

Our Patchwork of Sick and Vacation Pay Rules Is Counter-Productive to American Employment

Employment Law, HR Policies & Procedures / September 16, 2019 / Andrea Johnson

My Dear Mr. President . . . and to our Esteemed Congress,

Here's the perspective of one employment lawyer in Texas.

Guys, **[1]** *we still have a country to run.* **[2]** And, the reality is our country runs on *business*, which means employers and employees.

In the Employment Law Area, we Need National Thought, Practice, and Law on Critical Issues.

Why? The why is obvious if your company has had, has today, or is talking about having in the future employees in more than one state within the United States.

While we Americans act in many ways as a single entity—THE United States of America—we are, in a lot of other ways, still a loose affiliation of single states, with separate governments and laws. That was probably just fine in the 1700 and 1800's, when communication was by slow-moving, hand-written letters, delivered using horses, and when journeys of 25 miles, much less 250 miles, were considered major events. Today, we travel with jets and fast cars, and we communicate instantaneously through things called texts, emails, and "Instagram." We can "Go To" a meeting without ever leaving our desks.

So, we can hire and work with employees in many states all at the same time. Isn't that wonderful? *Of course, it is.* Using our best national talent is where we should be.

We Hire Nationally, But, in Contradiction, Regulate on Minute, Local Levels.

There is, however, a silent and dangerous, negative side effect of national employment. As employers, we must abide by all the state laws affecting our personnel. While in the main, our laws have many similarities, there are some significant differences giving employers pause.

Let's Talk About Sick Pay and Vacation Pay.

There is no national policy or law mandating either. Historically, this kind of pay has been considered a *benefit*, an *extra enticement* of employment, a way to lure better workers to join a company. Up until recently, we seemed to get along just fine without laws mandating either vacation pay or sick pay. Why? Employers know, full well and good, that having some sick pay and vacation pay is better for business—employees are happier, and job candidates view employers more favorably. *Duh.*

In fact, in my over 30 years of practicing law in Houston, the fourth largest city in the United States (largest in Texas), *all* employers that I have dealt with—from Mom and Pop shops to multi-national employers—have all had some kind of sick pay and vacation pay policies. I don't doubt that there may be some employers here or there without such policies, but all I am saying is that all the folks that I have worked with have offered some benefits in these areas.

Today's Demand for Government-Mandated Sick Pay and Vacation Pay.

Nonetheless, there is now a hue and cry today for sick pay and vacation pay laws, as if it were a massively huge problem.

The problem is that this “need” is translating itself into a hodgepodge of laws, across the U.S. Not only are different states seeing these issues in different ways, counties within states are putting up their own unique rules, and, in fact, in some cases, individual cities want to mandate separate requirements, also.

In the process, we are becoming, not a national employment country but, a grouping of provincial fiefdoms where the employment laws change every few miles depending on the “feudal lord” (or mayor/governor) or party in power. Thus, whether we travel 25 or 2500 miles through the internet or through “skyped” meetings, bringing in that great talent from across state lines can come with a heavy price of unforeseen costs, as well as additional risks and liabilities an employer may not have thought about.

The Differences in Texas and California Law Illustrate the Dangers.

For example, in my pro-employer state, Texas, employers who offer paid vacation time, may have rules for “use or lose it,” meaning that, if an employee does not use his/her vacation time by year end, it will not be available for the next year. Employers also do not have to pay for unused, accrued vacation time at employment termination. Solid rationale supports these notions, such as (a) employers not having heavy administrative burdens of continually tracking vacation days that seem to be ever increasing year to year, or such as (b) a sincere desire that employees actually take their vacation days because it is a good thing for their personal well-being and, therefore, for the well-being of the business as a whole.

Similarly, even in the pro-employee state of California, vacation is not a right; it is considered an extra benefit, as it is generally thought of pretty much everywhere (as to forfeiture concerns, the state sees the vacation pay as “earned” *once it is accrued* [3]). Nevertheless, because vacation pay is deemed a benefit and not a right, California courts (believe it or not) have permitted paying vacation time at a rate *differe nt* from (lower than) that paid to employees for their normal work. See, e.g., *Bell v. H.F. Cox, Inc.*, 209 Cal. App. 4th 62, 146 Cal. Rptr. 3d 723 (2012) (policy set vacation pay for drivers at a weekly rate that was different than what the driver usually earned).

While employers in states like Texas have more options, those employers, similar to those in California forced to do so by law, often *voluntarily* allow some amount of carryover of vacation days, and, my guess is that a good number of employers *voluntarily* do, in fact, pay all employees for unused, accrued vacation, as California employers are required to do. Again, market dictates and business equity often lead employers in this direction, despite no Texas law being on the books. Here, however, it is a choice.

The big difference in California: The California mandatory “no forfeiture” rule and the “must-pay-at termination” law can have severe financial impact on companies. Effectively, there can be huge amounts of debt on the books of every company that owes paid vacation time to employees who are on the accrual system. Only capping the accrual rate [4] may assist the employer in limiting the amount of vacation pay that may be banked.

The problem that California law (and others like it [5]) poses for Texas employers is that the costs of employing personnel in the Golden State are much higher than they are for employees in the Lone Star state. Further, the additional rules—from state-to-state to counties and to cities—also make employment management internal to a company more complicated, as dictated solely by a person's location. It follows, then, that, aside from thousands leaving states like California due to the state tax burden, this legislative employment burden may also negatively affect California, since the cost and administrative hassle related to personnel may be factors in hiring decisions.

Open or “Unlimited” PTO?

Is it any wonder that the concept of “Open” or “Unlimited PTO” has caught on so well in California and is now spreading elsewhere (including here in Texas)? This shining new toy of human resources, which sprung up in liberal Silicon Valley, permits an employee to take as many days as he or she desires, as long as their work is being done adequately. Sounds delicious, right? *Oodles of vacation time!* But strange as one may find this, Open or Unlimited PTO policies [6] have been

found to dampen employee appetite for taking days off. [7] The added bonus for employers is that no vacation days – zero—none—have to be paid at termination, even in California (remember, the vacation is not accrued, so there is none at the end). That's a decided win-win, but maybe only for employers [8] (who would say they were caught between the rock and hard place with the only other choices being (a) no vacation time—untenable—or (b) onerous, state-mandated vacation pay regulations that apply to an accrual system).

Me personally, I like the accrued vacation time concept, as I think it makes the playing field fairer—everyone knows the amount of vacation everyone gets. This concept also rewards employees for loyalty and seniority, another benefit to both employees and employers. Yet, state-mandated vacation laws have penalties and there are risks of class actions for violators, so I can see why the “open” idea has gained traction. In the end, employers may ditch a fairer system for one that effectively is less fair (in practice) to avoid mountains of debt and draconian rules of enforcement. *That's sad.*

Mandatory Paid Sick Leave?

Then we move to sick time, and again, in bygone days (still in Texas and many states), the issue was left up to employers. As noted with vacation, sick pay is traditionally a benefit, not a right. As noted, I have not known any employer who has not allowed at least a few paid sick days every year. Putting my reality to the side, we apparently *must* have a political cause to shout about, and the current flavor of the month is mandated paid sick time, now seen as a human right.

California-Type Paid Sick Leave Laws in Texas?

On the one hand, I used to think of California as being the “silly” state with different laws on virtually everything. Vacation pay is one area, and so is sick pay, which has been raised to a *hyper* level because, not only does the state as a whole have sick pay laws, but, not to be outdone, numerous counties *and* cities have their own unique rules. [9] It is rainbow of California confusion. What fun!

On the other hand, I used to think that Texas was the state of easy-to-follow rules (or no rules), good for employers, helping business hire employees and keeping the doors open. Thankfully, we don't have a state-wide law (yet), but more left-leaning cities like Austin, San Antonio and Dallas have decided that their citizens *deserve* (and their city-based employers should be *forced* to give) mandatory paid sick time. For the time being, those laws have been either stopped entirely or slowed. The Austin law was overturned. See *Texas Ass'n of Business v. City of Austin*, 565 S.W.3d 425, 440-41 (Tex. App.-Austin 2018, pet. review filed March 29, 2019) San Antonio, facing its own lawsuit, agreed to stay its law. And, Dallas, the newcomer to this paid sick day hit parade, is currently embroiled in another expensive lawsuit, with an injunction motion pending. [10] For its part, the State of Texas contends that the city ordinances violate the state minimum wage law, and, so far, it has been proved right. See *id.* Stay tuned, Texans, to see how closely we may eventually mirror what appears to be *today* a “silly” cornucopia of California laws.

All of this, in a sense, makes a lawyer like me more valuable, I suppose, as it seems we must be consulted about every little move in employment, but, honestly, that does not feel right. Employers should not have to operate in a minefield of employment uncertainty, and the HR function should not have to be run by lawyers. It just should not be that complicated.

Is a National Rule Possible?

If it were up to me, I would make the issues national in scope, pre-empting the patchwork.

It is clear to me that one of the reasons there is growing sentiment for these kinds of local laws is that the national government has abdicated its leadership role as to our national employment issues. [11] Rather than address the matter, which is important to the business of America, given our modern interstate hiring practices, we seem to be more concerned about talking heads on cable news and tweeting. It seems, then, that local laws fill the void by this inability to lead.

Having a national consensus and policy would help facilitate employing our best talent across the country. What our current legal confusion does, in contrast, is put up barriers to hiring, creating expensive and complicated laws about what were traditionally called employment extras (and which most people had anyway). As “rights,” they seem to justify government regulation, interference, and control, adding unnecessary and conflicting administrative nightmares to the employer's plate. Finally, these laws always have the added bonuses of liability risks that go hand in hand with any supposed altruistic purposes—if the law is not followed to a “T,” the employer will be fined, penalized, subject to double

damages, face lawsuits, pay the other side's attorneys' fees (plus their own legal fees), risk possible class actions, *and, if some activists had their way, flogged and sent to jail.*

Is this how we want to get business done? Is this how we want American employment to be handled? I hope that's not our goal.

So, Mr. President and Congress, can you please get your act together? Or, are we to be left to our own devices, as we have been?

ABOUT THE AUTHOR

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[1] As I am from California, "guys" means everyone, guys and gals, or, as they say in Texas, "y'all."

[2] All I see is screaming and name-calling and so-called investigations and demands for ouster from office, against the backdrop of over-the-top political theater in debates about socialism and boisterous rallies about guns and immigration. But we are not addressing our nation's day-to-day needs, which include the important employment laws governing the workplace.

[3] See the general discussion by the California Department of Industrial Relations.
https://www.dir.ca.gov/dlse/FAQ_Vacation.htm

[4] These requirements are ameliorated some because a "reasonable" amount of capping on accrual is permitted. See *Boothby v. Atlas Mechanical, Inc.*, 6 Cal. App. 4th 1595, 8 Cal. Rptr.2d 600 (Cal. App. [3rd Dist.] 1992).

[5] For example, Colorado law states that vacation pay, if "earned," must be paid at termination. *CO Rev. Stat. Sec. 8-4-101, et seq.* But see *Nieto v. Clark's Market, Inc.*, 2019 COA 98 (Colo. App. June 27, 2019) (vacation pay not earned or vested by company policy statement; therefore, no requirement to pay).

[6] Also called "Untracked."

[7] See <https://www.launchways.com/what-is-unlimited-pto-policy/>

[8] As a policy may be seen as more flexible than traditional vacation policies, employees may like the concept as well. See *id.*

[9] These are a couple of articles outlining the issues: <https://fitsmallbusiness.com/california-paid-sick-leave-law/>; <https://www.californiaemploymentlawreport.com/2019/06/higher-minimum-wages-in-many-local-cities-and-counties-across-california-effective-july-1-2019/>

[10] *ESI/Employee Solutions, LP, v. City of Dallas*, Civ. Action No. 4:19-cv-00570-SDJ (E.D. Tex., Sherman Division, filed July 30, 2019).

[11] This same abdication has happened in Texas government, as well. Our legislature missed a golden opportunity to put this current three-city controversy about paid sick time to rest this last session, when a bill proposed as such quietly died without a vote. That's unfortunate because Texas cities and the state must be involved with costly litigation and await on trial court and appellate court interpretations. Meanwhile, employers are left in the middle and vulnerable to a degree; they must employ people, all while trying to figure out what the law is.

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