may only be ordered if “no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure a principal’s return to court” [CPL 510.40(4)(a)]. When such monitoring is ordered, the individual is considered “in custody” for the purposes of CPL 170.70 and 180.80 [CPL 510.40(4)(d)].

5. When setting monetary bail, the court must consider the individual’s ability to pay bail and ability to post a secured, partially secured, or unsecured bond [CPL 510.10(1)(f)]. The court must set THREE forms of bail, one of which MUST BE a partially secured or unsecured surety bond [CPL 520.10(2)(b)].

6. Misdemeanor sex offenses, defined in PL Art. 130, include: sexual misconduct, forcible touching, and sexual abuse in the 2nd and 3rd degrees [CPL 510.10(4)(e)].

7. Criminal Contempt as a Misdemeanor and Criminal Obstruction of Breathing or Blood Circulation are bail eligible ONLY IF the alleged crime is committed against a family member, as defined by CPL 530.11 [CPL 510.10(4)(h) and (k)].

8. Criminal Possession of a Weapon 3rd, subsections 5-10 are already qualifying offenses subject to bail by virtue of being classified as violent felonies, listed in PL 70.02.

9. Incest in the 1st, 2nd, and 3rd degrees (PL 255.25, 255.26, 255.27) are bail eligible [CPL 510.10(4)(e)].

10. Felony sex offenses, defined in PL 70.80, include: any felony defined in PL Article 130; a sexually motivated felony (defined in PL 130.91); Patronizing a Person for Prostitution in the 1st and 2nd degrees, PL 230.05, 230.06; Aggravated Patronizing a Minor for Prostitution in the 1st, 2nd, and 3rd degrees, PL 230.11, 230.12, 230.13; and a felony attempt or conspiracy to commit any of the above [CPL 510.10(4)(e)].

11. Criminal Contempt as a Felony [PL 215.51(b)(c)(d) and 215.52] and Unlawful Imprisonment (PL

135.10) are bail eligible ONLY IF the alleged crime is committed against a family member, as defined by CPL 530.11 [CPL 510.10(4)(h)].

12. Making a Terroristic Threat, PL 490.20, is NOT bail-eligible. Other violent felony terrorism offenses that are eligible for monetary bail include: Soliciting or Providing Support for an Act of Terrorism in the 1st and 2nd degrees, PL 490.10, 490.15; Crime of Terrorism, PL 490.25; Hindering Prosecution of Terrorism in the 1st and 2nd degrees, PL 490.30, 490.35; Criminal Possession of Chemical or Biological Weapon in the 1st, 2nd, and 3rd degrees, PL 490.37, 490.40, 490.45; Criminal Use of Chemical or Biological Weapon in the 1st, 2nd, and 3rd degrees, PL 490.47, 490.50, 490.55 [CPL 510.10(4)(g)].

13. Designating an offense as a hate crime elevates the category for misdemeanors and C, D, and E felonies. Thus, Assault in the 3rd degree, normally an A misdemeanor, committed as a hate crime elevates the offense to a nonviolent Class E felony. Likewise, Arson in the 3rd degree as a hate crime is elevated from a C nonviolent felony to a B nonviolent felony [PL 485.10(2)].

14. Sex Trafficking, PL 230.34, contains subsections designated as violent and others designated as nonviolent. Subsections (5)(a) & (b) were included as eligible for bail and remand in the reform law passed in 2019, as they are designated violent felony offenses, whereas, subsections (1), (2), (3), (4) and (5)(c)-(h) are designated nonviolent felony offenses, but are now eligible for monetary bail and remand [CPL 510.10(4)(e)].

15. Burglary in the 2nd degree, subsection 2, is only bail and remand eligible when such burglary is alleged to have occurred within the “living area” of a dwelling. Cases where the allegations occur elsewhere (a lobby, for example) are not “qualifying offenses” for the purposes of bail and remand [CPL 510.10(4)(a)].

16. Violent felony offenses are listed in PL 70.02 and include, among other violent felonies: Intimidating a Victim or Witness in the 1st and 2nd degrees, PL 215.16, 215.17; violent felony sex offenses (e.g. incest, rape, criminal sexual act, and course of sexual conduct against a child); and violent felony firearms and weapons offenses (e.g., criminal possession of a weapon 1st and 2nd; criminal use of a firearm, and aggravated criminal possession of a weapon). It also includes select sex trafficking charges, PL 230.34(5)(a) & (b) and 230.34-a, and Strangulation in the 2nd degree, PL 121.12, which, although already bail-eligible, they were individually added to the list of qualifying offenses for bail and remand in the 2020 bail reform amendments.

17. The 2020 amendments to the bail statute made any crime that is alleged to have caused the death of another person eligible for monetary bail. If the crime is a felony, then remand is also an option. The listed charges are examples of offenses that involve such allegations, some of which are technically deemed nonviolent felonies.

18. For both the current crime alleged and the pending case, the prosecution must demonstrate reasonable cause to believe the individual committed the alleged offenses. The 2022 amendment to the statute adds that “harm to an identifiable person or property” includes crimes of theft or damage to property, making such offenses qualify for bail, and thus, pretrial detention. However, the statute also indicates that if a theft offense is “negligible” and is not committed to further other criminal activity, then the court must release the individual under their own recognizance or may set non-monetary conditions.