

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 disparities](#) in New York's [jail population](#), 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.
- **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 recognizance, 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 research](#) 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 noncompliant 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](#). Updated semi-annually, OCA now provides on its website a [deidentified public dataset](#) 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, including 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 proposed](#) 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 prosecution 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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Acknowledgements: We are grateful to Jullian Harris-Calvin at the Vera Institute of Justice for her partnership in discussing the 2023 legal changes and their potential ramifications. A special thank you to Karen Kane and Carolyn Cadoret at the Office of Court Administration for their insight into the new reporting requirements.