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Building an Effective Paid Time Off & Sick Leave Program: What You Need to Know

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The Paid Time Off and Leave Challenge


- Paid time off programs primarily seek
 - Talent acquisition and retention
 - Minimizing accruals for accounting purposes
- Traditionally, employers could discipline employees taking paid time because voluntary programs did not provide job protection
- But ... most paid time off programs were built before statutory sources of paid sick, family, or medical leave



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The Paid Time Off and Leave Challenge

- Statutory paid leave programs change everything
 - Voluntary programs still commit to pay, but statutory protections
 - Restrict right to manage absences
 - Complicate strategies to avoid accruals



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Common Types of Paid Leave and the Issues with Each

- Vacation plans – wage payment issues
- Sick leave plans – varying jurisdictional requirements
- Combined paid time off plans – require compliance with both vacation and sick leave laws
- Floating holidays / personal days – is it vacation by a different name?
- Unlimited time off plans – are they truly unlimited and what, if anything, do I have to pay when an employee separates?



The Perfect Paid Time off and Leave Plan



The Solution: Integrate Pay and Compliance



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Wage Payment and Other Financial Drivers



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What the CFO Wants: Minimize Accrual and Payout Obligations


- According to the U.S. Bureau of Labor Statistics, in 2016 employee benefits cost private industry 32% of total compensation (wages & salary plus benefits)
- Vacation and PTO days have real dollar value
- If unused vacation or PTO must be paid out at the end of the year or upon separation, the company needs to accrue for and treat the money owed like its already spent



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What the CFO Wants: Minimize Accrual and Payout Obligations

- Each state has its own wage payment statute that controls pay out of unused time off work
- Transitioning to a new type of plan may require payout or banking of accrued unused time and making it available under old plan terms



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Two Types of Wage Payment Statutes

Some States Require Payment Regardless of Policy Language

- Accrued unused vacation cannot be forfeited at the end of the year
 - But annual and overall accrual caps can be used to limit bank
- Accrued unused vacation must be paid out at end of employment
 - But if time is not accrued until certain things occur, then it's not owed

Some States Permit Employers to Adopt Use It or Lose It Policies

- Employer may adopt a use it or lose it feature in the policy
- Policy should be very clearly worded
- Employees should be given notice/reminders that unused time will be lost
- Employees must be given opportunity to take time off
- Even if statute says permissible, take care in describing when the time off is earned/accrued in the policy



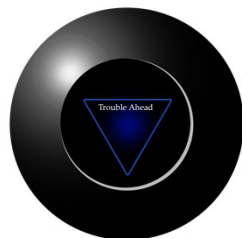
What's at Stake if Your Policy or Practice Violates the Wage Payment Statute?

- Claims for unpaid vacation or PTO
- Class actions
- Civil penalties of \$X per day unpaid
- Attorney fees
- In some jurisdictions, failure to pay can be considered a criminal misdemeanor offense



State Wage Payment Statutes that Limit or Prohibit Employer from Adopting a Use It or Lose It Policy

- California
- Colorado
- Illinois
- Louisiana
- Massachusetts
- Montana
- Nebraska
- Rhode Island



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Sick and Safety Leave Compliance Complications



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Current Paid Leave Laws


State Laws	Local Laws
<ul style="list-style-type: none">• Arizona• California• Connecticut• Maryland• Massachusetts• Michigan• New Jersey• Oregon• Rhode Island• Vermont• Washington	<ul style="list-style-type: none">• Berkley, Emeryville, Los Angeles, Long Beach, San Diego, San Francisco, Santa Monica, Oakland (CA)• Chicago, Cook County (IL)• Montgomery County (MD)• Minneapolis, St. Paul (MN)• Duluth (MN) (January 2020)• New York City (NY)• Westchester County (NY)• Philadelphia (PA)• Austin (pending legal challenges), San Antonio (TX) (August 1, 2019)• SeaTac, Seattle, Tacoma (WA)• Washington D.C.



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General Structure of Sick/Safety Leave Laws

- Accrual formula: 1 hour PSL for every X hours worked
- Provisions for when accrual begins and when accrued time can be used
- Require minimum accruals caps, carryovers or grants
- Employer's current PTO policies may satisfy if they meet all other elements of the law



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General Structure of Sick/Safety Leave Laws

- Employer and employee notice requirements
- Pay at end of employment usually not required
- But leave may need to be reinstated upon re-hire within a certain period of time
- Can be used by the employee, to care for a family member, or if a victim of rape, domestic violence or stalking



Paid Sick & Safe Leave Compare/Contrast Benefits

Feature	Law # 1	Law #2	Law #3	PTO Policy
Eligibility				
How much				
Accrual rate				
Accrual cap				
Carryover				
Front load				
Usage cap				
Reasons				
Employee notice obligation				
Documentation				
Payroll notice				
Job protection				
Pay upon term				



Paid Family Leave – on the Rise



Current Laws

- 4 States (California, New Jersey, New York, and Rhode Island) currently provide for paid family medical leave administered through temporary disability programs




Coming in 2019


- State of Washington and Washington, D.C. (contributions begin in 2019, and benefits in 2020)
- Massachusetts (contributions begin in 2019, and benefits in 2021)

Hawaii is studying a paid family leave program with proposed legislation due in 2019




Feature	CA PFL	NY PFL	WA PFML	MA PFML	Company Policy
Eligibility					
Duration of leave					
Amount of pay					
Reasons					
EE notice obligation					
Documentation					
Job protection					
Collective bargaining agreement coverage					
Written policy					
Payroll deductions					
PTO/sick substitution					

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Re-Examining Unlimited PTO Programs

Do they comply or make sense given statutory leave programs?

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Unlimited PTO Programs

- Is it truly unlimited?
 - What about Family Medical Leave Act and other statutory leaves?
 - What about leave as an accommodation?
- How will employees request time off?
- What happens to previously accrued hours?
- Are cash-outs upon separation required?

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Integration with Other Laws

- Family Medical Leave Act (FMLA) and state laws
 - Can require use of paid leave hours during “unpaid” FMLA
 - “Unpaid” if no wage replacement benefits are being received
 - Unlimited PTO in the context of intermittent leave
- ADA (ADAAA) and state anti-discrimination laws
- Pregnancy disability leave
- Workers’ compensation / short-term disability insurance benefits / paid family leave programs
 - Integrating paid leave hours with benefits?
- FLSA/state salary deductions for exempt employees
 - Need a bona fide plan to make salary deductions



The Compliance Challenge

- Most employers do not provide leave to part-timers or temps
- Some employer policies provide for leave accrual based on scheduled hours, not hours worked
- Policies may not meet accrual and carryover requirements
- Policies may not meet minimum use increment requirements
- Policies may pay at base rate, not the “regular rate”



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“Operationalizing” Leave



Integrating Pay & Compliance

Compare HR Wants With CFO Needs & Legal Obligations In Drafting Policies

Make Sure Your IT Or Payroll and Time Keeping Providers Can Implement Your Design

Communicate The Changes To Your Employees Clearly & Purposefully

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Developing a Strategy

- What are the Company's current policies?
 - Is an audit needed (particularly if the Company is a large employer in many jurisdictions)?
- What does the Company's "ideal" paid time off and leave program look like?
- Where are the gaps?
- Where are the process improvements?
- What are the applicable laws?
 - Federal, state, local
 - How do we find out this information?

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Developing a Strategy

- What are the Company's resources to determine how we learn about new legal developments that could impact our program?
- Who are our internal and external partners?
 - Counsel, TPAs, IT, Benefit Administrators, Compensation Dept., Payroll

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Drafting Policies

- When and how much leave can an employee accrue
- When can leave be used
- Minimum use increments
- Rate of pay when used
- Notice or scheduling requirements



Drafting Policies

- Interaction with other policies (e.g., holidays or if employee is sick)
- Ensuring paid leave programs run concurrently by requiring employees to apply for statutory paid/unpaid leave (not paid sick leave) as a condition of receiving paid medical, parental or caregiver leave
- Advancing hours
 - Restriction on recovering hours through salary deductions for separating employees
- What happens on termination



Implementing Payroll Requirements

- Wage statement requirements
- Calculating rate of pay
 - Determine “commission” v. “bonus”
- Accrual methods
- Change payroll systems
- Tracking generally
- Recordkeeping



Factors Impacting Leave & Benefit Availability

- Length of service
- Hours worked
- Exempt vs. non-exempt
- Full-time vs. part-time
- Disability only
- Bonding only
- Disability & bonding
- Type of delivery
- Location of worksite (e.g. NYS, NYC, Westchester)
- Size of worksite
- Reason for leave
 - Covered by statute
 - Covered by voluntary policy
- Length of leave



Hypothetically speaking ... what's available when?

- NY employee is disabled by pregnancy for 10, then seeks baby bonding leave. The STD plan has a 7 day waiting period. NY DBL pays \$170/week and a supplemental benefit pays 75% of wages (with DBL reimbursed). DBL/STD is supplemented with accrued paid time to ensure EE gets 100% of wages. EE has two weeks accrued PTO Sick.
- NYPFL is 60% of wages; runs concurrently Company Paid Parental Leave (or supplemented by PTO, then Vacation if employee is not eligible for Paid Parental Leave).



Administering Programs: What's Available When?

Week	1	2	3	4	5	6	7	8	9	10	11	12	13-26
PTO sick	X	X	X	X	X								
PTO other											?	?	
Vac													?
WC													
NYY DBL		X	X	X	X	X	X	X	X	X			
Supp STD		X	X	X	X	X	X	X	X	X			
Parent leave											X	X	X
Health ins	X	X	X	X	X	X	X	X	X	X	x	x	
FMLA	X	X	X	X	X	X	X	X	X	X	X	X	
NYPFL											?	?	?



Employee Messaging

- What will happen to previously accrued hours?
- What are the reasons for which time can be used from the various banks?
- How can employees request leave?
- Who is eligible to participate under individual programs?



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