

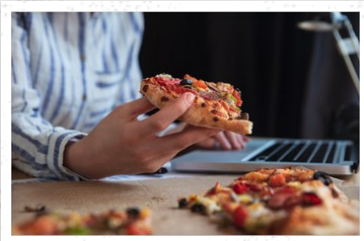
BREAKS & VACATIONS IN THE WORKPLACE

— NATIONAL CONCRETE BURIAL VAULT ASSOCIATION —

A SHORT PRIMER ON EMPLOYEE BREAKS AND VACATIONS

Written by [Poul Lemasters, NCBVA Legal Counsel](#) | October 2023

It's nearing the end of the year, so why not grab that last minute vacation? After all, we all deserve a break. Actually, we may be required to take a break! Maybe that vacation is closer than you thought. Let's be clear. **This is a short explanation on what can be a complicated subject – breaks and vacations in the workplace.** The subject can become complicated because state laws as well as current business practices will affect your requirements. But you must start somewhere, so here is a quick breakdown on breaks and vacations.



TAKE A BREAK: YOU DESERVE IT

First, many people are surprised to know that on the federal side, **the Fair Labor Standards Act ("FLSA") does not require breaks.** In fact, the FLSA does not require breaks, meal periods, rest periods, vacation, holiday, sick, or severance pay. Basically, all the stuff we are about to explain is not federally required.

However, the FLSA does state that if you do offer a break – typically defined as a break between 5-20 minutes – then it must be counted as time worked and included in pay. However, a meal break – typically defined as a bona fide meal period 30 minutes or longer – may not be included as pay so long as the

employee is completely relieved from their duties. This means that if you are eating at your desk to answer phones, you are not completely relieved of work, and it is not a bona fide meal period.

Where breaks and vacations really become an issue is on state and business practices. Unfortunately (or fortunately for lawyers), this means that there is no easy cookie-cutter way to handle the subject but rather guidelines to consider.

WORK BREAKS

For most states, a break follows federal guidelines that as long as it is under 20 minutes, then it is deemed a break and must be paid. Each state has its own requirements that range from no breaks at all to mandated breaks for a certain number of hours worked (California requires a 10-minute break for every 4 hours worked). The more common state requirement among most states are breaks for minors, those employees under 18 years of age. In the case of a minor, many states require mandated breaks for shifts of 5 hours or more.



What about OSHA Standards?

It is also worth mentioning the OSHA recommended breaks. OSHA has suggested guidelines to follow when workers will be in hot or cold environments. Besides general guidelines such as dressing appropriately; providing liquids (yes you can dehydrate quickly in cold environments too); training workers on how to prevent and recognize stress in these environments; **OSHA also recommends that employers provide breaks to workers who are subject to cold or hot environments.** Specifically, OSHA states:

- **For Cold Environments** - Employers should give workers frequent breaks in warm areas. Acclimatize new workers, and those returning after time away from work, by gradually increasing their workload and allowing more frequent breaks in warm areas as they build up a tolerance for working in the cold environment.
- **For Warm Environments** - When heat stress is high, employers should require workers to take breaks. The length and frequency of rest breaks should increase as heat stress rises. In general, workers should be taking hourly breaks whenever heat stress exceeds the limits shown in Table 1 under [Determination of Whether the Work is Too Hot section on the Heat Hazard Recognition page](#). Breaks should last long enough for workers to recover from the heat. How long is long enough? That depends on several factors including environmental heat (WBGT) and the worker's physical activity level, as well as the individual worker's personal risk factors. The location of the breaks also matters. If workers rest in a cooler location, they will be ready to resume work more quickly. Breaks should last longer if there is no cool location for workers to rest.

The issue with OSHA is that there is no set time limit or requirement – but rather suggested guidelines. Saying that, if OSHA suggests something, then it should be followed as an employer. The main point is to recognize that outdoor workers should be provided appropriate breaks which align with the outdoor environment. As the employer, it is your duty to make sure that the breaks are provided and understood. Otherwise, an injury could be seen as an OSHA violation.



MEAL BREAKS

In addition to work breaks, there are also meal breaks, or rest breaks that are over 30 minutes. Again, these are mostly state mandated and not required under FLSA. **The only FLSA requirement is whether it is paid or unpaid.** If the meal break is truly a meal break – then it can be unpaid – but this means the employee is free from work activities. The employee does not necessarily need to be allowed to leave the premises for a meal break, but the employee must be completely relieved of work duties to not be paid.

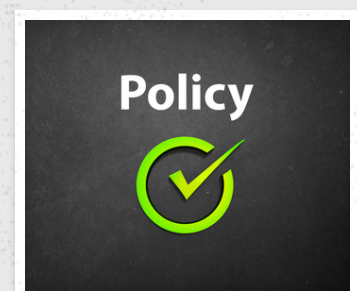
State Requirements

States will range in requirements for meal breaks from states that do not require any meal breaks all the way to states that mandate 30-minute meal breaks for certain hours worked (California requires a 30-minute meal break for any employee that works 5 or more hours).

Some states also mandate when the meal break must occur. Connecticut, for example, states that not only must employees receive a 30-minute meal break for each 7 ½ hours worked; but that the meal break must be taken some time after the first 2 hours worked and before the last 2 hours worked. Like breaks in general, many states have special provisions in the case of minors, requiring meal breaks for those under the age of 18 to be guaranteed during their shift.

WRITTEN POLICIES AND TRACKING

For an employer, not only do you need to know your state law, but your business should also have a written process that outlines your break and meal break policies. **At a minimum, your business needs to follow state laws when creating break and meal break policies.**



In addition to written policies, and perhaps even more critical, is your process of tracking employee breaks and meal periods. It is the employer's responsibility to track all breaks and failure to do so is an off-the-clock workplace violation that can lead to wage and hour claims. Make sure your business has some process to document employee breaks.



VACATION OR PTO

First off, if your business still lists vacation time, it may be time to update. Many businesses used to define vacation time, versus sick leave, versus personal days. In today's business world, most companies now simply classify this all as paid time off ("PTO"). In doing so it is easier to create one policy for all.

When creating the policy, there are several things to consider. Keep in mind that while no state requires vacation time be offered, there are some states that require paid time off, specifically sick time, and this must be included in your policy. (With some limitations, this includes Arizona, California, Connecticut, Maryland, Massachusetts, Michigan, Nevada, New Jersey, Oregon, Rhode Island, Vermont, Washington, and D.C.)

What are the advantages and disadvantages to using PTO versus vacation time?

Typical advantages are ease of tracking time off for the employer and more flexibility for the employee. After all, with PTO I can simply take a Monday off versus calling in sick at the last minute! But there are disadvantages, which include more time off (employees may not use all their sick days but they typically do use all their PTO) and more coming to work sick days because of employees wanting to use all the PTO for vacation.

What is use it or lose it?

When creating your Vacation/PTO Policy, consider the "use it or lose it" factor. Again, dependent on state law, most employers have the right to determine this in their own policy. There are arguments for and against the policy, but in principle, the idea is that at the end of the year an employee will lose anything not used and may not roll over unused benefits to build a reserve. Whatever policy you choose, make sure it is clearly explained as well as applied to all employees equally.

On this same issue comes the determination if unused PTO is earned and must be paid to the employee if unused. State law may dictate, and if your state does not allow a "use it or lose it"

provision, then your business will have to either allow the employee to rollover the unused time or pay them at the end of the year.

What happens to PTO upon termination?

The other payout issues for PTO and vacation time is upon termination. Many states have provisions that require an employer to pay out all unused PTO or vacation time upon termination. However, this can be affected by your PTO accrual method. Simply put, if you give an employee 1 week of PTO at the beginning of the year, then most likely this is banked and considered earned. If they leave or are terminated in February, they have 1 week of PTO, and depending on state law, you may have to pay all of it to them. However, if the employee earns PTO a little at a time, say one day per month worked, then in this case they may have only earned 1 day – and that may be all you owe them.

Again, this will be dependent not only on state laws, but also your own policies you develop. The chart below (as of the time of this article) outlines the basic PTO "use it or lose it" guidelines. When developing a policy, keep in mind that one disadvantage to PTO is that many states will require PTO to be paid out upon termination, but unused sick time usually does not count.

[Click to enlarge chart](#)

State Law PTO Guidelines

State	Does the state have a law banning "use it or lose it" policies?	Does the state require employers to provide PTO payout at termination?
Alabama	No	No
Alaska	No	No
Arizona	No	No
Arkansas	No	No
California	Yes	Yes
Colorado	Yes	Yes
Connecticut	No	No
Delaware	No	No
D.C.	No	No
Florida	No	No
Georgia	No	No
Hawaii	No	No
Idaho	No	No
Illinois	No - While state does not prohibit "use it or lose it" policies in the workplace, it does regulate it.	Yes
Indiana	No	Yes
Iowa	No	No
Kansas	No	No
Kentucky	No	No
Louisiana	No	Yes
Maine	No	No
Maryland	No	No - However, employers must pay employees for unused vacation time if the employer does not have a forfeiture policy that says otherwise.
Massachusetts	No - However, employers must provide accrued vacation pay to terminated employees.	Yes
Michigan	No	No
Minnesota	No	No
Mississippi	No	No
Missouri	No	No
Montana	Yes	Yes
Nebraska	Yes	Yes
Nevada	No	No
New Hampshire	No	No
New Jersey	No	No
New Mexico	No	No
New York	No - However, employers must give employees advance notice of any implemented "use it or lose it" policy.	No
North Carolina	No	No
North Dakota	No	Yes - While employees are entitled to unused vacation pay when they are terminated, there are some exceptions.
Ohio	No	No
Oklahoma	No	No
Oregon	No	No
Pennsylvania	No	No
Rhode Island	No	Yes
South Carolina	No	No
South Dakota	No	No
Tennessee	No	No
Texas	No	No
Utah	No	No
Vermont	No	No
Virginia	No	No
Washington	No	No
West Virginia	Yes	No
Wisconsin	Yes	No - Employers can decide whether to provide accrued vacation pay upon termination.
Wyoming	Yes	No

REMEMBER: TIME OFF WORK IS VALUABLE

Lastly, consider this. In the business world today, many employers and employees agree that time off from work is the most valuable benefit available. **All the money earned is worthless if you have no time to spend it.** When considering your break and vacation policies, keep in mind what your state law requires; but be aware of what your employees desire so that you can attract and keep the best in your company.

REGISTER FOR THE Q&A ZOOM CALL

Wednesday, November 1, at 2:00pm ET

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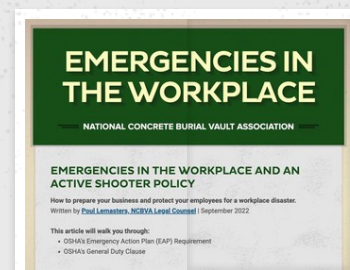


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Mark your calendar & [register](#). There is no charge to attend, but registration is required.

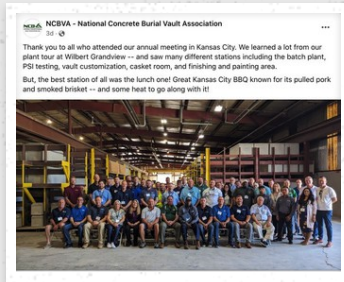
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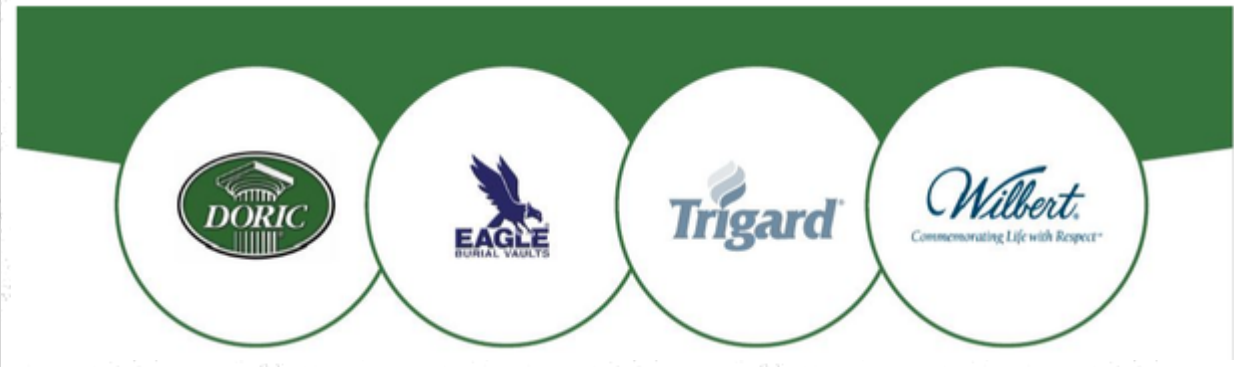
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