

STATE OF NEW YORK

1958

2021-2022 Regular Sessions

IN SENATE

January 16, 2021

Introduced by Sen. KRUEGER -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations

AN ACT to amend the executive law, in relation to clarifying that workers shall not be punished or subjected to discipline by employers for lawful absences

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Legislative intent. Too often, absence control, or
2 "no-fault" attendance policies, violate workers' rights in New York
3 state and discourage them from taking job-protected leave or time off to
4 which they are entitled by law. Under such policies, workers are
5 assessed points (sometimes referred to as "demerits" or "occurrences")
6 for each absence - regardless of the reason - and those points subject
7 them to discipline, often including termination. Employers ignore or
8 interfere with these rights due to ambiguities in the law and their own
9 policies and practices. By punishing workers for any absence, including
10 absences protected by law, absence control policies frequently threaten
11 public health and family economic security, and undermine New York state
12 workplace rights. According to A Better Balance, which released a
13 report detailing legal concerns with "no-fault" attendance policies in
14 June 2020, some of the nation's largest employers maintain policies that
15 "reliably fail to inform workers about their legal rights to take time
16 off without punishment for certain illnesses, health conditions, or
17 disabilities, or for the need to care for an ill loved one" under state,
18 local, and federal civil rights laws. After surveying the policies of
19 sixty-six U.S. employers impacting approximately eighteen million work-
20 ers, A Better Balance found that more than 80% of those policies failed
21 to make clear that employees would not receive points for disability-re-
22 lated absences; many provided incomplete or misleading information to
23 workers regarding their right to time off under the federal Family and

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 Medical Leave Act (FMLA); and the majority of the policies indicated
2 that workers will incur points when they miss work because they are
3 sick. It is the intent of the New York state legislature to make it
4 explicitly clear that workers shall not be punished or subjected to
5 discipline for lawful absences. Workers have the right to take legally-
6 protected time off from their jobs to address certain medical, caregiv-
7 ing, and religious needs without penalty.

8 § 2. Section 292 of the executive law is amended by adding a new
9 subdivision 39 to read as follows:

10 39. The term "absence control or no-fault attendance policy" shall
11 mean a policy maintained by an employer under which employees are
12 assessed "points," including but not limited to, demerits or occur-
13 rences, for each absence, regardless of the reason for such absence, and
14 those points subject the employee to progressive disciplinary action,
15 including, but not limited to, failure to receive a promotion, loss of
16 pay, or termination.

17 § 3. Subdivision 1 of section 296 of the executive law is amended by
18 adding a new paragraph (i) to read as follows:

19 (i) For an employer, labor organization, or employment agency to
20 assess points, occurrences, or otherwise discipline employees, includ-
21 ing, but not limited to, through an absence control or no-fault attend-
22 ance policy, for absences related to a known disability, pregnancy-re-
23 lated condition, or otherwise protected by law, without first engaging
24 in a good faith, interactive process to consider whether an employee is
25 entitled to a reasonable accommodation.

26 § 4. Subdivision 1 of section 296 of the executive law is amended by
27 adding a new paragraph (j) to read as follows:

28 (j)(i) for an employer, labor organization, or employment agency to
29 maintain an absence control or no-fault attendance policy, unless it
30 complies with the following:

31 (A) The policy shall be distributed in writing to all current employ-
32 ees within thirty days of when this law becomes effective. Thereafter,
33 the policy shall be distributed in writing to all employees at the time
34 of hire and within five days of when any changes to the policy are made;

35 (B) Employees must have a means of accessing the policy both at their
36 physical workplace and outside of it;

37 (C) The policy must make clear that employees will not face negative
38 consequences, such as be assessed with points or occurrences, or other-
39 wise face disciplinary action, for absences that are protected by law;

40 (D) The policy must specifically reference and provide a reasonable
41 amount of detail about all laws that provide legal protections for time
42 off and legally protected reasons for leave, including, but not limited
43 to, (i) the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101
44 et seq., as amended; (ii) the Family and Medical Leave Act of 1993, 29
45 U.S.C. § 2601 et seq.; (iii) the New York State Human Rights Law,
46 section 290 et seq. of the executive law; (iv) the New York State Paid
47 Family Leave Act, N.Y. Workers' Comp. Law, § 200 et seq.; and (v) the
48 New York State paid sick leave law, N.Y. Lab. Law § 196-b et seq.

49 (E) The policy shall identify a process for employees to complete each
50 of the following:

51 (1) report that an absence is for a legally protected reason for
52 leave;

53 (2) provide medical documentation;

54 (3) seek removal of points or occurrences that an employee believes
55 were wrongly assessed; and

1 (4) permit delayed reporting of an absence in unforeseen and/or emer-
2 gency circumstances without incurring additional points or discipline.

3 (ii) The division of human rights shall develop a model absence
4 control policy that conforms to the requirements of this subdivision.
5 The division shall make such model policy available on its website in
6 English and Spanish and any other language deemed appropriate by the
7 division.

8 (iii) If any employer is found to maintain an absence control or
9 no-fault attendance policy that is not compliant with the requirements
10 of this subdivision, the employer shall be liable for a penalty of fifty
11 dollars for each work day that the violations occurred or continue to
12 occur, but not to exceed a total of five thousand dollars. The attorney
13 general may bring any legal action necessary, including administrative
14 action, to collect such claim. For the purpose of assessing compliance
15 with the provisions of this subdivision, the attorney general or desig-
16 nee, or, if the employer is the state, the division of human rights or
17 designee, may, with forty-eight hours' notice, at reasonable times and
18 without unduly disrupting business operations enter and inspect any
19 place of business or employment, question any person who is authorized
20 by the employer to receive or investigate complaints about attendance
21 issues, and examine an employer's records, policies, procedures, and
22 training materials related to the requirements of this section. The
23 attorney general shall adopt rules as necessary to implement the
24 provisions of this subdivision.

25 § 5. Paragraph (c) of subdivision 3 of section 296 of the executive
26 law, as added by chapter 369 of the laws of 2015, is amended to read as
27 follows:

28 [~~(e)~~] (c-1) The employee must cooperate in providing medical or other
29 information that is necessary to verify the existence of the disability
30 or pregnancy-related condition, or that is necessary for consideration
31 of the accommodation. The employee has a right to have such medical
32 information kept confidential. As part of the good faith, interactive
33 process, the employer must afford the employee a reasonable opportunity
34 to provide medical or other information which may preclude the assess-
35 ment of points, occurrences, or other forms of discipline, including but
36 not limited to pursuant to an absence control or no-fault attendance
37 policy.

38 § 6. This act shall take effect on the ninetieth day after it shall
39 have become a law. Effective immediately, the addition, amendment and/or
40 repeal of any rule or regulation necessary for the implementation of
41 this act on its effective date are authorized to be made and completed
42 on or before such date.