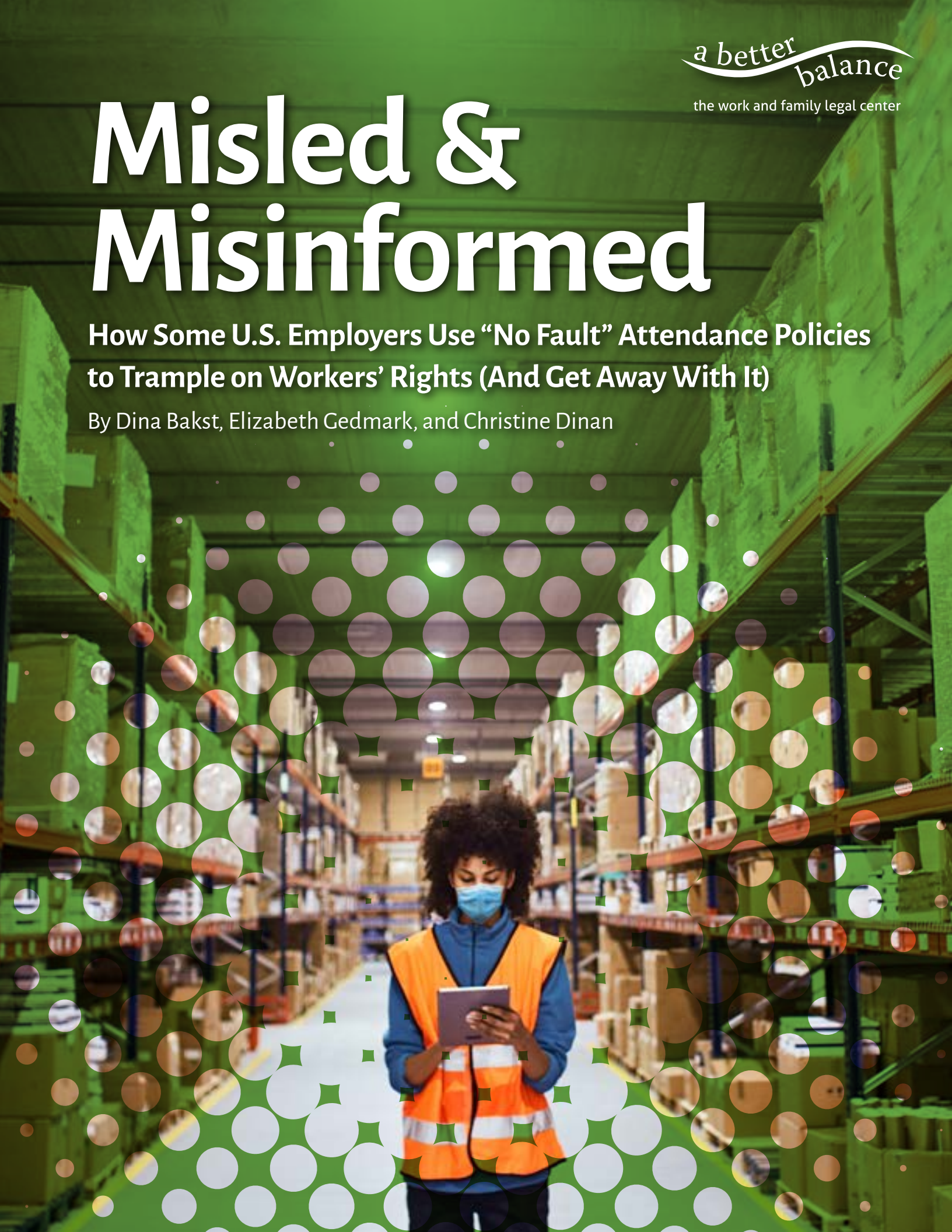


Misled & Misinformed

How Some U.S. Employers Use “No Fault” Attendance Policies
to Trample on Workers’ Rights (And Get Away With It)

By Dina Bakst, Elizabeth Gedmark, and Christine Dinan





a better
balance

the work and family legal center

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A BETTER BALANCE is a national legal advocacy organization dedicated to promoting fairness in the workplace. We help workers across the economic spectrum care for themselves and their families without risking their economic security. Through legislative advocacy, litigation, and public education, A Better Balance leverages the power of the law to ensure that no workers have to make the impossible choice between their job and their health or their family’s health.

Call A Better Balance’s national legal helpline at 1-833-NEED-ABB for free and confidential information about your workplace rights around caring for yourself and your family.

The authors wish to thank Susanna Barron for her significant contributions to the legal research for this report.



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EXECUTIVE SUMMARY

AS REPORTS OF COVID-19 OUTBREAKS at several major meatpacking plants began to emerge in April 2020, tragically resulting in some workers' deaths and leading to rare plant closures, the danger posed by an employee reporting to work sick was suddenly laid bare. But the strict “points-based” attendance policies favored by some of the country’s biggest employers—including the meat and food processing, manufacturing, and retail companies that have become essential during these frightening times—virtually ensure that this risk will remain.

“No fault” attendance policies, as they are often called, are used by some of the nation’s largest companies—**Walmart, Tyson Foods, ConAgra Foods, FedEx**, among many others—to encourage workers to show up for their shifts and penalize them when they do not. Yet too frequently, these attendance policies are used to infringe on workers’ rights by punishing them with “points” or “occurrences” for absences that are legally protected, including time off for serious medical needs. Despite the existence of hard-fought workplace protections like the Family and Medical Leave Act, the Americans with Disabilities Act, and paid sick time laws, workers are *still* being punished for taking time off to care for themselves or their loved ones.

After analyzing the “no fault” attendance policies of sixty-six U.S. employers, including several major companies, whose policies impact approximately **18 million workers**, as well as dozens of cases involving legal challenges to such

policies, it has become clear that “no fault” attendance policies consistently share a common set of faults: they fail to inform workers about their rights to time off without punishment for certain medical, pregnancy-related, and caregiving needs, and they are designed to operate in ways that make it nearly impossible for workers to exercise those rights.

Key Findings

Employers’ “no fault” attendance policies reliably fail to inform workers about their legal rights to take time off *without punishment* for certain illnesses, health conditions, or disabilities, or for the need to care for an ill loved one under state, local, or federal law. Specifically:

- **Employers’ “no fault” attendance policies regularly provide incomplete or misleading information to workers regarding their right to time off under the federal Family and Medical Leave Act (FMLA).** For instance, only *one* of the 66 policies surveyed made clear that FMLA leave can be used during pregnancy. Some policies indicated that FMLA leaves must always be approved in advance, which is plainly wrong. Others incorrectly implied that employees would *only* be protected by the FMLA if they were absent for a period of several days.
- Despite the fact that many of the employers whose policies we reviewed are operating in states and localities with paid sick time laws, many of these attendance policies failed to include information about these rights or indicate that workers will not receive occurrences for sick time. **Indeed, the vast majority of the policies that we reviewed clearly indicate that workers will incur points when they miss work because they are sick.** In fact, employers sometimes assess points even if workers are *ordered* to go home due to illness.
- **Over 80% of the policies surveyed failed to make clear that employees will not receive points for qualifying disability-related absences** pursuant to the Americans with Disabilities Act (ADA). Of the few policies that mentioned the ADA, even fewer mentioned the term “disability” or explained that accommodations could include time off for disability-related absences, and *none* indicated that pregnancy-related disabilities may be protected, as they are under the Americans with Disabilities Act Amendments Act (ADAAA).



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Employers’ “no fault” attendance policies **reliably fail to inform workers** about their legal rights to take time off without punishment.

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- **Only two policies mentioned the right to accommodations, including time off for pregnancy-related conditions, under a state Pregnant Workers Fairness Act (PWFA)**, despite the fact that many of the companies whose policies we reviewed are operating in states and localities with these protections.

“No fault” attendance policies are also often problematic in practice, since many employers’ policies make it extremely difficult, if not impossible, for employees to provide details when they need to call out sick or submit medical documentation, and rigid attendance practices do not adequately account for emergencies, disproportionately harming the most vulnerable workers:

- **More than one-third of the policies that we reviewed contained no mention of medical documentation whatsoever.** Others allowed workers to submit a doctor’s note only to *reduce* the number of points for an absence, but never to excuse them from points altogether.
- **Only 12% of the policies that we reviewed acknowledged that emergencies might prevent a worker from complying with an employer’s call-out requirements,** and fewer than 10% outlined a process for employees to seek removal of points that have been assessed.

This report looks at why this is happening and how we can fix it. We propose a set of recommendations, including state and federal legislation that will ensure that employers cannot use attendance policies to interfere with workers’ rights—or face increased penalties for doing so. We also urge Congress to exercise oversight to ensure that the major corporations that utilize attendance policies are fully compliant with civil rights and labor laws and fully transparent about their policies.





INTRODUCTION

IMAGINE THAT YOU WORK IN A POULTRY PLANT, where you work side-by-side with your co-workers daily, cutting, deboning, and processing the chicken that will be sold to grocery stores across the country—dangerous and unpleasant work on the best of days. If you happen to wake up coughing and feverish, you are faced with a choice: if you stay home, you will not only lose a day’s pay, but you will be given a “point” under your employer’s attendance policy—too many of which can cost you your job. But if you go into work, you will not only worsen your own symptoms, but will likely infect your co-workers—and possibly countless American consumers—as well. For millions of workers in the U.S. living paycheck to paycheck, impossible “choices” like these are an all-too-common occurrence: risk your health or lose your job?

At the time of this report’s publication in June 2020, **Americans are grappling with the coronavirus pandemic, the greatest public health crisis of our time—and it has brought the harmful consequences of strict “points-based” attendance policies into sharp relief**, particularly given their prevalence in industries that are crucial to our country’s supply chain. Now, when an employee shows up to work sick, they risk spreading a highly infectious, deadly virus that not only threatens the health of their co-workers, but entire communities. In recognition of this threat, corporate giants like Amazon and Tyson Foods initially announced¹ that they were *temporarily* suspending their attendance policies to ensure that workers are not discouraged from staying home when they feel ill. But not every company with an attendance policy made such a move—and temporary changes are not enough.

A Better Balance has been sounding the alarm about punitive attendance policies for years. In 2017, we published a groundbreaking report, *Pointing Out*,² highlighting the harsh impact of such an attendance policy at Walmart, the nation's largest private employer. This report was based on the results of a survey conducted jointly by A Better Balance and United for Respect,³ in which more than 1,000 current and former Walmart employees described their experiences of receiving points for medical absences—or, worse yet, ignoring aches and pains, delaying crucial care, and going into work sick out of fear of incurring points that could cost them their jobs.

In the years since we published *Pointing Out*, it has become clear that the problem is bigger than Walmart—indeed, it impacts workers in many industries that are essential to our economy. 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”—or “occurrences” as they are more formally called—for medically-necessary absences related to their own illnesses, disabilities, or health conditions, or for the need to care for a seriously ill loved one.

Federal, state, and local laws make clear that punishing a worker with a disciplinary “point” when they need to miss work for a legally-protected reason is **a violation of their rights.**

In many instances, these absences should be protected by a federal, state, or local civil rights law that provides workers with the right to time off without penalty for certain illnesses and health conditions, or to care for a loved one—protections that A Better Balance has worked tirelessly with our partners, workers, and other advocates to enact and enforce. As we describe more fully below, the language in these federal, state, and local laws—aided by implementing regulations and agency guidance—makes clear that **punishing a worker with a disciplinary “point” when they need to miss work for a legally-protected reason is a violation of their rights.**

But regardless of these protections, punitive attendance policies are too often used by employers to trample on these rights. Workers are given little (if any) information about their leave rights—which is particularly concerning, as workplace policies are often employees' *only* source of information about their rights—and therefore led to believe that the harsh consequences of these policies will occur regardless of how dire their medical or caregiving needs may be. And they are often correct, as attendance policies frequently operate in ways that systematically deprive workers of legal protections.

In this report, we highlight the ways in which punitive attendance policies are being used by some of our nation's largest employers—particularly in the food processing and manufacturing industries—to deprive tens of millions of workers of their lawful rights to time off without penalty, and discuss our recommended solutions.



METHODOLOGY AND KEY FINDINGS

WE HAVE THOROUGHLY REVIEWED AND ANALYZED the attendance policies of 66 different employers, ranging in size, location, and industry.⁴ **Together, they cover an estimated 18 million workers across the country**, underscoring the substantial reach of these policies.

We collected these policies from a number of sources, including public filings from case dockets, public internet sources, and workers who have contacted our legal helpline. Although we know that many more companies utilize a points-based attendance policy than are included in this sample, it would be impossible for us to review every policy because they are rarely made public; indeed, they can even be difficult for workers to access at their own workplaces, making it impossible for employees to understand their obligations under the policies.

SELECT COMPANIES SURVEYED

IN PREPARING THIS REPORT, we reviewed and analyzed the attendance policies of several major employers. Our survey included the following companies, whose policies have been challenged on various legal grounds in court:

- 3M
- Boeing
- Cargill Meat Solutions
- ConAgra Foods
- FedEx
- Froedtert Health
- GE Aviation
- JBS
- Kroger
- Mayo Health System
- Mars Chocolate North America
- McKee Foods Group
- Pace Industries
- Pilgrim's Pride
- Shell Chemical
- Tyson Foods
- United Airlines
- Walmart

We have not included the complete list of employers surveyed, however, because many of the attendance policies that we reviewed were provided to us confidentially by workers who contacted our legal helpline and from other non-public sources. But the fact that these policies are not publicly available—or even readily accessible to the workers who are impacted by them—is incredibly problematic. Since we published *Pointing Out* in 2017, we have asked nearly every worker who has contacted our legal helpline with an attendance issue whether they can access their employer's attendance policy—but shockingly, only a very small percentage of those workers actually had a copy of the policy or were able to access it. In fact, one worker who asked her employer's Human Resources department how she could get a copy of her employer's policy after she was terminated for attendance issues was told to “get a lawyer” if she wanted to access it.

The employers whose policies have been reviewed represent a diverse sample, however, ranging from large companies with a nationwide presence to smaller companies with a single location. And after carefully analyzing these policies, we identified a common set of issues and concerns that consistently appeared across the policies. These findings were so consistent—and so startling—that we decided to publish them in order to highlight the ways in which “no fault” attendance policies are being used to undermine workplace rights.

Our key findings from this review include the following:

- **First, these policies are problematic as written.** Points-based attendance policies frequently fail to recognize or adequately inform employees of legal protections to time off for medical absences. Worse yet, when they do provide information about certain legal rights, it is often misleading, inaccurate, or incomplete. As a result, workers frequently misunderstand the scope of their legal protections, often with disastrous consequences.
- **Second, these policies are problematic in practice, as they are frequently designed to operate in ways that make it impossible for employees to exercise their legal rights.**

Each of these findings is discussed in more detail below, along with our recommendations for necessary improvements to laws and policies.

BACKGROUND: WHAT IS A “NO FAULT” ATTENDANCE POLICY?

“NO FAULT” ATTENDANCE POLICIES are used by some of the nation’s largest companies. Our review indicates that the most common industries with these policies include manufacturing and food processing and packaging, but they are also used by healthcare, transportation, retail, and hospitality companies—even universities and local governments.

The workers impacted by these policies are typically engaged in physically demanding blue-collar and pink-collar jobs, which are occupied predominantly by women and people of color.⁵ These are largely low-wage jobs, in which workers have little bargaining power. Many are located in the South, where fewer state and local workplace protections exist.

Under these attendance policies, workers receive points (sometimes referred to as “occurrences” or “demerits”) for each unplanned absence, tardy, or early departure—*regardless of the reason*. These are often referred to as “no fault” attendance policies, ostensibly because all absences are treated equally, and the reason for the absence is irrelevant. But in practice, employees are faulted for every minor deviation from their scheduled working hours—even, under some policies, for clocking in just *one minute* late. Employees can receive



occurrences for a number of other attendance-related behaviors, including the failure to clock in or out; clocking in early for a scheduled shift; failing to respond when on-call; and failing to submit a request for paid time off sufficiently far in advance. Workers frequently get double the points for absences on weekends, holidays, and certain high-volume business days, such as the day after Thanksgiving (“Black Friday”).

Moreover, the stories we have heard from workers illustrate the heartbreaking impact that these policies have on those with serious medical issues and caregiving needs.

- **Nicole***, a single mother from Texas, received points when she needed to care for her eight-month-old daughter while she was recovering from pneumonia.
- **Leah***, a worker from Kentucky, received points after she was sent to the emergency room because she had been vomiting blood.
- **Carly***, a worker in Florida, went into work after a serious illness, in spite of her doctor’s advice to rest for three days, because she was told that she would receive points otherwise. Her doctor told her that she could have suffered serious damage to her ear because she did not fully rest and recover.
- **Kyle***, a worker in Ohio who is visually impaired, was given points when he was unable to work his shift because he had inexplicably been assigned to gather carts in the parking lot, a position that he could not safely perform because of his disability.

When a worker reaches a certain number of occurrences, they are subject to discipline under the policy. Often that discipline is progressive, and it can result in termination. But workers can face punishment under these policies shockingly quickly: under some employers’ policies, just two absences can trigger discipline. And newer employees often face an even lower threshold for termination during the first few months of their employment, **where a single absence can result in termination**. This can be particularly challenging for the low-wage and seasonal workers who fill many of these jobs, which also have very high turnover rates.

Significantly, nearly every policy that we reviewed explicitly designated certain absences as “authorized” or “approved”—meaning that they would not subject workers to any occurrences. The list of approved absences frequently includes things like jury duty and bereavement leave, and (as will be discussed more below) it frequently *fails* to include all protected reasons for absences for which an employee cannot lawfully be punished—such as time off for medical absences, including leave related to a worker’s disability or pregnancy, or to care for an ill loved one. Furthermore, employers’ policies frequently fail to describe these legal protections in an accessible way, leaving many workers to believe, based on the written policies and their own experiences, that even lawfully protected absences will be punished with points.

Workers can face punishment under these policies shockingly quickly: under some employers’ policies, just two absences can trigger discipline.

EXCERPTED ATTENDANCE POLICIES

Shell Chemical LP's attendance policy (effective as recently as 2016) indicates that disability-related absences *will* subject workers to points, unless the disability is related to an occupational injury or the absence is protected by the FMLA. The policy fails to mention the Americans with Disabilities Act (ADA):

Geismar Attendance Management System

The primary purpose of the Attendance Management System (AMS) is to provide each employee with Shell's expectations regarding attendance. Each absence record will be monitored with the overall purpose of guiding employees towards improvement in their attendance records. The primary focus of the program is directed towards improving employee's controllable absences, which include: non-occupational disabilities (excluding Family Medical Leave Act (FMLA) protected disabilities and FMLA protected dependent care) and absent without leave (awol).

Chargeable absence incidents include:

- Non-FMLA non-occupational disability
- Absent without leave (AWOL): When an employee fails to report for work within the first two hours of his/her regularly scheduled shift or in cases where the Company determines an employee is absent from work for unacceptable reasons.

Non-chargeable absence incidents include:

- Occupational disability
- Manager Approved Personal Leave
- FMLA non-occupational disability leave
- FMLA dependant care leave
- Bereavement leave
- Jury duty
- Military leave
- Vacation
- Company business
- Suspension/DML

Source: *Amedee v. Shell Chem. LP-Geismar Plant*, 384 F. Supp. 3d 613, Dkt. 36-18 (M.D. La. 2019), *aff'd sub nom. Amedee v. Shell Chem., L.P.*, 953 F.3d 831 (5th Cir. 2020)

Compare how **Roanoke College**, in their publicly available and current policies, treats hourly personnel—who are punished with “occurrences” for most unscheduled absences, (even when they are unavoidable or caused by no fault of the employee)—and receive extra punishment for failing to follow procedures, even if they contact someone:

- **Unscheduled Absence** - Any absence for an emergency or other unexpected cause which was not scheduled and approved in advance per departmental policies. This includes all unscheduled, lost work time whether avoidable or unavoidable, regardless of the reason or the lack of fault of the employee and/or whether the employee receives pay for the time off. Additionally, if an employee does not have a leave available to cover a time missed it will be counted as an unscheduled absence. Leaves may include vacation, sick, personal, jury duty, funeral leave, military leave, family and medical leave, and work-injury related leave.

Call-Off Notification Procedures:

You must follow these call-off notification procedures for your department any time you have an unscheduled absence. If you contact someone, but do not follow these procedures, you will receive an additional half (.5) point occurrence, on top of the earned infraction's occurrence,

....to how the College treats employees in the staff handbook, which has no strict “occurrences” system and instead uses the College’s judgment of what constitutes excessive absenteeism:

Excessive absenteeism or tardiness, as determined in the judgment of the College, shall be grounds for disciplinary action, up to and including dismissal.

Source: Roanoke College, Attendance Policy—Hourly Personnel, <https://www.roanoke.edu/documents/HR/Attendance%20Policy%20REV%202%20August%202018.pdf> (last visited June 25, 2020); Roanoke College, Staff Handbook, <https://www.roanoke.edu/documents/HR/Staff%20Handbook%20-%20Updated%20October%202019.pdf> (last visited June 25, 2020).

Cargill Meat Solutions Corporation's attendance policy (effective as recently as 2014) lists “guidelines” under which workers can be sent home by Cargill’s Medical Department when they are sick—including when they are actively vomiting or have a temperature over 100.5 degrees—and notes that they will *still* receive points if sent home. Cargill’s policy also makes clear that absences covered by the Family Medical Leave Act will not receive points, but fails to explain what this means, or indicate that absences related to a worker’s disability or pregnancy will also be exempt from points.

The only exceptions to this policy will be the following:

- A. Family Medical Leave Act (with proper verification).
- B. Snow/Ice Storm according to the contract.
- C. Immediate Life & Death situations (with proper verification).
- D. Work Related Injuries (off work by order of Cargill authorized doctor).

Guidelines to being sent home by the Medical Department:

1. Hypertension: Blood pressure greater than 160 systolic and 90 diastolic.
2. Temperature greater than 100.5.
3. Contagious/Infection (chest pain or heart attack).
4. Actively Vomiting.
5. Angina Myocardial Infarction (chest pain or heart attack).
6. Respiratory Distress.
7. Hyperglycemia: Blood Sugar over 300.
8. Hypoglycemia: Blood sugar under 60 (after eating).

All other requests will be considered an employee voluntarily requesting to go home and subject to the Disciplinary Action Steps. If an employee is being sent home by the Medical Department and it falls under the above stated criteria, and the employee is up for term review, the Company will instead issue a write-up. *Although the termination will be set aside, it will count as the ninth (9th) absence occurrence and third (3rd) violation and the next violation will result in termination.*

Source: *Lipp v. Cargill Meat Sols. Corp.*, No. 4:15-CV-00458-SMR-CFB, 2017 WL 5895001, Dkt. 14-5 (S.D. Iowa May 11, 2017), *aff'd*, 911 F.3d 537 (8th Cir. 2018)

McKee Foods Corporation's policy (effective as recently as 2015) specifies that employees can receive points for absences due to personal illness, family illness, and unforeseen emergencies. Although the policy states that employees will not receive attendance points for "FMLA," the policy does not spell out the acronym for the federal law or indicate that there are many circumstances where personal/family illness or unforeseen emergencies, including pregnancy-related medical conditions, could qualify for FMLA leave.

**McKEE FOODS CORPORATION AND AFFILIATES
Gentry Policy Manual**

POLICY (Corporate)

*Revised: January 22, 2015
Supersedes: May 17, 2011
Distribution: General*

ATTENDANCE – HOURLY

*Document No. GPG-A010
Page 2 of 4*

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- 4.3. Non-chargeable incident is defined as a full or partial day absence that does NOT receive any attendance points (i.e., PTO, FMLA, military leave of absence, plant closings, non-chargeable weather day, death in the family, some civic duty, or jury duty). Written departmental guidelines should be followed.
- 4.4. Chargeable incident is defined as an absence (full or partial, single or blocked) that is charged to an employee's accumulated attendance points (i.e., personal illness, family illness, late call, no call, weather day, unforeseen emergency, unexcused absence, prearranged PTO with no time available). Typically, a chargeable absence would be applied when the absence is not pre-arranged or there is insufficient PTO in the employee's bank to cover for the absence.

Source: *Garcia v. McKee Foods Corp.*, No. 5:18-cv-5112, 2019 WL 6311998, Dkt. 35-6 (W.D.Ark. Nov. 25, 2019)

THE PROBLEM: “NO FAULT” ATTENDANCE POLICIES ARE FREQUENTLY USED TO VIOLATE WORKERS’ RIGHTS

OUR REVIEW OF EMPLOYERS’ POLICIES, the case law, and the stories that we’ve heard from callers to our helpline make abundantly clear that “no fault” attendance policies are frequently used to interfere with workers’ legal rights to time off without penalty. They do this in several ways. First, the policies themselves fail to recognize and inform employees about their rights to protected leave under state, local, and federal laws. Second, these policies are designed to operate in ways that infringe on workers’ legal rights, so that in practice, it is nearly impossible for employees to exercise their rights to lawfully be absent.

Fault #1: “No Fault” Attendance Policies Are Misleading as Written

One consistent problem with the policies that we reviewed is that they mislead workers into believing that they have no legal protections when it comes to medical absences. Employers’ attendance policies reliably fail to inform workers about their legal rights to take time off *without punishment* for certain illnesses, health conditions, or disabilities, or for the need to care for an ill loved one under state, local, or federal law. If the policies do contain some of this information, it is often incomplete, or worse yet, inaccurate.

FMLA Leave

The federal Family and Medical Leave Act (FMLA)⁷ provides eligible employees⁸ the right to take up to 12 weeks of unpaid, job-protected leave⁹ for certain discrete purposes, including childbirth and bonding with a new child, dealing with a serious health condition, or caring for a family member who has a serious health condition.¹⁰ A serious health condition under the FMLA is different from an ordinary illness like a stomach bug, which is a common source of confusion for workers. Chronic conditions, conditions requiring an overnight stay in a hospital, and those that incapacitate an individual for four or more consecutive days and require ongoing medical treatment typically qualify, as well as pregnancy-related medical conditions.¹¹ FMLA leave can be taken continuously or intermittently, in increments of one hour or less, depending on the employer’s timekeeping system.¹²

It is well-settled that employers may not punish an employee because of the employee’s FMLA-protected absences—and that such punishment includes



assessing points for FMLA absences under an attendance policy. Indeed, the FMLA regulations explicitly address “no fault” attendance policies, explaining that, “**employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under ‘no fault’ attendance policies.**”¹³ Moreover, once an employer receives information indicating that an employee *may* need leave for an FMLA-qualifying reason—if, for example, the employee says that she is in the hospital or that her child is very sick—the law places the responsibility on the employer to determine whether a request for time off is likely to be protected by the FMLA.¹⁴ But before these obligations kick in, employees must notify their employers of their need for time off and the medical reason behind it.¹⁵ In light of these notice obligations, it is important that employees have a basic understanding of their FMLA rights, but they are frequently provided with misleading and incomplete information about the FMLA in their employers’ attendance policies.



A particularly alarming finding from our review was that some employers’ attendance policies contain information about the FMLA that is clearly inaccurate. For example, several policies indicated that no points would be assessed for FMLA leave, as long as that leave was approved *in advance* of the absence—leaving no room for the possibility that the need for FMLA leave may be unforeseeable, which is explicitly contemplated by the regulations.¹⁶ Others implied that employees would *only* be protected by the FMLA if they were absent for a period of several days—which is also plainly wrong, because the FMLA can cover intermittent absences of less than a day.

Furthermore, although over 70% of the policies that we reviewed explicitly state that no occurrences will be given to workers whose absences are protected by the FMLA, the vast majority of these policies simply identified “the Family and Medical Leave Act” or “FMLA leave” as a reason for an authorized absence, without providing *any* details about what this means—including the types of absences that may qualify for FMLA protection or its eligibility requirements.¹⁷ Consequently, although workers may have a vague understanding that the FMLA protects some medical absences, they are given no information about whether a trip to the emergency room would qualify as a “serious health condition,” or any indication that leave can be taken intermittently. Nor do they receive the critical information that they must have worked for their employer for at least a year and a certain number of hours before these protections kick in, or that caring for certain family members¹⁸ is protected, but not others.

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A particularly alarming finding was that some employers’ attendance policies contain information about the FMLA that is **clearly inaccurate.**

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Clarity in employer policies about what the FMLA protects is plainly needed, as it is evident that workers are frequently misled about their rights and punished even when their absence is likely protected by the FMLA. **Kaytiara McAlister, a pregnant lead operator at a manufacturing company in Georgia, was fired for leaving work to seek medical attention after she discovered that she was bleeding and feared that she might be having a miscarriage.** Even though Kaytiara had told her supervisor why she was leaving, and her absence likely should have been protected by the FMLA, Kaytiara received a point for leaving her shift early. **Similarly, Brittany*, a retail worker in Texas, was told that she could not take FMLA leave to care for her mother after she had had a stroke because she had not worked there long enough to apply.** But although Brittany had not yet worked at her current store for a year, she likely would have been eligible based on her previous employment with the same company—something her manager never told her.

KAYTIARA'S STORY

Kaytiara McAlister had been working as a lead operator at Tydenbrooks, a manufacturing company in Georgia, for five years. She was pregnant with her second child, and she began to feel sharp pains in her stomach in the middle of a shift that she had voluntarily picked up. When she went to the bathroom, she looked down and discovered that she was covered in blood. It was still early in her pregnancy, and she had not yet told anyone at work about it. Fearing miscarriage, Kaytiara told her supervisor that she was pregnant and what was happening. He told her that she should go to the hospital and said he



the FMLA and ADA. Kaytiara lost her job and her health insurance when she needed them most.

would let Human Resources know what was going on. She found out she had a sub chorionic hemorrhage, but thankfully did not miscarry.

When she returned to work for her next shift, Kaytiara learned that she had received a point for leaving early that day, and was terminated. This was even though she had volunteered for the shift, even though her supervisor had told her to leave, and even though she was experiencing a medical emergency that likely should have been protected by

Lacking clear guidance from their employers, many workers are placed in the impossible position of dealing with family or health emergencies without knowing if their absences are protected or being given the opportunity to provide documentation, often with disastrous results. **Taylor Trail, a welder for a trailer manufacturing company in Virginia, was fired for points he received after leaving work early when his young sons were being taken to the hospital.** After receiving a call from his wife, who said she was on the way to the hospital, Taylor asked his supervisor if he could take FMLA leave, and his



supervisor said he was “not sure.” Taylor left anyway, believing that his absence would be protected. Ultimately a court found that he was wrong, because his sons’ illnesses were not severe enough to constitute a “serious health condition” within the meaning of the FMLA—but not before noting that Taylor’s employer had not complied with its duties under the FMLA, and “should have requested that Trail provide documentation of his sons’ illness, given him an appropriate opportunity to furnish that documentation, and requested additional information if necessary before determining whether Trail’s . . . early departure was protected by the FMLA.”⁹⁹ Nevertheless, because Taylor’s employer later determined that his absence was not protected by the FMLA (and the court agreed), he received a point, which resulted in his termination.

Even workers who have attempted to exercise their FMLA rights to avoid punishment under an attendance policy have been stymied by their employers. **Vincent Gunter, a millwright at the Pennsylvania plant of a copper tubing manufacturer, was fired for points he received when he needed to miss work because his asthma flared up.** Believing that his asthma-related absences should be excused, Vincent consistently obtained notes from his doctor each time that he missed work, which he provided to his supervisor—but he continued to receive points. Vincent had requested FMLA paperwork from his employer, which he belatedly received—but by the time it was returned

by his doctor, Vincent had already been fired for his absences.²⁰ Similarly, **Victoria Ballard, a grocery store cashier in Illinois, was fired for absences related to her diabetes just minutes after her supervisor had given her FMLA paperwork to have completed by her doctor.** When she was fired, she was explicitly told, “we’re terminating you due to your absences, due to your medical condition.” Victoria indicated that she had just been given the FMLA forms to complete, but she was told that it was “too late.”²¹ These workers’ experiences highlight both how employers are too frequently shirking their notice obligations and how important it is for workers to understand, and be in a position to assert, their FMLA rights. Moreover, although Vincent and Victoria both challenged their terminations in court (and were successful in avoiding dismissal at summary judgment), it should not have taken a lengthy round of litigation—which many low-wage workers simply cannot afford—to enforce their rights.

To be clear, questions about FMLA eligibility and its covered purposes can be confusing even for lawyers, and we do not mean to suggest that workers can or should become experts on the FMLA. But workers must understand enough about the law to know when they may be protected, so they can put their employer on notice.

It is also critical that information about workers’ FMLA rights be included in employers’ attendance policies. Although covered employers are required to display FMLA posters in their workplaces and provide general information about the FMLA to eligible employees,²² these efforts are often ill-suited to helping workers meaningfully understand their rights—particularly as they apply to attendance policies. Buried among other notices and divorced from context, such general information is much less useful.



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These workers’ experiences highlight both how **employers too frequently shirk their notice obligations** and how important it is for workers to understand their FMLA rights.

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SPOTLIGHT ON WALMART

IN THE YEARS SINCE WE PUBLISHED *POINTING OUT*, Walmart has made some major changes to its time off and attendance policies. Although some of these changes—including protections for pregnant workers and the provision of paid time off for all workers—represent real progress, they do not go far enough. Strikingly, Walmart’s policy *still* does not make clear that employees will not be punished for absences protected by the FMLA and ADA, demonstrating that Walmart has substantial work left to do in order to fully protect workers’ rights.

Pregnancy-Related Absences and Emergency School Closures

In February 2019, following the filing of a class action lawsuit by A Better Balance challenging its attendance policy for violating New York’s pregnancy accommodation law, Walmart modified its written attendance policy to make clear that employees (or “associates” as Walmart refers to them) will not be punished with points for pregnancy-related absences. According to the new policy, this includes absences caused by an associate’s “inability to work due to pregnancy or a pregnancy-related condition, including prenatal care and appointments.” This is a major improvement, which we hope will ensure that pregnant workers who need time off to maintain a healthy pregnancy—whether to attend routine prenatal care appointments or to seek medical care when complications arise—can take the time they need without risking their jobs.



Further recognizing that unexpected emergencies may require employees to miss work, Walmart’s policy also now makes clear that an emergency school or childcare closure caused by inclement weather or other unexpected circumstances, such as a loss of power, is an authorized reason for an associate’s absence—meaning that it cannot cause them to incur points. Of course, A Better Balance is vigilantly monitoring Walmart’s practices to ensure compliance with these changes.

ADA and FMLA Absences

Unfortunately, however, Walmart’s attendance policy *still* fails to address the rights of workers under the FMLA and ADA. **Neither “disability” nor the FMLA-qualifying reasons for leave—particularly a worker’s own serious health condition or care for a family member with a serious health condition—appear on the list of reasons for an authorized absence in Walmart’s attendance policy.** As a result, we have heard from Walmart workers who are still sometimes assessed with points for these absences.

Walmart’s policy includes “reasonable accommodation” on its list of authorized absences—but with no mention of disabilities or the ADA, workers (and managers) are left with no information about what this term means, or which health conditions accommodations must be made for. As long as this disconnect remains, we expect that Walmart associates will continue to receive points for disability-related absences.

VIRGINIA'S STORY

"I am a person with disabilities—I have severe asthma and diabetes—and they can be paralyzing when they act up. I am also a hard worker, which I take a lot of pride in. Although my health issues can be challenging, I have never let them control me, and I always give 110% to my job.

"That's why, in my first week of work at a Walmart Store in Charleston, South Carolina, I told my supervisor about my disabilities and explained what I needed to manage them: occasional breaks to use my nebulizer to help me breathe,



and test my blood sugar. This was never a problem—they even let me use the office in the store to test my blood sugar.

"But on the few days when my blood sugar got so high that my vision became blurry, or my asthma flared so badly that I had trouble breathing, I was punished with "points" when I needed to miss work—even though I followed procedure and called in to report my absences and offered

a doctor's note the next day. Those points eventually cost me my job." —Virginia James, South Carolina

Indeed, **A Better Balance client Virginia James was terminated from her job as a cashier at a Walmart store in South Carolina for absences caused by her asthma and diabetes.** After we helped Virginia file a charge with the Equal Employment Opportunity Commission (EEOC) challenging her termination as a violation of the ADA, the EEOC completed a systemic investigation into the impact of Walmart's attendance policy on workers with disabilities. As a result of that investigation, the EEOC recently concluded that there was "probable cause" to believe that Walmart "has or had a nationwide no-fault attendance and leave policy and/or practice that subjects qualified individuals with disabilities to attendance points for missing time from work for disability-related reasons"—meaning the EEOC believes it is more likely than not that Walmart's policy violates the ADA. The matter is ongoing, and we remain hopeful that it will prompt Walmart to make necessary changes to its attendance policy to protect workers with disabilities.

As for the FMLA, Walmart's attendance policy remains completely silent—making it an outlier among the companies whose policies we reviewed. The policy contains no indication that workers with serious health conditions or who are caring for a loved one with a serious health condition will not incur points. Workers are advised that they can apply for a "leave of absence" if they need to be absent for more than three scheduled shifts, but this leave may not be job-protected, and it is not an adequate substitute for the protections afforded by the FMLA—which can be taken intermittently, and for absences of less than three days.

Protected PTO

In February 2019, Walmart also introduced a program that provides employees with paid time off that can be used when unexpected personal or family emergencies arise. Referred to as "Protected PTO," this paid time off is available to all Walmart associates—including part-time and temporary workers—after an initial waiting and accrual period. If an associate uses their Protected PTO when they need to miss all or part of a shift, the absence will be deemed "authorized," meaning it is exempt from points.²³ Protected PTO can be used for any reason (not just a medical emergency) and according to the policy, Walmart does not require any documentation from associates when they use it.

Although Walmart’s decision to provide all associates with some job-protected paid time off is laudable, there are some significant issues with this policy. First, it takes the average Walmart worker an extremely long time to accrue this leave. Associates generally gain just one hour of Protected PTO for every 30 hours worked,²⁴ and because so many Walmart associates are underemployed (given the company’s overreliance on part-time workers), it can take them months to accrue a single day of leave. Additionally, the provision of *some* protected time off does not ensure that workers will be able to take all of the time off to which they may be entitled. Associates can generally only accrue up to 48 hours of Protected PTO in a year,²⁵ but workers may be entitled to more than 48 hours of job-protected leave if, for example, they have a disability or serious health condition.

Our understanding, based on conversations with Walmart workers who have contacted our helpline, is that **Walmart still does not have appropriate mechanisms in place to ensure that workers who are absent for any lawful reason do not receive points for their absences** if they do not have enough Protected PTO to cover them. It is therefore possible, if not likely, that associates whose absences may be protected by the FMLA or ADA will nevertheless incur points if they do not have enough Protected PTO available to use.

Higher Stakes for Absences

Finally, although Walmart workers now have a bank of Protected PTO from which to draw when unexpected absences arise, the stakes are now even higher when they *do* receive points. Another change implemented in February 2019 was that the threshold for termination has been lowered from nine occurrences to five for all associates. And now it is even easier for workers to rack up points, as absences on certain “key event dates” designated by Walmart will result in *double* the amount of points. If a worker is absent on one of these days and fails to call in (a “no call/no show”), they will receive *four* occurrences for a single absence.

And it’s not just the threat of termination that looms over workers who receive points; Walmart associates’ points now directly impact their compensation. Under the new policies, associates’ quarterly “MyShare” payouts—cash bonuses based on store performance—may now be reduced if they do not have perfect attendance, which further incentivizes associates to come into work sick.

This is deeply troubling, particularly in light of Walmart’s failure to ensure that workers with disabilities, serious medical conditions, and caregiving responsibilities are not punished for lawful absences. **It makes it increasingly likely that a Walmart worker is one unexpected illness—whether theirs or that of a loved one for whom they provide care—away from losing their job.**

As the largest private employer in the country and a self-proclaimed leader in the retail industry, **Walmart can, and must, do much better.**



It’s not just the threat of termination that looms over workers who receive points; Walmart associates’ points now directly impact their compensation.



Sick Leave

Workers suffering from common illnesses like a cold or stomach bug are generally not entitled to leave under the FMLA, but they may still have a right to job-protected sick time. Although there is not currently any federal statute that provides a right to sick time, many states and localities have stepped in to fill this gap.²⁶ Currently, workers in 11 states,²⁷ Washington, D.C., and 18 localities²⁸ have the right to paid sick time when they are sick, caring for a loved one who is sick, or seeking preventative medical care—and the anti-retaliation provisions in these laws mean that they cannot be punished for using paid sick time under the law. (Additionally, several state and local sick time laws explicitly prohibit the assessment of points or discipline under an attendance policy against workers who exercise their sick time rights.)

Many of the policies we reviewed, which seemingly apply nationwide, belonged to employers that are operating in states and localities with paid sick time laws—but the policies consistently failed to include information about these rights or indicate that workers will not receive occurrences for sick time.²⁹ In fact, the vast majority of the policies that we reviewed unequivocally indicate that workers will incur points when they miss work because they are sick³⁰, making it all the more important that workers understand their sick time rights where they exist.

Strikingly, employers' lack of empathy for employees' need for sick time was a common theme throughout the policies that were reviewed. Incredibly, under some policies, workers could even be assessed points if their employer ordered them to go home because they were sick! Presumably, this was done out of a concern for public health and workplace safety—underscoring the importance of enabling workers to stay home when they are sick.

Indeed, the public health case for paid sick time is one of the most compelling arguments in its favor. **The risk of highly infectious diseases spreading rapidly among employees, customers, clients, and the broader public when people are forced by economic necessity to go into work sick poses a significant threat to public health—one that the coronavirus pandemic has forced Americans to confront in stark terms.** As this crisis has unfolded, it has also highlighted the striking inequalities in which workers have access to paid sick time.³¹

Nowhere should the concern about employees reporting for their shifts sick be more paramount than in hospitals, which must take special care to minimize the



exposure of sick staff to patients. Yet our review has shown that hospitals and healthcare providers frequently employ attendance policies that punish workers with points when they stay home sick. Consider the fact that after Maryland passed the Healthy Working Families Act in 2018, guaranteeing paid sick time to workers across the state, the Maryland Hospital Association³² and Johns Hopkins University Medicine³³ (the largest private employer in the state) urged the legislature to pass an amendment striking the provisions that prevented employers from punishing workers who used their sick leave by assessing points. And Johns Hopkins is not an outlier in relying on a punitive attendance policy; hospitals and health care providers made up more than 15% of our sample.

It is crucially important to provide workers with **the right to sick time without punishment**, and to ensure that attendance policies account for these protections where they exist.

Finally, although many policies indicated that employees would receive *fewer* points for a sick day if they provided a doctor's note, they failed to recognize the added burden this can impose on low-wage workers, many of whom lack health insurance or simply cannot afford the time and expense of getting to the doctor—particularly if they have a minor illness (like a cold) that does not require medical attention. Doctor's offices also often do not want these patients in their waiting rooms, spreading illness when no treatment is required. And, as we discuss further below, in many policies this was the *only* context in which medical documentation was mentioned, leaving workers with the impression that a doctor's note could never be used to excuse their absence entirely.

It is crucially important to provide workers with the right to sick time without punishment, and to ensure that attendance policies account for these protections where they exist.

ADA Leave

Employees with disabilities may also be entitled to job-protected leave under the Americans with Disabilities Act (ADA). Enacted to eliminate discrimination against people with disabilities in employment, housing, and other public and private spaces, the ADA provides critical legal protections to workers with disabilities that must be robustly enforced.³⁴

The ADA requires employers to make “reasonable accommodations” for employees with known disabilities, so long as the accommodations can be made without undue hardship to the employer.³⁵ **Many workers with disabilities may not realize that they are covered by the law; disabilities that may entitle**



workers to accommodations include conditions like asthma, diabetes, depression, anxiety, migraines, and some pregnancy-related health conditions.

And in order to invoke the law, workers do not need to use any “magic” words; an employee asking in plain English for some adjustment or change related to a medical condition counts as a request for a reasonable accommodation.³⁶

A request alone is not enough to get a reasonable accommodation, but it is all that is necessary to start an “interactive process” with the employer. An employee who lets an employer know that a difficulty at work is related to a medical condition (or where the connection to a medical condition is known to an employer) has also made a request for a reasonable accommodation.³⁷

The Equal Employment Opportunity Commission (EEOC), the federal agency that enforces the ADA, has issued guidance to employers which makes clear that a reasonable accommodation under the ADA may include modifying or adjusting an attendance policy.³⁸ Similarly, the EEOC has also made clear that unpaid leave may be a reasonable accommodation.³⁹ This is the case even if an employee has exhausted her previously earned leave time. Importantly, this means that the assessment of points for disability-related absences may violate the ADA.

In spite of the fact that the ADA is a federal law covering most employers,⁴⁰ the majority of the policies that we reviewed made *no* mention of this basis for protected leave. **Only 13 of the policies—approximately one-fifth of the sample reviewed—indicated in an explicit way that disability-related absences could potentially excuse an employee from incurring points.**⁴¹ But even some of these policies used confusing or incomplete language that was unlikely to inform a worker with a disability that they may have a right to time off without penalty. For example, some of the policies merely mentioned the ADA, without even bothering to spell out the acronym, or “reasonable accommodations,” a legal term that can be meaningless to a layperson, without any reference to disability. These passing references are unlikely to signal to a worker that their disability-related absences may be excused from points as an accommodation. The remainder of the policies that were reviewed—80% of our sample—made no mention whatsoever of the ADA or disability-related leave as being exempt from attendance consequences.

ARTHUR’S STORY

Arthur Bolton worked as a packer at Bay Valley Foods, a food processing plant for shelf-stable foods in Pennsylvania. He suffered from high blood pressure and neuropathy in his feet, and he sometimes had medical absences related to these conditions. Under Bay Valley’s attendance policy, workers do not receive points for the first two days of a medical absence if they provide a doctor’s note, but they will receive a point on the third consecutive day. Thus, although Arthur provided doctor’s notes which made clear that his absences were related to

his disabilities, he received points because the absences were for more than two days.

After he had incurred a certain number of points, Arthur was called into a meeting to discuss his absences, and he raised his health issues. He was not eligible for FMLA leave because he had not worked there for a year yet, but there was never any discussion of excusing his points under the ADA. When he received another point (for which he also provided a doctor’s certification), Arthur was fired.⁴²

Employers’ harsh and inflexible treatment of individuals with disabilities under points-based attendance policies has increasingly subjected them to legal liability. The EEOC has identified “inflexible leave policies that discriminate against individuals with disabilities” as one of the “emerging and developing issues” in its 2017-2021 Strategic Enforcement Plan,⁴³ and the agency has successfully brought a number of systemic charges against companies that fail to adjust their attendance policies as a reasonable accommodation.⁴⁴ Most recently, **the EEOC found probable cause to believe that Walmart’s attendance policy violates the ADA,⁴⁵ based on the experiences of workers like Virginia James, A Better Balance client** and a cashier with severe asthma and diabetes who was fired for disability-related absences.⁴⁶ (See pg. 20 for Virginia’s story.) It is clear that employers must do more to ensure that their attendance policies are not being used to violate the rights of workers with disabilities.

SPOTLIGHT ON MEATPACKING PLANTS

THE COUNTRY'S BIGGEST NAMES in meat-packing and food processing—JBS, Tyson Foods, Cargill Meat Solutions, ConAgra Foods, Smithfield Foods, and many others—employ points-based attendance systems to keep their lines moving.⁴⁷ Most of the jobs at these facilities are located in rural areas and they are heavily concentrated in the South, where they are often the best-paying jobs available, making them desirable despite the unpleasantness and dangerousness of the work. But the workers must pray that they don't have any health issues, as these companies are notorious for punishing workers for medical absences.

According to a poll of Alabama poultry workers conducted by the Southern Poverty Law Center, 97% of the workers surveyed reported that there was a point system in their plant; 81% said that their plants assessed points for any absence—even for medical reasons.⁴⁸ **Fearful of accumulating points, poultry workers have reported that they regularly go into work sick or with injuries** (which, if sustained on the job, may *still* cost them points), and that they have also incurred points if they need to miss a shift for a doctor's appointment or to stay home with a sick child.⁴⁹ This is particularly concerning in light of the dangers faced by workers in the meatpacking industry, who face some of the highest rates of occupational illness and injury in the United States.⁵⁰



SHEENA'S STORY

Sheena Lipp worked at Cargill Meat Solutions' meat processing facility in Ottumwa, Iowa. Sheena suffered from an incurable lung disease that required periodic doctors' visits and occasionally made it difficult for her to breathe when her condition flared up, which happened a few times each year. Like most of the policies we reviewed, Cargill's attendance policy made no mention of the fact that disability-related absences could be excused as a reasonable accommodation. Nevertheless, Sheena's supervisors were aware of her condition and periodically excused her absences for

doctor's appointments. But when Sheena received a point for an absence during a flare-up after accidentally reporting the wrong reason for the absence, she was summarily fired, even though she later told the company that the absence had in fact been related to her disability. Despite being told the absence was related to her disability, the company failed to engage in the interactive process or otherwise consider whether an accommodation could be made. That one simple action cost Sheena her job, because a court ultimately sided with her employer.⁵¹

ROZAIRE'S STORY

Rozaire Alcegaire was similarly fired from her job as a meat cutter at JBS's pork processing plant in Louisville, Kentucky for medical absences, even though they stemmed from a work accident that she reported to the company. Rozaire, a Haitian immigrant who did not speak English, had been injured at work by a forklift. She subsequently missed several weeks of work while she was recuperating at home. She had regular communications with the company during that time, as JBS employees were taking her to her doctor's appointments and JBS's FMLA coordinator even attempted to provide her with FMLA paperwork, but only in English. JBS had an attendance policy, but Rozaire had never heard anything about it until her accident. "Nobody explained it to me," she said. And although JBS's attendance policy exempts both FMLA leave and

absences connected with on-the-job injuries from incurring points, this proved meaningless to Rozaire, who was subsequently terminated for absenteeism. The reason? JBS argued (and a court ultimately agreed) that Rozaire's injury did not qualify as a "serious health condition" under the FMLA, and faulted her for not following the procedures to report her absences each day—even though she had been in regular communication with the company throughout her absence, and despite the employer's misguided attempt to advise her of her FMLA rights.⁵² Rozaire had worked for JBS for seven years, and her termination was a shock. "Before the accident, I did my job very well. I don't know why they fired me," she said. Her experience provides another compelling example of how workers are misled and misinformed by these policies.

And these concerns are even more salient in a public health crisis. Amid alarming reports of COVID-19 outbreaks at meatpacking plants,⁵³ workers at a Smithfield Foods plant in Missouri reported that the company was continuing to assign points to workers displaying COVID-19 symptoms who stayed home (as recommended by the Centers for Disease Control) unless Smithfield or a doctor *ordered* the worker to stay home.⁵⁴ Given the unavailability of testing during much of this crisis, and many doctors' reluctance to write such notes when they are seeing many patients remotely, through telemedicine (if at all), this high bar virtually guarantees that workers who stay home when they are exhibiting symptoms will incur points. Further incentivizing workers to come into work sick, Smithfield also, according to workers, offered a \$500 cash bonus to any worker who did not miss a shift for any reason between April 1 and May 1, 2020.⁵⁵

Workers with serious health conditions fare even worse, even when their absences should be protected by the FMLA or ADA—illustrating how major companies' attendance policies and practices are being employed to mislead and misinform their workers about their legal rights.

Punishing workers who need time off for medical reasons is not only callous, but it poses a danger to public health. It means that workers face an increased risk of becoming ill every time they go to work, a reality that has been driven home in these frightening times. Workers in these essential businesses deserve much better—even in the absence of a pandemic.

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Pregnancy-Related Leave

Finally, pregnant workers—who often need time off for prenatal appointments and other medical care—may have additional rights that employers' attendance policies must take into account. Eligible employees can use FMLA leave for certain pregnancy-related medical conditions (regardless of whether they would otherwise constitute a “serious health condition”) or to seek prenatal care.⁵⁶ And, although pregnancy is not considered a disability under the ADA, **certain pregnancy-related health conditions, such as gestational diabetes, hypertension, and placenta previa (among others), may constitute disabilities for which reasonable accommodations must be made.** Additionally, 30 states and five localities have Pregnant Worker Fairness Acts (PWFAs)⁵⁷ that entitle workers with otherwise healthy pregnancies to modest workplace accommodations—which can include scheduling modifications and time off—that are needed to stay healthy and on the job.⁵⁸

But these protections were seldom spelled out in the policies that we reviewed. Although most of the policies mentioned the FMLA, **only one attendance policy⁵⁹ mentioned that FMLA leave could be used for absences during pregnancy.⁶⁰** (The few policies that discussed the qualifying reasons for FMLA leave in any detail mentioned only that it could be used for the birth of a child, with no mention of pregnancy.) Similarly, of the few policies that mentioned the ADA, *none* indicated that pregnancy-related disabilities may be protected. And finally, only *two* of the policies that we reviewed mentioned the right to accommodations

under a PWFA—despite the fact that many of the employers whose policies we reviewed are operating in states and localities with these protections.⁶¹

We have heard heartbreaking stories from workers who have faced punishment for seeking emergency medical care related to their pregnancies, underscoring the need for this information. **A Better Balance former client Tasha Murrell worked in a warehouse for XPO Logistics in Tennessee while she was pregnant with her third child.** As she approached the thirteenth hour of her shift, Tasha asked her supervisor if she could leave early one day because she was in pain. Her request was denied, but Tasha left anyway—understanding that doing so would likely cost her a point. Tragically, she miscarried the next day.⁶²

TASHA'S STORY

Tasha Murrell worked at a warehouse for XPO Logistics in Memphis, Tennessee. The job was brutal and physically demanding, as Tasha was consistently on her feet in a warehouse where temperatures soared above 100 degrees and her job required frequent heavy lifting. She regularly worked 14-hour days; if she tried to leave earlier, she risked getting a point under XPO's attendance policy.

When Tasha became pregnant with her third child, she was thrilled; she had two boys and was hoping for a girl. Soon after Tasha told her



supervisor about her pregnancy, she asked if she could leave “early” one day—after already working 12 hours—because she was not feeling well, citing her pregnancy. Her request was denied, but Tasha could not take the pain anymore, so she left—understanding that she would receive a point for doing so. “I barely made it to the car,” she recalls.⁶³ The next morning, she woke up to find that her mattress was stained with blood. Tasha went to the hospital, but it was too late; she learned that she had miscarried. She went back to work a week later.

Pregnant workers frequently require medical care—sometimes urgently—to support a healthy pregnancy, and they should not have to delay this out of fear of incurring points that could cost them their jobs. But too often they do, because they do not understand their rights and are deeply concerned about losing their jobs—and their health insurance—at a time when they need them the most. It is therefore incredibly important to ensure that pregnant workers are aware of their legal rights, and able to invoke them, when they are needed.

The Omission of Legal Rights in These Policies Is Dangerously Misleading

The fact that employers' attendance policies do not explicitly identify and describe *all* of the legally-protected reasons for which workers must be allowed to take leave without incurring points—including leave protected by the FMLA, ADA, and state and local sick time laws and PWFAs—is dangerously misleading.

As a threshold matter, it is important to recognize that their employers' policies are frequently a low-wage worker's *only* source of information about their legal rights. Through our legal helpline, we frequently speak with workers who are surprised to learn about the federal, state, and local employment laws that might protect them, because their employers have never mentioned them.

With this context in mind, it is particularly concerning that the language of most attendance policies is misleading to workers. The policies frequently indicate that the limited carve-outs for approved absences are exhaustive lists—with the corollary that any absence for a reason *not* listed in the policy will be unexcused and subject an employee to points. Thus, **a reasonable worker reviewing such a policy would be unlikely to understand that they may have additional protections for certain absences that are not included in the policy.** Indeed, we often hear from workers scared to leave work or miss a day, or even inquire about whether an absence would be protected, for fear of getting points.

Moreover, **many of the laws providing a right to time off—including the FMLA and many state and local sick time laws and PWFAs—explicitly require employers to provide notice of these rights to their employees.** The onus is therefore on the employer to ensure that workers are aware of these legal rights to time off.⁶⁴ But, as our review of employers' policies makes clear, too many employers are shirking these obligations—and enforcement of these notice violations is often extremely limited.

Finally, **it is striking to note that many more of the policies that we reviewed accounted for workers' rights under federal laws (such as the FMLA and, more limitedly, the ADA) than state and local protections.** As we have discussed in this report, state and local laws typically provide more expansive rights than federal law. It is therefore vitally important that workers be made aware of these protections as well.

Fault #2: “No Fault” Attendance Policies Are Problematic in Practice

If the problem were limited to the way that attendance policies are written, the solution would be more straight-forward. However, it extends further than this—punitive attendance policies share many characteristics in the way that they operate in practice, which makes it nearly impossible for employees to exercise their legal rights. Our review has identified several common flaws in the design and operation of these policies.

The Interactive Process Is Shut Down Before It Can Begin

Under laws requiring reasonable accommodations, like the ADA and PWFAs, employers are required to engage in an “interactive process”—essentially, a conversation—with their employees to determine if their needs can be met without undue hardship to the employer. This obligation applies equally when

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Many of the laws providing a right to time off **explicitly require employers to provide notice** of these rights to their employees.

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the accommodation sought by the employee is time off under an attendance policy. But attendance policies commonly have several features that prevent the interactive process from occurring.

Automated Call-in Procedures

Under many employers' attendance policies, workers are required to call a designated number to report unplanned absences. When they call, they generally receive an automated message, either directing them to select from a set of pre-programmed options or to leave a voicemail message to indicate the reason for their absence. Other policies direct employees to report their absences using an app or web portal with a similar set of limited options to select from, which can be particularly challenging for workers without computer skills or ready access to the internet. These systems may be efficient for the employer, but they are problematic in that **they leave no opportunity for the employee to speak with a live person—and therefore no opportunity to engage in a cooperative dialogue, as is required for an interactive process.**

Moreover, the set of pre-programmed options may not allow the employee to communicate that the reason for their absence (such as a disability or pregnancy-related health condition) may carry additional protections. Critically, in order to trigger an employer's obligation to consider an accommodation under the ADA or a PWFA, the employer *must be made aware of the need for it*—so the employee needs to provide sufficient information about their disability or health condition for which they need accommodations. If employers' reporting

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Many employers' policies make it **extremely difficult, if not impossible**, for employees to submit medical documentation.

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processes prevent workers from providing this information, they are shutting down the interactive process before it can begin—perhaps purposefully, precisely so they will not have to engage in the interactive process and can attempt to plausibly declare that they were ignorant of the employee’s circumstances.

Medical Documentation

A related issue is that many employers’ policies make it extremely difficult, if not impossible, for employees to submit medical documentation which would put their employers on notice of their need for accommodations.

More than one-third of the policies that we reviewed contained *no* mention of medical documentation at all. Others vaguely described a process for providing medical documentation in connection with ordinary sick leave (to reduce the number of points for an absence, as noted above)—but most of these policies did not specify the type of documentation required, the person to whom it must be provided, or any deadline for providing it, leaving employees to guess at these requirements. And of the policies that we reviewed, this was generally the *only* context in which medical documentation was even mentioned.⁶⁵ Consequently, there was no suggestion that employees could provide a doctor’s note or other medical documentation after an absence to allow the employer to decide if it should be excused from points altogether as a legally-protected absence.

The lack of opportunity for employees to provide medical information that would put their employers on notice of their rights is significant and

troubling. It leads to the “ostrich approach” that we previously identified in our report, *Pointing Out*: by failing to allow employees to indicate the reasons for their absences, including by accepting medical documentation, employers are burying their heads in the sand to avoid hearing information that could trigger legal responsibilities.

Rigid Attendance Practices Do Not Account for Emergencies

A second set of issues stems from the rigidity and inflexibility of these policies, which do not adequately protect workers’ rights in unpredictable and emergency situations.

No Excuses for Failing to Call In

Generally speaking, punitive attendance policies contain strict penalties for failing to report an absence: under most of the policies that we reviewed, workers are assigned additional points for an absence if they fail to call in within a specified time (a “no call/no show”), and most also specified that if an employee is absent for a certain number of consecutive days (oftentimes three) without calling in, they will be terminated.

It is certainly reasonable for employers to expect their employees to communicate when they are unable to come into work as scheduled—we don’t dispute this. But it is also important for employers (and their policies) to recognize that emergencies can sometimes prevent employees from complying with these requirements. For example, if an employee has an unexpected health crisis and is rushed to the hospital, they may not be able to contact their employer within the timeframe specified in the policy. The laws providing a right to leave in these circumstances recognize this: if an employee needs unforeseeable FMLA leave, they are required to provide notice to their employer “as soon as practicable under the facts and circumstances;”⁶⁶ and many sick leave laws contain similar notice requirements.

But **only eight (12%)⁶⁷ of the 66 policies that we reviewed contemplated that emergencies or other unforeseen circumstances may prevent an employee from timely calling in an absence**, or outlined a process that would enable an employee to provide a reason for their failure to call in that may excuse the points (and avoid termination). This is a critical safeguard to protect employees’ rights in a crisis.

Managers Lack Discretion to Remove Points

Similarly, the overwhelming majority of the policies that we reviewed lacked any process for the removal of points after they had been assigned—indeed, **only six policies (less than 10% of our sample) outlined a mechanism or process for employees to seek reconsideration or removal of points that have been assessed**. Through our legal helpline, we have repeatedly heard from workers whose experiences suggest that these are not careless omissions; employees who have attempted to have their points removed are frequently told by their managers that their hands are tied, and they are powerless to remove points once they have been assessed.

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In contrast, under many attendance policies employers explicitly retain the ability to deviate from the progressive disciplinary process set out in the policy and accelerate discipline if, in their discretion, they deem it necessary to do so. Notwithstanding the fact that this undercuts the rationale behind many “no fault” attendance policies (by assigning *more* fault to certain attendance behaviors than others), it certainly indicates that managers can exercise the discretion necessary to consider employees’ individual circumstances and ensure that they do not receive occurrences for lawful absences.

Fault #3: “No Fault” Attendance Policies Disproportionately Affect the Most Vulnerable Workers

“No fault” attendance policies are also problematic because they widen existing inequalities between the hourly workers who are most likely to be subject to these policies and salaried workers with greater access to benefits and workplace protections, even in the absence of clear legal rights. **The harsh consequences of these policies are not evenly distributed, and are used as a tool to treat workers as expendable, harming women and people of color, who are overrepresented in the low-wage, hourly jobs where these policies are frequently used.** The fact that many of the large processing plants and distribution centers in which “no fault” attendance policies are employed are located in rural areas and Southern states exacerbates these inequalities, as fewer workplace protections exist. Public transportation can often be scarce or unreliable in these areas, causing additional challenges that make it easy for workers to rack up points.

Similarly, **the impacts of “no fault” attendance policies are most strongly felt by the workers who are most likely to need time off: pregnant women, caregivers, and people with disabilities or chronic health conditions.** With each absence bringing workers closer to termination, these policies threaten the loss of income (and possibly health insurance) at a time when workers are most vulnerable. Moreover, because the majority of caregiving responsibilities continue to be borne by women in the United States, these policies will continue to disproportionately hurt working women and further depress women’s wages. Ensuring “no fault” attendance policies do not punish workers for lawful absences is a gender justice, racial justice, and economic justice issue.

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The New York State Capitol building
in Albany, New York

RECOMMENDATIONS

FACING PUNISHMENT FOR MEDICALLY-NECESSARY ABSENCES—even when they are protected by law—is a common occurrence for tens of millions of workers in the United States, and this must change. To ensure that workers can take the time off that they need to care for their health and their loved ones without threatening their economic security, important changes need to be made to our laws and to employers' policies. In order to fully address this issue, we recommend the following:

First, we must work to ensure that *all* workers have the right to job-protected time off to care for their own health or the health of a loved one. The first step to ensuring that workers can take time off without penalty for their medical and caregiving needs is guaranteeing that they have a legal right to do so. The federal FMLA provides basic protections, but it leaves out far too many workers, so it is critically important that state and local governments fill this gap by enacting laws that guarantee paid sick time, paid family and medical leave, and pregnancy accommodations for *all* workers.

Second, employers must ensure that their attendance policies fully identify, explain, and respect employees' rights. Too often, workers' *only* source of information about their legal rights is what is contained in their employers'

policies. It is therefore essential that these policies explicitly state that employees will not receive points for medical absences that are protected by federal, state, or local law, and specifically identify what those laws provide, in language that is comprehensive and easy to understand. Although mentioning that the FMLA or ADA may protect an employee from incurring points is important, it is not enough; employers' policies should explain exactly what these laws are and what they provide, who they cover, and how to invoke them. Employers must also ensure that their attendance policies are provided to workers, in writing, upon hire and are readily available thereafter as well.

In order to fully protect workers' rights, attendance policies should also contain clear, written procedures for the following: (1) reporting that an absence may be for a legally-protected reason, including information about how to provide medical documentation, if needed, with sufficient specificity—e.g., the contents of the documentation, to whom it must be provided, and when it must be submitted; (2) allowing employees to provide delayed notice of the reason for their absence in unforeseen and/or emergency circumstances, without incurring additional points or discipline; and (3) allowing employees to dispute the assessment of points—and granting managers the discretion to remove them—for a lawful absence.

Finally, we must strengthen the existing laws providing a right to time off to clarify employers' obligations and impose stronger penalties for noncompliance. When employers ignore or interfere with employee rights and assign them points for lawful absences, workers often have little recourse to challenge these practices until they are out of a job. The fact that an employee can bring a lawsuit *after* they have been fired provides scarce comfort to someone who is facing a health or family crisis, and sorely in need of steady income. It leads many employees, fearful of accumulating points, to go into work sick or delay necessary medical care—eviscerating the protections that exist to prevent workers from having to prioritize their economic well-being over their health. This is untenable.

Thankfully, there is a legislative solution to this problem. A bill has been introduced in New York State to fill this gap in the law. The bill, **S. 6671, the "Protecting Lawful Absences from Work Act (PLAWA),"** would curb the practices detailed in this report by explicitly prohibiting retaliation—including the assessment of points or other discipline under an attendance policy—against employees who exercise their rights to lawful time off, including for example, paid family leave under New York law. It would also make clear that when time off may be required as a reasonable workplace accommodation, employers are *required* to engage in an interactive process with their employees *before* assessing points. In other words, employers will be required to consider employees' doctor's notes before automatically assigning a point for a medical absence—and face penalties if they fail to do so. Finally, the law would mandate that employees receive written notice of their rights to lawfully be absent for certain reasons under state law, with strong penalties for noncompliance.

By clarifying that employers' policies must yield to workers' legal rights, New York State would set an important precedent, requiring companies to ensure that their attendance policies are not used to punish workers for lawful absences and encouraging other states to follow suit. We urge the swift passage of PLAWA.

The passage of laws like PLAWA at the state level is an important first step, but because so many of the workers impacted by these policies rely on federal law for their workplace protections, **Congress must also consider federal legislation to address the problems with “no-fault” attendance policies identified in this report.**

- Congress should ensure that employers that utilize attendance policies are fully compliant with federal, state and local civil rights and labor laws and fully transparent with their employees and the public about their policies.
- Our federal laws should also impose stronger penalties against employers that fail to fulfill their notice obligations under the FMLA and ADA, and clearly prohibit employers from assessing points without engaging in the interactive process that is required by the ADA.

Additionally, the U.S. Securities and Exchange Commission should require that companies disclose their attendance policies for analysis by investors and the public, so that they are able to make informed decisions about any potential risks that may come from investing in that company.

It is incumbent upon policymakers at all levels of government to ensure that workers have meaningful and enforceable rights to take time off to care for their health and their loved ones without punishment.

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Congress **must consider federal legislation** to address the problems with “no-fault” attendance policies identified in this report.

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Endnotes

- 1 See Annie Palmer, *Amazon won't dock warehouse workers for missing shifts during coronavirus crisis*, CNBC.COM (Mar. 8, 2020, 11:57 PM), <https://www.cnbc.com/2020/03/09/amazon-adjusts-attendance-policy-for-warehouse-workers-amid-coronavirus-outbreak.html>; Deena Shanker and Lydia Mulvany, *Threat of Sick Workers at U.S. Meat Plants Forces Policy Changes*, BLOOMBERG (Mar. 20, 2020 7:00 AM), <https://www.bloomberg.com/news/articles/2020-03-20/threat-of-sick-workers-at-u-s-meat-plants-forces-policy-changes?srnd=premium>. But see Tyler Jett, 'A serious mistake': Union president criticizes Tyson Foods over attendance policy, DES MOINES REGISTER (June 4, 2020 1:47 PM), <https://www.desmoinesregister.com/story/money/business/2020/06/04/a-serious-mistake-ufcw-president-criticizes-tyson-foods/3144004001/> (noting that Tyson had reinstated its attendance policy in June 2020).
- 2 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>.
- 3 Formerly known as OUR Walmart.
- 4 The policies in this sample were collected from public sources and from workers who received them in the course of their employment. They may have been modified in whole or in part, or no longer be in use by these employers. Our analysis is limited to the versions of these documents that were made available to us.
- 5 See Shawn Fremstad, Hye Jin Rho & Hayley Brown, *Meatpacking Workers are a Diverse Group Who Need Better Protections*, CTR. FOR ECON. AND POLY RES. (Apr. 29, 2020), <https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/> ("People of color, immigrants, and people in relatively low-income families are disproportionately employed in meatpacking plants. Almost one-half (44.4 percent) of meatpacking workers are Hispanic, and one-quarter (25.2 percent) are Black."); LAURA HUIZAR & TSEDEYE GEBRESELASSIE, WHAT A \$15 MINIMUM WAGE MEANS FOR WOMEN AND WORKERS OF COLOR 2-3 (National Employment Law Project 2016), <https://www.nelp.org/wp-content/uploads/Policy-Brief-15-Minimum-Wage-Women-Workers-of-Color.pdf> (noting that women, African American, and Latino workers are overrepresented among workers earning less than \$15 per hour, and in industries such as food services, retail, home care, auto manufacturing, and hotel accommodations).
- 6 Names with an asterisk have been changed to preserve confidentiality.
- 7 This section focuses on the federal FMLA, but many states also have their own state-specific FMLAs, which often exceed the protections of the federal FMLA. Violations of the federal FMLA will nearly always also be violations of state FMLAs, and situations that do not violate the federal law may well still violate state laws.
- 8 An eligible employee under the FMLA is one who has worked for 12 months, and at least 1,250 hours in the last 12 months, for an employer with fifty or more employees.
- 9 Workers in eight states and the District of Columbia are also entitled to some form of paid family and medical leave, which allows them to receive income replacement if they are absent for many of these reasons. Some (though not all) of these laws also provide job protection. For more information, visit <https://www.abetterbalance.org/resources/paid-family-leave/>.
- 10 The FMLA also permits military family members up to 26 weeks of leave to care for a covered servicemember or address certain needs arising out of a servicemember's active duty.
- 11 29 U.S.C. § 2611(11); 29 C.F.R. §§ 825.113-115.
- 12 29 C.F.R. §§ 825.202, 825.205(a).
- 13 29 C.F.R. § 825.220(c) (emphasis added).
- 14 "[W]hen the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances." 29 CFR § 825.300(b).
- 15 Employees only need to give "verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." 29 C.F.R. § 825.302(c).
- 16 29 CFR § 825.303 ("When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case.")
- 17 It should be noted that many policies refer workers to separate FMLA policies and/or to Human Resources for more information; however, it would be preferable for employers to include some basic information about the types of absences that may be protected by the FMLA in the attendance policy itself, to encourage employees who might be eligible to seek more information.
- 18 The family care provisions of the FMLA only allow an eligible employee to provide care for a spouse, child, or parent, as those terms are defined in the FMLA regulations. See 29 CFR § 825.122.
- 19 *Trail v. Utility Trailer Mfg. Co.*, No. 1:18-cv-00037, 2020 WL 104681, at *1-2, *6 (W.D. Va. Jan. 8, 2020) (granting summary judgment for employer on FMLA claims, but noting that the employer "did not comply with its duties under the FMLA" and that "[i]ts rush to terminate Trail was ill-advised.").

- 20 *Gunter v. Cambridge-Lee Indus., LLC*, 186 F. Supp. 3d 440, 443-45 (E.D. Pa. 2016) (denying summary judgment for employer on FMLA interference claim).
- 21 *Ballard v. Jewel Food Stores, Inc.*, No. 18-CV-2944, 2020 WL 616468, at *4 (N.D. Ill. Feb. 10, 2020) (denying summary judgment for employer on FMLA claims).
- 22 29 CFR § 825.300 (a).
- 23 Our understanding, based on conversations with workers, is that for unanticipated absences, associates will still incur a point initially and must request to use their Protected PTO upon their return to work in order to have the point removed.
- 24 Recent reports suggest that in at least some stores, it may take new associates more than 40 hours to accrue one hour of Protected PTO.
- 25 Accrual rates and maximums vary by state and employment status, but associates will generally be eligible to earn up to 48 hours of Protected PTO in a year.
- 26 Since its founding, A Better Balance has been supporting state and local campaigns to enact paid sick time. For more information about our campaigns and resources for policymakers and advocates, please visit <https://www.abetterbalance.org/our-campaigns/paid-sick-time/>.
- 27 New York State passed a permanent sick leave law in April 2020, becoming the 12th state to provide paid sick time. Its law becomes effective on September 30, 2020.
- 28 Paid sick time laws were passed in Austin, Dallas, and San Antonio, Texas, but they are not currently in effect while litigation challenging the laws is pending. See Alex Samuels, *Coronavirus revives push for mandatory paid sick leave rules, but Texas leaders have long been opposed*, THE TEXAS TRIBUNE (Mar. 10, 2020), <https://www.texastribune.org/2020/03/10/coronavirus-revives-push-paid-sick-leave-rules-texas/>; Devon D. Sharp, *Dallas Paid Sick Leave Ordinance Blocked by Federal Judge*, LAW.COM (April 2, 2020 11:56 AM), <https://www.law.com/texaslawyer/2020/04/02/dallas-paid-sick-leave-ordinance-violates-texas-constitution/?slreturn=20200525134454>.
- 29 Although some of the policies that we reviewed predated the passage of certain sick time laws, it is crucial that these policies be updated regularly to account for new protections under state and local laws.
- 30 There is one notable exception: most of the policies that we reviewed did indicate that absences caused by on-the-job injuries (which are protected in most states by workers' compensation laws) would be exempt from points.
- 31 See, e.g., Diana Boesch, *The Uneven Expansion of Access to Paid Sick Days*, CTR. FOR AM. PROGRESS (Aug. 30, 2018 9:29 AM), <https://www.americanprogress.org/issues/women/news/2018/08/30/457309/uneven-expansion-access-paid-sick-days/>; Rachel Abrams & Jessica Silver-Greenberg, *'Terrified' Package Delivery Employees are Going to Work Sick*, N.Y. TIMES (Mar. 21, 2020), <https://www.nytimes.com/2020/03/21/business/coronavirus-ups-fedex-xpo-workers.html> (describing attendance policies used by major delivery companies including FedEx, UPS, and Amazon, under which workers do not receive sick leave).
- 32 *Position Paper, Md. S.B. 912*, MD. HOSR ASS'N, https://www.mhaonline.org/docs/default-source/position-papers/2019/senate-bills/sb-912---maryland-healthy-working-families-act-adverse-actions-absence-control-policy.pdf?sfvrsn=38f3d40d_2 (last visited May 29, 2020).
- 33 *Hearing on S.B. 912 Before the S. Fin. Comm.*, 2019 Leg. Sess. (Md. 2019) (statement of Sally Guy, Johns Hopkins University Medicine), http://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=fin&sys=2019RS&clip=FIN_3_19_2019_meeting_1&url=http%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2Fdb762e36-a8fd-4516-b296-74de42f2fa27%2F%3FCatalog%2F03e481c7-8a42-4438-a7da-93ff74bd4a4c%26plafrom%3D3423000.
- 34 *Why it Matters*, THE ARC, https://thearc.org/policy-advocacy/civil-rights/#why_matters (last visited June 3, 2020).
- 35 42 U.S.C. § 12112(b)(5)(a).
- 36 U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2003-1, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting%20>.
- 37 *Id.*
- 38 U.S. EQUAL EMP. OPPORTUNITY COMM'N., EEOC-NVTA-2016-1, EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT (2016), <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>.
- 39 *Id.*
- 40 The employment provisions of the ADA (Title I) cover private employers with 15 or more employees. 42 U.S.C. § 12111(5).
- 41 Although six policies stated that employees on short-term disability leave would not incur points (without specifying whether that leave was provided under a company policy or as a public benefit), those policies have been excluded from this number because eligibility for short-term disability benefits is often not coextensive with the protections of the ADA. Underscoring this point, a few policies affirmatively note that employees receiving short-term disability benefits *will* still receive points.
- 42 *Bolton v. Bay Valley Foods, LLC*, No. 3:17-cv-69, 2020 WL 1853505 (W.D. Pa. April 13, 2020) (granting summary judgment for defendant on disability claims because plaintiff had failed to provide a finite duration for the leave that he was seeking).
- 43 U.S. EQUAL EMP. OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017-2021, <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

- 44 See, e.g., *EEOC Sues Wayne Farms for Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 22, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/8-22-16.cfm>; *Verizon to Pay \$20 Million to Settle Nationwide EEOC Disability Suit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (July 6, 2011), <https://www.eeoc.gov/eeoc/newsroom/release/7-6-11a.cfm>; *Pactiv to Pay \$1.7 Million to Settle EEOC Disability Discrimination Class Investigation*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Nov. 5, 2015), <https://www.eeoc.gov/newsroom/pactiv-pay-17-million-settle-eeoc-disability-discrimination-class-investigation>.
- 45 *EEOC Finds that Walmart's Attendance Policy Likely Violates ADA, In the Midst of COVID-19 Pandemic*, A BETTER BALANCE (Mar. 12, 2020), <https://www.abetterbalance.org/in-the-midst-of-covid-19-pandemic-eeoc-finds-that-walmarts-attendance-policy-likely-violates-americans-with-disabilities-act/>.
- 46 Virginia James, *Walmart's Attendance Policy Penalizes Workers With Disabilities Like Me. The EEOC Agrees*, MEDIUM (Mar. 12, 2020), <https://medium.com/a-better-balance/walmarts-attendance-policy-penalizes-workers-with-disabilities-like-me-the-eeoc-agrees-d3dd50be8a22>.
- 47 *USDA Plans to Increase Poultry Line Speeds, Ignoring Danger to Pregnant and Other Vulnerable Workers*, A BETTER BALANCE (Oct. 25, 2018), <https://www.abetterbalance.org/usda-plans-to-increase-poultry-line-speeds-ignoring-danger-to-pregnant-and-other-vulnerable-workers/>.
- 48 OXFAM AMERICA, LIVES ON THE LINE: THE HUMAN COST OF CHEAP CHICKEN 35 (2015).
- 49 *Id.* at 21.
- 50 BRIAN STAUFFER, "WHEN WE'RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING," WORKERS' RIGHTS UNDER THREAT IN US MEAT AND POULTRY PLANTS (Human Rights Watch 2019), <https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat>.
- 51 *Lipp v. Cargill Meat Sols. Corp.*, No. 4:15-CV-00458-SMR-CFB, 2017 WL 5895001, at *5 (S.D. Iowa May 11, 2017), *aff'd*, 911 F.3d 537 (8th Cir. 2018) (granting summary judgment to defendant because plaintiff had not provided sufficient notice of her need for accommodations).
- 52 *Alcegaire v. JBS, USA, LLC*, No. 3:15-cv-266, slip op. at 5-8 (W.D. Ky. Sept. 26, 2017).
- 53 See, e.g., Miriam Jordan & Caitlin Dickerson, *Poultry Worker's Death Highlights Spread of Coronavirus in Meat Plants*, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/us/coronavirus-chicken-meat-processing-plants-immigrants.html>; Amelia Lucas, *Tyson Foods chairman warns 'food supply chain is breaking' as coronavirus forces plant closures*, CNBC.COM (Apr. 27, 2020 2:28 PM), <https://www.cnbc.com/2020/04/27/tyson-foods-chairman-warns-food-supply-chain-is-breaking-as-coronavirus-forces-plant-closures.html>.
- 54 Complaint at 17-18, *Rural Cmty. Workers All., et al. v. Smithfield Foods, Inc., et al.*, No. 5:20-cv-06063 (W.D. Mo. 2020).
- 55 *Id.* at 16.
- 56 29 CFR § 825.120(a)(4) ("The expectant mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child.")
- 57 Some of these laws are more limited in scope; for example, some PWFAs cover only public-sector workers or entitle pregnant workers to only certain accommodations, such as a job transfer. For more information, please visit <https://www.abetterbalance.org/resources/pregnant-workers-fairness/>.
- 58 Pregnant workers may also be entitled to accommodations under the federal Pregnancy Discrimination Act (PDA)—which can include time off without penalty under an attendance policy—if their employer makes similar accommodations for non-pregnant workers who are similar in their ability or inability to work.
- 59 However, at least one employer in our sample maintained separate FMLA guidelines that *did* indicate that FMLA leave could be used during pregnancy, although this information was omitted from the employer's attendance policy.
- 60 Although the FMLA posters provided by the Department of Labor do not specifically identify pregnancy, we believe that this omission is extremely problematic, as there is a clear need for this information. Through our helpline, we have heard from so many pregnant workers who did not realize that the FMLA may protect their absences prior to giving birth.
- 61 Many PWFAs were recently enacted and some of the policies that we reviewed may predate their passage; however, it is crucial that employers' policies be updated regularly to account for new protections under state and local laws.
- 62 See Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html>.
- 63 *The Human Toll of Instant Delivery*, THE DAILY (Nov. 26, 2018), <https://www.nytimes.com/2018/11/26/podcasts/the-daily/warehouse-workers-instant-delivery.html>.
- 64 It should be noted that many policies contain a catch-all provision in the list of reasons for authorized or excused absences for any absences "otherwise protected by law," or words to that effect. Such vague language would be unlikely to satisfy an employer's affirmative obligation to provide a notice of rights under a specific statutory scheme.
- 65 One caveat: several employers' policies require a release or fitness for duty certification from an employee's doctor to allow them to return to work following an absence of three days or more. Obtaining this documentation will likely require a doctor's visit, which could further prolong the time that an employee needs to be out of work.
- 66 29 C.F.R. § 825.303(a).
- 67 Some of these policies merely permit someone other than the employee to report their absence in an emergency situation; only five policies explicitly contemplate that an emergency may excuse the failure to timely report an absence according to the notification policy.



A Better Balance is a non-profit legal advocacy organization working nationally to promote fairness, equality, and justice in the workplace for women and families.

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