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LEAVE SHARING/DONATION PROGRAMS CHECKLIST

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Legal Considerations

1 - Tax consequences to employees and employer

Tip: Review proposed arrangement with accountants.

2 - Medical information confidentiality laws

Tip: Do not disclose any identities or medical information without individual's written consent; allow them to choose what is disclosed.

3 - N.C. general rule that benefits programs are contractually binding on employers, as written

Tip: Program will be legally enforceable against you, as written by you, and ambiguities, omissions construed against you. Be sure to include all terms, conditions, limitations and eligibility requirements and have it reviewed by legal counsel.

4 - Labor laws: prohibitions against joint employee-management committees (union/non-union shops); subject of mandatory bargaining (union shops only)

Tip: Unless employer is unionized or is non-unionized but considering a joint employee-management committee, there is little risk here.

5 - ERISA-covered program?

Tip: Unless employer's paid time off programs are ERISA-covered plans (most are not) or the employer is considering a leave bank program, there is little risk here.

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Practical Issues and Tips

1 – Determine type of program:

- Case-by-case donation (typically voluntary)
- Leave bank
 - Voluntary/non-exclusive (e.g., does not require membership)
 - Voluntary/members only (may or may not require initial and/or periodic donations, mandatory assessments; can be flat amounts or prorated according to annual accrual)
 - Mandatory
- Both

2 – Eligibility Criteria

- Qualifying conditions
 - Employee, employee family (define family)
 - Health
 - Define: Catastrophic illness/injury v. FMLA serious health condition
 - Specify exclusions (e.g., short-term sporadic illness, recurrence of chronic conditions, on-the-job injuries)
 - Specify medical certification requirements; include right to employer chosen provider
 - Expressly state determinations case-by-case for conformity with policy intent
 - Non-health (define)

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- Duration of absence (e.g., absent from work for minimum period - common period is a single block that exceeds the annual paid-time off allotment)
- Prohibition against using donated leave for any purpose other than the one it was donated for

❑ Recipient

- Employee classification (e.g., regular, temporary, full-time, part-time, etc.)
- Company service requirement (e.g., 1 year) or leave bank membership requirement (minimum period of membership before eligible for benefits)
- Has exhausted all other available paid leave; consider requirement for having taken minimum amount of unpaid leave
- Leave without pay would otherwise have been granted
- Require completion of form certifying understanding of program, and consent for disclosures

❑ Donor/donated leave

- Type of leave that may be donated (e.g., vacation, sick, personal, PTO, etc.)
- Has sufficient accrued leave
- Require completion of form certifying understanding of program, and consent for disclosures
- Consider prohibition against donation to immediate supervisor/direct report
- Consider requiring supervisor approval for donation

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3 – Determine who will be responsible for soliciting donors

- Company v. recipient
 - Factors to consider:
 - Violation of non-solicitation policy
 - Likelihood of coercion, intimidation, “kickbacks”
 - Desirability of anonymous recipient option (anonymous recipient v. anonymous unless recipient consents to identification v. identified)
 - Desirability of anonymous donor option (anonymous donor v. anonymous unless donor requests to be identified v. identified donor)
- No donor/recipient identities should be disclosed unless consent is obtained
 - Consider allowing recipient to elect how much information to be disclosed

4 – Steps for minimizing undue influence

- Include prohibition against intimidation, coercion, kickbacks, favoritism
- Consider prohibition of donation to immediate supervisor/direct report

5 – Donated leave considerations

- Minimum and maximums for amount received, amount donated (by incident, annual, lifetime)
 - Common to require donors to retain at least one-half of annual accrual
- Prohibit donations of unaccrued leave
- Can leave that otherwise would be forfeited be donated?
- Donations are irrevocable

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- Determine accounting for donated leave (e.g., is donated leave in hours/days converted to cash value at donor rate of pay and then reconverted into hours/days at recipient rate of pay?)
- Determine minimum payout allotment (e.g., hour, day, week, etc.)
- Donation not tax deductible to donor; taxable to recipient

6 – Determine who authorizes donations/receipt eligibility

- Supervisor/manager role (e.g., certifies that leave without pay would be approved)
- HR/benefits role
- Appeal process
- Use of joint management-employee committee

7 – Coordination with other benefits

- STD, LTD, workers' comp
- Will PTO/vacation/sick time accrue during use of donated leave?
- Benefits status during use of donated time

8 – Limitations

- Consider prohibition against receipt of donated leave after return to work
- Can donated leave be carried over to next year?
- How will unused donated leave be treated (e.g., return to donor(s) on pro-rata basis)?
- Can recipient get pay for donated but unused leave upon termination?

9 – Documentation

- Policy
- Procedure for request, donation, approval, etc.

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- Request form/recipient certification/consent
- Donation form/donor certification/consent