Is Unlimited PTO the Answer to Employers' Great Resignation Concerns? Practical Tips to Unveil a Policy at Your Workplace

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A relatively new trend may be key in your employee retention strategy: offering unlimited paid time off to your workforce. Some employers may be nervous about not placing any cap at all on the amount of time your workers can take off work, but a new flexible approach to workforce management may be just your ticket to separate your organization from your competitors. What are the pros and cons to this strategy – and what legal issues do you need to consider before unveiling an unlimited PTO policy of your own?

Why You Might Need a New Approach

The COVID-19 pandemic has left an indelible impact on the American workforce. After tackling the once daunting ordeal of instituting a primarily remote labor force, many employers realized that the modern approach boosted employee productivity – devoid of management's gaze. Yet, as the dust settled and companies began to relax, believing the worst was behind them, the pandemic, true to form, brought on another set of employment hurdles – the Great Resignation.

Ian Cook, writer of Harvard Business Review's article titled "Who is Driving the Great Resignation," explains that the "tidal wave" of employee resignations has left significant difficulties for employers to attract and retain top talent. According to a survey conducted by Pew Research Center, nearly 45% of Americans who quit their jobs cite "a lack of flexibility" and subpar benefits and health insurance as the primary catalyst driving their resignations. Now, more than ever, employers are left with the task of revamping their compensation and benefits policies to incentivize their top performers to stay.

What is Unlimited PTO?

If the pandemic has taught us anything, it's that employees are now pushing the limits to what they deem an archaic employment structure. The solution to the Great Resignation may be similar in effect to remote work – providing employees flexibility and autonomy through Unlimited Paid Time Off (PTO).

Traditionally, an employee's time off has been separated into vacation and sick days, designated when the time is taken off work. In these scenarios, an employee may only take the number of

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vacation days allotted to that individual. Unlike paid sick leave, unused vacation at termination is paid out to the employee.

Unlimited PTO policies go one step further: they place no cap on the amount of time an employee can take off work. Again, the name itself may be daunting to some employers, but an unlimited PTO policy benefits employees and employers alike. Under an unlimited PTO policy, employees receive their sought-after flexibility, and employers are alleviated by the burden of tracking employees' time off.

But as beneficial as unlimited PTO appears, employers must equally assess the benefits and potential liabilities the policy may pose before rolling one out.

Potential Benefits to Unlimited PTO Policies

On its face, unlimited PTO is a win for both employees and employers. An unlimited PTO policy is a valuable recruiting tool as it promotes autonomy over the employee's own work/life balance. With more flexibility comes a greater responsibility for time management. Flexible policies around vacation can foster trust, avoid burnout, and focus on meeting objectives in a results-oriented environment rather than worrying about counting accrued vacation hours.

Along with the benefits of a potentially happier and healthier workforce, unlimited PTO also has employer benefits. Unlimited PTO is seen as a cost-saving technique. If an employee does not accrue vacation, then there is no need to pay out unused vacation days at the end of the employment relationship. However, in order for PTO not to accrue the unlimited PTO policy must truly be unlimited.

Potential Pitfalls to Unlimited PTO Policies

So, is unlimited PTO too good to be true? Since Unlimited PTO is a newer policy, case law and literature are scarce surrounding this topic. But there are some key issues to consider. First and foremost, it's critical for employers to consult with a labor and employment attorney to ensure that an unlimited PTO policy is implemented correctly. Your next consideration: do you have operations in California?

California-Specific Concerns

Employers with California employees should be cautious to ensure that they have a truly unlimited PTO policy to prevent setting off California Labor Code Section 227.3. Although an employer is not mandated to provide vacation pay, the Section does provide that certain restrictions are placed on employers if they have an established policy to provide paid vacation.

California allows vacation accrual, caps on the maximum amount, and bans "use it or lose it" policies. Under California law, earned vacation time is considered wages, and vacation time is

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earned, or vests, as labor is performed. Because vacation pay is regarded as the same as all other forms of compensation at termination, accrued vacation pay must be paid to the employee upon termination.

Recently, the holding in *McPherson v. EF Intercultural, Inc.* provided more insight into how §227.3 fairs with unlimited PTO. The California appellate court held that it's possible for vacation time to vest despite an employer's efforts to establish an Unlimited PTO policy. The impact of the case is significant because California employers must pay unused vacation time when someone's employment ends, and a failure to pay can lead to severe costs and penalties. However, the court made it very clear that *it's possible to set up an unlimited paid vacation policy to avoid that consequence*, as long as you properly communicate the policy and the vacation time is truly "unlimited."

Concerns for All Employers

But the concerns aren't limited to employers with California operations. Additional problems related to unlimited PTO policies that apply across the board include, but are not limited to: inconsistent enforcement, employees taking less time off, and the creation of animosity among employees who are paying attention to which of their colleagues are taking time off and those who are not. For example, unequal administration and approval of PTO may lead to potential discrimination claims.

Employers must also remain cautious when combining sick and vacation days into one unlimited PTO policy. An increasing number of states and municipalities require employers to provide a certain amount of paid sick leave. This regulatory framework presents several issues. For instance, what if an employee is denied leave that was meant to be requested as a sick day under the law? Such a scenario may expose an employer to potential risks for retaliation claims.

Other considerations include: Does management in your workplace require "face time" around the office – or at least favor those who show up more often than others? How are teams affected or treated differently? Is there a policy to determine whether the employee is using excessive leave or abusing the system? Will you compensate an employee for unused time? Will other paid sick leave be considered separately? How will your company avoid subjective approval or discriminatory application of the policy? Are your wage statements compliant with the current sick leave policy and any state or local laws?

Conclusion

As vacation and time away from work are known to boost concentration, creativity, and morale, unlimited PTO may be the unsung hero to combat the Great Resignation for employers. While there is uncertainty surrounding the new trend, it is clear that it may greatly benefit the employees and your culture — but a carelessly crafted policy will also expose employers to substantial risks.

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Therefore, it is essential to effectuate a clear written policy that considers the interplay of state and local leave laws and mitigates your risk while providing a benefit to your workers. If you have questions about developing such a policy at your workplace, contact your Fisher Phillips attorney or the authors of this Insight. We will monitor developments related to workplace law and provide updates as necessary, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information directly to your inbox.

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