

Colorado Labor Division Guidance Clarifies Forfeiture of Vacation Pay Sometimes Permissible

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Colorado employers are not required to provide their employees any paid vacation benefit. However, when they do, clear “use-it-or-lose-it” provisions in vacation policies are valid under certain conditions under the Colorado Wage Claim Act, according to the Colorado Division of Labor’s guidance on vacation pay.

The new guidance comes in the wake of the Division’s September informal announcement interpreting Colorado law to prohibit forfeiture clauses in vacation agreements, including “use-it-or-lose-it” provisions. (See our article, [Colorado Division of Labor Likely to Prohibit Forfeiture of Vacation Time](#).) The announcement left employers with many questions, including whether the interpretation amounted to a blanket ban of “use-it-or-lose-it” vacation policies. This new guidance clarifies that there is no blanket ban on such policies, but that they must be drafted carefully to avoid risking a violation under the Wage Claim Act.

Guidance

In Frequently Asked Questions, released on October 19, 2015, the Division states, “the ‘use-it-or-lose-it’ policy may not operate to deprive an employee of earned vacation time and/or the wages associated with that time. Any vacation pay that is ‘earned and determinable’ must be paid upon separation of employment.”

Determining when vacation pay is “earned” depends on the terms of the agreement between the employer and employee. If the agreement is silent or ambiguous as to when vacation is “earned,” the Division will consider a number of factors to determine when vacation pay is “earned.” These include:

- the employer’s historical practices,
- industry norms and standards,
- the subjective understandings of the employer and employee, and
- any other factual considerations which may shed light on when vacation time becomes “earned” under the agreement in question.

Colorado employers’ paid vacation policies must be clearly drafted to prevent forfeiture of earned vacation time. The guidance highlights the importance of carefully drafting vacation policies and specifically defining when vacation time is “earned.” Whether a “use-it-or-lose-it” policy is permissible in Colorado will depend on the specific language of the employer’s policy.

Open Questions

It is unclear under the new guidance whether “use-it-or-lose-it” policies defining vacation time as “earned” when it is both accrued and used are permissible. Additionally, the new guidance does not reference Paid Time Off (“PTO”) or sick time and, thus, it is unclear whether the guidance applies to these policies. However, because the Wage Claim Act references only vacation pay, the new guidance presumably does not apply to PTO or sick time.

Next Steps

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

If you have any 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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