

**Another Day Off?  
Nuts & Bolts of Employee Leave**

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Presented By:  
Catherine Brown Fryer  
Bickerstaff, Heath, Smiley, Pollan, Keever & McDaniel, L.L.P.  
816 Congress Avenue, Suite 1700  
Austin, Texas 78701-2443  
512/472-8021  
512/320-5638 (FAX)  
[www.bickerstaff.com](http://www.bickerstaff.com)

## **Another Day Off? Nuts & Bolts of Employee Leave**

Paid and unpaid employee leave are fundamental employment benefits. As units of local government, you have authority in some instances to establish the type and extent of leave that will be available to your employees. In other instances, the type and duration of leave is mandated by law. Of utmost importance is that you have an employment manual that communicates clearly to your employees the types and amount of leave to which they are entitled and the manner in which they must seek approval for such leave. Clearly stated policies which are neutral and uniformly applied and careful documentation of personnel issues are an employer's greatest defenses against claims of discrimination and retaliation. Bear in mind, also, when adopting your employment policies that paid leave is a form of compensation. As such, it may only be granted by a local government on a prospective basis in order to avoid violation of article III, section 53, of the Texas Constitution, which prohibits counties and municipalities from granting any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered. The purpose of this paper is to identify the various types of employee leave that units of local government may or must provide to employees

and to assist you in the development of personnel policies governing the taking of such leave. **Please note that this paper does not address issues related to municipal or county civil service, to hours of labor and vacation of municipal fire and police departments, or to leave provided by independent school districts.**

### **Holidays, Vacation, Sick Leave, and Other Personal Leave**

Most public and private employers provide paid leave to employees for designated holidays, vacation, and sick leave. There are also other types of personal leave which many employers provide on a paid basis. Local governments, to a large degree, are able to adopt employment policies which govern the type and extent of leave which will be afforded their employees. Municipalities and counties are generally free to set the terms of employment for their employees, including the types and amounts of paid and unpaid leave so long as the availability of such benefits are established before service is performed. TEX. LOCAL GOV'T CODE § 152.011 (Vernon 1999); Op. Tex. Att'y Gen. No. JC-0123 (1999).

#### **A. Holidays/Vacation**

##### **1. Holidays**

Many local governments honor the state and national holidays designated by the Texas Legislature for state employees. Texas Government Code section

662.003 recognizes the following state and national holidays:

### National Holidays

- 1) New Year's Day
- 2) Martin Luther King, Jr., Day (the third Monday in January)
- 3) President's Day (the third Monday in February)
- 4) Memorial Day (the last Monday in May)
- 5) The Fourth of July
- 6) Labor Day (the first Monday in September)
- 7) Veterans Day
- 8) Thanksgiving Day (the fourth Thursday in November)
- 9) Christmas Day

### State Holidays

- 1) Confederate Heroes Day (January 19<sup>th</sup>)
- 2) Texas Independence Day (March 2<sup>nd</sup>)
- 3) San Jacinto Day (April 21<sup>st</sup>)
- 4) Emancipation Day in Texas (June 19<sup>th</sup>)
- 5) Lyndon Baines Johnson Day (August 27<sup>th</sup>)
- 6) The Friday after Thanksgiving
- 7) December 24<sup>th</sup> and 26<sup>th</sup>

The State of Texas also provides its employees with “optional holidays” for Rosh Hashanah, Yom Kippur, or Good Friday. To take an optional holiday, an employee must give up, during the same fiscal year, another holiday that falls during the work week. Cities and counties are not bound by this Chapter 662 of the

Government Code and may adopt their own schedule of holidays. However, many local governments find the state schedule a useful guide. Local governments must keep in mind that all employers must “reasonably accommodate” the religious practices of their employees unless to do so causes an undue hardship. 42 U.S.C. § 2000e (1994). Such accommodation would include authorizing days off for observing religious holidays.

Whatever holidays are adopted should be specifically listed in your personnel manual. You should also state in your manual whether the holiday is “lost” if it falls on a weekend or whether, when a holiday falls on a weekend day, the Friday before or Monday after may be taken off.

Be sure to include in your personnel manual provisions regarding treatment of employees who may be called upon to work during holidays (e.g., emergency workers).

## **2. Vacation**

Vacation time is paid time off from work usually taken in increments of days or weeks. No state or federal law requires employers, including local governments, to provide vacation time to employees. In order to attract a qualified and competent workforce, it is essential that some amount of paid leave for vacation be provided. In adopting a vacation policy, careful consideration should be given to the following

issues. Please note that, in the examples given below, the issues identified are not meant to be limitations on the authority of the local government. The examples are merely typical ways in which the issue is treated in employment manuals or things to be considered in drafting a policy. Unless otherwise indicated, they are policy variations but not restrictions.

- Who is entitled to accrue vacation time? For example,
  - Vacation time is accrued only by full-time employees.<sup>2</sup>
  - Vacation time is accrued by all full-time employees and by part time employees working a minimum of \_\_\_ hours per week.
- When does vacation time begin to accrue? For example,
  - Vacation time accrues after the employee has completed one full year of continuous employment.
  - Vacation time accrues after the employee has

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<sup>2</sup>Your employment manual should define the terms “full-time employee,” “part-time employee,” and, if applicable, “temporary employee.”

completed six months of continuous employment.

- Does vacation time accrue while an employee is on a leave of absence? For example,
  - Vacation time will accrue while an employee is on a leave of absence.
  - Vacation time will not accrue while an employee is on a leave of absence.
  - Vacation time will accrue only while an employee is on a paid leave of absence.
- When may vacation time be used? For example,
  - Vacation time may be used as soon as it is accrued.
  - Vacation time may be used only after the employee has completed one full-year of continuous employment.

- May vacation time be accumulated? For example,
  - Unused vacation time may be carried over from year to year up to a maximum of \_\_\_ hours.
  - Vacation time must be taken within one calendar year after the calendar year in which it is accrued.<sup>3</sup>
- At what rate does vacation time accrue? For example,
  - Does vacation time accrue at the same rate for all employees?
  - If vacation time accrues for part-time employees, does it accrue on a pro rata basis in relation to accruals for full-time employees?
  - Does vacation time accrue at a higher rate based on length of service?
- Will employees be compensated for unused vacation

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<sup>3</sup>Such a limitation is usually accompanied by a provision under which a supervisor may allow the leave to be taken at a later time if it could not be taken during the required period because the employer could not spare the

time at the time employment is terminated?

- May an employee receive pay in lieu of vacation time during the period of employment?
- May vacation time be used only in certain increments?

For example,

- Vacation time must be taken in increments of at least four hours.
- If an employee takes FMLA leave, must he/she exhaust accrued vacation time during such leave?<sup>4</sup>
- How does the employee obtain approval for taking vacation time?

## **B. Sick Leave**

In adopting a sick leave policy for employees, many of the same

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employee from work.

<sup>4</sup>The burden is on the employer to designate leave as “FMLA leave.” Your policy should require employees to notify you if vacation time is being taken for any purpose which would come under the purview of the FMLA (i.e., to care for a seriously ill parent). You may not designate vacation time as FMLA leave after the vacation is over. 29 C.F.R. §825.208(b) and (c).

considerations that apply in the vacation context come into play. Your employment manual should advise your employees on at least the following issues:

- For what purposes may sick leave be taken? For example,
  - Sick leave may be taken only for the employee's illness or disability.
  - Sick leave may be taken for the employee's illness or disability or to allow the employee to care for a sick family member.
  - Sick leave may be taken to allow the employee to make medical or dental appointments.
- Who is entitled to accrue sick leave? For example,
  - Sick leave is accrued only by full-time employees.
  - Sick leave is accrued by all full-time employees and by part-time employees working \_\_\_\_ hours per week.

- When does sick leave time begin to accrue?<sup>5</sup> e.g.,
  - Sick leave begins to accrue immediately upon employment.
  - Sick leave begins to accrue at the completion of the probationary or orientation period (if applicable).
  - Sick leave begins to accrue after six months of continuous employment.<sup>6</sup>
- Does sick leave time accrue while an employee is on a leave of absence? For example,
  - Sick leave will accrue during the period of time that an employee is on a leave of absence.
  - Sick leave will not accrue during the period of

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<sup>5</sup>Customarily, sick leave will accrue at an earlier date than vacation leave in recognition that an employee's need for such time off is generally beyond his/her control.

<sup>6</sup>It is not advisable to require employees to have continuous employment for at least one full year prior to being eligible for sick leave. A federal district court has held that such a policy may violate Title VII if it has a disparate impact on a protected group. *EEOC v. Warshawsky and Co.*, 768 F.Supp. 647, 651-655 (N.D. Ill. 1991). The impact may turn out to be severe for pregnant employees and thus violate the Pregnancy Discrimination Act.

time that an employee is on a leave of absence.

- Sick leave will accrue during the period of time that an employee is on a paid leave of absence.
- When may sick leave be used? For example,
  - Sick leave may be used as soon as it is accrued.
  - Sick leave may be used only after the employee has completed six months of continuous employment.
- May sick leave be accumulated? For example,
  - Unused sick leave may be carried over from year to year up to a maximum of \_\_\_\_ hours of sick leave.
  - Accrued sick leave must be taken within one year after the calendar year in which it is accrued.
- Will employees be compensated for unused sick leave at the time employment is terminated?
- May an employee receive pay in lieu of sick leave during

the period of employment?

- May sick leave be used only in certain increments? For example,
  - Sick leave must be taken in increments of at least one hour.<sup>7</sup>
- If an employee takes FMLA leave, must he/she exhaust accrued sick leave during such leave?
- What requirements are imposed on the employee for reporting or obtaining approval for sick leave? For example,
  - An employee must notify his/her supervisor of the need to take sick leave within 30 minutes of the time he/she was scheduled to appear for work.
  - Any absence of three days or more for illness must be supported by evidence of a visit to a doctor (or medical certification).

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<sup>7</sup>Unlike vacation time, any requirement that sick leave be taken in specified increments will allow for a lower minimum increment in recognition of the fact that sick leave may be taken for medical examinations or treatment which do not require much time off.

In Texas, workers' compensation benefits may not begin to be paid until the fifteenth day after a workers' compensation insurance carrier receives written notice of a work-related injury. TEX. LABOR CODE ANN. § 409.021(a) (Vernon 1996).

You may want to provide reassurance in your employment manual that unused sick leave is available for use in that period. You may even agree to provide paid sick leave during that period regardless of whether the employee has any unused sick leave remaining.

If sick leave may be taken for care of a family member, be sure to specify in your employment manual the family members for whose care such leave may be taken by your employee (i.e., child, parent, grandparent, parent-in-law, spouse). Also, if sick leave is requested for care of a family member, be alert to the fact that you may need to designate such leave as FMLA leave. Keep in mind that if you do not allow employees to take sick leave for the care of sick family members, then when an employee is on FMLA leave for such a purpose, you do not have to require exhaustion of paid sick leave in that instance.

Pursuant to Subchapter E of Chapter 157 of the Local Government Code, a commissioners court of a county may establish a program to allow qualified employees to voluntarily transfer earned sick leave time to a county sick leave pool. TEX. LOCAL GOV'T CODE ANN. § 157.072 (a) (Vernon 1999). Counties with a

population in excess of one million may also allow for the voluntary transfer of vacation leave time to the county's sick leave pool. TEX. LOCAL GOV'T CODE ANN. § 157.072 (b) (Vernon 1999). Eligible employees enrolled in a county sick leave pool may apply to withdraw leave time from the pool under the conditions set out in Chapter 157 and as determined by the commissioners court. Similarly, a home rule city may, by charter provision or ordinance, create a sick leave pool to which employees may contribute accrued sick leave for use by other employees who are ill but have exhausted their sick leave. OP. TEX. ATT'Y GEN. No. DM-129 (1992).

Abuse of sick leave, unfortunately, is fairly common. All employers can identify employees who use sick leave as soon as it accrues or who are always "sick" on Fridays, Mondays, or on either side of a three-day weekend. Generally, an employer should not interfere with an employee's taking leave to which he/she is entitled. You should always reserve the right in your employment manual to require verification of need for sick leave. Also, if there is a substantiated pattern by an employee of taking sick leave time only on Fridays and/or Mondays, you may choose to counsel that employee, show him/her the pattern that has emerged, and discuss your concern about their commitment to the job. This should be done only if the circumstances warrant, and consultation with counsel about the advisability of such an action is recommended.

### **C. Leaves of Absence**

There are a multitude of reasons why an employee may seek to take a leave of absence from his/her employment. It is critical that you include in your employment manual sections identifying the availability of leaves of absence and, for each type of leave, stating whether the leave will be paid or unpaid, the maximum duration of such leave, the employees who are eligible for such leave, the procedure for securing approval for such leave, the rights to a position upon completion of such leave, and the consequences of failing to return to duty upon completion of such leave.

In addition to the various types of leaves of absence discussed below, a leave of absence may also be considered a reasonable accommodation under the Americans With Disabilities Act, 42 U.S.C. §12101, *et seq.* (“ADA”). EEOC regulations implementing the ADA cite as a possible accommodation “permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment.” 29 C.F.R. §1630.2(o). Possible reasons to grant leave as an accommodation under the ADA would include time off for the training of a service

animal, for learning to use Braille or to learn sign language, for recuperating from an illness or from an episodic manifestation of the disability, and for obtaining medical treatment or physical/occupational therapy. EEOC Compliance Manual, Reasonable Accommodation, §902 App., CCH ¶ 6908, p. 5457. Paid leave must be provided only if it is available to similarly situated employees. If an employee is granted leave as an accommodation, he/she is entitled to return to his/her same position unless doing so would impose undue hardship on the employer. *Id.* at p. 54.48. Thus, consideration must be given to providing leave as a reasonable accommodation under the ADA even if the employee is thereby given more leave than the employer's general leave policy, or even the FMLA, permit.

### **1. Disability Leave**

While such leave is not required by law, some employers allow leave for short or long term disabilities. If such leave is provided, the leave policy must be drafted to avoid disparate impact on protected classes of employees. For example, if an employer offers short-term disability leave, Title VII requires the employer to treat pregnancy and related conditions the same as non-pregnancy conditions. Also, the interplay of disability leave and FMLA leave, which is required to be provided, must be clearly set out in the employment manual.

In providing short or long term disability leave, the employer may require the

exhaustion of accrued sick and/or vacation time as a part of such leave. Disability leave may be paid or unpaid, in accordance with the employer's policy.

Your employment manual should specify any restrictions on the use of such leave. Such limitations include a designation of which employees are eligible for the leave and under what circumstances, notice requirements for taking leave, the duration of the leave, whether employee benefits accrue during the leave,<sup>8</sup> rights to employment following leave, consequences of failure to return to work on completion of leave, requirements for medical certification and periodic updates or recertification while on leave, the right of the employer to require second opinion medical examinations (at the employer's expense), and medical clearances required to return to work on a part-time or full-time basis. You may want to coordinate short-term disability leave with FMLA leave so that short-term disability leave will be limited to 12 weeks per 12 month period.

## **2. Personal Leave**

Some employers provide for "personal leave" in addition to vacation, sick leave, and disability leaves for compelling personal reasons. Usually such leave is provided at the discretion of the employer, is of a set maximum duration, and is

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<sup>8</sup>Before adopting a policy that provides for a continuation of health insurance coverage during periods of disability, confirm that employees on extended leave of absence are entitled to such coverage. Many health policies have an actively-at-work requirement which may prevent the extension of benefits during an extended leave. If so, you may be required to give a COBRA notice.

unpaid leave.

### **3. Jury Duty**

An employer may not discharge, threaten, intimidate, coerce, or penalize any permanent employee for that employee's service as a juror. 28 U.S.C. § 1875 (1994). The salaries of **state employees** may not be offset by the amount of per diem received by the employee for jury service. TEX. GOV'T CODE ANN. § 659.005(a) (Vernon Supp. 2002). This law does not apply to local governmental entities which are free to adopt a policy that employee salaries will be offset by jury duty per diem.

Also, in Texas, you may not discharge or discipline an employee for complying with a valid subpoena to appear in a civil, criminal, legislative, or administrative proceeding. TEX. LAB. CODE ANN. § 52.051 (Vernon 1996).

### **4. Funeral or Bereavement Leave**

An employer may want to provide a brief (customarily three days) leave period for the death of an immediate family member. If such a policy is adopted, it should specify what is meant by "immediate family." This type of leave is usually paid leave.

### **5. Voting/Election Leave**

In Texas, employers may not refuse to allow an employee to be absent from

work on an election day in order to vote except when the polls are open for two consecutive hours outside the employee's normal working hours. TEX. ELEC. CODE ANN. § 276.004 (Vernon Supp. 2002). Neither may an employer threaten to terminate the employment of or to penalize an employee for being absent from work on election day to vote. *Id.*

In addition, an employee must be allowed time off to attend a precinct convention in which the employee is eligible to participate or to attend a county, district, or state convention if the employee is a delegate. TEX. ELEC. CODE ANN. § 161.007. (Vernon Supp. 2002). An employer may not reduce or threaten to reduce an employee's wages or other employment benefits for exercising this right except that an employer may make a deduction for the actual time the employee was absent from work. *Id.*

## **6. Military Leave**

Leaves of absence for military service are governed by the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301, and, for local governments in Texas, by Texas Government Code sections 431.005 and 431.006.

### **A. USERRA**

USERRA is a federal statute enacted in 1994 after the Persian gulf War. It

revises the former Veterans Reemployment Rights Act and is administered by the United States Department of Labor. USERRA was intended to encourage participation in non-career military service by getting rid of the disadvantages servicemen and women would see in their civilian employment as a result of that service. An employer gets a qualified employee, and the country gets trained personnel at the ready when needed.

USERRA prohibits discrimination against persons who serve in the uniformed services and supersedes any state or local law, contract, or agreement that reduces the right and benefits USERRA provides. State and local governments are free to provide **greater** rights and benefits than are provided by federal law.

USERRA rights are enjoyed by all individuals on active duty, active duty for training, inactive duty for training, full-time National Guard duty, and during time off for medical exams taken before service for the following military branches:

- Army
- Navy
- Air Force
- Marines
- Coast Guard
- Public Health Service Commission Corps
- The reserve components of these services
- The Army National Guard

- The Air National guard

Both involuntary and **voluntary** military service is covered. So, whether your employee is called up by Uncle Sam to fulfill a military commitment or whether the employee hears an internal voice calling him or her to duty, USERRA applies.

The basic protections afforded by USERRA are as follows:

- USERRA prohibits discrimination in initial employment, reemployment, retention, promotion or any benefit of employment on the basis of membership, application for membership, performance of service, application for service, or service obligation.
- USERRA prohibits retaliation for exercise of rights under USERRA and also protects those persons assisting or cooperating in the exercise of those rights.
- USERRA provides reemployment rights to persons who serve in the uniformed services if her/she actually held a civilian job prior to service, the employee gave written or verbal notice of the need to leave the job for military service (unless prevented from doing so due to military necessity), the employee was in the military service 5 years or less, the employee was not discharged under dishonorable or other punitive conditions, and the employee reported back to the civilian job in a timely manner or submitted a timely application to return.

- USERRA grants rights to continued health insurance benefits. If your employee has coverage through your health plan, the employee must be allowed to elect to continue that health care coverage for 24 months (a continuation similar to COBRA but longer).
- USERRA grants rights to pension plan benefits.
- USERRA protects other employment benefits and preserves rights to make the returning employee whole. The reemployed person is entitled to seniority and other seniority-based benefits as if the employee had remained employed. For non-seniority-based benefits, the employee must be provided similar seniority status and pay that is provide any other employee who take a leave of absence or are furloughed.

An employee who has been on military leave must report back to work or submit an application for reemployment in a timely fashion. If the employee serves fewer than 31 days, he/she must report to work no later than the start of the 1<sup>st</sup> full regularly scheduled work period of the first full day after completing service (allowing 8 hours for transportation). If the employee serves between 30 and 81 days, he/she must submit an application for reemployment no later than 14 days after completing service. If the employee serves more than 180 days, he/she must submit an application for reemployment no later than 90 days after completing

service. Circumstances involving injury or that otherwise make it impossible for an employee to report for work may extend the reporting period.

**PLEASE NOTE THAT, UNDER TEXAS LAW, STATE AND LOCAL GOVERNMENT EMPLOYEES HAVE 90 DAYS TO APPLY FOR REEMPLOYMENT REGARDLESS OF THE LENGTH OF MILITARY SERVICE.**

An employee returning from military leave is entitled to return to the same position or to an “escalated” position, on where they would have been if they had not left for service. Length of service affects the employer’s obligation in this regard.

**USERRA ALSO PROVIDES SPECIAL PROTECTIONS AGAINST TERMINATION OF EMPLOYMENT OF RETURNING EMPLOYEES. THIS SUPERSEDES THE TEXAS EMPLOYMENT AT-WILL DOCTRINE AND MEANS THAT THE EMPLOYEE MAY ONLY BE TERMINATED FOR CAUSE DURING THE SPECIAL TIME OF PROTECTION. EMPLOYEES ON MILITARY LEAVE FOR 31-180 DAYS RECEIVE 180 DAYS OF PROTECTION. EMPLOYEES ON MILITARY LEAVE FOR OVER 180 DAYS RECEIVE PROTECTION FOR ONE YEAR.**

This paper only scratches the surface of USERRA. The Department of Labor website contains a lot of helpful information on this topic to employers and to employees. See [www.dol.gov](http://www.dol.gov).

## **B. Chapter 431, Texas Government Code**

Officers and employees of the state, municipalities, counties, and other political subdivisions who are members of the state military forces or of a reserve component of the U.S. armed forces, are entitled to 15 days of paid leave per federal fiscal year for time spend away from work for authorized training or duty authorized by the proper authority. While an employee is on this leave, he/she may not be subjected to loss of time, efficiency rating, vacation time, or nay benefit of employment during or because of the absence. Reemployment rights are much like those in USERRA but exclude temporary employees, elected officials, and anyone serving by senate confirmation. **All covered employees have 90 days within which to apply for reemployment at the end of military service.**

### **7. Workers' Compensation**

Special care should be given to the employment status of employees who are absent from work due to on-the-job injuries. Labor Code section 451.001 provides that a person may not discharge or otherwise discriminate against an employee

because the employee has filed a workers' compensation claim in good faith, has hired an attorney to represent the employee in a claim, has instituted or caused to be instituted in good faith a proceeding under Subtitle A of the Workers Compensation Act, or has testified or is about to testify in a proceeding under Subtitle A. If you discharge an employee who is absent due to on-the-job injuries, you run the risk of litigation regarding the termination of employment. All of the cases involving workers' compensation retaliation are very fact specific so you would do well to consult counsel if you are considering the discharge of an employee who is out on workers' comp leave or who has filed a claim for workers' compensation benefits. The courts have held that uniform enforcement of a reasonable policy regarding absence control or maximum lengths for leaves of absence will withstand a claim of retaliatory discharge. *Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444 (Tex. 1996); *Baptist Memorial Healthcare System v. Casanova*, 2 S.W.3d 306 (Tex. App.–San Antonio 1999, pet. denied). The employment policy must be one which is applied uniformly to **all** employees, not just to employees that are out on workers' compensation leave. *Trevino v. Corrections Corp. of America*, 850 S.W.2d 806 (Tex. App.–El Paso 1993, writ denied). In the *Baptist Memorial* case, the hospital had an employment policy limiting employee leaves of absence to six months. Pursuant to that policy, the hospital discharged a physical therapist aide

who had been on leave of absence over six months due to a workers' compensation injury. The court found that the policy was reasonable and had been applied uniformly to all employees. Therefore, there was no retaliation based on the workers' compensation claim. *Baptist Memorial Healthcare System v. Casanova, supra.*

### **Family and Medical Leave**

Brad Young is addressing this topic at the seminar today. Please refer to his materials on the Family and Medical Leave Act.