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PERSPECTIVE

Season's Greetings And Legal Challenges

By Elizabeth Roth and Barbara Tanzillo

As the holiday season approaches and employers nervously eye their workloads and the business days remaining in the year, many consider asking (or even requiring) some employees to work on a company-designated holiday. For other employers, the end of the year is an ideal period for a holiday shutdown. Each situation requires some planning and analysis.

Paid holidays, while often expected by employees and offered by employers, are not, in fact, legally required for private employers in California. This is succinctly stated by the California Division of Labor Standards Enforcement (DLSE) (See http://www.dir.ca.gov/dlse/FAQ_Holidays.htm)

However, if an employer has designated certain days as company-recognized holidays, the employer has essentially created a contractual right to a day of holiday pay for any employee employed on those days. And these company-designated holidays fall disproportionately in the final months of any calendar year, due to the traditional holidays around Thanksgiving, Christmas and New Year's Day.

Some employers in need of additional help at holiday time may be tempted to offer employees the right to exchange a company-designated holiday for a "floating holiday" — another day off with pay, chosen in the discretion of the employee. It is likely that such a solution will inadvertently convert the floating holiday into a vacation day not only for the current year but for future years as well. A day off with pay that is freely chosen by an employee is not a holiday, which is a day chosen by an employer. As the DLSE Enforcement Policies and Interpretations Manual, Section 15.1.12 "Confusion of Vacation Pay With Other Leave Benefits," explains, "leave time provided [without condition] is presumed to be vacation no matter what name is given to the leave by the employer." Vacation time vests, and must be paid upon employment termination. Vacation time is highly regulated under California law and is quite distinct from a paid holiday.

In explaining how a day of leave can be provided with a condition, and thus escape being characterized as vacation, the DLSE manual goes on to say "Thus, there must be an objective standard by which it can be established that the leave time is attributable to holidays, sick leave, bereavement leave or other specified leave. Tying the right to take the time to a specific event or chain of events such as allowing a vacation period for the Thanksgiving weekend would suffice to satisfy the test. (See discussion of the test in O.L. 1992.04.27, 1986.10.28, 1986.11.04, 1987.01.14-1)."

Each of the four letters sharpens our understanding of "the test," often by referring to the influential state Supreme Court case *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774 (1982). Suastez provides clear guidance on the meaning of California Labor Code Section 227.3, and establishes that vacation vests daily as it is earned, is compensation for past services, and cannot be forfeited: "Case law from this state and others, as well as principles of equity and justice, compel the conclusion that a proportionate right to paid vacation 'vests' as the labor is rendered. Once vested, the right is protected from forfeiture by [S]ection 227.3. On termination of employment, therefore, the statute requires that an employee be paid in wages for a pro rata share of his vacation pay."

The employer in O.L. 1992.04.27 provided two "floating holidays" in each calendar year. These floating holidays were also referred to as "personal holidays," and employees were permitted to "observe the holiday for their birthday or anniversary on a day they may select." The DLSE advised that such holidays, if not tied to a particular date, were additional vacation days, subject to the provisions of Section 227.3, but also noted, "The Division will accept a program which would allow the employee to take the 'anniversary' or 'birthday' holiday any time within a week from the date it arises so as to allow the employee to take advantage of a long weekend." The employer in O.L. 1986.10.28 also provided "floating holidays," and leaves for "general absence" and the DLSE notes that "permitting the employee to use the time at his or her personal convenience or option appears to be in effect vacation time."

In O.L. 1986.11.04 the employer provided "flexible time off," which could be used "at the employee's discretion; i.e., it can be used for vacation, sick leave, or personal business," and as a result, this flexible time off was deemed to be the same as vacation, and not subject to forfeiture. In O.L. 1987.01.14-1, the employer provided "personal days off," which were found to be indistinguishable from vacation days, and thus, not subject to forfeiture. In these two letters, the DLSE clarified that required "cashing out" of earned but unused flexible or personal days would be permitted, as long as no earned days were lost. Taken together, the opinion letters provide guidance that a true floating "holiday" must be tied in some way to a certain event.

For some employers, the holiday period is a time of natural work slowdowns and potential employee vacations rather than a period when extra workers are required. As a result, some companies plan a company-wide shutdown or the temporary closing of a few departments for the last few days of the year.

If an employer is planning a shutdown over the holidays, the company already should have provided reasonable notice to its employees of any requirement that employees use accrued vacation in combination with certain company-designated holidays during such a company closure. The DLSE has defined such reasonable notice period in an internal enforcement memorandum as "as far in advance as possible but generally no less than one full fiscal quarter or 90 days, whichever is greater." If no such notice has been provided, employees should be given the option of taking time off without pay or using their accrued vacation time.

Often the date of such a shutdown will be the week between Christmas and New Year's Day. For those employees who are classified as exempt, employers should make sure that any holiday shutdown matches the company's defined workweek, in order to avoid the obligation to pay the full salary for the entire week. Companies should clearly communicate to their employees that they should not perform any work during the week of a holiday shutdown. Because both Christmas and New Year's Day fall on Saturdays this holiday season and because many companies define their workweek as 12:01 a.m. Sunday to midnight the following Saturday, 2010 may be a year in which certain companies can close for the week without triggering the usual concern that exempt employees will work part of two separate work weeks. The more difficult issue will be to clarify that the employer has no expectation that exempt employees will be constantly checking their e-mail and voicemail messages.

Employers should proceed cautiously if they intend to remain closed for more than one workweek or in more than one pay period. While the DLSE has not been consistent in its review of this issue, certain opinion letters have stated that longer shutdowns may be viewed as unintentional employment terminations. Such terminations could, in turn, trigger the required payout of final wages and accrued vacation and even "floating holidays."

Companies should plan their holiday closings and holiday staffing decisions carefully to avoid any unintended consequences.

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