OCTOBER 30, 2020

YOU'LL BE LEAVING EARLY TO VOTE? ELECTION DAY CONSIDERATIONS FOR EMPLOYERS

With Election Day just around the corner, employers will want to consider their local and state rules regarding whether employees are entitled to time off to vote. While there is no federal law requiring that an employer provide leave to its employees, there are a multitude of state laws – that vary with great significance – on crucial considerations for employers as November 3 approaches. Typically, these laws speak to three main issues: when and how much voting leave may be taken; whether time off to vote is paid or unpaid; and whether notice or proof of eligibility may be required.

AMOUNT OF LEAVE AND WHEN IT IS TAKEN

Some states, like Michigan and Indiana (which recognize election day as a state holiday) don't require employers to provide employees any time off to vote. Other states require that employers ensure that employees have sufficient time off to vote. If there is sufficient time outside working hours, no leave may be required. However, when the employee's scheduled shift is such that it does not allow sufficient time to vote outside working hours, then the employer is generally required to provide certain time off for the employee to vote. What is a sufficient amount of time, however, varies among the states. For example, in Wisconsin, an employee has sufficient time to vote if s/he has three consecutive hours off during which the polls are open. If not, Wisconsin employers are obligated to provide unpaid leave for up to three consecutive hours. For example, the Wisconsin polls will be open from 7:00 AM to 8:00 PM. A nurse who is scheduled to work from 7:00 AM to 7:00 PM does not have three consecutive hours in which to vote. Accordingly, the employer would be required to provide the employee with time off to vote. In Wisconsin, the employer may decide when the hours are taken and, therefore, could designate an early departure at 5:00 PM (which would then provide the employee with three consecutive hours to vote). In Texas, however, an employer is not required to provide leave unless the employee does not have two consecutive non-work hours available while polls are open. Illinois employers must permit a two-hour absence during working hours if the employee's working hours begin less than two hours after the opening of the polls and end less than two hours before the closing of polls.

PAID VS. UNPAID LEAVE

While time off to vote in Wisconsin is unpaid, some states require employers to provide paid leave for voting. When time off is required for voting in Texas and Illinois, as described above, that time must be paid. Similarly, a Colorado employer is required to provide up to two hours of paid leave; however, the employer is not required to do so if the employee has three non-work hours available while polls are open.

NOTICE AND PROOF OF VOTING

Some states require that an employee provide advanced notice of their voting plans. For example, Wisconsin simply requires some form of notice before Election Day, Illinois requires notice at least one day in advance of Election Day, Iowa requires that the advance request be in writing, but Colorado requires no advance notice whatsoever. Moreover, some states, such as Wyoming, require that the employee must have actually voted to be paid and, presumably then, allows the employer to require proof from the employee.

PRACTICAL TAKEAWAYS

Election Day is November 3, 2020. Employers should be aware of:

- The polling times in their state; and
- Any state (or local) laws requiring time off to vote; when, where and how time off is requested, scheduled and possibly paid.

Employers are also urged to be cautious when disciplining employees who are late to work because they faced long lines at polling places or other unexpected delays. Given the unprecedented changes we are seeing to the voting landscape caused by COVID-19, such adverse employment action may lead to discrimination allegations based on race, disability, and in some jurisdictions, political affiliation.

Please also note: as states face a predicted shortage of election workers, obligations to give time off to employees who volunteer to work the polls on Election Day may also need to be examined.

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If you have any questions or require any assistance as you consider how the voting laws may impact your organization and its obligations, please do not hesitate to contact:

- Robin Sheridan at (414) 721-0469 or rsheridan@hallrender.com;
- Saniya Khare at (248) 457-7852 or skhare@hallrender.com; or
- Your regular Hall Render attorney.

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