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LEGISLATIVE MEMO: In Support of S. 1958, Clarifying That Workers Shall Not Be Punished Or Disciplined By Employers For Lawful Absences

New York State has been a leader in advancing progressive employment legislation that allows employees to care for themselves and their families without risking their health or economic security, providing most employees with the right to paid family leave and workplace accommodations for disabilities, pregnancy-related conditions, and other needs. Yet too often, employers utilize absence control (or “no-fault” attendance) policies that mislead and misinform their employees, and discourage them from taking job-protected leave or time off to which they are legally entitled. This legislation would curtail these practices, by requiring employers who maintain “no fault” attendance policies to ensure that employees are made aware of their legal rights, clarifying employers’ obligations with respect to employees’ leave rights, and imposing new penalties if they fail to comply. A Better Balance urges lawmakers to pass S. 1958 without delay.

With the rising use of absence control policies in the workplace, too frequently New Yorkers are being punished when they take legally-protected time off. Under these policies, employees 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. Through our legal helpline, A Better Balance has heard from countless workers who have experienced the harsh realities of these policies firsthand, as they have received points for absences related to their disabilities, pregnancy-related conditions, or caregiving obligations.¹

Moreover, A Better Balance released a new report² in June 2020 containing important findings about the ways that “no fault” attendance policies are used to mislead and misinform workers about their legal rights. 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

¹ See, e.g., DINA BAKST, ELIZABETH GEDMARK & CARA SUVALL, POINTING OUT: HOW WALMART UNLAWFULLY PUNISHES WORKERS FOR MEDICAL ABSENCES (A BETTER BALANCE 2017), <https://www.abetterbalance.org/wp-content/uploads/2017/05/Pointing-Out-Walmart-Report-FINAL.pdf> (highlighting the stories of dozens of workers who received points for lawful absences related to their own medical needs or caregiving).

² DINA BAKST, ELIZABETH GEDMARK & CHRISTINE DINAN, MISLED & MISINFORMED: HOW SOME U.S. EMPLOYERS USE “NO FAULT” ATTENDANCE POLICIES TO TRAMPLE ON WORKERS’ RIGHTS (AND GET AWAY WITH IT) (A BETTER BALANCE 2020), https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf.

to time off under the federal Family and Medical Leave Act (FMLA); and the majority of the policies indicated that workers *will* incur points when they miss work because they are sick.³

When attendance policies are used to punish employees for taking legally-protected time off, it has a chilling effect that discourages them from exercising their rights. Employees are instead forced to choose between their health or ability to care for an ill loved one and a paycheck, eviscerating the protections that exist to prevent such an impossible choice. But under existing laws, employees often have no recourse to challenge these practices until they are terminated.

By making it crystal clear that employers who maintain “no fault” attendance policies must inform their workers of their rights and cannot impose points or other discipline on employees for absences to which they are entitled by New York State laws – and imposing monetary damages and other penalties if they do so – S. 1958 would clarify employers’ obligations under state law and provide greater protection for employees’ rights. Specifically, this legislation makes clear that when time off may be required as a reasonable workplace accommodation, employers are required to engage in an interactive process with their employees *before* assessing points, and to give employees an opportunity to provide medical documentation or other information to support their need for leave.

Crucially, this legislation would also require employers to distribute their policies in writing, and ensure that their policies 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. We frequently hear from workers across the state who are subject to strict attendance requirements and have never received any information about their legal rights to certain time off – and this must change. Our laws will prove meaningless if workers are not informed of their rights and empowered to exercise them.

The passage of this crucial legislation would also set an important precedent for other states across the country. Absence control policies are used by some of the biggest companies in retail, manufacturing, food service and other sectors, which employ workers across the country. By clarifying that such policies must yield to workers’ rights, New York State would set an important precedent, requiring such companies to ensure that their attendance policies are not used to punish workers for lawful absences and encouraging other states to follow suit. A Better Balance urges swift passage of S. 1958.

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[S. 1958](#)

POSITION

Support

³ *Id.* at 2.