

Memorandum

To: Chair Helen Head and Committee on General, Housing and Military Affairs
From: Anne M. Noonan, Commissioner, Vermont Department of Labor
Cc: Julio Thompson, Director, Civil Rights Unit, Office of the Vermont Attorney General
Date: 1/15/15
Re: S. 213 An act relating to an employee's use of benefits

In response to your letter to me dated, June 25, 2014, asking for the Vermont Department of Labor to examine no-fault attendance policies and the FMLA, I submit the following.

Overview

In the 2014 legislative session, S. 213 sought to promote healthy workplaces by ensuring employers would not penalize their employees who utilize employer-provided sick days. S. 213 was received by the House Committee on General, Housing and Military Affairs late in the session and there were concerns raised by the Committee on how no-fault attendance policies relate to the FMLA. House Committee on General Affairs Chair, Rep. Helen Head, has requested the Vermont Department of Labor to examine the use of no-fault attendance policies and legalities with the FMLA.

The question is: Do no-fault attendance policies violate the FMLA or other federal/state laws by denying access to awarded or accrued time off?

The short answer is that they may violate such laws if they penalize employees for taking legally-protected leave, or interfere with employees' exercise of those rights. According to the U.S. Department of Labor's **Fact Sheet # 77B: Protection for Individuals under the FMLA:**

"Examples of prohibited conduct include:

- Refusing to authorize FMLA leave for an eligible employee,
- Discouraging an employee from using FMLA leave,
- Manipulating an employee's work hours to avoid responsibilities under the FMLA,
- Using an employee's request for or use of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, or,
- Counting FMLA leave under "no fault" attendance policies."

There have also been a few court cases in relation to the FMLA and no-fault attendance policies. In *Green v. Walmart Stores*¹, the district court denied the employer's motion for summary judgment on an employee's FMLA claim because the employer admitted to counting FMLA-days for purposes of progressive discipline under its no-fault attendance policy.

¹ http://scholar.google.com/scholar_case?case=192670159493374105

No-fault attendance policies also may conflict with Vermont law. Vermont's Parental and Family Leave Act (PFLA),² provides eligible employees up to 12 weeks of job-protected leave to bond with a new child or take leave for a serious illness of their own or a family member. The PFLA prohibits retaliation against employees who exercise these leave rights. Vermont also affords certain employees short-term family leave of up to 24 hours per year so that employees may make routine medical appointments, attend school meetings, or respond to medical emergencies involving their children.³ Again, employees are entitled to take this leave free from any retaliation by the employer. In addition, Vermont employees who are members of the military reserves or National Guard may take up to 15 days of job-protected leave per year for purposes of training, drill, or duty.⁴

Another source of potential conflict with no-fault attendance policies involves absences related to an employee's disability. Both the federal Americans with Disabilities Act (ADA) and Vermont's Fair Employment Practices Act (FEPA)⁵ require employers to take an individualized, case-by-case approach to a disabled employee's need for workplace accommodation. A rigid, no-fault attendance policy that penalizes disabled employees for absences related to treatment of their disability may in some instances run afoul of these laws. The EEOC has been active in challenging no-fault attendance policies that have been applied to disabled employees. For example, July of 2011, the Equal Employment Opportunity Commission (EEOC) reached a \$20 million settlement with Verizon Wireless⁶ over claims that the wireless company denied reasonable accommodations to disabled employees by disciplining or firing them pursuant to its no-fault attendance policy.

The FMLA also protects employees in situations that involve, "... a serious health condition that makes the employee unable to perform the essential functions of his or her job."

Vermont's equivalent of the federal legislation reads⁷:

(3) "Family leave" means a leave of absence from employment by an employee who works for an employer which employs 15 or more individuals who are employed for an average of at least 30 hours per week during the year for one of the following reasons:

(A) The serious illness of the employee.

As the Committee heard in testimony last session, one employee did speak about her illness and described medical conditions that appeared to meet the serious illness criteria for FMLA or PFLA leave. Assuming that the employee met the other criteria for FMLA / PFLA protection (*e.g.*, meeting the other eligibility requirements, providing timely notice to the employer, and providing any required certification from a health care provider), then the employee could have been provided leave time from her job with job security and without penalty.

Summary

Vermont employers cannot have policies, either explicitly or by their application, that violate federal or State laws.

An often-cited virtue of no fault attendance policies is that they are easy to administer because all absences, vacations, sick days, personal days, are treated equally. However, the Congress and the Vermont Legislature have long ago made a contrary judgment — not all work absences should be treated equally. They have decided that certain absences — such as required to deal with a seriously ill family member, to care for a new child, or to accommodate a disability — should enjoy strong laws such as the FMLA, PFLA, ADA, and FEPA. Thus, in order to comply with these laws, employers cannot treat *all* absences equally. They cannot interfere with employees' exercise of their federal or state leave rights and cannot retaliate against those employees who exercise those rights.

² 21 V.S.A. §§ 470-474.

³ 21 V.S.A. §§ 472a.

⁴ 21 V.S.A. §§ 491-93.

⁵ 21 V.S.A. §§ 495, et seq.

⁶ <http://www.eeoc.gov/eeoc/newsroom/release/7-6-11a.cfm>

⁷ 21 V.S.A. §§ 471