



Colorado Department Of Labor "Clarifies" Vacation Pay Position

Insights

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In late September of this year, the Colorado Department of Labor (CDOL) announced that “use-it-or-lose-it” vacation policies would no longer be permitted pursuant to its enforcement policy. However, mere weeks later, the CDOL reportedly acknowledged to the Denver Post that the materials it issued on this subject were “not clear.”

In an effort to clarify its position on vacation pay issues, the CDOL’s Division of Employment just released a Frequently Asked Questions posting on its website.

Use-It-Or-Lose-It Policies: When Are They Permissible?

In the FAQ, posted on October 19, 2015, the Division announced that use-it-or-lose-it policies “are permissible” under the new Colorado Wage Payment Act, but inexplicably stated in the next sentence that such policies “may not operate to deprive an employee of earned vacation time and/or the wages associated with that time.” The relevant text provides:

Can employers in Colorado have ‘use-it-or-lose-it’ provisions in vacation agreements?

Yes. ‘Use-it-or-lose-it’ policies are permissible under the Colorado Wage Protection Act, provided that any such policy is included in the terms of an agreement between the employer and employee. A ‘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. The terms of an agreement between the employer and employee will dictate when vacation pay is ‘earned.’

How an employee can lose vacation time without being deprived of vacation time is not explained, and no examples are provided that might provide further insight.

Four Clear Takeaways

However, four things are clear from this text. First, there must be an agreement between you and your employee for a use-it-or-lose-it policy to be considered acceptable. Although the statute does not explicitly require it, any such agreement should be in writing so that there is no confusion about its terms. A handbook vacation policy, receipt of which is acknowledged in writing by an employee, may constitute an agreement for this purpose.

Second, if you want to change your agreement or policy to include a use-it-or-lose-it provision, you cannot apply such a provision retroactively. That is, any vacation earned under the prior policy

cannot be lost.

Third, the value of all vacation pay earned and determinable at the time an employee leaves employment must be paid on separation.

Fourth, the definition of when vacation is earned is critical. In the absence of a definition, the Division may consider:

- your historical practices;
- industry norms and standards;
- the subjective understandings of you and your employees; and
- any other factual considerations that may shed light on when vacation time becomes 'earned' under the agreement in question.

Other Considerations

It appears that you could put a cap on how much vacation time or pay may be earned, and that you could require employees to use some of their accumulated vacation time before additional time or pay could be earned. It also appears that you could have a policy stating that vacation time or pay is not earned until employees work the specified amount of time and actually schedule time off. In these examples, the employees lose only the opportunity to earn vacation, and are not deprived of vacation already earned.

It is unclear whether the Division would approve of a policy that causes an employee to lose earned vacation time while employed, but not upon separation. Such a policy might require an employee to use earned vacation by a certain point in time or lose it, unless the employee separates from employment prior to that deadline. In such a case, the employee would be paid for all earned and unused vacation time.

Considering the confusing statements in the FAQ text, and until further clarification comes from the Division or through court decisions, you should recognize that you are taking a risk by adopting any policy that causes employees to lose vacation benefits already earned.

If you have any questions about this position or how it may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in our Denver office at (303) 218-3650.

You may find the Division's FAQs at: <https://www.colorado.gov/pacific/cdle/node/20161>

This Legal Alert provides an overview of a specific Colorado Department of Labor Division of Employment enforcement policy. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People



Susan M. Schaecher

Senior Counsel

303.218.3650

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