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:

Section 1. Legislative intent. Too often, absence control, or "no-fault" attendance policies, violate workers' rights in New York state and discourage them from taking job-protected leave or time off to which they are entitled by law. Under such policies, workers are assessed points (sometimes referred to as "demerits" or "occurrences") for each absence - regardless of the reason - and those points subject them to discipline, often including termination. Employers ignore or interfere with these rights due to ambiguities in the law and their own policies and practices. By punishing workers for any absence, including absences protected by law, absence control policies frequently threaten public health and family economic security, and undermine New York state workplace rights. According to A Better Balance, which released a report detailing legal concerns with "no-fault" attendance policies in June 2020, some of the nation's largest employers maintain 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. After surveying the policies of sixty-six U.S. employers impacting approximately eighteen million workers, A Better Balance found that more than 80% of those policies failed to make clear that employees would not receive points for disability-related absences; many provided incomplete or misleading information to 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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Medical Leave Act (FMLA); and the majority of the policies indicated that workers will incur points when they miss work because they are sick. It is the intent of the New York state legislature to make it explicitly clear that workers shall not be punished or subjected to discipline for lawful absences. Workers have the right to take legally-protected time off from their jobs to address certain medical, caregiving, and religious needs without penalty.

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

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

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

(i) For an employer, labor organization, or employment agency to assess points, occurrences, or otherwise discipline employees, including, but not limited to, through an absence control or no-fault attendance policy, for absences related to a known disability, pregnancy-related condition, or otherwise protected by law, without first engaging in a good faith, interactive process to consider whether an employee is entitled to a reasonable accommodation.

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

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

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

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

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

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

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

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

(2) provide medical documentation;

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

(4) permit delayed reporting of an absence in unforeseen and/or emergency circumstances without incurring additional points or discipline.

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

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

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

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

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