

December 13, 2022

NEW YORK AMENDS LABOR LAW TO PROHIBIT RETALIATION FOR LAWFUL ABSENCES

To Our Clients and Friends:

On November 21, 2022, Governor Hochul signed into law Bill A8092B, which amends the New York Labor Law (“NYLL”) to provide a new potential claim for employees who are retaliated against for taking lawful absences from work. The amendments also expressly prohibit employers from using “no-fault” attendance policies that penalize employees for taking protected absences. The new provisions of NYLL will be effective on February 20, 2023.

New Anti-Retaliation Provisions

When effective, the NYLL will prohibit employers from discharging, threatening, penalizing, discriminating or retaliating against an employee “because such employee has used any legally protected absence pursuant to federal, local, or state law.” Legally protected absences include absences taken pursuant to federal and state leave laws, such as the Family and Medical Leave Act (“FMLA”), the New York State and City Paid Sick Leave Laws, and the New York State Paid Family Leave Law.

The amendments will also restrict New York employers from maintaining “no-fault” attendance policies whereby an employer assigns “points” to employees for certain absences and imposes disciplinary action against employees who reach a certain number of points. The amended law expressly prohibits employers from imposing “any demerit, occurrence, 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” when an employee takes a protected leave. This effectively prohibits no-fault attendance policies in New York to the extent that a policy penalizes employees for absences covered by an applicable leave law.

Legal Landscape

Employers are already prohibited from penalizing employees for taking protected leave under many statutes that are covered by these amendments to the NYLL. For example, the U.S. Department of Labor and some courts have interpreted the FMLA to prohibit employers from assessing points under no-fault attendance policies for FMLA-protected leave. *See Woods v. START Treatment & Recovery Centers, Inc.*, 864 F.3d 158 (2d Cir. 2017). Moreover, the New York City Sick Leave Law specifically prohibits the “maintenance or application of an absence control policy that counts safe and sick leave as an absence that may lead to or result in an adverse action.”

New York legislators have nevertheless expressed concern that these existing protections are not sufficient to curb employers’ use of no-fault attendance policies in a manner that penalizes employees

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for taking protected leave. This law therefore aims to “make clear” that the practice of assessing points for any leave taken pursuant to applicable law is not permitted.

In addition to reinforcing existing law, these amendments allow employees to pursue claims against employers for retaliation for taking leave under any applicable leave law. For example, whereas the New York Paid Family Leave Law and the New York City Sick Leave Law only allow for administrative enforcement, the NYLL contains a private cause of action that allows employees to seek back pay, front pay, reinstatement, and/or liquidated damages when employees experience retaliation related to protected leaves.

The amendments will also permit the State to impose higher fines for violations of the anti-retaliation provisions of leave laws. For example, employers that violate the New York City Sick Leave Law may be fined up to \$2,500 for each violation. Under the amended NYLL, the State Department of Labor is authorized to impose fines of up to \$10,000 for initial violations (and up to \$20,000 for subsequent violations) of the same anti-retaliation prohibitions.

Key Takeaways for Employers

In light of the impending amendments, New York employers should review their policies – and revise them if necessary – to ensure they do not penalize employees for taking protected leave. Companies that currently utilize no-fault policies might also wish to train managers and HR personnel to ensure compliance with this new law.



The following Gibson Dunn attorneys assisted in preparing this client update: Harris Mufson, Alex Downie, and Mimra Aslaoui.

Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm’s Labor and Employment practice group, or the following:

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