

Insights, News & Events

# END-OF-THE YEAR TO-DO LIST FOR COLORADO EMPLOYERS: VACATION PAY AND DENVER MINIMUM WAGE

Insights  
Dec 4, 2019

Colorado employers will soon face two big changes that will impact your workplaces. In a matter of weeks, the state will adopt a new rule on use-it-or-lose-it vacation policies, and Denver will begin the process of increasing its minimum wage. With the new year approaching, now is the perfect time to get up to speed on these changes adjust your policies and practices.

## USE-IT-OR-LOSE-IT POLICIES UNDER COLORADO LAW

On December 19, 2019, the Colorado Department of Labor and will adopt its proposed rule on use-it-or-lose it vacation policies. The new rule confirms that unused vacation pay that is “earned and determinable in accordance with the terms of any agreement between the employer and the employee” must be paid to an employee upon separation of employment.

Colorado Revised Statute § 8-4-101(14)(a)(III) includes in the definition of wages or compensation “vacation pay earned in accordance with the terms of any agreement.” The statute requires that an employer pay an employee upon separation of employment all vacation pay “earned and determinable in accordance with the terms of any agreement.”

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The Department's previous written guidance provided "use-it-or-lose-it" policies are permissible so long as they do not operate to deprive an employee of earned vacation time and/or the wages associated with that time. The Department had not defined "earned" vacation time, and as shown below, still has not clarified.

On June 27, 2019, however, the Colorado Court of Appeals held that an employer may place conditions on payment of accrued but unused vacation pay at separation of employment under Colorado law. In *Nieto v. Clark's Market*, the employer's handbook provided that if an employee was discharged for any reason or for no reason at all, the employee "forfeits all earned vacation pay benefits." Clark's Market discharged Ms. Nieto and refused to pay her for vacation time that she had accrued but had not used. The Colorado Court of Appeals analyzed the Colorado Wage Claim Act and held that "the Market's unused vacation policy doesn't violate the CWCA." While this decision is expected to be appealed to the Colorado Supreme Court, that didn't stop the Department from developing a new rule in response.

## **DEPARTMENT OF LABOR AND EMPLOYMENT'S NEW RULE ON VACATION PAY**

Following *Nieto*, the Department issued a proposed rule stating that the "earned and determinable in accordance with the terms" rule does not allow a forfeiture of any earned vacation pay. The Department's August 20 proposal stated that employers may enter into agreements with employees on matters such as:

- Whether there is any vacation pay at all;
- The amount of vacation pay per pay year or other period;
- Whether vacation pay accrues all at once or proportionally for a certain period of time; and

- Whether there is an accrual cap of one year's worth (or more) of vacation pay.

The Department further stated that employers may have use-it-or-lose-it policies that "disallow carryover after employees accrue a year of vacation pay, but that do not forfeit any of that years' worth." For example, an employer's agreement for 10 vacation days per year:

- May provide that employees can accrue more than 10 days, by allowing carryover of accrued vacation from year to year;
- May provide that employees cannot accrue more than 10 days, by disallowing carryover of unused vacation from year to year; but
- May **not** provide that after an employee accrues 10 days, that amount diminishes below 10 days for any reason.

The Department again did not clarify what constitutes "earned" vacation pay. Again, the proposed rule will be effective on December 19, 2019, so you should take immediate steps to come into compliance.

## **DENVER CITY COUNCIL SETS LOCAL MINIMUM WAGE HIGHER THAN STATE LEVEL**

Those with employees in Denver have additional steps to take at the end of the year in order to keep pace with an additional change. During the 2019 regular session, the Colorado General Assembly repealed its prohibition on local governments establishing minimum wage laws within its jurisdiction, and Denver leapt at the first opportunity to take advantage of this development.

The Denver City Council followed by unanimously approving a minimum wage hike for employees working in Denver. On January 1, 2020, employers in Denver must pay their employees a minimum wage of \$12.85 per hour, which will be higher than the state's \$12 minimum wage that will also become effective in 2020. A year later, on January 1, 2021, Denver's minimum

wage will increase to \$14.77. It will then increase to \$15.87 on January 1, 2022.

## WHAT SHOULD COLORADO EMPLOYERS DO?

Colorado employers should review their employment policies related to vacation pay benefits. The vacation pay policies should clearly state whether you offer vacation pay, the amount of vacation pay per pay year or other period, whether vacation pay accrues all at once or proportionally, and whether accrued but unused vacation may carryover from year to year. With respect to use-it-or-lose-it policies, you should continue to stay up-to-date on cases analyzing use-it-or-lose-it policies. And of course, employers with operations in Denver must adhere to the city's minimum wage of \$12.85 per hour starting January 1, 2020.

We will monitor the developments in Colorado and provide updates as warranted, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in [our Denver office](#).

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