



November 2022

## New York Employers Cannot Retaliate Against Employees for Lawful Absences

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Starting February 19, 2023, New York employers will be prohibited from retaliating against employees who take lawful absences pursuant to federal, state or local law. Employers are advised to review their leave of absence policies to ensure compliance before the change — signed into law November 21, 2022 by Governor Kathy Hochul — takes effect.

### Retaliation Protections Under the Labor Law

Section 215 of the New York Labor Law prohibits employers from taking adverse employment action against employees who complain of an alleged Labor Law violation or otherwise assist in a state investigation into such a violation. Specifically, employers cannot discharge, threaten, penalize or in any other manner discriminate or retaliate against any employee because the employee:

- Made a good faith complaint that their employer violated the Labor Law; or
- Cooperated with an investigation by the New York State Department of Labor (NYDOL) or New York Attorney General regarding an alleged violation of the Labor Law.

In 2019, New York amended section 215 of the Labor Law to specify that the phrase “threaten, penalize, or in any other manner discriminate or retaliate” against an employee also includes threatening to report (or actually reporting) the citizenship or suspected immigration status of an employee or an employee’s family member

to immigration authorities because the employee made a complaint or otherwise participated in an investigation of an alleged Labor Law violation.

### No Retaliation for Lawful Absences

The new law, Assembly [Bill A8092B](#), further expands the retaliation protections under section 215 of the Labor Law. Effective February 19, 2023, employers may not retaliate against employees who are absent from work for a reason covered by federal, local or state law. Such leaves of absences include, but are not limited to:

- The federal Family and Medical Leave Act (FMLA)
- New York State Paid Sick Leave
- The New York City Paid Safe and Sick Leave Law
- New York State Paid Family Leave
- The various COVID-19 leave laws

The law will also expand the definition of “threaten, penalize, or in any manner discriminate or retaliate against any employee” to include using an employee’s lawful leave of absence as a basis to discipline, terminate, fail to promote, reduce pay or otherwise negatively affect the employee’s terms and conditions of employment. In other words, an employer cannot use an employee’s protected leave of absence as a factor when making employment decisions. While limited exceptions exist, such exceptions are typically fact-specific and it is

recommended that an employer consult with experienced counsel before taking adverse action against an employee on leave.

**Penalties Under the Labor Law**

The Labor Law permits enforcement by the NYDOL or the New York Attorney General and also allows an employee to bring a private cause of action against their employer. A fine of up to \$10,000 can be imposed for the first violation. If an employer is found to have previously violated the Labor Law in the previous six years, this fine can be increased to as much as \$20,000. Further, employees who are discharged from employment may also be entitled to back pay and liquidated damages for each violation.

Given the severe consequences for violating the Labor Law, we strongly recommend that employers review their leave of absence policies to ensure compliance with these expanded retaliation protections. Employers are also cautioned that any employment decisions based on an employee's lawful absence will result in a violation of these new amendments to the law.

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