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1. ELECTION—EMPLOYER'S FAILURE OR REFUSAL TO PAY EMPLOYEE—NOT ON PIECEWORK, COMMISSION OR HOURLY BASIS—REASONABLE AMOUNT OF TIME EMPLOYEE ABSENT FROM EMPLOYMENT TO VOTE ON ELECTION DAY—"INJURY" OR "LOSS"—SECTION 4785-195 G. C.—IF ACT IS TO INDUCE OR COMPEL PERSON TO VOTE OR REFRAIN FROM VOTING IT WOULD CONSTITUTE VIOLATION OF SECTION.
2. FAILURE OF EMPLOYER OR REFUSAL TO PAY EMPLOYEE FOR TIME WHEN ABSENT TO VOTE—DOES NOT "SUBJECT SUCH PERSON SO EMPLOYED TO A PENALTY"—SECTION 12950 G. C.
3. FAILURE OF EMPLOYER TO PAY EMPLOYEE—ABSENT TO VOTE ON ELECTION DAY—WITHHOLDING OF WAGES—WHEN ACT VIOLATES SECTION 12951 G. C.

SYLLABUS:

1. An employer's failure or refusal to pay an employe who is employed otherwise than on a piecework, commission or an hourly basis, for a reasonable amount of time during which such employe is absent from his employment for the purpose of voting on election day, constitutes an "injury" or "loss" as those words are used in Section 4785-195, General Code, and if done in order to induce or compel such person to vote or refrain from voting for or against any person or question or issue submitted to the voters at that election would constitute a violation of said section of the General Code.

2. An employer's failure or refusal to pay an employe for a reasonable amount of time during which such employe is absent from his employment for the purpose of voting on election day does not "subject such person so employed to a penalty" as those words are used in Section 12950, General Code.

3. An employer's failure or refusal to pay an employe who is employed otherwise than on a piecework, commission, or an hourly basis, for a reasonable amount of time during which such employe is absent from his employment for the purpose of voting on election day, amounts to a withholding of wages of such employe and if done for the purpose of inducing or compelling such employe to vote or refrain from voting for a particular candidate at that election is violative of the provisions of Section 12951, General Code.

Columbus, Ohio, January 4, 1951

Mr. Albert A. Woldman, Director, Department of Industrial Relations
Columbus, Ohio

Dear Sir:

"The Department of Industrial Relations has received inquiry on the question as to whether or not an employer is required to compensate the employe for the time during which the said employe absents himself from his employment and takes a reasonable amount of time to vote on election day.

There are certain sections of the Ohio General Code which we believe are pertinent to the issue involved and which sections read as follows:

'SECTION 4785-195. Whoever, being an employer, his officer or agent, discharges or threatens to discharge an elector because he took a reasonable amount of time to vote on an election day; or requires or orders an elector to accompany him to a voting place upon such day; or refuses to permit such elector to serve as an election official on any registration or election day; or *indirectly uses any force or restraint or threatens to inflict any injury, harm or loss; or in any other manner practices intimidation* in order to induce or compel such person to vote or refrain from voting for or against any person or question or issue submitted to the voters, shall upon conviction * * *' (Emphasis added.)

'SECTION 12950. Whoever refuses a person in his employ, entitled to vote at a general election, permission to absent himself from the service or employment in which he is then engaged or employed for a period of two hours between the time of opening and closing the polls on the days of such election or *subjects such person so employed to a penalty for so absenting himself* when he has applied for such permission prior to the day of such election, shall be fined * * *' (Emphasis added.)

'SECTION 12951. Whoever uses or threatens to use force, violence or restraint, or inflicts or threatens to inflict injury, damage, harm or loss upon, or threatens to enforce the payment of a debt against, or begins a criminal prosecution against, or injures the business or trade of, or practices intimidation upon or against a person in order to induce or compel such person to vote or refrain from voting, or to vote or refrain from voting for a particular candidate, or, *being an employer of labor or an agent of such employer, does any of such acts or threatens to withhold or reduces*

the wages of, or to dismiss from service an employe in order to induce or compel such employe to vote or refrain from voting for a particular candidate at an election, or by duress, constraint or improper influence, or by a fraudulent or improper device or contrivance, impedes, prevents or interferes with the free exercise of the elective franchise by an elector, shall be fined * * *' (Emphasis added.)

"We shall appreciate your answers to the following questions :

1. Does the employer's failure or refusal to pay the employe for the time spent by him in voting, constitute an 'injury, harm or loss' or 'intimidation' to the employe?
2. Does the employer's failure or refusal to pay the employe for the time spent by him in voting, 'subject such person so employed to a penalty?'
3. Does the employer's failure or refusal to pay the employe for the time spent by him in voting, constitute an act or threat to withhold or reduce the wages of such employe?'

Section 4785-195, General Code, quoted in part in your request was enacted by the Eighty-eighth General Assembly as a part of an Act revising, recodifying and supplementing the then existing election laws of the State, which Act was designated as the "Election Laws of Ohio" and is found in 113 Ohio Laws 307. Prior to this enactment analogous provisions to those contained in this section of the General Code were embodied in Sections 5175-26a and 5175-26b and were a part of the then existing corrupt Practices Act.

Although said Section 4785-195 presently appears as part of the Election Laws of Ohio it is evident from its wording as well as from its legislative history that it is a penal statute and is to be construed in accordance with the rules of construction applicable to penal statutes. Sections 12950 and 12951, also quoted in part in your request are found in that part of the General Code known as the Ohio Criminal Code and, therefore, are penal statutes. It follows that all three sections under consideration are to be construed in accordance with like rules of construction. One of these rules is that penal statutes must be strictly construed. (State v. Associates Investment Co., 26 N. E. (2d) 457, 136 O. S. 456, 129 A. L. R. 1074, 17 O. O. 29; Hildebrand v. State, 196 N. E. 412, 129 O. S. 574, 2 O. O. 562.)

The relationship of employer to employe is founded in contract. Employment contracts, whether written or oral, are based upon the

employe performing certain labor or rendering certain services in exchange for an agreed consideration to be paid by the employer. The amount of consideration paid by the employer may be measured by the amount of work performed or by services performed during designated time intervals, that is, the employe may be employed on what is known as a piecework basis, a commission basis, or upon an hourly, daily, weekly, monthly, yearly or similar basis.

The words "injury", "harm", "loss" and "intimidation" are defined in Webster's New International Dictionary, Second Edition, as follows:

"Injury:

1. Damage or hurt done or suffered by a person or thing; detriment to, or violation of, person, character, feelings, rights, property, or interests, or the value of a thing.
2. An act which damages, harms, or hurts; as, an *injury* to the feelings; slander is an *injury* to the character; also, a hurt or damage sustained; as, they suffered severe *injuries*.
3. Abusive or offensive speech; an insult.
4. *Law:* An actionable wrong; that is, any violation of another's rights for which the law allows an action to recover damages or specific property or both."

"Harm:

1. Injury; hurt; damage; misfortune.
2. Grief; pain; sorrow.
3. Evil; wrong; wickedness."

"Loss:

1. State or fact of being lost or destroyed; ruin; destruction; perdition; as, the *loss* of a vessel at sea; the *loss* of a soul.
2. An Act or fact of losing (in various senses) or suffering deprivation; failure to keep a possession; esp., unintentional parting with something of value; as, the *loss* of property; a business *loss*; *loss* of health or reputation; also, the privation, defect, harm, etc., which ensues from such loss.
 - b. An instance of losing.
3. That which is lost; that of which anything is deprived or from which something is separated, usually unintentionally and to disadvantage; as, the firm's losses were heavy; specif., waste; as, *loss* of liquor by leakage.
4. An act or fact of failing to win, gain, obtain, or utilize, or the state resulting from such failure; as, the *loss* of a race or battle; the *loss* of a victory; *loss* of time or opportunity. b.

Decrease in amount, magnitude, or degree (without reference to its effect) ;—opposed to *gain*. * * *

“Intimidation:

Act of making timid or fearful or of deterring by threats; state of being intimidated; as, voters were kept from the polls by *intimidation.*”

From the foregoing definitions I am inclined to the position that the non-payment of compensation for the time taken by an employe to vote, in and of itself, would not constitute an “intimidation” or “harm.”

In determining whether or not such non-payment of wages constitutes an injury or loss as used in said Section 4785-195, it must be kept in mind that the payment of compensation, as pointed out above, is in consideration of the performance of work or services and it may be said that the value of the work or service are supposedly commensurate with the compensation received. With reference, therefore, to one employed on a piecework basis, a commission basis, or upon an hourly basis whose compensation is based upon the amount of work performed or actual time spent upon his employment, I must conclude, in the light of the above definitions that he would sustain neither injury nor loss by reason of such non-payment.

It is a general principle of law that where two or more people enter into a contract, existing statutory provisions which directly or indirectly relate to the subject matter of the contract become a part of that contract. With respect to employes who are employed on a daily, weekly, monthly, yearly or similar compensation basis any statute prohibiting the performance of the work for which the employe is hired or making it mandatory upon the employer to allow the employe to absent himself on certain days or for periods of time during the day, when such days or periods during the day fall within the period of time during which the employment contract is to run are not only within the contemplation of the parties at the time the contract of employment is entered into but are a part of such contract. It follows, therefore, that any withholding of compensation from that stipulated by the employment agreement by reason of absence of the employe from his employment pursuant to such statutory authorization would constitute an injury or loss to such employe.

Your inquiry does not indicate any additional facts from which it might be indicated that the failure of the employer to compensate the employe was done in order to induce or compel the employe to vote or

refrain from voting for or against any person or question or issue submitted to the voters. I wish to point out that while such failure or refusal to pay an employe who is employed on a daily, weekly, monthly, yearly or similar basis would constitute an injury or loss, within the meaning of those words as used in said Section 4785-195, such act or failure would not be in violation of said section unless done in order to induce or compel such person to vote or refrain from voting for or against some person or question or issue submitted to the voters at that election.

Whether the failure or refusal to pay an employe for the time during which the employe absents himself from his employment for the purpose of voting on election day again depends upon the meaning of the word "penalty" as used in Section 12950, General Code. In Black's Law Dictionary, Third Edition, among other comments on the word "penalty" will be found the following:

"The terms 'fine,' 'forfeiture,' and 'penalty' are often used loosely, and even confusedly; but, when a discrimination is made, the word 'penalty' is found to be generic in its character, including both fine and forfeiture. A 'fine' is a pecuniary penalty, and is commonly (perhaps always) to be collected by suit in some form. A 'forfeiture' is a penalty by which one loses his rights and interest in his property. *Gosselink v. Campbell*, 4 Iowa, 300; *Bankers' Trust Co. v. State*, 96 Conn. 361, 114 A. 104, 107; *State ex rel. Jones v. Howe Scale Co. of Illinois*, 182 Mo. App. 658, 166 S. W. 328, 330."

A "fine" is ordinarily understood to be a pecuniary penalty imposed as the result of a statute. I am of the opinion that the penalty contemplated by Section 12950, General Code, does not include a fine, but is limited to forfeitures. Since forfeitures may be proper elements of contract I am inclined to the position that the word "penalty" as used in said section of the General Code is limited to those which are in law considered to be forfeitures. Since forfeitures are in fact the loss or termination of the rights of one against whom they are imposed it would appear eminently clear that a withholding of or refusal to pay compensation to an employe would not fall within such term. In those cases where the employe is engaged on a piecework or an hourly basis, as pointed out above, the employe has no rights which may be enforced. In the other cases I fail to see where any rights of the employe have been lost or terminated by the mere failure or refusal to pay such compensation. The employe's rights under his employment contract in such instances remain unaltered, only his means of enforcing them have been affected.

With respect to your last question the foregoing reasoning with respect to the distinction between the various types of employment contracts is equally applicable and it is quite evident that employes working on a piecework, commission, or an hourly basis, being entitled only to compensation for work actually performed or for the amount of time actually spent in their employment, would not be subjected to a withholding or reduction of such compensation when they are not paid for the time during which they may be absent for any reason.

Section 12951, General Code, makes it unlawful for an employer of labor to threaten to withhold or to reduce the wages of an employe in order to induce or compel such employe to vote or refrain from voting for a particular candidate at an election. Unless the failure or refusal to pay the employe for the time spent by him in voting be in furtherance of a purpose on the part of the employer to induce or compel such employe to vote or refrain from voting for a particular candidate such failure or refusal would not constitute a violation of this particular provision of said section about which inquiry is made. Assuming, for the purpose of this discussion, that such failure or refusal is for such purpose, since both the words "withhold" and "reduces" appear in this statute it is an indication that they were meant to convey separate meanings. I am inclined to the position that the word "reduces" relates to an actual decrease in the rate of compensation which the employer will pay from that previously paid by him for similar work as distinguished from a refusal or failure to pay for the time the employe is absent. The latter situation would actually amount to a withholding of a portion of the compensation due the employe who is employed under an employment agreement other than on a piecework, commission, or hourly basis. While the statute designates the threatening to withhold such wages as an unlawful act certainly the accomplished fact of withholding such wages, without a threat so to do, if done for the purpose designated in the statute, would be equally unlawful and within the prohibition thereof.

In view of the foregoing, you are advised that it is my opinion that:

1. An employer's failure or refusal to pay an employe who is employed otherwise than on a piecework, commission or an hourly basis, for a reasonable amount of time during which such employe is absent from his employment for the purpose of voting on election day, constitutes an "injury" or "loss" as those words are used in Section 4785-195, General

Code, and if done in order to induce or compel such person to vote or refrain from voting for or against any person or question or issue submitted to the voters at that election would constitute a violation of said section of the General Code.

2. An employer's failure or refusal to pay an employe for a reasonable amount of time during which such employe is absent from his employment for the purpose of voting on election day does not "subject such person so employed to a penalty" as those words are used in Section 12950, General Code.

3. An employer's failure or refusal to pay an employe who is employed otherwise than on a piecework, commission, or an hourly basis, for a reasonable amount of time during which such employe is absent from his employment for the purpose of voting on election day, amounts to a withholding of wages of such employe and if done for the purpose of inducing or compelling such employe to vote or refrain from voting for a particular candidate at that election is violative of the provisions of Section 12951, General Code.

Respectfully,

HERBERT S. DUFFY,
Attorney General.