

VOTING:  
ELECTIONS:



If an employer seeks to penalize an employee for taking time off from his employment to vote, on the ground that such employee did not utilize such time to vote, the burden of proof that the employee did not vote is upon the employer. All of the employees or any number of such employees of a company, may designate a representative to request of their employer that they be absent from their employment for the purpose of voting.

November 13, 1953

Honorable Frank Kostron  
Representative, 7th District of St. Louis  
1915 Congress  
St. Louis, Missouri

Dear Sir:

In your recent request for an official opinion you state:

"In reference to our discussion at the Council meeting on October 14, pertaining to the statutes of the State of Missouri under Section 129.060, I am enclosing, for the refreshment of your memory, the language of the Section as presently constituted.

"I am in possession of an opinion from the Attorney General which, in essence, states that this Section covers all elections, whether they be state, local, or national in scope. The other matters which need to be determined are:

"First, it states that the individual so absenting himself for the purpose of voting shall not be threatened with discharge or any other penalty from the employer 'if he votes.' In this regard, it might be well to isolate the burden of proof, that is, if the employee must prove that he has voted when given time off. How can this be accomplished under our present system in the City of St. Louis? Or, if the burden of proof is on the employer, we need not worry about that side of it.

"Secondly, and more important, is the question of notifying the employer, which under the Section states that request shall be made for such leave of absence prior to the day of election. The question involved is this:--Does each and every employee have to notify their employer as

individuals that they wish allotted time off on election day, or will it suffice in the event there is an organization representing all employees, for that organization to notify the employer in behalf of its members. We must bear in mind that the employer has entered into contractual relations with the employee group as such for representation purposes, and to prevent the necessity of individual representation. Whether this applies in the broader scope beyond wages, hours and working conditions, and many other matters which come under a contractual agreement is a matter we need to determine.

"So I think that there are two questions we would like clarified:

"1. As above stated, is the burden of proof on the individual that he has voted when given time off, or is it up to the employer to prove that he has not.

"2. Again as above mentioned, must each individual request time off under this Section, or can an organization under representative contract with the company speak in behalf of all employees who are members of that organization.

"I deem it to be extremely important that these matters be clarified and certainly, whatever you can do in this respect will be most helpful and greatly appreciated."

Section 129.060, RSMo 1949, as amended by Senate Bill 235, which was enacted by the 67th General Assembly, reads as follows:

"Any person entitled to vote at a general election held within this State, or any primary election held in preparation for such general election, shall, on the day of such election be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting; and any absence for such purpose shall not be sufficient reason for the discharge of or the threat to discharge any such person from such services or employment; and such employee, if he votes, shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages; provided, however, that request shall be made for such leave

of absence prior to the day of election, and provided further, that this section shall not apply to a voter on the day of election if there be three successive hours, while the polls are open, in which he is not in the service of his employer.

"The employer may specify any three hours between the time of opening and the time of closing the polls during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby conferred, or who shall discharge or threaten to discharge any employee for so exercising the privilege, or who shall subject the employee to a penalty or reduction of wages because of the exercise of such privilege, or who shall directly or indirectly violate the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$500.00."

We believe that you are correct in interpreting the language of the above bill to mean that the avoidance of any penalties by an employee is dependent upon the employee voting in the time allotted by his employer for him to do so; that is to say, that if an employee takes off from his employment for the three hours to vote and does not vote he may be penalized by his employer for so doing. Such appears to be the clear meaning of the bill.

Your first question is: Is the burden of proof on the individual that he has voted when given time off, or is it up to the employer to prove that he has not?

In the normal course of events it would seem that there would be no occasion for the employee either to have to prove that he had voted or for the employer to seek to prove that the employee had not voted. Obviously the employee would not raise the question against himself. This issue would, therefore, only arise when the employer sought to penalize the employee for taking time out for voting and not voting. In such circumstances we believe that the burden would be upon the employer to prove that the employee did not vote. It is a general principle of law that a person who predicates an action upon an assumed fact, must, if called upon to justify the action, prove the fact.

Honorable Frank Kostron

It is also a principle of law that a person is assumed, in the absence of proof to the contrary, to obey the law. In this instance we believe that the meaning of Section 129.060, supra, as amended by Senate Bill No. 235 is, as we have said, that if an employee takes time off from his employment to vote he will vote.

If an employer seeks to penalize an employee for taking time off to vote and not using that time to vote, we believe that the employer must, in order to justify his penalizing action, prove that the employee did not vote.

Your second question is: Must each individual request time off under this section, or can an organization under representative contract with the company speak in behalf of all employees who are members of that organization?

We are unable to see anything in Section 129.060, supra, which would prohibit all of the employees of a company from designating a representative to request of the employer a leave of absence for each such employee for voting purposes, and to arrange with the employer for the time of absence from his employment of each employee. Such procedure would appear to be practicable, and would effect a considerable saving of time of both the employee and the employer.

#### CONCLUSION

It is the opinion of this department that if an employer seeks to penalize an employee for taking time off from his employment to vote, on the ground that such employee did not utilize such time to vote, that the burden of proof that the employee did not vote is upon the employer.

It is the further opinion of this department that all of the employees, or any number of such employees, of a company, may designate a representative to request of their employer that they be absent from their employment for the purpose of voting.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

HPW/ld

JOHN M. DALTON  
Attorney General