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More Employers Give Unlimited Vacation

By Catherine Ho

A small but growing number of businesses are retiring their traditional vacation benefits policies in exchange for an honor system of sorts in which salaried workers take as many days off as they like - within reason and with a manager's approval, but without being tallied. The tradeoff: those vacation days don't accrue - meaning employers don't have to write massive checks for unused vacation when an employee leaves.

Unlimited vacation days may seem like an ideal arrangement, especially for workers, but employment law experts who advise white-collar employers, including law firms, about such policies, say there are risks too. Because state law defines accrued vacation time as wages, the policies venture into uncharted regulatory areas.

Unlimited vacation applies mostly to salaried employees because they have more freedom than hourly workers, said Daniel McCoy of Fenwick & West LLP, who last year advised at least 10 clients in the technology and software design industries in

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shedding vacation accrual policies. He's currently advising a Bay Area solar company in the switch, but declined to identify it by name, citing client confidentiality.

A nationwide janitorial services company and several Southern California auto dealerships have followed suit, according to attorney Keith Watts of Ogletree Deakins, who also declined to identify his clients by name. Social Strata Inc., a Seattle social media company, started offering unlimited paid leave last year after the company's CFO needed extended time off to help her husband recover from an accident.

"We trust her and know she'd get her work done whether she was physically here in the office or not," said Rosemary O'Neill, president of Social Strata. "We realized we trust everyone else in the company the same way, so we decided, 'We're going do it.'"

The following Monday, the company announced the news to its 10 employees.

"It worked out great," O'Neill said. "We'd never go back and change it."

The movement comes a decade after Netflix, the Los Gatos-based movie rental and Internet-streaming company, first gave its employees unlimited vacation time. The idea was that employees are adults and can decide on their own when to take time off, as long as they get their work done.

"Netflix keeps no record of vacation time for salaried employees, so there is never any unused vacation time to get paid for when you leave the company," said Steve Swasey, Netflix's vice president of corporate communications. "It's a hard concept to understand for people who are accustomed to traditional vacation policies. Folks at Netflix have no problem with it. People take time off all the time, and those who leave don't expect to be compensated for time they didn't take."

The concept has yet to gain widespread traction. About 1 percent of U.S. companies offer their workers unlimited leave, according to a 2010 survey of companies by World at Work, a global human resources association that tracks and studies employee benefits and compensation. That's partly because most businesses have known only one way of structuring their vacation benefits, McCoy said.

"People didn't have it on their radar before as an idea," McCoy said. "Businesses have historically viewed vacation as a sacred cow. Netflix and other companies [that] broke the mold said it doesn't need to be a sacred cow, at least for exempt salaried employees who have more freedom and mobility than hourly folks."

The policy is already common among law firms. For example, Rutan & Tucker, with two offices in California, has no written vacation policy for attorneys. Partners, as well as associates who meet a minimum of 1,950 hours a year, can take whatever time off they choose and don't accrue days, a firm spokeswoman said.

But some employment experts urged caution by employers considering the switch.

Under state law, accrued vacation days count as wages and must be paid out when an employee leaves a company. An employer who does away with those wages could become a target of the state Division of Labor Standards Enforcement, said Jennifer Brown Shaw, a partner at Shaw Valenza LLP, an employment boutique firm that represents and advises companies.

The DLSE, better known as the Labor Commissioner's office, handles claims brought by workers who bring disputes with their employers over wages. It's unclear whether a

policy that nixes accrued vacation days would comply with state wage laws. Such a case has never come before the board, said DLSE spokesman Dean Fryer.

One problem that could occur, especially if the practice spreads beyond top executives, is if vacation approval is inconsistently handed down. That could call into question the whole point of offering unlimited vacation, Shaw said.

She said that having the number of vacation days mandated by individual managers instead of under a blanket, companywide policy could lead to unfair distribution of vacation time.

"If you have employees in one department who are getting lots of vacation," Shaw said, "and a manager in another department is a hard-ass and doesn't let people take time off, that's a morale issue."

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