

Colorado Division of Labor Likely to Prohibit Forfeiture of Vacation Time

By Ryan P. Lessmann and Kristen M. Baylis

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Colorado employers with “use-it-or-lose-it” vacation policies, or who cap the amount of vacation time that employees can carry over from year to year, or who do not pay out accrued vacation upon discharge, should review and, if necessary, revise their vacation policies in light of recent changes to the state’s vacation pay enforcement position.

As part of its implementation of the new Colorado Wage Protection Act, the Colorado Division of Labor has announced, informally, a new enforcement position with respect to vacation pay. The Division interprets Colorado law to require that once vacation pay has been earned, it cannot be “unearned.” The Division expressly prohibits any type of forfeiture clause in vacation agreements, including “use-it-or-lose-it” provisions.

Employers may cap vacation accrual, but once vacation time has been earned, it must be paid out upon separation from employment.

The Division’s new policy applies only to vacation pay earned on and after January 1, 2015. Additionally, the vacation pay rules do not apply to sick leave or to paid time off (PTO).

Background

The Division’s new policy is based on its interpretation of Colorado Revised Statutes (Section 8-4-101(14)(a)(III)), providing that wages include vacation pay “earned in accordance with the terms of any agreement.” The statute also states, “If an employer provides paid vacation for an employee, the employer shall pay upon separation from employment all vacation pay earned and determinable in accordance with the terms of any agreement between the employer and the employee.”

Some companies interpreted the statute to mean that payment of vacation pay upon separation of employment was not required in all cases. However, that interpretation now poses risks for employers in light of the Division’s newly announced position.

Implications

Colorado employers are not required to provide any sort of paid vacation benefit. But if they do, and vacation pay is earned by an employee, it cannot be unearned and cannot be forfeited. As indicated, though, this is solely the Division’s informal position in determining wage claims filed with it. [Indeed, since the original posting of this article on September 24, 2015, we have obtained information that the Division’s informal interpretation is itself likely to change, and we understand that the Division’s formal position is forthcoming.] Additionally, this interpretation has not been adopted by any Colorado court at this time.

Even under the Division’s new informal interpretation, employers can retain PTO use-it-or-lose-it policies and non-payment-on-discharge policies, provided they are drafted properly to exclude reference to vacation time.

All Colorado employers should review their vacation policies, procedures, and employment agreements and remove any provisions requiring forfeiture of earned vacation pay, among other things.

If you have questions about the new enforcement position or about other developments affecting employers, please contact the Jackson Lewis attorney with whom you regularly work.

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