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Time to Review Unlimited PTO Policies

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Like many businesses, you may have decided to give your employees unlimited PTO — or are considering doing so. The flexibility that unlimited PTO affords helps you attract and retain talent. You also avoid the administrative headaches associated with tracking PTO. And if you terminate the employee, you don't have to pay out any accrued vacation time. Right? Not so fast.

A recent California Court of Appeal case reminds employers that loosely drafted PTO policies may leave them on the hook for unused vacation days. In *McPherson v. EF Intercultural Found., Inc.*, No. B290869, 2020 WL 1543339, at *1 (Cal. Ct. App. Apr. 1, 2020), the employer purported to have an unlimited PTO policy for certain exempt employees, allowing them to come and go as they pleased so long as they fulfilled their job responsibilities. But the employer did not put this policy in writing, nor did they explain to the employees that paid time off was not a part of their compensation. In the absence of a well-defined policy, the Court found that the employer had an “implied cap” of vacation days based on the customary amount of vacation the employees took. Therefore, the Court held that when the company terminated its employees, it had to pay out the value of the unused portion of the “implied cap.”

The Court explained, however, that employers with carefully outlined and applied unlimited PTO policies would not likely have to pay out unused vacation time. Accordingly, employers should have a written policy that:

- (1) clearly provides that employees' ability to take paid time off is not a form of additional wages for services performed, but perhaps part of the employer's promise to provide a flexible work schedule—including employees' ability to decide when and how much time to take off;
- (2) spells out the rights and obligations of both employee and employer and the consequences of failing to schedule time off;
- (3) in practice allows sufficient opportunity for employees to take time off, or work fewer hours in lieu of taking time off; and
- (4) is administered fairly so that it neither becomes a de facto “use it or lose it policy” nor results in inequities, such as where one employee works many hours, taking minimal time off, and another works fewer hours and takes more time off.

Id. at 14.

The prevalence of unlimited PTO policies across the country could give

this opinion weight even outside of California. Other states could issue similar decisions when considering the issue. In addition to the list above, there are several other best practices we would recommend an employer consider when drafting and implementing an unlimited PTO policy.

During the COVID-19 downturn, many employers have already been forced to lay off employees, and more layoffs could be coming. It is more important now than ever for employers to review their unlimited PTO policies to ensure that the policies are tightly drafted.

We encourage you to visit Holland & Hart's Coronavirus Resource Site, a consolidated informational resource offering practical guidelines and proactive solutions to help companies protect their business interests and their workforce. The dynamic Resource Site is regularly refreshed with new topics and updates as the COVID-19 outbreak and the legal and regulatory responses continue to evolve. Sign up to receive updates and for upcoming webinars.

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