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# You've Got the Right to Go When You Gotta Go

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by Marc Linder

# STEWARDS' CORNER

## You've Got the Right To Go When You Gotta Go

Have you ever had to go to the bathroom and been told by your supervisor to wait until your break? That's illegal. Workers have a right to use the toilet "when they need to do so." That's the law according to the Occupational Safety and Health Administration (OSHA).

But it hasn't always been. Believe it or not, until 1998, OSHA claimed that its regulation requiring employers to provide toilets didn't mean that employers actually had to let workers use those toilets.

Then the combined impact of lobbying by the United Food and Commercial Workers and the publication of a book, *Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time*, embarrassed OSHA into issuing a memorandum explaining that employers must "make toilet facilities available so that employees can use them when they need to do so."

OSHA also prohibited employers from imposing "unreasonable restrictions on employee use of the facilities" that would cause "extended delays."

### THE MAIN CULPRITS

Which industries are the main culprits? Various kinds of assembly-line factories, but especially food processing and automobile plants. Call centers have also become notorious for denying workers access to the toilet, while bus drivers all over the world are subject to the problem. And surprisingly, such white-collar professionals as elementary school teachers and pharmacists in supermarkets like Wal-Mart

have faced some of the harshest restrictions.

So now that the government finally agrees that when you gotta go you gotta go, how can workers make use of this right? Some union contracts assign relief workers to enable assembly line workers to leave the line between formal breaks. Only a few collective bargaining agreements actually say how many minutes management is permitted to make you wait, though some plants have informal understandings.

Surprisingly, even some strong unions such as the UAW have conceded employers as much as 40 minutes to get a relief worker. That's way too long. Even though OSHA has not specified how long an "unreasonably long time" is, it's clear that 40 minutes just won't cut it. Whether the line is drawn at one second or 15 minutes depends on various factors.

According to OSHA, two of the most important ones are: (1) how unreasonably the delay interferes with the worker's right to void when he or she needs to; and (2) how "disruptive" a worker's absence would be to production. But this disruption factor should never be permitted to trump the worker's need to use the toilet—especially since OSHA's memorandum puts employers on notice that they may have to establish relief worker systems. Ultimately, workers and unions will have to resolve this question by constantly pushing employers and OSHA.

Often it may not be necessary to call in OSHA. Some unions have found that just threatening a company with

an OSHA inspection is enough to make management back off. Here it's crucial never to underestimate the leverage that workers can exert by giving employers a bad name. It's hard to imagine a management that cares so little about adverse publicity that it wouldn't mind media revelations about how it made its workers urinate or defecate in their pants.

Take the Jim Beam bourbon plant in Clermont, Kentucky. In 2001 Beam unilaterally issued a rule that any worker without a doctor's note who went to the bathroom more than four times a day six times in a year would be fired. UFCW Local 111-D filed a complaint with OSHA, which cited the company.

Even though there was no fine, Jim Beam appealed, but the UFCW succeeded in interesting media all over the world. And when Jay Leno joked about how the color of bourbon was similar to urine's, Jim Beam immediately dropped its appeal.

### USING OSHA

Even if you're a union member, if your union fails to deal with the problem—and remember that OSHA takes precedence over any contract—you can file a complaint with OSHA.

If you file a signed written complaint (on request your name will still be withheld from the employer), OSHA is supposed to conduct an on-site inspection within five working days. If you make a telephone complaint, OSHA will contact the employer by phone or fax within one day and give the employer five days to respond. If the employer's response is inadequate and you give OSHA a rebuttal, within five working days OSHA is supposed to conduct an on-site inspection.

If, as often happens, the union's on your side, but isn't able to force the employer to comply, the union can also file the complaint on your behalf.

Keep in mind that if you don't file a complaint, it's almost certain that OSHA will never uncover this kind of health and safety violation on its own. It's virtually unheard of for compli-

(continued on page 13)

## Steward's Corner

(continued from page 12)

ance officers to question workers about bathroom access during regular scheduled inspections.

What can and will OSHA do? It depends on how serious or widespread the violation is and also on how vigilant the individual OSHA inspector and the area director are.

If OSHA finds that the employer unreasonably restricted your access to the toilet, it can issue a citation and impose a monetary fine. So far the biggest penalty OSHA has handed out for restricting toilet access is \$36,000 plus a compulsory \$25,000 contribution to local government. The unionized Cargill-Excel hog slaughter plant in Ottumwa, Iowa had to pay those amounts after OSHA found that two women had defecated in their pants because their supervisor had made one wait an hour and 35 minutes and the other 35 minutes for relief.

And Excel's problems aren't over. One of the workers filed a tort suit against the company based on the claim that "Human beings have a fundamental right to defecate or urinate in a reasonably private and dignified way."

On the other hand, sometimes, even when it finds a violation, OSHA doesn't deem it serious and doesn't fine the employer. Though little deterrence can be expected from such a slap on the wrist, since repeat violations can result in significant fines, OSHA has sometimes been able to jaw-bone employers into reaching agreements with the union on bathroom-break arrangements that have even specified how many minutes before the company has to provide relief.

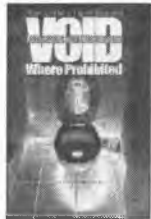
### PEE TO RULE

Finally, in a very important sense there was no need for OSHA to tell workers that they have a right to prevent employers from doing them harm by making them wait too long to eliminate waste, which may cause urinary tract infection (among other things).

Among the various innovative self-defense tactics union workers have used against overreaching employers is pee-to-rule: When management prohibited going to the bathroom outside of scheduled breaks, the whole plant agreed to descend on the bathrooms during a 10-15-minute break so that the long lines far exceeded the toilets' capacity. By the time the break was over, scores of workers were still waiting their turn and refused to go back to work until they had their chance. Management quickly got the point and rescinded the restrictions. □

[Marc Linder is a labor law professor at the University of Iowa.]

### Want To Read More on the Fight for Your Right To Go?



You're in luck. Labor Notes now has limited quantities of Marc Linder's two books on the subject for our readers at a greatly discounted rate.

For a mere \$10 (plus \$4 postage), you can receive copies of both *Void Where Prohibited: Rest Breaks and The Right To Urinate on Company Time* and *Void Where Prohibited Revisted*. To order, see page 15.

