

# The SESCO Report

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Your “Human” Resource Since 1945

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## Preparing for the Holiday Season

As employers approach the holiday season, many questions arise from both employers and employees alike about holidays. The following commentary and SESCO advice will help prevent misunderstandings and possible liability.

### Are holidays required to be provided?

For private, for-profit and not-for-profit employers, holidays and even sick days and vacation time are a normal part of an employee benefit package. However, the federal law and a majority of states do not require that employers provide holidays, sick days, vacation time or any other time off.

**Are employers required to pay for holidays if they are provided?** The federal government and, again, most state laws do not regulate holidays, sick or vacation days to include whether or not they are paid or how much an employer has to pay.

**If an employee works a holiday, does the employer have to pay a special rate?** The federal government and most state laws do not require that an employer pay any special rate to employees for working on holidays. Should an employee work the holiday and the time worked create overtime (hours worked in excess of 40 hours per week), the only requirement is that the employer pay overtime as required.

**Does an employer have to provide an employee time off for religious observance/religious holidays?** The rules are different when an employee requests time off to observe a religious holiday. Title VII,

which applies to employers with 15 or more employees, is the primary law prohibiting workplace discrimination. Title VII makes it illegal for employers to make job decisions based on an employee’s religious beliefs or practices. For example, an employer may not refuse to hire Muslim applicants or refuse to promote employees who don’t share the owner’s Christian faith.

Title VII also requires employers to make reasonable accommodations for their employees’ religious beliefs, unless the accommodation would create an undue hardship for the company. An accommodation could be a change to the usual rules, employee’s schedule, job duties, or position requirements that will allow an employee to practice his or her religion. Examples include relaxing a dress code to allow an employee to wear religious clothing or jewelry, or providing a private space and breaks during work day for prayer.

Shift and scheduling changes are among the most frequent religious accommodation requests. If an employee requests time off to observe a religious holiday, you must provide it absent an undue hardship. You don’t need to pay the employee for this time off; however, unless the employee is using paid leave like vacation or paid time off.

**What is an undue hardship?** A reasonable accommodation for an employee’s religious practices creates an undue hardship if it imposes anything more than a minimal burden. When an employee requests a religious holiday off, for example, you might have to pay some additional administrative cost such as those associated with additional scheduling and administrative time or pay another employee to come in or even pay overtime.

The undue hardship test also includes non-monetary factors such as whether

the accommodation infringes on the rights of other employees. If, for example, another employee is willing to swap shifts with someone who needs time off for a religious holiday, that wouldn’t be an undue hardship. However, Title VII does not require you to force a shift swap on an unwilling employee or to disrupt your usual scheduling or seniority system.

To prevent discrimination charges based on religious beliefs or practices, SESCO strongly recommends that the following policies are communicated during the interview (prior to hiring) as well as in the employee handbook:

- **Dress Code -** The EEOC (Title VII) is normally hands-off when it comes to an employer’s dress code. For a number of reasons, dress codes should be very specific and can also discriminate between males and females within your workforce. Dress codes can address piercings, tattoos, appropriate necklines for women’s dress, shoes, facial hair, type of dress (especially for customer service or sales-related employees) and a number of other guidelines which can prevent significant issues associated with religious beliefs.
- **Make it very clear to the applicant and subsequent employees what your expectations are in terms of schedules and hours worked including days worked.** Make it very clear up front to the applicant when you expect them to work regardless of if it’s on a Saturday or Sunday or another religious holiday or observance. This will greatly prevent the need for future accommodation, although it does not prevent an em-

### Inside This Issue

Preparing for the Holiday Season .....	1
With Fall Comes Hunting Season: Challenges for Employers.....	2
SESCO Client Corner .....	4

## HOLIDAY SEASON

employee from requesting an accommodation.

### What is a typical holiday package?

Most employers (70%) provide paid holidays, sick days, vacation days (or a combination thereof entitled Paid Time Off).

Normal practices are as follows:

- **Holidays** - The typical number of holidays provided are 5-7 holidays. These typically include:
  - Christmas
  - New Year's Day
  - Thanksgiving
  - Day After Thanksgiving
  - Memorial Day
  - July 4th
  - Labor Day
- **Sick Days** - A common number of sick days provided to employees annually are three (3). More and more states are actually passing state laws providing paid sick days including California, Connecticut, Massachusetts, Oregon and others.
- **Vacation** - Typical vacation days provided are, in fact, paid at the employee's regular salary or hourly rate based on 8 hours per day, even if the schedule

requires the employee to work 10 or even 12 hours per day. Typical vacation is earned versus accrued. Common vacation schedules are as follows:

- After 1 year of service - 2 weeks paid vacation
- After 5 years of service - 3 weeks paid vacation
- After 15 years of service - 4 weeks of paid vacation (or 3 weeks' vacation and 1 week paid)

**If our company provides for paid holidays, sick or vacation leave, do we have to pay an employee the days earned and not used upon separation?** The answer is strictly based upon state law. Federal law does not mandate or regulate holidays, vacation, sick leave or PTO. However, many states to regulate these fringe benefits to include whether or not an employer has to pay these earned, unused days at time of separation whether it is resignation or termination. Most states leave it up to the employer's policy. However, there are a hand full of states that require an employer to consider these fringe benefits as wages earned and thus to be paid at time of separation.

**In summary,** SESCO recommends that employers articulate both while interviewing and after hiring the fringe benefits provided as well as dress code and hours of work expectations. Further, employers should have their employee handbook reviewed annually as more and more states are implementing regulations regarding fringe benefits as well as hours of work and overtime. As our clients know, SESCO is recognized nationally as an expert in drafting and preparing employee handbooks and our retainer clients receive a free handbook review annually. For those that are not a retainer client, we welcome you to explore our retainer options available and/or allow SESCO to review your employee handbook.

**Note:** This article does not address governmental or public organizations as the rules and regulations are much more generous and accommodating for federal, state, local and public governmental agencies and organizations. SESCO does provide professional services to many state and local governments and public agencies and certainly welcome your call should you have questions that pertain to your specific sector.

## With Fall Comes Hunting Season Challenges for Employers

Hunting is an extremely popular pastime for most Americans. This means that employees are requesting time off for hunting and with this comes transporting firearms in their personal vehicles. These realities often create challenges for employers. Please consider the following SESCO recommendations:

### 1. Absenteeism and productivity issues

- It's incumbent upon employers to clearly articulate rules and policies, especially as relates to hours of work, tardiness and absenteeism. One of SESCO's recommendations in addition to a well-written employee handbook policy is to post your vacation or paid time off schedule in January of each year. Subsequently, employees can schedule their time off (as approved) on a first come, first served basis. If there is more than one employee requesting the same time

off, normally position and/or seniority takes precedent.

Your attendance policy also needs to articulate any restrictions on scheduling vacation and paid time off to include:

- All paid time off must have the approval of management
- If seasonal, when an employee cannot take vacation or paid time off
- If an employee misses work without prior approval, what are the disciplinary actions and/or consequences?

Again, well written and communicated policy is critical in managing time off and absenteeism, especially when it comes to the hunting season.



- ### 2. Potential liability for employers based on employees' use of firearms in the workplace
- Generally, employers are not held liable for crimes committed by their employees. However, if the employer knew or should have known of an employee's violent tenden-

## HUNTING SEASON

cies and that the employee possessed a firearm, it could be liable for injuries caused by the employee on the theory that the employer was negligent.

3. **Federal law does not regulate guns in the workplace** - Although federal law does not regulate guns, most states limit or restrict an employee's possession of firearms during working time or on the employer's property.
4. **Parking lot laws** - More than 20 states have enacted "parking lot laws," which provide that an employee may have a lawfully possessed firearm in his or her car in a company lot, garage, etc. However, most of these laws allow an employer to prohibit an employee from carrying a firearm on his or her person while working, having a firearm in company offices or having a firearm in a company vehicle. Many state laws address where a firearm can be maintained in the employee's vehicle such as in a locked trunk.
5. **Discrimination laws** - There are a few states that prohibit employers from refusing to hire or terminate employees because they own guns or have concealed carry permits.
6. **Posting** - Many states require employers to post notices if they are going to prohibit employees from possessing firearms in the workplace.
7. **Employer immunity** - Some state laws provide immunity for employers for crimes committed by employees who possess firearms in compliance with workplace gun laws.
8. **Employers challenging parking lot and similar laws have gained little traction** - Cases involving employers

attempting to prohibit employees from possessing guns on their properties have failed. Courts are upholding state laws such as parking lot laws.

9. **Employers servicing the public need to understand their state law regarding customers and carry permits** - If you are an employer that serves the public such as a retail service establishment, you need to understand your state laws regarding what you, as an employer, can address and prevent in terms of a customer carrying a firearm into your store or place of business. The state laws vary greatly and as you have questions, you should contact SESCO so that you can properly post your restrictions if legal to do so.

### Conclusion

While policies restricting an employee's ability to possess a firearm at the place of employment or during work time help to protect other employees and the employer from liability, employers must be careful not to run afoul of state laws protecting an employee's right to possess firearms. Further, employer's must not run afoul of state laws that allow customers to carry firearms legally within their place of business.

Currently, prohibiting employees from carrying a firearm on his or her person while working or having guns in the employer's office is permissible in every state. However, prohibiting employees from having firearms in their personal vehicles - even in a company parking lot - and discriminating against gun owners in hiring or in the terms and conditions of employment can result in significant liability in most states.

### A Special Thanks to American Tire Distributors/Tire Pros

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Tire Pros is the nation's largest network of elite, independent and locally-owned tire dealers. SESCO is proud to be endorsed by Tire Pros to their franchises across the country and welcome individual Tire Pros operators' calls concerning any human resource or employment law question or issue.

### Special Thanks to New SESCO Clients!

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