Does New York's New Absence Law Prohibit "No-Fault" Attendance Policies? YES, KIND OF!?!?

Labor & Employment Law Update

By Peter Hansen on December 19, 2022

On November 21, 2022, New York State Governor Kathy Hochul signed Assembly Bill 8092B, amending the state's labor law to clarify that employers cannot retaliate against employees for "any legally protected absence pursuant to federal, local or state law." The law, which will go into effect on February 19, 2023, is aimed directly at employer "no-fault" policies, meaning policies that assign "points" (or demerits, or occurrences, etc.) for each absence regardless of the reason the employee was absent. Once the employee runs out of "points," they are subject to discipline. Under Assembly Bill 8092B, such policies are, on their face, illegal unless they provide exceptions for legally protected leave.

Of course, many employers with "no-fault" policies already include at least some limited exceptions, such as absences for FMLA leave. Doing so is a best practice for all employers in every state, as disciplining or terminating an employee for taking legally protected leave is a sure way to face a lawsuit. To that end, in many ways New York's "new" law simply codifies what we already knew: employers should not take action against an employee for legally-protected leave. This law is notable, however, in that it's definition of "retaliation" includes assessing points or deductions for an allotted bank of time in a way that subjects, or could subject, an employee to disciplinary action. Put another way, assessing points for a legally protected absence would violate the law even if the employee is not otherwise disciplined.

As with any new law, there are a few unknowns. It is not clear, for example, whether employers can discipline an employee who fails to comply with an employer's notice requirements if the absence would otherwise be protected by law. For example, say an employee misses work to donate blood - legally protected leave in New York - but fails to give reasonable notice of their intended use of leave time (3 workdays notice for off-premise location and 2 day notice for a blood donation leave alternative). Was this a "legally protected absence" because the employee missed work for a reason that, theoretically, could have been legally protected? Or, does the fact that the employee failed to properly notify their employer preclude them from protection? Further, what if the employee provides the bare minimum notice that the law requires, but fails to

adhere to their employer's reasonable call-in policy – is the absence still "legally protected"? In short, we're treading on some uncertain ground because the amendment does not provide a definition as to what constitutes a "legally protected absence pursuant to federal, local, or state law."

Takeaway:

New York employers should be extremely cautious in determining how to apply attendance rules and should immediately re-examine and review attendance polices and handbooks to be sure that they are in compliance. This includes remaining mindful to federal, state and local laws surrounding granting employees time off in various circumstances (*i.e.*, religious needs, medical-related absences, etc.)

It is important to note that as a general matter, "No-Fault" policies are likely still allowed under New York law within certain guidelines. The amendment does not address "no-fault" or absence controlled policies that are specific to absences that are not legally protected.

To ensure that "No-Fault" policies are in compliance with New York law, employers should clearly state that demerits, points or deductions will not be applied to employees who take a legally protected absence under federal, state or local law. It is vital that absence policies are clearly written and easy for employees to understand.

Lastly, employer s in all states must consult experienced legal counsel on how best to implement and enforce "No-Fault" policies moving forward. Other states such as California and Ohio have tried to implement limits to no-fault policies and worker advocates have sights on extending the "no-fault" concepts to other states. As a result, similar laws may be headed to your state as well.

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