

Paid sick leave may be the death knell for paid time off

By Judith Droz Keyes

In 2015, California will become the second state in the nation to require employers to provide paid sick leave. Although San Francisco has had a similar ordinance for several years, the statewide law will greatly expand the number of employees entitled to this benefit — and the number of employers who must provide it. Among other considerations created by this new reality is: How does paid time off fit in, and does it still make sense to have paid time off?

Evolution of Paid Time Off

First there was vacation. Although not legally mandated by any law (even now), by the middle of the 20th century, most employers in most industries provided most employees with some amount of vacation — paid time off to be scheduled in advance and used however the employee wanted. In California, unlike in most states, it became the law that vacation had to be treated as compensation. Just like wages, once vacation is earned (at whatever rate the employer sets), it can never be forfeited. So no “use it or lose it” vacation policy in California.

Then came sick leave. Not legally mandated by any state until Connecticut did so in 2012, it became common in the 1960s and '70s for employers to provide employees with some amount of paid time off to be used when they were too sick to work. It was like health insurance: If you got sick, paid sick leave was available. If you didn't get sick, you didn't use sick leave — and you lost it.



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The problem was, some employees abused sick leave — they called in sick when they really weren't sick precisely because they didn't want to lose it. In response, rather than doing away with sick leave (after all, most employees didn't abuse it), employers adopted absence control policies — attendance policies that prescribed discipline for excessive absence, or abuse of sick leave.

By the early 1990s, it became the vogue for employers to combine vacation and sick leave into undifferentiated “paid time off.” The thinking was that paid time off would deter the abuse of sick leave by, in effect, giving additional vacation to employees who didn't call in sick. From the start, it was clear that paid time off had to be treated as both all vacation and all sick leave. Whichever designation is more advantageous to the employee in the situation at hand is the designation that applies. So, for example, like vacation, all accrued paid time off must be paid out on termination. And, like sick leave, accrued paid time off must be provided to employees for absences such as those covered by Family and Medical Leave and for “kin-care.”

California Sick Leave Law

Effective July 1, 2015, California will mandate that, with few

exceptions, all employees in California must be provided with paid sick leave. Accrual of sick leave must begin no later than the 91st day of employment, and must be at the rate of one hour of leave for every 30 hours worked. Employers can adopt an accrual cap of 72 hours, and can limit usage of accrued leave to 24 hours per year. Employees can use accrued sick leave for themselves and for a long list of family members, for sickness, preventive medical care, and a few other circumstances. The employer's right to require notice of the use of sick leave is limited. Employees must be allowed to use sick leave in increments as small as two hours, and, like with kin-care, employees cannot be disciplined or otherwise retaliated against for using sick leave. Employers must inform employees of their available sick leave on the paystub or another document that accompanies the paycheck, and must keep records reflecting accrual and usage for at least three years.

Can These Coexist?

The sick leave law states that paid time off policies will be acceptable if they meet all of the law's requirements and protections. But is this realistic? It doesn't seem so.

An employer that wants to take the path of least resistance and keep its existing paid time off policy as-is by definition must treat all of the time an employee accrues as legally mandated sick leave. Will it really be all right for employees to take all of their paid time off with little notice, in two hour increments, with impunity?

This seems unrealistic. It surely will tempt to discipline or negatively evaluate the employee who uses his or her paid time off in this way — and doing that will be unlawful.

Another option is to keep the existing paid time off policy, but to segregate a portion of it as legally mandated sick leave. This approach would create two sick leave banks: one treated under the mandates of the law, and another subject to the employer's pre-existing paid time off rules. But bearing in mind that paid time off can be deemed all sick leave for purposes such as kin-care, having a sick leave bank with one set of rules, and a paid time off bank that can be sick leave under another set of rules, is likely to prove to be at least confusing, and probably unwieldy. It can be done, but hardly seems worth the effort.

The only other option, and the one that perhaps makes the most sense, is to eliminate paid time off and to go back to having one policy for vacation and a separate policy for sick leave. Vacation will be subject to the employer's rates and rules, with the caveat it can never be forfeited. And sick leave will be sick leave: with rates and rules and records that comply with California's new law.

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