



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GROVER SELLERS  
ATTORNEY GENERAL

Honorable John D. Reed, Commissioner  
Bureau of Labor Statistics  
Austin, Texas

*Overruled in  
part by  
V-1475*

Dear Sir:

Opinion No. O-6842  
Re: Construction of Penal  
Code, Article 289, on  
the right of an employee  
to absent himself to  
vote, and related ques-  
tions.

You request our opinion on the following:

" . . . .

"Inquiry has been made of this office as to proper interpretation and application of this article (P.C., Art. 289). In order to properly answer those inquiries will you please answer the following questions with reference to said statute?

"Would an employee working only a part of the time the polls are open on election day be entitled to absent himself from his job for the purpose of voting?

"If an employee is entitled to take time off from his work to vote must this time off be compensated at his regular rate of pay by his employer?

"If the answer to question two is in the affirmative would the employee be privileged to leave his job at any time he desired for this purpose or would the employer be within his rights in prescribing the time allowed during the day for the purpose of voting?

" . . . ."

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Statutory provisions pertinent to your questions are:

Penal Code, 1925, Article 209:

"Whoever refuses to an employe entitled to vote the privilege of attending the polls, or subjects such employe to a penalty or deduction of wages because of the exercise of such privilege, shall be fined not to exceed five hundred dollars."

Vernon's Annotated Civil Statutes, 1925, Article 2930:

". . . In all elections, general, special, or primary, the polls shall be open from seven o'clock a. m. to seven o'clock p. m. in all counties having a population of 150,000 or more according to the last Federal census and in all other counties the polls shall be opened at 8 a. m. and shall remain open until 7 p. m. The election shall be held for one day only."

V. A. C. S., 1925, Article 4591:

". . . every day on which an election is held throughout the State, are declared legal holidays, on which all the public offices of the State may be closed and shall be considered and treated as Sunday or the Christian Sabbath for all purposes regarding the presenting for the payment or acceptance and of protesting for and giving notice of the dishonor of bills of exchange, bank checks and promissory notes placed by the law upon the footing of bills of exchange."

Our statute does not prohibit labor on legal holidays.

"The word 'holiday' as interpreted by the courts does not import the same status as Sunday and a declaration in a statute that a certain day shall be a legal holiday gives that day

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the attributes of Sunday only to the extent of the express words of the statute." Sunday and Holidays, 39 Tex. Jur. 857, par. 2, n. 1.

Penal Code, 1925, Article 209, is a part of the Election Law of 1905 (Acts of 29th Leg., 1st Called Sess., Ch. 11). Section 175 of that Act (page 562) is as follows:

"Any person or corporation who refuses to an employe entitled to vote the privilege of attending the polls, or subjects such employe to a penalty or deduction of wages because of the exercise of such privilege is guilty of a misdemeanor."

The codification of 1911, Penal Code, Article 244, incorporated this provision in its precise phraseology. The 1925 codifiers brought it forward in its present form, without, of course, changing its intent or purpose.

Although other states have enacted legislation aimed to require employers to allow their employees time to vote without deduction of pay, our investigation has disclosed only two cases (both of them Illinois cases) involving the questions under discussion.

A case of first impression is that of People vs. Chicago, M. & St. P. R. Co., (1923) 306 Ill. 486, 138 N. E. 159, 28 A. L. R. 610. The court there held:

". . . The provisions of said statute that gave him the right to absent himself for two hours on election day and to cast his vote, and which required his employer, plaintiff in error, to give him this opportunity of attending the election for such purpose, are wholesome provisions of the statute, and are valid and binding; but the provision of the statute that requires the employer to pay him at the rate of 85 cents per hour for the time employed in attending the election and casting his vote -- or, speaking more accurately, the provision requiring the employer to pay him for two hours' time at such rate for exercising such privilege -- is invalid, because it is an unreasonable

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abridgment of the right to make contracts. The legislature had just as much right to require employers to pay their employees for the time they necessarily would be compelled to use in looking after any sick member or members of their family as it had to pass the provision in question. Other striking examples of void legislation of the character in question might be stated, and in which it would appear that the employee would be engaged in a matter of pursuit equally as commendable and as essential to his own personal welfare; but further comment is unnecessary, as it is entirely clear that the provision in question is an unreasonable abridgment of the right to contract, and therefore void.

"It is claimed by the people that the provision in question is sustainable under what is known as the police power of the state, commonly defined as that inherent plenary power in the state to prohibit all things hurtful to the comfort, welfare, and safety of society. The relation of employer and employee is purely voluntary, resting upon the contract of the parties. Every man has a natural right to hire his services to anyone he pleases, or refrain from such hiring, and it is equally the right of everyone to determine whose services he will hire. The state has no right to interfere in a private employment and stipulate the terms of the services to be rendered. Tiedeman, Pol. Power, §§ 176, 178. It is true that the state does have the right, under its police powers, to pass laws that tend to promote the health, safety, or morals of such employees as Furney, because of the fact that such laws would tend to promote the health, comfort, safety, and welfare of society. The act in question, as contended by plaintiff in error, does not in any way, so far as we are able to see, tend to promote the health, safety, or morals of such employees. The provisions in question are not adapted to the object for which the law was enacted, and cannot be said to secure public comfort, welfare, safety, or public morals. There is no contention, and there can be none made

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with any reasonable showing, that the provision in question tends to promote the safety or health of any employee. It has always been the policy of our laws to condemn the idea of any voter being paid for exercising the privilege of an elector or voter. The right to vote is simply one of the privileges guaranteed to every citizen of this country who possesses the requisite qualifications. It is not only a right, but should be regarded as a duty of the citizen, where he is reasonably able physically to perform that duty. It is not the constitutional right of any citizen to be paid for the exercise of his right to vote, and the holding of the provision of the statute void does not violate the right of any citizen, including those who are employed to labor. This provision of the statute is not sustainable under the police power of the state, and it does violate the constitutional provisions aforesaid, and therefore must be declared void. Besides, 'no exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process, and equal protection' of the laws, and it should not 'override the demands of natural justice.' . . ."

Our Supreme Court, opinion by Chief Justice Cur-  
 ton, in Trevelers Ins. Co. vs. Marshall, (1934) 76 S. W.  
 (2d) 1007, at page 1011, cited with approval the above case  
 in holding the Emergency Moratorium Law unconstitutional be-  
 cause it impaired the obligation of contracts.

The other case is that of McAlpine vs. Dimick,  
 (1927) 326 Ill. 240, 157 N. E. 235, holding a portion of the  
 Illinois primary law invalid which gave employees the right  
 to absent themselves from employment for two hours on pri-  
 mary election day to vote, without deduction from their  
 salaries. The court, citing the first mentioned case, said:

". . . The provision of section 7, giv-  
 ing employees the right to absent themselves  
 from their employment for two hours on election

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day for the purpose of voting without any deduction from their salaries or wages on account of such absence is also unconstitutional, being a violation of section 2, article 2 of the Constitution. *People v. Chicago, Milwaukee & St. Paul Railway Co.*, 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610. These sections are not, however, of such a character as to interfere with the operation of the rest of the act, if they are stricken from it, and therefore do not affect the constitutionality of the entire act."

The right of franchise in our democracy is of supreme importance and its exercise should be zealously guarded. "Statutes regulating the rights of citizens to vote are of great public interest, and, therefore, are given a broad interpretation to secure for the citizen his right to vote and to insure the election of those officers who are the people's choice." Sutherland, *Statutory Construction*, Third Edition, Volume 3, page 445, par. 7215, n. 1.

We therefore answer your first question: An employee is entitled to absent himself from his job for a reasonable time for the purpose of voting. See our answer to question No. 3.

Second question: We believe that that part of the statute prohibiting the deduction of wages when the employee absents himself from his work in order to vote is invalid.

Third question: Bearing in mind that our polls are open until 7:00 P.M., that a statute should be interpreted by its equity, and of the interdependence of employer and employee in our industrial civilization, it is our opinion that an employer is within the statute and his rights in prescribing the time allowed during the day for the purpose of voting. The time allowed should be sufficient and fair so as to fully and completely permit the employee to exercise his suffrage. Such regulations would

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vary according to local conditions; but it should give the employee ample and convenient time within which to vote.

Trusting that the above answers your inquiry, we are

Very truly yours

ATTORNEY GENERAL OF TEXAS

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By

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