

Ask the Attorney: Unused vacation, FMLA and harassment training compliance

In this month's Q&A, our expert attorney, Nancy Delogu of Littler Mendelson, the nation's largest employment law firm, tackles FMLA, unused vacation payout and harassment training compliance.

Upon separation, must we pay employees for their unused vacation time?

Q: "Is an employer required to pay an employee who leaves employment of their own free will the vacation time they have accrued during the year prior to their leaving?" - M., Oklahoma

A: This will depend on the state in which the individual lives, and if state law does not expressly address whether unused accrued vacation is payable at termination, then the question is whether it is due and owing will often turn on any contract or promise you may have made the employee. Increasingly, it seems, states treat a promise of paid time off as accrued wages which are due no later than after termination of employment, so it is important to know what your local law is, regardless of what your policy may say.

In Oklahoma, "wages" includes holiday and vacation pay, and any similar advantages agreed upon between the employer and the employee, which are "earned and due," or provided by the employer to his employees in an "established policy." Accrued vacation pay is only "earned and due." However, if the employer and employee have agreed upon payment at termination pursuant to express language in a written employment contract or policy manual which provides for the payment of cash in lieu of time-off, or pursuant to an "established policy" based upon a promise by the employer, either express or implied, and supported by a prior course of conduct by the employer—in other words, where payment of cash in lieu of time-off was actually made to previous employees.

Can we dictate that an employee use FMLA leave in increments?

Q: "An exempt employee expected to work a regular eight-hour workday provided medical documentation that supported a request for a six-hour day to reduce workload. Is it possible to request that the employee take the leave in half day increments?" - Rachel, District of Columbia

A: Maybe, but I suspect you will not be able to insist upon it. First, if the employee is entitled to Family and Medical Leave (or D.C. FMLA) then the employee cannot be required to take leave in increments larger than the smallest increment by which you track other types of leave, and one hour is the largest such increment permitted by law.

The U.S. Department of Labor has published this useful Fact Sheet to help you calculate increments of leave, especially if your policies vary. If neither federal or local FMLA leave laws apply here, then Americans with Disabilities Act and/or the D.C. Human Rights Act may perhaps require you to grant a reasonable amount of leave and/or reduced work schedule as a reasonable accommodation, but reducing the workload by twice what the employee needs might not be considered "reasonable."

I am unsure why you would like the employee to take leave in half-day increments, but be aware that if the leave is not FMLA leave and/or is not covered by a paid sick leave policy that allows an exception, you must pay salaried exempt workers their entire wage for any day in which they perform some work or risk losing status as salaried exempt under the Department of Labor's "salary pay" requirement for exempt workers.

How do we bring our harassment training into compliance in New York?

Q: "My consulting firm presents sexual harassment prevention training for our clients. The training has been designed to meet the guidelines of New York State and City. I have tried, to no avail, to locate a government agency that will review the program and verify/approve that it is in compliance." - Kenneth, New York

A: I am unaware of any agency or organization that will verify your training program is compliant in New York. In general, federal and state human rights agencies do not provide approve or certify harassment prevention programs, although they provide guidance on best practices.

The State of New York has placed all of the requirements for compliant training online in an easy to use website, which you can access at [New York State Model Sexual Harassment Policy](#). This site includes a model policy, training videos subtitled in multiple languages, and an overview webinar describing the state's training requirements.