Strategic Perspectives

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ON THE LABOR FRONT—Some union-represented employees shortchanged by paid leave laws

By Michael J. Soltis, J.D.

Celebrating Labor Day a few weeks ago, many unions proclaimed that the labor movement should be thanked for numerous workplace benefits, paid sick leave among them. The latest AFL-CIO digital ad campaign says it succinctly: "Want Paid Leave? Join a Union." Indeed, unions have been leading advocates for the paid sick leave laws that have been enacted in nearly 40 jurisdictions—a dozen states, the District of Columbia, four counties, and 20 cities. Which makes it all the more baffling why many of those laws shortchange union-represented employees by not guaranteeing them the same sick leave benefits guaranteed to non-union employees.

Without that guarantee, a union-represented employee may still need to choose between the employee's or a family member's health and a paycheck. The leave laws use various legislative drafting devices to shortchange union-represented employees.

Some simply exclude union-represented employees

Michigan's Paid Medical Leave Act and Philadelphia's Promoting Healthy Families and Workplaces Ordinance both guarantee *employees* the right to accrue and use paid sick leave. The definition of employee in both *excludes* those covered by a collective bargaining agreement, i.e., union-represented employees. The result is beyond dispute: Non-union employees are entitled to the benefits and protections of the leave law; union-represented employees are not.

Other jurisdictions exclude union-represented employees in certain industries only. The New Jersey Earned Sick Leave law, the Cook County Earned Sick Leave Ordinance, and Chicago Paid Sick Leave Ordinance deny construction industry employees covered by a collective bargaining agreement the right to accrue and use paid sick leave under those laws.

Some allow employers and unions to waive employees' leave entitlement

Some paid leave laws allow an employer and union representing the employer's employees to agree to waive employees' statutory leave rights. Where employees' leave rights can be

waived—especially by third parties—employees have no guarantee of leave. None of these jurisdictions allow non-union employees to waive leave rights.

The Arizona Fair Wages and Healthy Families Act and New Jersey paid leave laws allow employers and unions to agree that employees covered by a labor contract will not receive the benefits of those laws. Cook County and Chicago allow an employer and union to make that same agreement so long as the waiver is stated "explicitly … in clear and unambiguous terms."

The District of Columbia paid leave law allows a partial waiver of its annual leave benefit, which is either seven, five, or three days per year, depending on the size of the employer. Its Accrued Sick and Safe Leave Act allows employers and unions to agree that employees covered by a labor contract will receive less paid sick time than the law requires but no less than three paid leave days per year.

The California Healthy Families, Healthy Workplaces Act allows an employer and union to waive employees' right to leave under that statute but adds conditions: the labor contract must:

(1) require that the hourly pay rate of covered employees be at least 30% more than the state minimum wage;
(2) expressly provide for paid sick days or a paid leave or paid time off policy that permits the use of sick days;
(3) have a final and binding arbitration procedure to resolve disputes concerning its paid sick days provisions; and
(4) have premium wage rates for overtime hours.

Waiver with conditions. New York City does not guarantee paid sick days to union-represented employees either. Its Paid Sick and Safe Leave Ordinance allows an employer and union to waive employees' rights to paid leave required by the ordinance if the labor contract has a "comparable" benefit for employees in the form of "leave, compensation, other employee benefits, or some combination thereof."

The examples of "comparable benefits" listed include "vacation time, personal time, safe/sick time, and *holiday and Sunday time pay at premium rates"* (emphasis added). Logically, holiday and Sunday time paid at premium rates is not comparable to paid time off from work. Working for your wages is not comparable to having paid time off. Nor is there any requirement that the employer even be open for business on holidays or Sundays or that all employees be offered the opportunity to earn that premium time.

The Earned Sick Leave Law of Westchester County (New York), which abuts New York City to the north, has the same "comparable benefit" provision as New York City.

Some allow employers and unions to waive employees' leave entitlement in certain industries only

The leave laws in Maryland, the District of Columbia, and Montgomery County (Maryland) allow an employer and union in the construction industry to agree to waive employees' rights to paid leave under the leave laws if done in clear and unambiguous terms.

The California law allows construction industry employers and unions to agree to a similar waiver, if the labor contract includes premium wage rates for overtime hours and a regular hourly rate at least 30 percent more than the state minimum wage.

Washington State amended its Paid Sick Leave Law recently to allow an employer and certain construction unions to waive the state's paid leave requirements in clear and unambiguous terms, if the contract provides "equivalent" sick leave to that in the state law but may allow employees to receive payment for sick leave before taking sick leave.

Pay-in-advance feature. It is unlikely the pay-in-advance feature justified the amendment since most leave laws, including the original Washington law, already allow frontloading, i.e., payment of leave at the beginning of the year in advance of its use. The amendment states it was needed because the law "does not provide for flexibility and portability of benefits for construction workers who may work for multiple employers and who already negotiate wages and benefits with their employers." I suspect the rationale is that there is a sick pay fund into which construction employers pay and that money remains available for construction employees, no matter for whom they are working at the time the sick leave is used.

New York City's ordinance allows employers and unions in the grocery and construction industries to waive employees' right to paid sick days under its ordinance in their labor agreement.

Some leave laws guarantee the same paid leave benefit to union-represented employees

Yet, the paid leave laws in some jurisdictions guarantee union-represented employees the same leave benefits as non-union employees. The Minneapolis Department of Civil Rights Frequently Asked Questions concerning the city's Sick and Safe Time Ordinance states unequivocally: "Employers operating under a collective bargaining agreement (CBA) must meet at least the minimum requirements of the ordinance."

If paid leave laws do not make any distinction between union-represented and non-union employees, this silence suggests that all employees have the same leave entitlement. These silent jurisdictions include Connecticut, Massachusetts, Oregon, Vermont, St. Paul and Duluth, Minnesota, and Dallas, San Antonio, and Austin, Texas.

On CBA expiration. A minor variation to a guarantee of equivalent benefits is a provision that the law applies to union-represented employees upon *expiration* of the current labor agreement. This is a common statutory leave drafting tool to balance the need for employees covered by a labor contract to receive the benefits of the new law without disrupting an existing labor contract. Paid leave statutes in Maine, New Jersey, the District of Columbia, and Montgomery County (Maryland) have such a provision.

Why do some leave laws shortchange union-represented employees?

Just about every paid leave law begins with a series of legislative findings embodied in "whereas" clauses that proclaim the rationale for its enactment. A common clause states that an employee will, at some point, need temporary time off to care for the employee's own or a family member's health needs. In words or concept, the "whereas" clauses proclaim that many employees do not have paid sick leave, must regularly choose between caring for their own or a family member's health and a paycheck or even a job, and that this law will eliminate an employee's need to make that tough decision.

Given the law's justification and the supportive role unions have played in having them passed, the obvious question is: Why would any paid sick leave law shortchange employees covered by a labor contract? If just a few laws did so, it would be an aberration, but as noted above, many leave laws shortchange union-represented employees. The press releases heralding the passage of a paid leave law typically tout its benefits to employees. I have yet to see a press release explain why union-represented employees were not given the same benefits guarantee as others. Left without an explanation for making this distinction, speculation fills the void.

> *"Left without an explanation for making this distinction, speculation fills the void."*

CBAs are different? Some might claim that labor contracts are different and need special treatment. The paid leave laws in jurisdictions that treat all employees exactly the same belie this argument. Also, many leave laws state that they are providing a minimum leave standard. Other laws that provide minimum labor standards apply to employees covered by a labor contracts, most notably the wage-hour laws.

Trade for something better? Could it be that an employer and union should be able to waive employees' paid leave benefits to allow them to trade that leave for something more desirable? With few exceptions, the laws that allow waiver *do not require* that employees receive anything in return for the waiver. New York City and Westchester require a "comparable benefit," incomparable though it may be (see discussion above).

And how can the waiver be reconciled with the compelling need for paid leave described in the "whereas" clauses? Where there is a waiver, that compelling need remains unmet, the minimum standard remains unmet, and employees must continue to make that difficult "health or paycheck" decision.

CBAs already provide the benefit? Some may say that even raising the distinction is inane because many labor contracts already have paid sick leave and complying with the law would be redundant. While many labor contracts may have paid sick leave, not all do. Even if every labor contract did, the paid leave laws have a "safe harbor" clause that says, in effect, if employees already receive the leave required by the law under the same terms and conditions through an employer policy or agreement, the employer need not provide additional leave.

Many employers whose employees are not represented by a union provide paid time off that meets or exceeds the benefit in the paid leave law, yet the law applies to them. They must seek refuge in the safe harbor. Why shouldn't all union-represented employees be covered by the leave law and let their employers seek shelter in the safe harbor as well?

Some might also believe that focusing on why union-represented employees are shortchanged is a waste of time because an employer and union would never agree to waive employees' right to paid leave. If that were so, there would be no need to give them the right to do so. That such a clause is in the law suggests that employers or unions may find it in their best interests to waive employees' right to statutory paid leave.

CBAs have different pay structures? Perhaps the distinction is warranted because labor contracts have different sick pay structures, some might argue. As noted earlier, the recent Washington amendment was intended "to provide flexibility and portability of benefits" for construction employees who work for multiple employers. Yet, even there, a construction employer and union may waive employee leave rights under the state law only if the labor contract provides an equivalent benefit. Such a provision is a far cry from a law that denies its leave benefit and protections to all employees covered by a labor contract or allows an employer and union to negotiate away those benefits and protections.

Also, if the rationale for the Washington amendment is that it would be too disruptive to change existing sick pay structures, some non-union employers as well have complicated, integrated leave programs with pay structures quite different than in the paid leave laws.

Strategic purpose? Finally, perhaps allowing an employer and union to waive paid leave under the law serves a union's strategic purpose. Presumably, an employer that does not provide paid leave saves the costs associated with that leave, whether the cost be for employees taking leave or the cost of replacing those employees. Allowing a waiver of employees' paid leave rights allows a union to dangle that waiver possibility to entice an employer to either recognize a union or agree to a union proposal, the logic behind this rationale goes. But that rationale itself has shortcomings.

Obviously, it does not apply in the jurisdictions that completely exclude employees covered by a labor contract from the statutory leave benefit. There is nothing there for a union to dangle. For the others, given the challenges of recruiting and retaining employees in this full-employment economy, denying employees the statutory paid leave benefit provided by other employers—competitors, perhaps—gives me doubt about the logic of this waiver strategy.

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I have yet to identify the policy or political reason some legislators shortchanged some union-represented employees in their paid leave laws.

About the author: Michael J. Soltis is an attorney, author, arbitrator, speaker and adjunct law professor of employment and labor law. He represented employers in employment and labor law matters for more than 35 years with a national labor and employment law firm.

