CLIENT ALERTS & INSIGHTS

New York State Explicitly Limits Bounds of "No Fault" or Points-Based Attendance Policies

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On November 21, 2022, New York Governor Kathy Hochul signed into law a new measure that explicitly prevents employers from penalizing workers for lawful absences.

The new law amends Section 215 of New York Labor Law which prohibits employers from discharging, threatening, penalizing, discriminating or retaliating against any employee that engages in certain enumerated protected activities. The amendment adds "us[ing] any legally protected absence pursuant to federal, local, or state law" as one such protected activity. Legally protected absences are provided by a host of federal, state and local laws, including, but not limited to, the federal Family and Medical Leave Act, the New York Paid Family Leave law, the New York Paid Sick Leave law and New York City Earned Safe and Sick Time Act. The amendment further provides that when an employee is absent for one of these legally protected reasons, employers are prohibited from "assessing 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." Notably, loss of pay and failure to receive a promotion are mentioned as examples of disciplinary action that could be deemed retaliatory.

The amendment targets widely used "no fault" or points-based attendance policies that have come under recent scrutiny. Under such policies, employers assign points or demerits against an employee's attendance record for absences, often without regard to the reason. Employees who accumulate a certain amount of points or demerits are often penalized, up to and including termination. While these policies provide exemptions for legally protected absences, many businesses are accused of not making workers' rights clear at the outset, leading them to believe that they will still be penalized for taking legally protected leave.

The new law becomes effective on February 19, 2023. New York employers would be wise to review their absence policies beforehand to ensure that they include-and actually honor-exceptions for legally protected absences. Failure to do so could lead to significant civil penalties and damages.

For more information, please contact a member of Benesch's Labor & Employment Practice Group.

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