

A person wearing a dark blue button-down shirt is holding a red binder and a spiral notebook. The person's hands are visible, with dark nail polish. The background is a soft, out-of-focus light blue and white.

Creating a Successful PTO Program

Prepared by:
Kerstin Miller
Smith & Downey, P.A.

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you **UNLIMITED** access to Lorman's ever-growing library of training resources:

- ✓ **Unlimited Live Webinars** - 110+ live webinars added every month
- ✓ **Unlimited OnDemands** - Over 3,900 courses available
- ✓ **Videos** - More than 1,900 available
- ✓ **Slide Decks** - More than 3,300 available
- ✓ **White Papers** - More than 2,000 available
- ✓ **Reports**
- ✓ **Articles**
- ✓ **... and much more!**

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.



Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

CREATING A SUCCESSFUL PTO PROGRAM

November 19, 2019

Kerstin M. Miller, Esq.

kmiller@smithdowey.com

Smith & Downey, P.A.

I. INTRODUCTION

As the economy improves and becomes a “workers’ economy,” companies are hard-pressed to find more incentives to draw sought-after workers and keep them. Leave benefits are an important tool in attracting and retaining quality employees. However, employers must be cautious to avoid legal pitfalls. A growing number of states have enacted paid sick leave and family leave laws, which mandate certain leave benefits and govern what must be communicated to employees in policies. These state laws interact with federal laws that also cover leave of absence policies. Employers must navigate these laws, while designing a leave program that is effective and promotes appropriate time off while at the same time discouraging leave abuse.

Many employers turn to Paid Time Off, or “PTO” programs to help them meet these goals. PTO programs generally combine sick leave, vacation, and personal leave into a single “bank” that employees can use at will. PTO programs are generally easier to administer, as they require less tracking of different types of leave, such as sick leave and vacation. They are generally favored by employees, as it provides an equal opportunity for employees to take time off, and employees are not “penalized” for staying healthy. Finally, many employers who switch to PTO programs note a decrease in unscheduled absence. Employees have a greater incentive to save their PTO for planned vacations and other planned events, and are less likely to take off unexpectedly.

Notwithstanding the many positive aspects of moving to a PTO program, there are also some potentially negative aspects. Employers report that employees with PTO tend to use a greater percentage of their total allotted annual leave than employees with separate vacation and sick banks. Not only do employees use more leave, but they may also be more resistant to using PTO for reasons related to illness, as they are motivated to save PTO for vacations and other planned events. PTO is reported to be less popular among those employees who have high health care utilization needs. There may also be greater legal and financial risks associated with PTO, as state paid sick leave laws may require unused PTO to be carried over to the next year, and may require any unused PTO to be paid out at the end of employment, unlike sick leave, which is usually forfeited at the time of termination.

While PTO does have some drawbacks, many employers find that the rewards outweigh the risks.

II. COMPONENTS OF A SUCCESSFUL PTO PROGRAM

A successful PTO program should have, at a bare minimum, a legally compliant written policy that clearly explains when and how leave can be taken. But a written policy, standing alone, will not result in a successful PTO program. Front-line managers and supervisors must be well-versed in the leave policy and understand how to appropriately handle leave requests and recognize red flags. The policy must also be effectively communicated to employees so that employees have a clear understanding of what is required of them. Finally, there are special considerations for employers who would like to include PTO donations as part of their PTO program.

A. Legally Compliant Written Policy

All PTO policies should state, at a minimum:

- Who is entitled to PTO
- Whether there are any different requirements for different classes of employees
- How PTO is accrued (e.g., 1 hour for every 30 worked, or 1 day/month)
- If accrued on a calendar basis, define the calendar year (e.g., January 1st to December 31st, or on the employee's work anniversary)
- Circumstances under which PTO can be used
- How to request PTO in advance (e.g., how far in advance should it be requested? To whom should the request be directed?)
- Call-in procedures for emergency use of PTO
- Any required documentation (e.g., doctor's notes)
- Whether unused PTO will be carried over to the next year or forfeited at the end of the year
- Any other state-law requirements.

Employers should carefully review state paid sick leave laws, family medical leave laws, and other laws that may govern what must be communicated to employees about leave. For example, many state paid sick leave laws require an employer's PTO policy to state how to report potential violations of the law.

B. Well-Trained Managers and Supervisors

A company is only as strong as its weakest supervisor. Managers are the front-line in ensuring that a legally compliant PTO program on-paper becomes a legally compliant PTO program in practice.

Managers should be trained prior to rolling out the PTO policy. Managers should not only be familiar with the policy itself, but they should also be able to issue-spot when employee leave requests may require HR support. For example, employers who are subject to the

Americans with Disabilities Act should train supervisors to recognize that employee who has exhausted is or her PTO might still be entitled to additional unpaid leave as an accommodation. Employers who are subject to the FMLA should train supervisors to recognize when a request for PTO might be an FMLA-covered event. Managers should be trained each time the PTO policy is revised, and in any event, at least annually.

C. Effective Communication with Employees

A PTO program can only be successful if employees clearly understand their rights and obligations under the program. Any changes to PTO or leave program should be clearly communicated to employees.

Employers must also carefully review state law to confirm that they have provided any required notices to employees, such as posters explaining state sick leave laws.

D. Special Considerations for PTO Donation Policies

PTO donation programs must comply with IRS requirements, which can be complex. Employers should consult a tax advisor prior to implementing a PTO donation program, to ensure that the program does not have any unintended tax consequences.

III. CURBING EMPLOYEE ABUSE OF PTO

A. Recognizing Employee Abuse of Sick Leave

The first step in curbing abuse is to recognize when certain patterns may indicate abuse of PTO. These may include:

- Pattern of calling out Fridays, Mondays, days adjacent to holidays or immediately following vacation, day after the Super Bowl!
- Pattern of calling out when scheduled for undesirable shift
- Pattern of calling out on days previously denied vacation request
- PTO used immediately as it is earned (without notice, as opposed to approved PTO)
- PTO used on days when certain responsibilities fall on the employee (project deadline, etc.)
- Suspicious or vague excuses for need for leave
- “Slips” on social media

B. Steps to Curb PTO Abuse

While there is no foolproof method to curbing all PTO abuse, employers should consider taking the following steps:

- **Consistently enforce call-out procedures.** Even if an employee is on a form of protected leave, the employee can generally be required to follow reasonable call-out procedures, as long as they are consistently applied to all employees. Employers should also consider keeping a log of an employee's stated reason for the need for leave.
- **Review attendance records.** Employers should regularly review attendance records to spot patterns of absence that suggest abuse.
- **Speak with employees who have exhibited warning signs of abuse.**
 - Do not accuse of faking! This could set the employer up for a potential defamation claim. Instead, identify objective concerns and ask for an explanation.
- **Consistently require documentation of need for leave.** This requirement must be applied consistently. For example, employers cannot single out employees on FMLA to ask for documentation. Requirements for documentation should also be carefully reviewed to ensure compliance with the FMLA and any applicable state or local laws.
- **Regularly remind employees** that leave abuse will not be tolerated. On the one hand, if employees believe an employer is lax, they are more likely to abuse PTO. On the other hand, if employees believe that an employer is vigilant in scrutinizing leave usage, they are less likely to abuse PTO.
- **Train supervisors!** Supervisors must understand how various laws (e.g., FMLA, social media laws) may impact the company's ability to ask for renewed documentation or take other steps, such as reviewing social media accounts

IV. **FEDERAL, STATE, AND LOCAL LAWS IMPACTING PTO**

The most difficult aspect of crafting a legally compliant PTO program is to ensure full compliance with a variety of federal, state, and local laws that may apply. This is particularly difficult for companies with employees in multiple states, which may have different (and even contradictory) laws impacting PTO.

A. **Federal Laws**

1. **The Family and Medical Leave Act (FMLA)**

The FMLA is a federal law that requires employers with 50 or more employees within a 75-mile radius to provide up to 12 weeks of leave for specified reasons to certain covered employees. While the FMLA does not require the leave to be paid, its regulations do govern the interactions between FMLA and an employer's paid leave program. Specifically, the FMLA regulations specify when employers can require, or employees can choose, to have available paid leave such as PTO substitute for otherwise unpaid FMLA leave. There are some tricky aspects to the regulations. For example, while most employers are familiar with the rule that employers

can generally implement a policy that requires employees to use available PTO simultaneously with FMLA leave, many employers are not familiar with the exception to that rule. Specifically, when FMLA leave is paid, such as when employees are receiving short-term disability benefits or other benefits (such as state family leave insurance laws), the employer cannot require employees to substitute PTO to cover FMLA. (However, both the employer and the employee could voluntarily agree to have PTO cover that period of FMLA.)

2. The Americans with Disabilities Act (ADA)

The ADA applies to employers with 15 or more employees. Like the FMLA, the ADA does not require employers to provide paid leave. Instead, it requires employers to provide “reasonable accommodations” to employees with disabilities, unless the provision of the accommodation would create an “undue hardship.” A leave of absence may be considered a “reasonable accommodation,” even if the employee has used all available PTO and exhausted other available leave, such as FMLA.

3. Federal Contractors

Executive Order 13706 requires paid sick leave for certain employees working on federal contracts or subcontract. The final rules implementing the Executive Order were published on September 30, 2016.

B. State and Local Paid Sick Leave Laws

While it is beyond the scope of this article to describe in detail the requirements of the growing number of state and local paid sick leave laws, many such laws are remarkably similar and impact PTO programs in predictable ways, including the following:

- **Mandatory coverage:** Most state laws require coverage of part time and temporary employees. Most state laws cover nearly all employees who work in the state, even if employer is headquartered elsewhere.
- **Mandatory accrual rates:** Most common is 1 hour for every 30 hours worked, up to 40 hours. Some allow “front-loading.”
- **Coverage of New Employees:** Most state/local laws require new employees to begin earning immediately. Some laws allow limits on use of leave during the first few months of employment.
- **Obligations for Employees to Find a Sub:** Most state/local laws state that employees cannot be required to find their own substitute to cover their absence.

- **Mandatory Carryover:** Most state/local laws require that employers allow employees to carryover a minimum amount of leave. Some state/local laws provide unlimited carryover, but allow for a cap on leave.
- **Cap on Leave:** Some state/local laws provide for a cap on the maximum leave that can be accrued. This may be in addition to or instead of cap on carryover.
- **Minimum Increments:** Most state laws say employees can take leave in smallest increment accounted for in time keeping (usually 15 minutes); or 1 hour, whichever is smaller.
- **Permissible Uses:** Employees must be allowed to use PTO for all of the reasons required by law.
- **Employee Notice of Need for Leave:** Most state laws limit how much advance notice can be required.
- **Employer Verification of Need for Leave:** Most state laws limit when an employer can request documentation of need for leave, and what kind of documentation. For example, many state laws prohibit employers from requesting documentation of the need for leave unless an employee has taken leave for at least 3 or 4 consecutive work days or shifts.
- **Mandatory Enforcement Language:** Many state laws require employers to include specific language in policy advising employees of their rights under the law and how they can report concerns to the appropriate government agency.
- **Reinstatement Upon Rehire:** Most state/local laws require reinstatement of leave if employee terminates employment and returns within specific time period, if the leave was not otherwise paid out.
- **Be Cautious in Adopting Model PTO Policies Approved by State Government:** Many of these policies are not meant to be used as PTO programs and likely need to be further personalized to make it work.
- **Recordkeeping Requirements:** Most state laws have recordkeeping requirements. Some have obligations to notify employees on regular basis or at other specific times of the amount of leave they have available to them – e.g., every pay period.

The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.