

# Employment Practices Liability

January 3, 2017

## Separate vs. Combined Leave Policies - The Pros and Cons

by Kimberly A. Ross, Partner, FordHarrison

**Executive Summary:** With more and more jurisdictions on local and state levels enacting paid sick leave laws, and likely more to come, a frequent question from affected employers is whether it is preferable to have separate vacation/personal leave and paid sick leave policies or an all-inclusive paid time off (PTO) policy. There is no right or wrong answer to the question and, instead, many factors should be considered such as the size and structure of the company, the number of locations in places requiring paid sick leave, the industry norms for the amount and type of expected paid leave (i.e. what the competition is paying), and state laws on how paid leave is administered, among other factors.

To further evaluate whether to have a single PTO policy or separate policies for vacation, personal days and sick leave, below are some of the pros and cons of each. Some of this analysis will focus on jurisdictions in which paid sick leave is now or will soon be mandatory, but even if the employer's jurisdiction does not require paid sick leave, the discussion is still instructive.

**Payout of Leave upon Termination:** Many states require employers to pay out earned but unused vacation upon termination, regardless of any organization policy or practice. Paid sick leave and other wage laws generally do not require payout of sick leave upon termination (unless the organization policy requires it). Therefore, if sick leave is combined into PTO, all unused time must be paid out upon termination. If the leaves are kept separate, this reduces the amount payable upon termination to only the unused vacation/personal time.

**Carryover of Accrued Leave:** Most state wage laws allow employers to prohibit carryover of unused vacation time, as long as the employee has a reasonable period of time in which to use it. Most paid sick leave laws, however, provide that an employee must be allowed at least some carryover of sick leave into the new accrual year. Therefore, with a combined PTO policy, the employer will have to allow carryover consistent with paid sick leave laws, which necessarily includes the carryover of some vacation and personal leave as well. The carried over time will also come at a higher cost if the employee receives a raise before taking the carried over time off, or at termination. This might also encourage employees to try and save time in one year knowing that when they take the carried over leave the next year, it will be worth more. With separate leave policies, an employer can limit the time that can be carried over to only sick leave, which will also limit how much unused leave must be paid out upon termination and at what rate.

**Tracking of Leave:** Whether it is easier to track combined or separate leave policies will vary from company to company. Some employers are set up electronically to track hours worked and leave taken, and some are still tracking manually. With separate leave policies, an employer can easily determine how much vacation an employee has taken and what vacation will carry over (or not) to the next year. Tracking paid sick leave can be a bit more challenging since an employer must determine whether the reason for the leave qualifies under either its policy or applicable laws. Since paid sick leave laws specify how much leave can be carried from one year to the next, however, the tracking should theoretically be reasonable. On the other hand, some employers may find it easier to track combined leave because they only have to

track one set of available leave hours, and do not have to determine the purpose of leave being taken (or evaluate the validity of the excuse if it is for something medically-related).

**How and When Leave is Earned:** Paid sick leave required by law is frequently earned by the number of hours worked, as opposed to vacation and personal leave, which is more commonly earned by the employee's length of service. Although many organizations do not provide vacation and other personal leave to part time or temporary employees, most of the current paid sick leave laws apply to part time and temporary employees. With a combined PTO policy, this may require employers to provide vacation or other personal leave to part time employees, even when not desired. The employer could draft separate leave policies, one for full time employees providing PTO, and one for part time or temporary employees that minimally complies with state or local laws on paid sick leave. Because avoiding providing part time or temporary workers paid vacation would require separate written policies, employers would lose the benefit of having only one policy for all employees.

**Waiting Periods for Accruing and Using Leave:** Most jurisdictions that regulate vacation time allow employers to require employees to work a certain length of time (perhaps six months or a year) before they begin to accrue and/or use vacation or personal leave. On the other hand, many paid sick leave laws (such as in Chicago and Cook County) require accrual to begin immediately upon hire (though some do allow a waiting period for an employee to begin taking paid sick leave – 180 days in Chicago and Cook County). With a combined PTO policy, employers in jurisdictions that require paid sick leave to accrue upon hire will not be able to require a waiting period for accrual, and the waiting period for accrual and use of vacation and personal time will need to be consistent with applicable paid sick leave accrual and use laws. This would potentially also lead to having to pay out more accrued but unused leave upon termination.

**Flexibility and Morale:** PTO policies allow for more flexibility to employees on how to use their time off. An employee who does not often get sick can take more vacation, while an employee with a large family to care for will have a better opportunity to receive pay while attending to family medical issues. PTO policies may also improve employee morale in terms of allowing this additional flexibility in how leave is used, without having to justify the reason for the use. Employees can be encouraged to use all of their PTO time to avoid burnout, while it would not be possible to encourage employees to use all their paid sick leave if they do not actually need it for one of the reasons allowed in the various laws or by company policy. Combined PTO policies also have the potential to reduce resentment among other employees towards those they perceive to be abusing their paid sick leave, and also to eliminate the need to lie about the reason for the leave.

**Privacy Issues:** For an employee to use paid sick leave, he or she must divulge to the employer the reason for the leave (at least a bare minimum so that the employer can determine whether the sick leave is being used appropriately either under the company's policy or relevant law). With a combined PTO policy, in which it does not matter the reason for the time off, an employee can keep private medical issues private and will not have to divulge details to the employer. Not

## Employment Practices Liability News & Alerts

having to divulge the reason for the absence may also encourage more sick employees to actually stay home rather than fearing reprisal for taking time off and also potentially getting others sick at the same time. On the other hand, it may be argued that having a combined leave policy might encourage sick employees to go to work so that they can save days to take a longer vacation. This would not ultimately affect the total payout, but it could cause inconvenience for a longer vacation absence. Organizations can separately institute limits of the amount of vacation that can be taken at one time to alleviate these concerns.

**Employers' Bottom Line:** There are many good reasons for separate or combined leave policies. Because every organization is different, and states and local municipalities may have laws pertaining to various types of leaves, it is important for each organization to evaluate its own needs, using some of the above considerations as a starting point.

**For more information about CIRMA's Employment Practice Liability Helpline Program, please contact your CIRMA Risk Management Consultant.**

---

*Have a question or concern about Employment Practices?*

Call the EPL Helpline at 844-426-9086

Or e-mail them at

[cirmahotline@fordharrison.com](mailto:cirmahotline@fordharrison.com)

---

FordHarrison is a U.S. labor & employment law firm with more than 200 attorneys in 30 offices, including five affiliate firms. The firm is committed to adhering to the FH Promise, a set of principles that guides how the firm delivers legal services and works with its clients. FordHarrison attorneys represent employers in labor, employment, immigration and employee benefits matters, including litigation. Through its membership in the global employment law firm alliance, Ius Laboris, FordHarrison provides clients that have multinational operations with a broad range of services related to labor and employment law in 49 countries throughout the world. For more information on FordHarrison, visit [fordharrison.com](http://fordharrison.com). To learn more about Ius Laboris, visit [iuslaboris.com](http://iuslaboris.com).