



# **Are Unlimited Vacation Policies Right For All Employers?**

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According to a survey report by the Society for Human Resource Management, it is estimated that about 3 percent of companies in the U.S. maintain unlimited vacation policies. These companies are often in the technology industry, startups, and companies that mostly employ salaried, exempt workers. The ideals behind adopting such a policy are easy to see, offering worklife balance and flexibility to employees, empowering employees with the trust and responsibility of balancing their time off, and relieving the company of having to track and administer a vacation and/or paid time off policy. While the unlimited vacation policy trend is growing, there are various considerations an employer must take into account before diving in.

## **Appropriate Culture and Workforce**

Unlimited vacation policies are better suited for companies that already provide employees with flexible hours and autonomy. If your client's organization has a large number of nonexempt employees, then an unlimited vacation policy may not be a good fit. Nonexempt employees typically have responsibilities that require a more structured schedule that requires tracking hours worked. Further, nonexempt employees do not receive pay during vacation without some form of paid leave benefit. However, an unlimited vacation policy can still be applied to a small group of employees, such as the executives in the company. Ultimately, employees who do well with unlimited vacation are those who understand that they are still responsible for bottom line performance.

## **Pay Attention to State Law**

Federal law does not require employers to provide paid or unpaid vacation. However, some state laws require paid sick leave, vacation time or payout of any unused vacation upon termination. In states such as Texas, any written promises (e.g., employee handbook) will dictate the compensation of vacation or PTO time. Accordingly, it is very important for employers to develop a clear written policy regarding paid leave and follow it exactly. Past practices can also become enforceable in court if it differs from the policy.

Some states forbid use it or lose it policies and require employers to pay out unused or accrued vacation time. For example, in Louisiana and California, if an employer provides paid vacation, such paid vacation time is generally considered "earned" compensation. After the vacation time is earned, it cannot be taken away, and employers must compensate employees for any unused vacation time.

States that mandate payout of accrued vacation time, such as California, may consider an unlimited vacation policy as an attempt to circumvent mandatory payouts. Since employees are not limited to a

vacation policy as an attempt to circumvent mandatory payouts. Since employees are not limited to a certain amount of accrued vacation time, there is arguably no obligation for a payout if it is unused, but courts may conceivably deem some amount of the vacation as earned. However, there is currently little case law and guidance regarding the relationship between vacation payout laws and unlimited vacation policies. A prudent employer will confirm in writing that no vacation is accrued, and therefore there is no unused vacation to be paid out upon termination.

### **FMLA, ADA, USERRA and Other Forms of Leave**

In addition to vacation and PTO, most employers are subject to various leave laws, including, the Family and Medical Leave Act, military leave under the Uniformed Services Employment and Reemployment Rights Act, maternity/paternity leave and other laws. While the Americans with Disabilities Act is not necessarily a law that mandates protected leave, leave may be a form of reasonable accommodation and should be taken into account as well. It is critical for an employer and its counsel to consider the company's current leave policies and how they will be impacted by the implementation of an unlimited vacation policy. An employer takes into account how it will deal with extended leaves of absence, how long the employee will be entitled to paid leave benefits and when other forms of wage replacement benefits might kick in (e.g., as disability benefits).

### **Be Fair and Consistent in the Administration of Unlimited Vacation Policy**

Although unlimited vacation policies may seem simple to administer, challenges may arise during its actual implementation. For example, if an employee wants to take a two week vacation and must obtain his supervisor's approval first, employers must take care to be fair and consistent in their administration of the policy. If perceived favoritism or unfairness occurs, this may create a risk of discrimination claims. It is important that policies and procedures are followed consistently, and approvals must be fair and reasonably provided to minimize these types of risks.

### **Transitioning to an Unlimited Vacation Policy**

If an employer decides to make the transition from a traditional vacation policy to an unlimited vacation policy, with the help of legal counsel, the employer will need to decide how it will treat the vacation days employees have already earned. Employers may decide to pay out the unused days, allow employees an amount of time to use up their remaining vacation days, keep a separate record of the unused vacation days earned under the traditional vacation policy to be paid out upon termination or other options. Regardless of which option an employer takes, reasonable notice should be given to employees.

Certain parameters should also be considered to minimize risk of abuse. For example, if an employee wants to take a particular number of consecutive days off, the employer may require approval from their manager and/or human resources department. Legal counsel may also advise that an employer consider limitations on certain time periods that are particularly busy. Further, some sort of advance notice requirement should be in place so employers know when their employees will be off and are able to ensure that employees are not all taking vacation at the same time.

Managers also should be trained on how to administer the unlimited vacation policy. As discussed above, managers should be trained on fairly and consistently approving vacation in order to reduce the risk of perceived favoritism or unfairness. Further, managers may be tasked to pay attention to how an unlimited vacation policy is affecting morale, whether employees are actually taking any vacation and if employees might be getting burned out because they feel that taking time off is actually discouraged under such a policy.

## **Conclusion**

Unlimited vacation policies are becoming increasingly prevalent and worth considering. However, as described in this article, legal counsel will note that there should certainly be rules that apply to an unlimited vacation policy. They may even wish to advise that employers consider an alternative name, such as a discretionary vacation policy. Ultimately, employers should evaluate whether such a program is appropriate for their workforce by taking into account benefits, potential drawbacks and legal risks associated with an unlimited vacation policy.

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