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FACT SHEET: Why New York Needs a Law Protecting Employees From Being Punished for Lawful Absences

New Yorkers are being punished when they take legally-protected time off, undermining their workplace rights and threatening their health and economic security.

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.

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 recently surveyed the “no fault” attendance policies of sixty-six U.S. employers and 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 Medical Leave Act (FMLA); and the majority of the policies indicated that workers *will* incur points when they miss work because they are sick.²

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

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.

forced to choose between their health or caregiving obligations 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.

The passage of this crucial legislation would clarify employers' obligations under New York State laws and set an important precedent for other states across the country.

Pending New York State legislation [[S1958 \(Krueger\)](#)] would make 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 state law – and that they risk liability for monetary damages and other penalties if they do so. Where time off may be required as a reasonable workplace accommodation, employers would be required to engage in an interactive process with employees before assessing points, and to give them an opportunity to provide medical documentation or other information to support their need for leave. Crucially, employers would also be required to ensure that their policies comply with a set of substantive and procedural safeguards, and to distribute their policies in writing and ensure that they are accessible to workers.

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 passing this legislation, 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.

The New York State bill would:

1. Make it illegal for employers to assess points or otherwise discipline employees for absences protected by law without first engaging in a good faith, interactive process to consider whether the employee is entitled to a reasonable accommodation.
2. As a part of the interactive process, require that employees be afforded a reasonable opportunity to provide medical or other information that may preclude the assessment of points or other forms of discipline under a time and attendance policy.
3. Require all employers who maintain a “no fault” attendance policy to ensure that their policy specifically references and provides a reasonable amount of detail about all laws that provide legal protections for time off, and contains certain procedural safeguards, including identifying a process for employees to report that an absence is for a protected reason and seeking the removal of “points” that may have been wrongly assessed.
4. Require employers to distribute their policies in writing and ensure that they are accessible to employees both at their physical workplace and outside of it.

For more information contact A Better Balance at 212-430-5982 or www.abetterbalance.org