



Question #1

We approve a lot of unpaid time off around here. In fact, we have approved over 1,100 hours of unpaid time off since 1/1/17. That's way too much!

The flip side of our savings in unpaid wages is a loss of productivity as this practice puts a burden on other employees and on operations in general.

Can we impose a penalty for taking unpaid time off? Negative vacation accrual? No bonus at year end? What are we able to do to get a handle on this problem?

Answer

Below is the email communication that was sent by one of our HR Professionals to address the above question:

This email is in response to your email regarding employees' excessive requests for personal leave.

As I understand your situation, your organization is having a problem with employees' requests for personal leave and you want recommendations on how to best handle this problem.

Where the requests for leave are protected under FMLA or the ADA (or other state/federal basis), employees should not be penalized for taking unpaid leave. Those protected leaves must be treated and considered separately from the unpaid personal leaves. Management of these protected leaves is done through proper documentation and open lines of communication with the employee (and, with permission, the employee's health care provider) to ensure the employer is meeting its obligations to engage in the interactive process.

In this type of situation, where the employer has a practice of allowing employees to take unpaid personal leave and is now seeking to curb (or control) this practice, we

recommend the employer clearly communicate the employees and give notice of the policy change so that employees can plan accordingly (as many employees might “rely on” the more liberal unpaid leave practice).

Specifically, we recommend the employer advise the employees that starting on a future date (e.g. August 1, 2017), the company will no longer be allowing employees to take unpaid personal leaves of absence unless there is a protected reason for that type of leave. The employer should also clarify the expectation that employees are to use available PTO/vacation for this purpose. In addition, the employer should clarify that it will no longer advance PTO/vacation under this new policy. Finally, employees should be warned (reminded) that not showing up for a scheduled shift may be viewed as a no-call/no show and voluntary resignation of employment, pursuant to the attendance policy.

With respect to your specific questions:

1. Can we impose a penalty for taking unpaid time off?

Provided that the unpaid time off is not taken for a protected reason (i.e. FMLA, ADA, workers’ compensation, etc.), yes, the employer can “penalize” employees for taking protected time off. However, the employer should carefully consider the “penalty” that it imposes. In addition, if the employee is given “permission” to take the unpaid time off (for a non-protected reason), then the “penalty” for taking this time should be clearly communicated to the employee at the time permission is granted, so that the employee is making an informed decision. (e.g., you can have the unpaid time off, but this is the consequence).

Suspending the employee for taking unpaid time off would likely be ineffectual, as that type of action would give the employee exactly what the employee is seeking – time away from work.

Instead, we would recommend the “penalty” for taking unpaid time off be informing the employee that taking this time will be viewed as a voluntary resignation of employment.

2. Negative Vacation accrual?

Provided that the unpaid time off is not taken for a protected reason (i.e. FMLA, ADA, workers’ compensation, etc.), yes, the employer can track the unpaid time off as “negative vacation accrual”. However, since the time off is unpaid, and vacation time is paid time off, it is unclear how the employer would reconcile those two banks of time.

For example, if an employee takes 1 day of unpaid time off (because all vacation is exhausted), that time is not paid. Yet, when the employee accrues a day’s worth of vacation, that time off would be with pay. So, how (if at all) does the employer reconcile the negative bank with the positive accrual? Does the employer pay the employee for the unpaid day once he has accrued the time? Or does the employee work off the

negative balance without receiving the value of the time (which seems to be a double penalty to the employee – he doesn’t accrue positive vacation and he does not ultimately receive the value of the accrued time)

If there is no plan for reconciliation, then what would be the purpose of tracking negative vacation time? If the idea is that once an employee’s “negative bank” hits a certain level, no further unpaid leave is provided (or employment is terminated), then the employer could simply implement a policy wherein it provides a set amount of unpaid time off.

Due to the potential complications that can arise, we do not recommend this practice.

3. No bonus at year end?

Provided that the unpaid time off is not taken for a protected reason (i.e. FMLA, ADA, workers’ compensation, etc.), yes, the employer can have employees risk “forfeiting” a year-end bonus if they take unpaid time off for personal reasons. However, if this were to be the potential penalty, this penalty would need to be communicated to the employee prior to the employee taking unpaid personal leave. In addition, the employer would need to consider the “threshold(s)” for bonus forfeiture and be consistent in its application of the forfeiture. For example, would there be “levels” of forfeiting a bonus (1-5 hours – no forfeit, 6-10 – forfeit 10%, etc.). The employer would also need to carefully and accurately track the time to ensure that they are treating everyone the same.

If you have any further questions or concerns, please feel free to contact me directly.

Question #2

We have an employee that has an old football injury. He said he did some research and he feels that a stand-up desk could be helpful to him. He is inquiring as to whether the firm will buy this for him and, if not, if he can purchase one on his own. What would you recommend?

Answer

Below is the email communication that was sent by one of our HR Professionals to address the above question:

This email is in response to your email you ask how you should best handle an employee’s request for a stand-up desk.

In response to your question, Nevada employers are not required by OSHA to provide specific furniture. However, there are some scenarios that you may want to consider to determine if a new desk is required.

For example, if the person requesting the new desk provides you with a doctor's note stating that he or she needs a particular desk because of an existing medical condition, a reasonable accommodation would be to provide the person with a new desk. However, you do not have to purchase the highest rated desk, but one that complies with the medical certification. It's not about the cost, but the desk that the employee's physician is recommending be used.

If the employee did not provide medical certification, allowing him to purchase his own desk would be at your discretion.

The OSHA guidance on an employer's responsibility may be found by visiting <https://www.osha.gov/as/opa/worker/employer-responsibility.html>.

If you have any further questions or concerns, please feel free to contact me directly.