

5 Questions To Ask When Workers Get Called For Jury Duty

By Vin Gurrieri

Law360 (October 17, 2019, 5:58 PM EDT) -- A recent Fifth Circuit decision allowing a worker to pursue claims that he was illegally fired after jury service shows that missteps related to jury obligations can get employers in trouble if they're not careful.

Although employees having to miss work to serve on juries is nothing new, there are still some common mistakes that employers make, like not knowing the nuances of how workers should be paid or penalizing them for missing work.

Last month, the Fifth Circuit **issued a ruling** in a case that highlighted the latter of those potential pitfalls. It revived a worker's suit accusing a Taco Bell franchisee of illegally firing him because he served on a jury for about a week and refused to lie to get out of it.

Mark Payne, a California-based partner at Troutman Sanders LLP, said that while companies tend to be supportive of their workers' civic responsibility, errors do sometimes still occur.

"If an employer were to terminate somebody or take other adverse action — discipline them or doctor their pay or bonus — because they took jury leave, then federal and state law prohibits that kind of action," Payne said. "Most employers realize that, although they can innocently make mistakes like all of us."

Here, experts identify five questions businesses should ask to make sure they do right by employees who get tapped to do their civic duty.

Do workers need to be paid?

First and foremost, when employees miss work time to serve on juries, the most basic question that businesses must confront is whether they are on the hook to pay them during that time.

Under federal and most state laws, with some exceptions, employers aren't required to pay workers for time spent on jury duty. But the law does protect workers from any reprisal for being away from work, Payne said.

Since a few states and some municipalities do require that workers be paid for some amount of time while they're serving, the onus is on employers to know exactly what the rules are in their jurisdiction.

"Employers have got to be careful about checking in their state or even the local county or city because more and more these days counties and cities are weighing in on these things," Payne said.

What about exempt employees?

Payne also cautioned that any responsibility employers have to pay workers who are serving jury duty can be different when it comes to salaried employees who are exempt from minimum wage and overtime requirements.

“If you’re an exempt employee and you’ve done any kind of work during the workweek, then you get paid for that workweek, period,” Payne said. “It doesn’t matter if you took most of it off for jury duty, you would get paid because you’re an exempt employee.”

As an example, Anna Suh of Fenwick & West LLP said that a hypothetical exempt employee who does a full day of jury service and then works one hour — or even a minute — of that workday must then be paid their full salary for the workweek.

“It doesn’t happen too often, but I’ve had situations where that might become an issue when an employer didn’t keep that in mind,” she said.

Do any other rules come into play?

Leigh Goddard, a Nevada-based partner at McDonald Carano LLP, said some states have particularized rules that go beyond simply protecting workers from penalties related to their jury service.

For example, she said Nevada has a law in place that says workers — for instance, those who normally work overnight shifts — can’t be scheduled to work during the eight-hour period before they are due to report for jury duty. That sort of rule places the burden on employers to make sure they know about and are in compliance with all mandates related to workers’ jury service.

“In Nevada, it’s a gross misdemeanor to terminate or even to threaten to terminate an employee who is out for jury duty or even summoned for jury duty,” Goddard said. “And they also have to not require them to work for the eight hours before they have to show up — I guess our legislators want them to be alert and ready to go.”

Should an employer pay them anyway?

Even if employers have no obligation to pay employees who are away on jury duty, some may still choose to give them a few days’ pay as a courtesy.

Many businesses have pay policies in place to that effect, usually accounting for somewhere between three days and a week of jury duty, but some employers may subtract any nominal daily stipend that workers receive for their service, attorneys say.

“My experience is that while it’s not required, employers often do have policies that will pay for some jury service — it could be three days, it could be five days, or it could be more generous than that,” Payne said. “That’s really well within the discretion of management.”

Goddard, for one, said such policies — even though not mandated under any law — can go a long way toward engendering the goodwill of employees by helping them overcome the hardship that could otherwise come along with not being paid for a few days or weeks.

“I think that’s a best practice for a lot of employers, and it shows that it’s a good place to work and that they care about their employees, that they’re not going to require them to be without paid time while they’re doing their civic duty,” Goddard said.

Another approach employers can adopt, according to Goddard, is allowing workers to use any accrued paid time off when they are called to serve on a jury to ensure that they are paid in full during that time.

But she cautioned that workers tapping into their accrued time must be at their discretion; otherwise, employers could open themselves up to potential legal trouble.

"You cannot require that the employee use sick or vacation time," Goddard said. "Someone may choose to use that, but you cannot require that someone use that leave. That may be a mistake that some people make."

Can employees whose jury service lasts weeks or months be replaced?

Although most people who report for jury duty might only miss a day or two of work, their time away can be far longer if they are tapped to serve in a trial that lasts weeks or in a monthslong grand jury proceeding.

Such extended absences often give employers fits, since the work those employees normally do has to get reassigned lest it go undone.

For shorter absences, many employers will choose to simply divide the work up among other employees. But that might not be feasible if a worker's jury service is lengthy, forcing employers to look elsewhere — such as hiring a temp.

While nothing prevents an employer from bringing in an outside helping hand, they could face legal trouble if they decide to keep the temp over the returning employee or otherwise take an adverse action against the worker who left to perform their civic duty.

Suh, for one, said employers should tackle any extended jury-related absences in a similar manner as they treat other forms of leave.

"Employers generally know that there are requirements around accommodating folks' jury duty and that it should be treated as protected leave," Suh said. "Jury duty, if we're talking about extended-leave jury duties, I would say is no different or unique in terms of a fact pattern than other types of extended leave that employers often deal with on a day-to-day basis."

--Editing by Aaron Pelc and Alanna Weissman.