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Dedicated in loving memory of HaRav Yosef Grossman zt"l

ABSENT WITHOUT LEAVE: DOES HALACHA MANDATE SICK PAY?

Adapted from the writings of Dayan Yitzhak Grossman

AP News reports:

> Pregnant New Yorkers will be entitled to at least 20 hours of paid leave to attend prenatal medical appointments under a law that took effect Wednesday.
>
> Gov. Kathy Hochul said the policy makes New York the first state in the country to offer paid leave for prenatal care.
>
> All pregnant workers in the private sector are eligible for the paid time off. Workers can schedule the paid leave for pregnancy-related medical appointments such as physical examinations, end of pregnancy care, and fertility treatments, among other things.
>
> Hochul pushed for the measure in the state's last legislative session as a way to help reduce maternal and infant deaths in New York.
>
> "No pregnant woman in New York should be forced to choose between a paycheck and a check-up—and that's why I pushed to create the nation's first paid prenatal leave policy," Hochul said in a statement last month.
>
> Employers are forbidden from requesting medical information when a worker requests the prenatal paid leave. The policy is separate from any other paid sick leave offered by an employer. Spouses of pregnant women are not eligible for the prenatal leave.[1]

The United States, as a less socialist country than many other developed ones, does not mandate paid sick leave at the federal level, although some states (including a number of liberal coastal ones like New York, New Jersey, Maryland, and California) and localities do mandate such leave in certain contexts.[2]

In this article, we consider the halacha governing sick leave.

The Gemara cites a *breisa*:

> If one hires a worker, and at midday he heard that his relative died, or a fever seized him: If he was a worker hired by the day, the employer gives him his wages (prorated for the hours he worked, and he is not penalized for his abrupt departure). If he was a contractor (hired by the job), the employer gives him his fee (prorated for the fraction of the job he performed).[3]

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1 AP News. https://apnews.com/article/pregnancy-paid-leave-new-york-722af41d72a2a852619214935 00ba944.

2 Wikipedia contributors. Sick leave in the United States. In Wikipedia, The Free Encyclopedia. https://en.wikipedia.org/w/index.php?title=Sick_leave_in_the_United_States&oldid=1258476347.

3 Bava Metzia 77a-b.

The Bais Hava'ad on the Parsha
Bring the Parsha to Life!

PARSHAS SHMOS

JUNK FOOD

Excerpted and adapted from a *shiur* by Dayan Yosef Greenwald

Shall I go and summon for you a wet nurse from the Hebrew women, who will nurse the boy for you?

Shmos 2:7

This teaches that she had taken him around to many Egyptian women to nurse and he had not nursed, because he was destined to speak with the Shechinah.

Rashi ibid.

Why is a child subject to food prohibitions? The Gemara says in Yevamos that forbidden foods are *metamteim es haleiv* (create a spiritual blockage in the heart). This applies even to children; though not yet subject to the prohibition, they still suffer the effects. What in a non-Jewish woman's milk causes *timtum haleiv*? Some say that the milk is kosher, but because it transmits nutrients from the nonkosher food the mother ate, it causes spiritual impediment. Others explain that milk transmits to the child the essence of the woman who produced it, so if it comes from an impure source, it will impact the baby negatively.

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Q&A from the BAIS HAVAAD HALACHA HOTLINE
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Book Keeping

Q I have a bookstore in my basement. May I read the books on Shabbos?

A One of the categories of *muktzeh* is *muktzeh machamas chisaron kis,* which covers items that one is particular about so he avoids using them regularly. Such items may not be moved on Shabbos for any purpose (Shulchan Aruch O.C. 308:1).

An example offered by the Rama (ibid.) is merchandise for sale, because the vendor is particular to preserve it in perfect condition. But the Mishnah Brurah (ibid. 6) clarifies that if the seller doesn't mind using the merchandise himself, it isn't *muktzeh*.

The Chazon Ish (Hil. Shabbos 42:16) explains that the sort of item that buyers tend to insist appear pristine is classified

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The Gemara explains that although according to the normative opinion of R' Dosa, a worker may generally renege on a commitment to work without penalty even in the absence of duress (*oness*), the *breisa* is discussing a case where the employer will suffer financial loss if the work is not completed (*davar ha'aveid*). In this case, a reneging worker will, in certain circumstances, forfeit some of his pay. But the *breisa* teaches that if the worker reneged due to *oness*, he is not penalized.

Based on the Gemara's discussion of this *breisa*, many *Rishonim* conclude that even if a worker quits due to *oness*, he is only paid for work he has actually performed, but never for the work he did not do. (If he quits without *oness*, in some cases he forfeits some pay for work he has done, as above.) [4]

Elsewhere, however, the Gemara indicates that one who couldn't work due to illness is entitled to his entire agreed-upon compensation:

> For it was taught in a *breisa:* From where is it derived that a runaway *eved Ivri* (Hebrew servant) is obligated to make up the time he missed? The *pasuk* says: "He shall serve six years." I might have thought this is so even if he took ill, so the *pasuk* says: "And in the seventh he shall depart" (i.e., he departs then even if he was ill during his term)...
>
> Does the *breisa* mean even if he was sick for all six years? But it was taught in a *breisa:* If he was sick for three and worked for three, he is not obligated to make up the time. If he was sick all six, he is obligated to make up the time.
>
> Rav Sheishess said: The first *breisa* is speaking of one who did sewing (i.e., he did light work for his master while he was ill, so he need not make up the time, even if he was sick all six years.)[5]

The *poskim* offer several different resolutions to this apparent contradiction, with important ramifications for the typical case of an employee who takes sick leave.

EVED IVRI *VS. EMPLOYEE*

Tosfos proposes two distinctions between the two Gemaros, the first of which is a fundamental difference between an *eved Ivri* and an employee:

> Teachers of children (i.e., employees) cannot be compared at all to an *eved Ivri*. For an *eved Ivri's* body is owned (*gufo kanui*) by his master;[6] therefore, if he was sick for three years, he is not obligated to complete his term, for he cannot work beyond his ability. But a teacher's body is not owned; rather, he hired himself out to study until a certain time. If he is unable to complete it, he is only entitled to that which he has earned.[7]

AN EVED IVRI *WHO WORKED THREE YEARS VS. ONE WHO DIDN'T*

Tosfos's second distinction is that an *eved Ivri* who worked three years before becoming sick is a special case. A *nevuah* of Yeshayah says that "the term of a hired hand" is three years,[8] and the Torah itself says of an *eved Ivri* who completes six years, "for twice the wage of a hired hand—six years—has he served you."[9] Therefore, an *eved Ivri* who works that long before taking ill is entitled to full compensation.

A simple reading of Tosfos might suggest that according to this approach, an employee, too, could collect his full pay if he became sick after three years of work. But the Maharit (R' Yosef of Trani) understands Tosfos to mean that this dispensation applies only to an *eved Ivri*.[10]

PAID IN ADVANCE VS. NOT PAID IN ADVANCE

The Maharam MeiRutenberg (R' Meir ben Baruch) apparently initially ruled that an employee is comparable to an *eved Ivri* and must be paid in full if he becomes sick.[11] But he subsequently changed his mind and distinguished between someone who was paid in advance (like an *eved Ivri*, who is paid up front for his entire term)—who retains that pay even if he gets sick and cannot work—and one who wasn't, who may only demand payment for the work he performed.[12]

AN EMPLOYEE WHO RETURNED TO WORK VS. ONE WHO DIDN'T

The Rosh (R' Asher ben Yechiel) rules that neither an employee nor an *eved Ivri* is entitled to compensation for work he didn't do. But if the employee or *eved Ivri* returned to work when he recovered, and the boss allowed him back without saying he would dock pay for the missed work, he is presumed to have implicitly forgiven the lapse.[13]

THE HALACHA

The consensus of the *poskim* is that a worker is generally not entitled to compensation for work he missed due to illness, but they disagree about which, if any, of the above distinctions the halacha endorses:

- The Rama (R' Moshe Isserles) accepts the Rosh's position that an employer who takes his employee back must pay in full, and he also cites (as "some say") the Maharam's rule that a worker who was paid in advance may retain his full compensation after an illness.[14]
- The Radvaz (R' Dovid ibn Zimra)[15] and the Shach (the Sifsei Kohein, R' Shabsi ben Meir Hakohein)[16] endorse Tosfos's fundamental distinction between an *eved Ivri* and an employee and reject the Rama's distinctions.
- The Taz (the Turei Zahav, R' Dovid Halevi) rejects the position of the Rosh and Rama about an employer who takes a recovered employee back, but he endorses the Maharam and rules that whoever is in possession of the money (*muchzak*) may retain it: If the employer hasn't yet paid, he doesn't have to; if he has, the worker needn't give it back.[17]

It follows from the above that an employee is generally not entitled to paid sick leave, absent a contractual stipulation to the contrary. But halacha may take into account legal and social norms in this area, due to principles including *dina demalchusa dina* (the law of the government is the law, i.e., recognized by halacha as binding) and minhag (prevailing custom). For discussion of these considerations in the context of a different area of employer-employee relations, see our discussions of severance pay cited in the footnotes.[18]

4 See Tosfos Kidushin 17a s.v. *Chalah shalosh*.
5 Kidushin 16b-17a.
6 See Kidushin 16a.
7 Tosfos ibid. (first approach).
8 Yeshayah 16:14.
9 Dvarim 15:18.
10 Chidushei Maharit ibid., and cf. Ketzos Hachoshen *siman* 333 s.k. 9.
11 Shu"t Maharam ben Baruch (Prague edition) *siman* 85; Mordechai Bava Metzia 346. This opinion is cited by Tosfos ibid. as well (as "*yeish shehayu rotzim lomar*"), and cf. Chidushei Maharit ibid.
12 Teshuvos Maimoniyos *Kinyan siman* 31 s.v. *Shuv chazar bo mori;* Piskei HaRosh Bava Metzia *perek* 6 *siman* 6. Cf. Darchei Moshe C.M. *siman* 333 os 4.
13 Piskei HaRosh ibid. See Taz ibid. *se'if* 5 for various objections to this approach, including the arguments that the concept of *mechilah* is not applicable in our scenario and that the interpretation of the employer's silence as *mechilah* is uncompelling.
Ketzos Hachoshen ibid. rules that this distinction and the previous one apply only to a worker who was sick for up to half the term of his employment, but one who was sick for most of his term is never entitled to compensation for work he did not perform. This is also the position of Sefer Kis'os Levais Dovid *cheilek* 1 end of *siman* 86 (who surprisingly does not mention that this point is already found in the Ketzos).
14 Shulchan Aruch ibid. *se'if* 5. Taz ibid. argues that these two rulings of the Rama are inconsistent.
15 Shu"t Radvaz (*cheilek* 1) *siman* 207 (facsimile edition). The Radvaz's *teshuvah* is a rejection of the distinction between an employee who was paid in advance and one who wasn't. He does not discuss the distinction between an employee who returns to work after his recovery and one who does not, but he would likely reject that distinction as well, because the entire basis for all the distinctions put forth by the *Rishonim* is the apparent contradiction between the two cited Gemara passages, and once the fundamental distinction between an *eved Ivri*, who is *gufo kanui*, and an employee, who is not, is accepted, there is neither need nor basis for any other distinctions.
16 Shach ibid. *s.k.* 25. For further discussion of this distinction between *eved Ivri* and employees in other contexts, see Shach ibid. *s.k.* 47; Nesivos Hamishpat Biurim ibid. end of *s.k.* 6.
17 The Taz is not absolutely explicit about the latter point, but he strongly implies it.
18 Is There a Concept of Severance Pay in Halacha?; Is There an Obligation to Go *Lifnim Mishuras Hadin*?; Is There Any Minhag *Hamakom* in the U.S. Regarding Severance? Yoruchu: Dissolution and Severance, Part 4.

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as *muktzeh machamas chisaron kis*. Books meet this criterion.


RAV ARYEH FINKEL

R' Nissim Karelitz (Chut Shani, Shabbos Vol. 3 43:1) writes that books on display in a bookstore for customers to browse are not *muktzeh*, as the owner clearly accepts that the books will be used, albeit minimally. But books stored away and not displayed are *muktzeh*.

Some authorities hold that sfarim for sale are not *muktzeh*, because they are intended for Torah use (Piskei Teshuvos ibid. fn. 33, citing Chayei Adam).

Q What if I decide on Shabbos to keep a particular book for personal use?

A The Chazon Ish (ibid.) rules stringently, applying the principle of *iskatzai lekula* Shabbos (a *muktzeh* item remains forbidden for the entire Shabbos even if the reason for its *muktzeh* status is eliminated during Shabbos). But R' Shlomo Zalman Auerbach (Shmiras Shabbos Kehilchasah 20 fn. 83) argues that the principle does not apply in this context. A book that becomes damaged on Shabbos and is rendered unsalable would be subject to the same dispute.

Q What if I designate a book before Shabbos to be used on Shabbos?

A Some argue that an item does not lose its *muktzeh* status unless it is permanently designated for a different use. Others contend that it is sufficient to designate it before Shabbos for Shabbos use exclusively (O.C. 308:22). The Mishnah Brurah (ibid. 97) rules that one may be lenient in cases of necessity.

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The *Rishonim* point out that the food you consume becomes part of your body, so the capacity of your body to be a receptacle for *dvarim shebikdushah* can be damaged with forbidden food more than with any other kind of violation.

It is interesting to note that *ma'achalos asuros* differs from some other *aveiros*. In the case of Shabbos, when a *pikuach nefesh* situation requires that Shabbos be violated, there is no negative impact. By contrast, some say that one who eats *ma'achalos asuros* because he is required to do so for *pikuach nefesh* still incurs the effects of *timtum haleiv*.