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Expertise

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[Unused Vacation days? To Pay or Not to Pay](#)



Many employers are faced with the conundrum of whether to pay out unused but accrued vacation time when an employee is separated. Sometimes employers want to pay out vacation as a reward to an exceptional employee leaving on good terms. Sometimes the opposite is true, such as when an employee leaves without giving any notice. So the question arises, "Do I have to pay this person?" The answer is almost universally the same: "it depends."

Under federal law, employers are not required to offer paid vacation, therefore pay out at separation is not regulated. However, at the state and municipal level, it is sometimes a regulated area. It is important to note that the applicable regulation is based upon the state where the employee works, not the state where the company is headquartered. In most states, there is either no applicable law or the law states that the employer's policy or past practice governs.

Some states are more restrictive and have a default in the absence of a written policy. For example, in New York, employers must pay out unused but accrued vacation unless they have a written agreement or policy that notified employees

- in advance of the separation - that the benefit of vacation would be lost in certain circumstances. Other states, like California and Maine, consider accrued vacation an earned wage and protect it. Still other states, like Rhode Island and North Dakota, dictate when an employer can withhold vacation pay out.

Therefore, it is important for both multistate and single state employers to have a clear and compliant vacation policy. The following are a few best practices tips and helpful reminders:

Clarity: Communicate in writing whether or not vacation will be paid out at separation and list any conditions in the same section of your employee handbook. Many employers confuse the issue by having pay out discussed in multiple areas of the policy handbook. The topic should only be discussed in the vacation policy section, and if necessary, identically repeated in a separation section.

Consistency: Employers should avoid pay out for some employees but not others without a neutral and clearly written policy statement(s), such as: "employees that have been with the company for X years and are not being terminated for misconduct will be paid out their unused but accrued vacation." The risks for making exceptions can be substantial so employers should refrain from doing so. Engage clients can consult with their HR manager

for guidance. Failing to be consistent can lead to costly discrimination complaints.

Practice matches policy: Employers should avoid having a practice that contradicts with written policy. This again could lead to costly litigation. Policies should be evaluated on a regular basis, and if necessary, handbooks re-issued to reflect the preferred practice.

Caps: In states where accrued and unused vacation is considered a wage, employers should identify the point when vacation stops accruing. For example, in California an accrual cap can prevent a significant financial impact on an employer when a long-time employee who rarely took vacation separates from the company. ?Use it or lose it? rollover policies also should be considered and articulated in the company handbook.

A rose by any other name: Employers must be careful to call the pay out what it is. If the employer is actually paying out vacation in order to deter a potential employment claim, the employer should instead consider giving the same amount of money in exchange for a release of claims.

Going into the red: Some employers allow their employees to take time off that they have not yet accrued. A problem arises when the employee separates from the company without having earned all of the vacation taken, leaving a negative balance. Some employers want to be repaid for the time. Whether that is legally permitted can depend on the state where the employee works and recovery typically ranges from being difficult to impossible.

Compliance: As always, Engage clients should regularly contact their HR Manager to keep abreast of changes in the local, state or federal employment laws.

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