

Senate Commerce Committee

Aaron Jones 271-2609

HB 74-FN, relative to an employee's unused earned time.

Hearing Date: April 18, 2023

Time Opened: 9:05 a.m.

Time Closed: 10:05 a.m.

Members of the Committee Present: Senators Ricciardi, Innis, Soucy and Chandley

Members of the Committee Absent : Senator Gannon

Bill Analysis: This bill requires an employer to pay an employee for unused earned time.

Sponsors:

Rep. M. Cahill

Rep. Renzullo

Rep. McLean

Rep. S. Pearson

Rep. M. Pearson

Who supports the bill: Representative Michael Cahill, Representative Chuck Grassie, Anne Seaberg, Ruth Perencevich, Kathy Sue Spielman, Sandra Blanchard, Susan Wessels, Dorothea Vecchiotti, Deborah Klein Walker, Andrew Jones, Gary Devore, Susan Moore, Barbara Reed, Hannah Bissex, Lynn Merlone, A. Thomas, Jane Hershey, Joanne Emus, Patricia Martin, Nancy Brennan, Sanra Stonebanks, Maureen Ellermann, Nancy Greenwood, Sally Hatch, Kathleen Bean, Maura Willing, Ann Rettew, Nancy Bishop

Who opposes the bill: Dave Juvet (BIA), Andrea Chatfield (NH State Council), Gary Abbott (Associated General Contractors), Josh Reap (Associated Builders & Contractors), Tom Prasol (NH Retail Association), Catherine Provencher (University System of NH), Joan Pageau (BIG I of NH), Bruce Berke (NFIB), Katherine Heck (NH Municipal Association), Paula Minnehan (NH Hospital Association), Henry Veilleux (NH Lodging & Restaurant Association), Sally Staude, Elaine Plante, Heather McGrail (Greater Manchester Chamber), Barry Duffy (Pike Industries), Stacia Maloney, Charyl Reardon (White Mountains Attractions Association), Curtis Howland, Ryan Audley (R.S. Audley, INC.), Tim Vaughn, Glenn Adams (Sargent Corporation), Dale Sackett, Marco Iacobucci (Redimix Companies), Dan Bennett (NH Automobile Dealers Association), Arthur Rose, Zephan Wood, Teresa Everett (Blink's™ Fry Doe®), James Barrett, John Kelly, Cheryl Coletti-Lawson, Scott Lawson, Amy Landers (Lakes Region Tourism Association), Karen Prince, Alex Koutroubas (American Council of Engineering Companies of New Hampshire), James Gardner, Lisabritt Solsky Stevens (Easterseals NH), Jesse Medeiros

Who is neutral on the bill: Tracy McGraw (NH Department of Labor)

Summary of testimony presented in support:

Representative Michael Cahill

- This bill would not require employers to offer paid time off (PTO), vacation time, or sick leave. In addition, employers with 15 or fewer employees would be exempt.
- This bill would remove the blanket statement that upon termination, regardless of circumstances, no earned time would vanish if it were not used.
- In Newmarket, a company sold their assets, yet their liabilities – including the vacation time that had been accrued – was not transferred. The five employees who continued to work for the new employer had losses ranging from \$300 to \$591, which totaled \$2,261.44. Representative Cahill said approximately 20 percent of these cases go to the Department of Labor (DOL).
- If a case goes to the Department, they are only allowed to look at the policies or practices of an employer.
- Representative Cahill reiterated that this bill would affect the one blanket policy that enables an employer to walk off with whatever was not used. By doing away with this blanket statement, Representative Cahill said there would be benefits for both sides.
- In another case, an individual was laid off and she had \$2,300 in vacation time. To use vacation time, the policy stated an individual had to ask three weeks in advance, and they had to provide two weeks' notice if they were leaving. Representative Cahill said this individual did not have an opportunity to do either.
- If this bill were passed, it would be at the discretion of the employer on what they would like to do.
- Representative Cahill reiterated that there has been a longstanding practice of an employer not paying unused vacation time.
- Representative Cahill said they wanted people to use vacation time, and they did not want it viewed as being in lieu of a pay raise.
- While the bill had a \$4.5 million fiscal note, Representative Cahill said that Commissioner Charlie Arlinghaus believed it would be smaller because it was unlikely that employees left en masse.

Representative Chuck Grassie

- Representative Grassie shared that when he worked a white-collar job, the employer did not keep track of accrued time, which this bill would require.
- When the COVID-19 pandemic occurred, Representative Grassie was laid off from his blue-collar job. Many of the employees did not get their accrued vacation time. When the business reopened, those who returned were hired as new employees.

- While a complaint can be filed with the Department, Representative Grassie said it is unlikely if there is a chance an individual could be brought back.
- Even if one person is affected, Representative Grassie said this bill remained important because this is a benefit that has been earned by employees.
- Representative Grassie said blue-collar employees are affected much harder, and their first thought is how are they going to pay their bills.

Summary of testimony presented in opposition:

Dave Juvet, Senior Vice President of Public Policy, Business and Industry Association

- This bill would change a benefit into compensation, which has not been previously done.
 - On Page 1, Lines 12 and 13, it states, “[f]or the purpose of this section, the terms "earned time," "vacation" or "vacation time," and "paid time off" shall be considered compensation and therefore constitute wages due.”
- Mr. Juvet emphasized that employee benefits are not compensation; instead, they are provided to retain and attract employees to the workplace.
- Mr. Juvet urged the Committee to oppose this bill because it would open the door for benefits to be treated as something else.
- If paid vacation time was not used, then it would be lost under a “use it or lose it” policy. Under this bill, however, Mr. Juvet said it would be unclear on what would happen.
- If someone left in good standing, they would get paid for unused accrual time. For an employee who did not leave, however, they would lose their time at the end of the year without being paid for it.
- **Senator Innis** said if it were moved from a benefit to compensation, then it might be taxable.
 - **Mr. Juvet** replied they were suggesting that this is not done.
- **Senator Innis** said he feared it could be taxable as income when it is not income.
 - **Mr. Juvet** replied that it would be taxable as income; however, vacation time is already taxable. For employers, a situation is created where it would cost them additional money. An employee, who has not used vacation time up to the point of their termination, would get paid for all of their accrued vacation time.
 - For tax purposes, **Attorney Chatfield** said paid PTO is treated as a W-2 wage. The potential liability of having unused PTO must be accounted for when a budget is being balanced.

Andrea Chatfield, HR State Council of NH

- Attorney Chatfield said that HR professionals have appreciated the value that fringe benefits provide to employees. PTO is a benefit used to encourage employees to take time off to rest and relax, and it was not intended to be an extra paycheck.
- Currently, Attorney Chatfield said a lot of employers pay out earned time upon the termination of an employee.
- This bill would be inconsistent with the longstanding policy that employers should decide what fringe benefits are offered, and the terms and conditions of those benefits.
- Under RSA 275:49, III, employers who have fringe benefits must provide written notice of the terms and conditions of those benefits to employees. If terms and conditions are changed, it must be provided to employees. Under Department regulations, the notice should be signed by the employee, which is why employee handbooks are commonly used to convey policies.
- A lot of employers have begun migrating to benefits that are lumped together instead of having separate policies for vacation time, sick time, or personal time. Attorney Chatfield said this has been easier for an employer to administer, while also providing an employee with flexibility.
- Traditionally, sick time or personal time is not paid to an employee upon their termination; however, it would be required under this bill. Consequently, Attorney Chatfield said employers could rethink their PTO policies, specifically how much is provided and what is approved.
- Attorney Chatfield said the financial liability posed by unused time would have to be considered by an employer, which would place a heavy burden on nonprofits and small employers.
- While the bill limited payouts to when an employee left in good standing, Attorney Chatfield said they were not sure what that meant because it has not been defined in statute or case law. Consequently, Attorney Chatfield was concerned inconsistent interpretations could be made by hearing officers or courts.
- The bill would require an employer to account for and provide an employee with their used and unused time. There are instances, however, where payroll companies could be inaccurate. While it could be out of the control of an employer, Attorney Chatfield said they could still violate statute.
- Attorney Chatfield wondered what would happen if employees were temporarily laid off and they were brought back.
- If there is no accrual method, the bill would require PTO to be paid out on a prorated basis. However, Attorney Chatfield wondered how this would apply to employers that have begun to move to unlimited PTO.
- Attorney Chatfield reiterated that there are a lot of unanswered questions for HR professionals and business owners, there is a huge financial liability being

faced by nonprofits and small employers, and an area of discretion and judgement would be taken away from employers.

Gary Abbott, Associated General Contractors

- Companies already develop policies that cover vacation time, sick time, and jury duty.
- For the first time, this bill would change benefits into compensable wages.
- In Line 17, the Association felt it was unknown what was considered good standing. The Association believed anyone would get paid if they followed or met the conditions of the office policy.
- If an employee had a dispute, they could appeal to the Department. Subsequently, the Department would examine the office policies to make a determination.
- Mr. Abbott said it was a slippery slope if the state decided to define office policies.
- Mr. Abbott believed companies were generous to provide paid compensation for vacations when an employee left.
- If this bill were passed, Mr. Abbott said an employee could take no vacation; instead, they could collect an extra paycheck.
- Mr. Abbott believed this bill could have ramifications for employees because companies could adjust earned time.

Josh Reap, President and CEO, Associated Builders and Contractors

- Under this bill, Mr. Reap said paid time off calculations could be confusing for employees that work under the Davis-Bacon Act.
- Under the Act, wage classifications vary by trade, and they are set by the U.S. Department of Labor.
- Over time, an employee could change roles; however, accrued time off is based on wage classifications. If someone left their employment in one role, it would need to be determined how many hours they spent in other roles. Mr. Reap said they do not track these hours; therefore, there could be issues when it comes to the annualization of benefits.
- This bill could negatively impact fringe benefits that were negotiated through a collective bargaining unit.
- While this bill was well intended, Mr. Reap said it was not ready for primetime.

Catherine Provencher, Chief Administrative Officer and Vice Chancellor of Finance, University System of New Hampshire

- Ms. Provencher said the University System of New Hampshire (USNH) provides a comprehensive and competitive benefits package to attract and retain talent.
- Ms. Provencher believed this bill would have unintended consequences.

- As part of the benefits package, employees can accrue up to 45 days of unused personal time. When there is a separation of employment, regardless of the reason, the USNH does pay an employee up to 30 days.
- Currently, there are 1,100 employees with more than 30 days of unused time, which would result in a \$3.7 million liability for the USNH.
- Consequently, Ms. Provencher said the unintended consequence could be a reduction in benefits.
- Ms. Provencher urged the Committee to vote Inexpedient to Legislate on HB 74-FN.

Bruce Berke, on behalf of the National Federation of Independent Business

- This bill could have a negative impact on the relationship between employers and employees.
- While the threshold is 15 or more employees, Mr. Berke said it could be changed in the future.
- Mr. Berke urged the Committee to vote Inexpedient to Legislate on HB 74-FN.

Katherine Heck, NH Municipal Association

- Ms. Heck emphasized that collective bargaining agreements could be impacted.
- Based on the fiscal note, employers would have to budget for maximum exposure to ensure there is cash on hand.
- Ms. Heck agreed that what is currently offered is a benefit, not a wage.
- How benefit packages are handled, calculated, and offered can vary across municipalities. Given the highly competitive labor market, Ms. Heck said maintaining local control was important.
- If this bill were passed, it could have a severe impact on budgets based on potential liabilities that were not budgeted for. Currently, municipalities are involved in the budgeting process or they have passed budgets that will take effect in 60 days.

Paula Minnehan, Senior Vice President of State Government Relations, NH Hospital Association

- The Association was opposed to HB 74-FN because it would change vacation earned time to compensation.
- Hospitals offer a variety of packages that provide flexibility, so the needs of their employees can be met.
- Ms. Minnehan said challenges would arise if the state dictated the benefits offered by hospitals; instead, the private sector should create and manage benefit packages that are in their best interest.

Neutral Information Presented:

Tracy McGraw, Attorney, NH Department of Labor

- Attorney McGraw said this bill would not override collective bargaining agreements that are already in place.
- The Department does adjudicate worker compensation cases as well as wage and hour cases.
 - Since August 2022, the Department has processed 491 wage and hour claims. An additional 43 claims were filed; however, they were not factored in because they were rejected.
 - 100 cases, or roughly 20 percent, asserted claims of unpaid vacation, holiday, or PTO.
 - 13 decisions were awarded to claimants for PTO, and there were an additional 13 cases where an employer paid wages without a hearing.
- Under notice provisions, employees are required to be notified of their pay and a calculation of their earned time, vacation time, PTO, and sick time. Attorney McGraw said the Department could easily interpret this in wage and hour cases.
- When the Department receives wage claims, Attorney McGraw said a hearing officer would examine all of the evidence, such as if an employer followed their policy all of the time. There have been cases, especially when an employee has prevailed, where a policy has not been followed or another issue arose that was inconsistent with the policy.
- Attorney McGraw said this bill would not impact businesses with less than 15 employees. The reference to 15 employees or less is made in other statutes, such as RSA 281-A:64.
- When there are layoffs or a business is sold, the Department would decide if there was a contract between a buyer and a seller that determined who accepted the assets and debts of the business. Since it is evidentiary, a hearing officer must examine the language of the contract and determine its accuracy and credibility. If there is no documentation to support that a buyer accepted all debt, including earned time, then the Department would seek out reimbursement from the prior owner. In these situations, however, this might not be possible due to insolvency or the prior owner no longer existing.
- Attorney McGraw emphasized that the Department had a neutral position on the bill; however, they understood its intent and they could administer it.
- If PTO were combined into a single bucket, the Department would accept evidence from the hearing that supported how the time was earned, how it may have been broken down, and if there was a language in place that provided notice, in writing or posting, as to what the vacation, PTO, or sick time policy was. If a party did not prevail, they are allowed to appeal to the Compensation Appeals Board and eventually the NH Supreme Court.