

# Ask these questions when considering unlimited PTO

In many ways, so-called unlimited paid-time-off policies capture the zeitgeist of progressive HR management. Unlimited PTO increases employees' flexibility and helps instill a sense of accountability. It can improve recruitment and retention and decrease administrative burdens.

The benefits of unlimited PTO policies are obvious. But many of the legal risks they create are not.

If your organization is considering implementing an unlimited PTO policy, there are several questions you need to ask.

## **Is truly unlimited leave a truly good idea?**

Most unlimited PTO policies let exempt employees take an unlimited amount of time off work provided they continue to fulfill all their duties and responsibilities.

Don't take the word "unlimited" lightly. You should think carefully about whether to place a maximum annual cap on PTO. For example, even if a manager is fulfilling her regular duties, do you want her to be out of the office for, say, 50 work days per year? Would that harm the workplace culture or stunt collaboration and employee development?

The kind of leave employees take matters. For example, if an employee takes a six-month military leave of absence, will he receive pay during that entire period? Such absences must be handled consistently and in a non-discriminatory way. An employee on military leave should not be treated less favorably than an employee who takes an equally long absence for some other reason. Otherwise, that would violate federal and state military leave laws.

To reduce those kinds of risks, some employers place maximum caps on certain types of leave. Of course, that undercuts the concept and many of the benefits of truly unlimited PTO.

### **Snapshot: Americans miss millions of vacation days every year**

**Chances are, your employees left lots of vacation leave on the table last year. Here's how much vacation we skip and forfeit annually.**

**Total unused vacation days: 705 million**

**Total forfeited vacation days: 212 million**

**Source: Project Time Off State of American Vacation Report, January 2019**

## What about family and medical leave?

Leaves for family or medical reasons pose their own set of risks, particularly for employers covered by the federal FMLA or local paid sick leave laws.

For instance, you may chafe at providing PTO to an employee who takes 12 weeks of FMLA leave for his own serious health condition, followed by an additional two weeks of time off work as an ADA accommodation. But if you limit the amount of PTO that can be used during this lengthy medical leave period, you risk a claim that you are treating a disabled or FMLA-eligible employee differently than someone taking another type of leave.

Separate and apart from potential discrimination claims, employers must ensure they track statutorily required leaves of absence. For example, if an employee believes she can use unlimited PTO for an otherwise FMLA-qualifying reason, she may feel she is compelled to initiate or cooperate with the formal FMLA approval process. This could undermine the employer's FMLA compliance efforts.

Taken a step further, an employer risks an FMLA claim if the employee is disciplined for taking an excessive amount of PTO when some of the leave could have—and should have—been designated as FMLA-protected leave.

The same is true under state and local laws requiring employers to provide paid sick leave. Those laws typically require employers to track accrued, used and available paid sick leave, and to maintain paid sick leave records for a certain period of time.

The way in which unlimited PTO coordinates with disability benefits may pose problems. Employees with medical issues may be incentivized to not qualify for short- or long-term disability or workers' compensation benefits in order to remain eligible for unlimited PTO. Employers may have to "top up" partial benefits to ensure the employee receives full pay in accordance with an unlimited PTO policy.

## How do state wage laws apply?

Transitioning from an accrued leave policy to unlimited PTO can pose risk under various states' wage payment and collection laws. This is a risk any time employees expect to be paid out upon separation for any unused PTO they have saved.

## If you decide to take the unlimited PTO plunge ...

If, after considering the issues outlined above, you decide to implement an unlimited PTO policy, keep in mind the following to reduce risk:

- Consider narrowly tailoring the scope of an "unlimited" policy. Maintain separate policies for leave related to family and/or medical reasons. Think about implementing an unlimited vacation policy rather than an unlimited paid-time-off policy.
- Include disclaimers in your policy. Make clear you expect employees to self-manage their leave, balancing it against their responsibility to accomplish their work. Retain discretion to discontinue or modify the unlimited PTO policy at any time. Require employees to use the typical procedure for requesting and taking time off. Note that employees do not "accrue" unlimited PTO and thus it will not be paid out upon termination of employment.
- Track the amount of leave employees are taking, and, if possible, the reasons why they are taking it.