

STATE OF NEVADA

JOE LOMBARDO
Governor



DR. KRISTOPHER SANCHEZ
Director

BRETT HARRIS, ESQ.
Labor Commissioner

DEPARTMENT OF BUSINESS AND INDUSTRY
OFFICE OF THE LABOR COMMISSIONER

August 19, 2024

Molly Gabel
Seyfarth Shaw LLP
999 Third Avenue, Suite 4700
Seattle, WA 98104
mgabel@seyfarth.com
Sent via electronic and U.S. Mail

Re: Request for Advisory Opinion—Nevada Revised Statute 608.0197

Dear Ms. Gabel,

Pursuant to Nevada Administrative Code (“NAC”) Section 607.650, an Advisory Opinion (“the Request”) has been requested by you regarding the application of Nevada Revised Statute 608.0197 to an employer with a collective bargaining agreement that requires the employer to provide its employees with paid sick leave at a rate of at least 0.01923 hours per hour of work performed. Specifically, you ask if the employer is exempt from the requirements of NRS 608.0197 because of NRS § 608.0197(8) when the employer and employees are parties to a collective bargaining agreement that provides for more than 0.01923 hours of paid leave for every hour worked.

As set forth in NAC 607.650, this Advisory Opinion is limited to the facts and circumstances set forth in the request. This Advisory Opinion shall not apply to any pending administrative, civil, or criminal proceeding and shall not be relied upon by any party, whether a party at issue in the facts or not, in any future proceeding unrelated to the specific and unique facts and circumstances set forth in the request.

RELEVANT FACTS

Pursuant to the facts proposed under the Request, the employer’s employees work under a collective bargaining agreement (“CBA”) that contains a paid leave term that provides for more than 0.01923 hours of paid leave per hour worked. The Request does not explicitly state whether all scheduled employees of the employer accrue leave under a CBA.

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The Request further indicates it is the employer’s policy to assess attendance points against

employees for using accumulated paid leave. It is unclear whether this point system is part of the paid leave term of the CBA. Under the points system, if an employee accumulates “a certain number of attendance points,” disciplinary action begins against the employee beginning with counseling, and progressing to an oral warning, written warning, and up to termination if an employee continues to accumulate points within a particular period. The Request does not provide specifics as to how many points and in what time the points must accrue for an employee to be subject to disciplinary action.

The Request provides a non-exhaustive list of examples of when the employer assesses points against an employee for a variety of attendance-related reasons. For example, the Request indicates the point system does not distinguish between an employee using accrued paid leave and an employee being late. Every absence, of any length, planned or unplanned results in an attendance point assessed against the employee. The Request does not indicate whether an employee’s use of paid leave assesses points per day or per use regardless of number of days.

APPLICABLE LAW

NRS 608.0197 Employer required to provide paid leave; use of paid leave; Labor Commissioner to prepare and post bulletin; maintenance and inspection of records; other rights, remedies, procedures and benefits; exceptions.

1. Except as otherwise provided in this section, every employer in private employment shall provide paid leave to each employee of the employer as follows:

(a) An employee is entitled to at least 0.01923 hours of paid leave for each hour of work performed.

(b) An employee may, as determined by the employer, obtain paid leave by:

(1) Receiving on the first day of each benefit year the total number of hours of paid leave that the employee is entitled to accrue in a benefit year pursuant to paragraph (a); or

(2) Accruing over the course of a benefit year the total number of hours of paid leave that the employee is entitled to accrue in a benefit year pursuant to paragraph (a).

(c) Paid leave accrued pursuant to subparagraph (2) of paragraph (b) may carry over for each employee between his or her benefit years of employment, except an employer may limit the amount of paid leave for each employee carried over to a maximum of 40 hours per benefit year.

(d) Except as otherwise provided in paragraph (i), an employer shall:

(1) Compensate an employee for the paid leave available for use by that employee at the rate of pay at which the employee is compensated at the time such leave is taken, as calculated pursuant to paragraph (e); and

(2) Pay such compensation on the same payday as the hours taken are normally paid.

(e) For the purposes of determining the rate of pay at which an employee is compensated pursuant to paragraph (d), the compensation rate for an employee who is paid by:

(1) Salary, commission, piece rate or a method other than hourly wage must:

(I) Be calculated by dividing the total wages of the employee paid for the immediately preceding 90 days by the number of hours worked during that period;

(II) Except as otherwise provided in sub-subparagraph (III), include any bonuses agreed upon and earned by the employee; and

(III) Not include any bonuses awarded at the sole discretion of the employer, overtime pay, additional pay for performing hazardous duties, holiday pay or tips earned by the employee.

(2) Hourly wage must be calculated by the hourly rate the employee is paid by the employer.

(f) An employer may limit the amount of paid leave an employee uses to 40 hours per benefit year.

(g) An employer may set a minimum increment of paid leave, not to exceed 4 hours, that an employee may use at any one time.

(h) An employer shall provide to each employee on each payday an accounting of the hours of paid leave available for use by that employee. An employer may use the system that the employer uses to pay its employees to provide the accounting of the hours of paid leave available for use by the employee.

(i) An employer may, but is not required to, compensate an employee for any unused paid leave available for use by that employee upon separation from employment, except if the employee is rehired by the employer within 90 days after separation from that employer and the separation from employment was not due to the employee voluntarily leaving his or her employment, any previously unused paid leave hours available for use by that employee must be reinstated.

2. An employee in private employment may use paid leave available for use by that employee as follows:

(a) An employer shall allow an employee to use paid leave beginning on the 90th calendar day of his or her employment.

(b) An employer shall allow an employee to use paid leave for any use, including, without limitation:

(1) Treatment of a mental or physical illness, injury or health condition;

(2) Receiving a medical diagnosis or medical care;

(3) Receiving or participating in preventative care;

(4) Participating in caregiving; or

(5) Addressing other personal needs related to the health of the employee.

(c) An employee may use paid leave available for use by that employee without providing a reason to his or her employer for such use.

(d) An employee shall, as soon as practicable, give notice to his or her employer to use the paid leave available for use by that employee.

3. An employer shall not:

(a) Deny an employee the right to use paid leave available for use by that employee in accordance with the conditions of this section;

(b) Require an employee to find a replacement worker as a condition of using paid leave available for use by that employee; or

(c) Retaliate against an employee for using paid leave available for use by that employee.

4. The Labor Commissioner shall prepare a bulletin which clearly sets forth the benefits created by this section. The Labor Commissioner shall post the bulletin on the Internet website maintained by the Office of Labor Commissioner, if any, and shall require all employers to post the bulletin in a conspicuous location in each workplace maintained by the employer. The bulletin may be included in any printed abstract posted by the employer pursuant to [NRS 608.013](#).

5. An employer shall maintain a record of the receipt or accrual and use of paid leave pursuant to this section for each employee for a 1-year period following the entry of such information in the record and, upon request, shall make those records available for inspection by the Labor Commissioner.

6. The provisions of this section do not:

(a) Limit or abridge any other rights, remedies or procedures available under the law.

(b) Negate any other rights, remedies or procedures available to an aggrieved party.

(c) Prohibit, preempt or discourage any contract or other agreement that provides a more generous paid leave benefit or paid time off benefit.

7. For the first 2 years of operation, an employer is not required to comply with the provisions of this section.

8. This section does not apply to:

(a) An employer who, pursuant to a contract, policy, collective bargaining agreement or other agreement, provides employees with a policy for paid leave or a policy for paid time off to all scheduled employees at a rate of at least 0.01923 hours of paid leave per hour of work performed; and

(b) Temporary, seasonal or on-call employees.

9. As used in this section:

(a) “Benefit year” means a 365-day period used by an employer when calculating the accrual of paid leave.

(b) “Employer” means a private employer who has 50 or more employees in private employment in this State.

ADVISORY OPINION

This Advisory Opinion assumes the employer in the Request employs more than 50 employees in private employment in Nevada because the statute only applies to private employers under those circumstances. NRS 608.0197 generally prohibits employers from retaliating against employees for using paid leave. Specifically, NRS 608.0197(3) explicitly states an employer shall not retaliate against an employee for using paid leave available for use by that employee. Here, the points system described in the Request is retaliation against employees for use of paid leave. If the proper use of accrued paid leave can contribute to disciplinary action being taken against the employee, that is retaliation.

However, as you correctly point out in the Request, NRS 608.0197(8)(a) explicitly states “[t]his section does not apply to...[a]n employer who, pursuant to a...collective bargaining agreement...provides employees with a policy for paid leave or a policy for paid time off to all scheduled employees at a rate of at least 0.01923 hours of paid leave per hour of work performed.” Subsection 8 refers to the law in its entirety as it is not qualifying any other subsection of NRS 608.0197. As such, the plain language of the statute exempts an employer who meets the specific description found in NRS 608.0197(8)(a)

The Request does not indicate whether “all scheduled employees” accrue paid leave under the CBA. Therefore, whether NRS 608.0197 applies to the employer described in the Request turns on whether this element of NRS 608.0197(8)(a) is met. If “all scheduled employees” are parties to the CBA that provides employees with paid leave accrual of more than 0.01923 hours of paid leave per hour of work performed, the plain language of NRS 608.0197(8) exempts the employer from the Request from NRS 608.0197. However, if not “all scheduled employees” of the employer are under the CBA that provides “at least 0.01923 hours of paid leave per hour of work performed,” the employer’s policy regarding an assessment of attendance points against the employee would be in violation of NRS 608.0197(3)(c).

Please be advised that this Advisory Opinion is limited to the specific facts and circumstances described herein. The Office of the Labor Commissioner may revisit this issue through the Administrative Rulemaking Process. Please be further advised that subsequent statutory or administrative rule changes or judicial interpretation of the statutes or rules upon which any opinion is based may require modification or abandonment of this Advisory Opinion.

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Thank you for reaching out to the Office of the Labor Commissioner with your questions. We appreciate the opportunity to provide information and education regarding Nevada labor laws and their application. Should you need any additional clarification, please do not hesitate to contact our office at (702) 486-4650.

Sincerely,

A handwritten signature in black ink, appearing to read "Brett K. Harris". The signature is stylized with a large initial "B" and "H".

Brett K. Harris, Esq.
Labor Commissioner