

Colorado Labor Agency Adopts Wage Rules that Include Bar on Vacation Pay Forfeiture

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The Colorado Department of Labor and Employment (CDLE) has adopted permanent amendments to its Wage Protection Act Rules (Permanent WPA Rules) that include a prohibition against forfeiture of vacation pay under the Colorado Wage Claim Act (CWCA).

The Permanent WPA Rules will take effect December 19, 2019.

The prohibition on forfeiture of vacation pay is consistent with CDLE's previous informal guidance on "use-it-or-lose-it" vacation policies. Moreover, in its [Statement of Basis, Purpose, Specific Statutory Authority, and Findings](#) in support of the Permanent WPA Rules, CDLE expressly disagrees with a recent Colorado Court of Appeals opinion upholding a forfeiture provision in an employer's workplace policy. (See our article, [Colorado Employer's Vacation Policy that Included Forfeiture Provision Upheld.](#)) Further, CDLE expressly states the Permanent WPA Rules on vacation pay supplant judicial interpretations that upheld vacation pay forfeiture.

Vacation Pay Permanent Rule

Permanent WPA Rule 2.15 states:

"Vacation pay" ... includes in the definition of "[w]ages' or compensation": "Vacation pay earned in accordance with the terms of any agreement. 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."

The "earned and determinable in accordance with the terms" provision does not allow a forfeiture of any earned (accrued) vacation pay, but does allow agreements on matters such as: (1) whether there is any vacation pay at all; (2) the amount of vacation pay per year or other period; (3) whether vacation pay accrues all at once, proportionally each week, month, or other period; and (4) whether there is a cap of one year's worth (or more) of vacation pay. Thus, employers may have policies that cap employees at a year's worth of vacation pay, but that do not forfeit any of that year's worth.

For example, an agreement for ten paid vacation days per year:

- (a) may provide that employees can accrue more than ten days, by allowing carryover of vacation from year to year;
- (b) may cap employees at ten days; but
- (c) may not diminish an employee's number of days (other than due to use by the employee).

[Emphasis added.]

Compared with Proposal

Permanent WPA Rule 2.15 differs from the [proposed Wage Protection Act Rule 2.15](#) released in August in two minor ways. Permanent WPA Rule 2.15 omits the phrase "use it or lose it," thus clearly prohibiting any forfeiture of accrued, unused vacation time. Permanent WPA Rule 2.15 also clarifies that it allows diminishment of vacation time through employees' use of vacation time.

Permanent WPA Rule 2.15 still does not reference paid time off (PTO) or sick time. It thus remains unclear as to whether it applies to these policies. However, because the CWCA references only vacation pay, Permanent WPA Rule 2.15 arguably does not apply to PTO or sick time.

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