

“Unlimited” Time Off Policies – Fad or Fun?

Article By:

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Over the past several years the concept of “unlimited” vacation policies have sprung up around the philosophy that it allows companies to treat its employees with respect and empower them to make their own decisions regarding when to work and when to play. Being at the center of innovation, many **Silicon Valley** companies have been early adopters, including *Netflix*, *Evernote* and *Quirky*. We are now seeing more traditional companies also jump on the bandwagon and follow the lead of Silicon Valley and offer unlimited paid vacation. While there are many articles arguing the pros and cons of such policies and who they really benefit, what are the legal implications in deciding whether a “flexible” time off policy is the right choice for your company?

The Starting Point: California does not require employers to offer *any* paid vacation leave. Additionally, with the exception of certain cities, such as San Francisco, there is also currently no obligation to offer any paid sick leave. Rather, the law comes into play in determining how an employer must administer and pay for vacation once it adopts such a policy.

The Law: Employers in California who offer vacation leave must broadly do three things: (1) accrue vacation without a “use it or lose it” policy (with the caveat that employers may implement a reasonable cap on accrual); (2) reasonably allow employees to take accrued vacation; and (3) pay out any accrued but unused vacation upon termination of employment.

“Unlimited” Vacation: To avoid navigating such rules, some employers instead choose to offer no limit, or flexible vacation plans. The “sell” is that employees are not restricted in the number of days off they may take each year, thereby providing them with more flexibility. While such policies are permissible under California law, there are many related questions that should be addressed before joining those companies who have made this switch.

Which Employees?: Traditionally “no limit” vacation policies (which I prefer to refer to as Flexible Time Off policies so as to avoid any suggestion that employees can take off whenever they want for however long they want) have been applied to executives or other senior personnel whom by the very nature of their work, are unlikely to abuse such policies. These senior employees already manage their own time and frequently work significantly more than 40 hours per week. However, applying the same philosophy to other employees can be more difficult. To protect against potential abuse, safeguards can be included in the policy, such as the need for advance notice, manager approval, limiting the number of consecutive days off, and/or limiting time off during certain busy

periods. A Flexible Time Off policy does not mean that employees simply get to choose when or for how long they will be absent. The flip-side of this is to ensure that employees are actually taking time off. If the intent of a Flexible Time Off policy is to encourage taking time off, morale could be badly affected if employees are not provided with leadership and guidance regarding actually using it.

Added Complications – Paid Sick Leave: Companies that have implemented a Flexible Time Off policy usually use such policy to cover all manner of absences, including vacation and sick leave. Usually, such policies offer more generous paid time off than any legal requirement and so this approach has historically worked just fine. However, on July 1, 2015, with limited exceptions, employers will be required to accrue paid sick leave for their employees. While the amount of paid sick leave taken each year may be limited to three days (presumably significantly less than the number of days that would be permitted under a Flexible Time Off policy), this new law makes it important to track the reason for time off to ensure that employees are actually provided such paid sick leave. For example, if an employee working under a Flexible Time Off policy takes three days off in January due to sickness, and then vacations periodically throughout the year, if that employee also requests paid sick leave in December of the same year, does your company have a means to determine whether that employee remains entitled to time off under California's new paid sick leave law? While the answer by many employers is that they would provide the three days and not worry about it, the response may be different for a poor performing employee who is seen as having already taken a lot of time off. The new sick leave law also has specific recordkeeping and notification requirements that will at a minimum require administration which is otherwise unnecessary under a Flexible Time Off policy.

Further Challenges: Employers contemplating a Flexible Time Off policy should also carefully consider overlapping leave rights, such as rights under the Family Medical Leave Act, Pregnancy Disability Leave, Organ Donor Leave, Bone Marrow Donor Leave, Jury Duty, Witness Duty And Crime Victim's Leave, Military Leave, Bereavement Leave, Workers' Compensation Disability Leave, Voting Time Off, Time Off for Emergency Civil Service, Time Off for Adult Literacy Programs, Domestic Violence, Sexual Assault or Stalking Leave, leave pursuant to the Family/School Partnership Act and the California Family Rights Act. While these leaves are generally unpaid, issues arise such as if you are prepared to allow an employee to take two weeks off to go skiing, should an employee serving their civic duty also be paid? Is there also a potential for a claim for discrimination if an employee on some form of disability leave, for example, does not receive pay whereas an employee taking time to rest and recuperate in Hawaii does?

Conclusion – The Takeaway: Employers have successfully driven culture through adopting Flexible Time Off policies, the issue is to apply them to the appropriate jobs within your organization and draft them using precise language to avoid unintended consequences. As with most employment laws, the key is to know how to navigate them by crafting and properly implementing appropriate policies.

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