

Complying With New York State's Lawful Absence Law, Keith Gutstein 5/4/2023

Now that New York State has banned disciplining employees for protected absences with passage of Bill A8092B ("Lawful Absence Law"), employers should be reminded of their obligations under the law and ensure their "no-fault" attendance policies and/or absence control procedures are compliant.

The legislation, which took effect February 19, amended Section 215 of New York Labor Law (NYLL) prohibiting employers from penalizing, threatening, or discriminating or retaliating against employees who take lawful time off. This includes being penalized under absence control policies (also known as "no fault" attendance policies).

Under the law, employers cannot maintain "no fault" policies that essentially punish workers for taking protected leave.

No Fault Policies

Many employers use these "no fault" attendance policies as a way to curb absenteeism and tardiness in the workplace.

No-fault attendance policies generally operate by having workers accumulate "points" for missing work, arriving late, or other attendance-related matters. After accumulating a certain number of "points," workers face discipline up to and including termination.

Employers have been criticized for maintaining policies that "reliably fail to inform workers about their legal rights to take time off without punishment for certain illnesses, health conditions, or disabilities, or for the need to care for an ill loved one" under state, local, and federal civil rights laws. Subsequently, employees might feel deterred from making use of legally protected absences.

What Employers Need to Know

New York State enacted the Lawful Absence Law to make it explicitly clear that workers shall not be punished or subjected to discipline for lawful absences.

Specifically, the amendment prohibits employers from "assessing any demerit, occurrence, or any other point, or deductions from an allotted bank of time, which subjects or could subject an employee to disciplinary action, which may include, but not be limited to failure to receive a promotion or loss of pay."

The amendment also adds to the definition of protected activity to include an employee who uses "any legally protected absence pursuant to federal, local, or state law." While the amendment does not define what constitutes a "legally protected absence pursuant to federal, local, or state law," some examples of legally protected leaves of absence include Family and Medical Leave Act (FLMA), New York State Paid Sick Leave (PSL), and New York State Paid Family Leave (PFL). Other examples include domestic violence leave, jury duty leave, voting leave, and blood donor leave.

Penalties For Violations

Since New York Labor Law 215.1(a) creates a private right of action, employers who violate the statute are subject to monetary damages. Employees who allege that they were disciplined or discharged due to a violation of the NYLL can seek reinstatement, back

pay, front pay, attorney's fees, and liquidated damages. Moreover, the New York State Department of Labor (DOL) can impose civil penalties against employees who violate the statute. The DOL can assess \$10,000 for first-time violations and up to \$20,000 for repeating employers who violate the statute.

Steps Employers Can Take

Private-sector employers, if they haven't already, should review their policies to make sure they comply with the law change. Specifically, paying attention to attendance and leave policies that assign demerits, points, or deductions to employees for work absences. Employers should also educate and train HR personnel and other staff members involved in tracking employee attendance on the recent law change to avoid costly repercussions.

Also remember, it is illegal for employers to retaliate against an employee for asserting their rights under the labor law. Retaliation can occur in many forms, including dismissal from employment, reduction of hours, alteration of work schedule, pay reduction, disciplinary action, and assignment to difficult duties.

KAUFMAN DOLOWICH IS HERE TO HELP

The experienced Labor and Employment attorneys at Kaufman Dolowich are available to assist with any questions regarding complying with the new law. Should you need any assistance, please contact Keith J. Gutstein (KGutstein@kaufmandolowich.com)

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