

STATE OF NEW YORK

8092--A

2021-2022 Regular Sessions

IN ASSEMBLY

June 11, 2021

Introduced by M. of A. REYES -- read once and referred to the Committee on Labor -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the executive law, the labor law and the workers' compensation 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. Short title. This act shall be known and may be cited as
2 the "Fair Attendance Policy and Practices Act".

3 § 2. Legislative intent. It is the intent of the New York state
4 legislature to make it explicitly clear that workers shall not be
5 punished or subjected to discipline for lawful absences. Workers have
6 the right to take legally-protected time off from their jobs to address
7 certain medical, caregiving, and religious needs without penalty.

8 § 3. Section 292 of the executive law is amended by adding a new
9 subdivision 40 to read as follows:

10 40. The term "absence control or no-fault attendance policy" shall
11 mean a policy, pattern, or practice maintained by an employer, labor
12 organization, or employment agency under which employees face conse-
13 quences for any absence, tardy, or early departure through the assess-
14 ment of points, also referred to as "demerits of occurrences", or
15 deductions from an allotted bank of time, and such points or deductions
16 subject the employee to progressive disciplinary action which may
17 include failure to receive a promotion, loss of pay, or termination.

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

20 (i) For an employer, labor organization, or employment agency to
21 assess points, occurrences, or otherwise discipline employees, includ-
22 ing, but not limited to, through an absence control or no-fault attend-
23 ance policy, for absences related to an accommodation to a known disa-

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

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1 bility, pregnancy-related condition, or otherwise protected by section
2 two hundred ninety of this article. Nothing in this section shall be
3 determined to diminish the rights, privileges, or remedies of any
4 employee under any other law or regulation.

5 § 5. The labor law is amended by adding a new section 202-n to read as
6 follows:

7 § 202-n. Protection of legal absences. 1. The term "absence or
8 no-fault attendance policy" shall mean a policy, pattern, or practice
9 maintained by an employer, labor organization, or employment agency
10 under which employees face consequences for any absence, tardy, or early
11 departure through the assessment of points, also referred to as "demer-
12 its of occurrences", or deductions from an allotted bank of time, and
13 such points or deductions subject the employee to progressive discipli-
14 nary action which may include failure to receive a promotion, loss of
15 pay, or termination.

16 2. An employer, labor organization, or employment agency shall not
17 assess points, occurrences, or otherwise discipline employees, includ-
18 ing, but not limited to, through an absence control or no-fault attend-
19 ance policy, for absences protected by the New York state paid sick
20 leave law pursuant to section one hundred ninety-six-b of this chapter,
21 the New York state military spousal leave law pursuant to section two
22 hundred two-i of this article, or otherwise protected by article thir-
23 ty-one of this chapter. Nothing in this section shall be deemed to
24 diminish the rights, privileges, or remedies of any employee under any
25 other law or regulation.

26 § 6. The labor law is amended by adding a new section 202-o to read as
27 follows:

28 § 202-o. Protection of legal absences; policy requirements. 1. For
29 purposes of this section, "absence or no-fault attendance policy" shall
30 have the same meaning as defined in subdivision one of section two
31 hundred two-n of this article.

32 2. An employer, labor organization, or employment agency shall not
33 maintain an absence control or no-fault attendance policy, unless it
34 complies with the following:

35 (a) The policy shall be distributed in writing to all current employ-
36 ees within thirty days of when this section becomes effective. Thereaft-
37 er, the policy shall be distributed in writing to all employees at the
38 time of hire and within five days of when any changes to the policy are
39 made;

40 (b) Employees must have a means of accessing the policy both at their
41 physical workplace and outside of such workplace;

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

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

54 (e) The policy shall identify a process for employees to complete each
55 of the following:

1 (i) report that an absence is for a legally protected reason for
2 leave;
3 (ii) provide medical documentation;
4 (iii) seek removal of points or occurrences that an employee believes
5 were wrongly assessed; and
6 (iv) permit delayed reporting of an absence in unforeseen and/or emer-
7 gency circumstances without incurring additional points or discipline.

8 3. For employers who choose to maintain an absence control policy, the
9 department, in collaboration with the division of human rights and the
10 workers' compensation board, shall develop a model absence control poli-
11 cy that conforms to the requirements of this section. The department
12 shall make such model policy available on its website in English and
13 Spanish and any other language deemed appropriate by the department.

14 4. If any employer is found to maintain an absence control or no-fault
15 attendance policy that is not compliant with the requirements of this
16 section, the employer shall be liable for a penalty of fifty dollars for
17 each work day that the violations occurred or continue to occur, but not
18 to exceed a total of five thousand dollars. The attorney general may
19 bring any legal action necessary, including administrative action, to
20 collect such claim. For the purpose of assessing compliance with the
21 provisions of this section, the attorney general or designee, or, if the
22 employer is the state, the division of human rights or designee, may,
23 with forty-eight hours' notice, at reasonable times and without unduly
24 disrupting business operations enter and inspect any place of business
25 or employment, question any person who is authorized by the employer to
26 receive or investigate complaints about attendance issues, and examine
27 an employer's records, policies, procedures, and training materials
28 related to the requirements of this section. The attorney general, in
29 collaboration with the department, the division of human rights and
30 workers' compensation board, shall adopt rules as necessary to implement
31 the provisions of this section, including a means by which individuals
32 can report policies, patterns or practices that are not in compliance
33 with the provisions of this section.

34 5. Nothing in this section shall be deemed to diminish the rights,
35 privileges, or remedies of any employee under any other law or regu-
36 lation.

37 § 7. Section 201 of the workers' compensation law is amended by adding
38 a new subdivision 25 to read as follows:

39 25. "Absence control or no-fault attendance policy" means a policy,
40 pattern, or practice maintained by an employer, labor organization, or
41 employment agency under which employees face consequences for any
42 absence, tardy, or early departure through the assessment of points,
43 also referred to as "demerits of occurrences", or deductions from an
44 allotted bank of time, and such points or deductions subject the employ-
45 ee to progressive disciplinary action which may include failure to
46 receive a promotion, loss of pay, or termination.

47 § 8. The workers' compensation law is amended by adding a new section
48 203-d to read as follows:

49 § 203-d. Protection for legal absences. 1. An employer, labor organ-
50 ization, or employment agency shall not assess points, occurrences, or
51 otherwise discipline employees, including, but not limited to, through
52 an absence control or no-fault attendance policy, for absences protected
53 by the New York state paid family leave act or otherwise protected by
54 this chapter.

55 2. The provisions of section one hundred twenty of this chapter shall
56 be applicable to this section.

1 3. Nothing in this section shall be deemed to diminish the rights,
2 privileges, or remedies of any employee under any other law or regu-
3 lation.

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

7 [~~e~~] (c-1) The employee must cooperate in providing medical or other
8 information that is necessary to verify the existence of the disability
9 or pregnancy-related condition, or that is necessary for consideration
10 of the accommodation. The employee has a right to have such medical
11 information kept confidential. As part of the good faith, interactive
12 process, the employer must afford the employee a reasonable opportunity
13 to provide medical or other information which may preclude the assess-
14 ment of points, occurrences, or other forms of discipline, including but
15 not limited to pursuant to an absence control or no-fault attendance
16 policy.

17 § 10. Severability clause. If any clause, sentence, paragraph, subdi-
18 vision, section or part of this act shall be adjudged by any court of
19 competent jurisdiction to be invalid, such judgment shall not affect,
20 impair, or invalidate the remainder thereof, but shall be confined in
21 its operation to the clause, sentence, paragraph, subdivision, section
22 or part thereof directly involved in the controversy in which such judg-
23 ment shall have been rendered. It is hereby declared to be the intent of
24 the legislature that this act would have been enacted even if such
25 invalid provisions had not been included herein.

26 § 11. This act shall take effect on the ninetieth day after it shall
27 have become a law. Effective immediately, the addition, amendment and/or
28 repeal of any rule or regulation necessary for the implementation of
29 this act on its effective date are authorized to be made and completed
30 on or before such date.