LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
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New York Expands Retaliatory Workplace Safeguards for Protected Leave

On Nov. 21, 2022 New York Governor Kathy Hochul signed a Bill A8092-B/S1958 into law that expands retaliatory workplace protections for employees. The newly signed law amends New York Labor Law (NYLL) Section 215 to prohibit an employer from punishing or disciplining an employee who takes time off work for a "lawful absence" protected by federal, state or local law.

By way of brief background, NYLL Section 215 is the state anti-retaliation provision related to the state labor laws. Under the provisions of this section, an employer is prohibited from discharging, threatening, penalizing or otherwise discriminating against an employee who engages in protected activity. The law previously defined protected activity as making a complaint about a possible labor law violation to the New York State Department of Labor (NYSDOL) or the employer (or some other enforcement entity), providing information to the NYSDOL, starting a proceeding under the NYLL, testifying in an investigation or other proceeding under the NYLL, exercising any rights that are protected under the NYLL or causing the employer to receive an adverse employment determination from the NYSDOL.

The purpose of the amendments is to clarify that punishing an employee who is absent from work for a protected reason (i.e., takes protected leave) constitutes unlawful retaliation. Specifically, the amendments expand the definition of protected activity to include taking a "legally protected absence pursuant to federal, local, or state law." The law also expands the definition of retaliatory conduct by adding that "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" for taking protected leave would constitute unlawful retaliation.

Interestingly, the law does not provide a more specific definition of what exactly will constitute such a "legally protected absence pursuant to federal, local or state law." To that end, there are a myriad of federal, state and local laws that include entitlements for leave for specific reasons and protections to employees from retaliation. Given the apparent broad application of these amendments and the several leave laws established by federal, state and local law, employers should take the opportunity to review their current attendance and leave policies and train supervisors and management that enforce said policies.

Based on the current plain reading of the amendments, there are three possible key implications for employers. First, the law appears to explicitly call out points-based attendance or "no fault" policies. Employers that utilize a points-based attendance policy or "no fault" – particularly those that take any and all absences into account – should review existing attendance policies and procedures to ensure compliance with the new requirements. Such policies that take any and all absences into effect would presumptively be unlawful under the amended law.

Second, the amendments include "making any deduction from an allotted bank of time" as a part of the unlawful retaliatory action definition. Therefore, employers should also consider reviewing their attendance and leave policies particularly with respect to when deductions from available paid time off will be taken and work with legal counsel to evaluate whether such practices would run afoul of the new provisions.

Third, the amendments provide that "failure to receive a promotion or loss of pay" that would result, even indirectly, from taking a protected leave of absence would also constitute unlawful retaliatory action under the amended law. Employers should consult with legal counsel when taking adverse action against an employee, including denying a raise, bonus or failing to consider them or award them a promotion, or otherwise enforcing an attendance policy, particularly when an employee has previously taken a protected or lawful absence. Attendance-based bonus policies may also be implicated by the new amendments. Therefore, employers should work with legal counsel to evaluate any attendance based bonus or compensation policies to analyze whether and how such policies or practices may be affected by the changes in the new law.

While we anticipate that the NYSDOL will issue updated guidance on the changes to NYLL Section 215, employers should not wait for any published guidance from NYSDOL to take the opportunity to review and revise any policies or practices to prepare for compliance with these changes.

The amendments take effect on Feb. 19, 2023.

For more information or questions about the information provided above, please contact Stephanie Fedorka, any attorney in Bond's labor and employment practice or the Bond attorney with whom you are regularly in contact.

**Special thanks to Associate Trainee Jackson Somes for assisting with researching and drafting this memo*.

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