

Colorado Vacation Policies: Use-It-Or-Lose-It Policy Hinges On When Vacation Is 'Earned'

Insight — 10/20/2015

In recent weeks, the Colorado Division of Labor (the Division) indicated that it was taking a new position when enforcing wage claims based on an employer's vacation policy. The specific issue revolves around whether a use-it-or-lose-it vacation policy—*i.e.*, a policy where an employee cannot rollover some or all earned vacation from year to year—is lawful in Colorado.

In response to inquiries about its position on such policies, the Division recently posted FAQs on its website stating that a use-it-or-lose-it vacation policy does not necessarily run afoul of the Colorado Wage Protection Act. However, if an employee challenges the validity of the policy, the determining factor will focus on when the vacation pay is earned.

Division of Labor Leaves Many Questions Unanswered

According to Colorado's Wage Protection Act, vacation pay “earned in accordance with the terms of any agreement” are “wages.” As a result, many Colorado employers have in place use-it-or-lose-it vacation policies, in which an employee may accrue a certain amount of vacation or paid time off (PTO) each year, but some or all of that vacation time will not roll over into the following calendar year. The reason for such policies is simple: it avoids employees banking large sums of vacation or PTO, which is typically paid out upon separation from employment. Until recently, the Division had not taken a formal position on such policies.

However, given the recent changes to the Wage Protection Act, the Division is responsible for adjudicating wage claims, albeit the jurisdiction is limited to claims for \$7,500 or less. In light of that change, and as many people likely saw, the Division issued guidance informally in recent weeks concerning use-it-or-lose-it vacation policies. After numerous legal alerts were sent out, the Division took a step back, as reflected in a *Denver Post* article.

Earlier this week, in an effort to clear up the confusion, the Division issued two FAQs, as noted above. Those FAQs specifically address whether Colorado employers may include use-it-or-lose-it provisions in their vacation policies. The Division answered “yes,” as long as any such policy is included in the terms of an agreement between the employer and employee. That clarification seems helpful, as it states that use-it-or-lose-it vacation policies are permissible under the Wage Protection Act.

The first FAQ, however, goes on to state that a use-it-or-lose-it policy may

not deprive an employee of earned vacation time and/or the wages associated with that time. It also states that 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 determine when vacation pay is earned.

This part of the FAQs is less helpful. It raises many questions about how an employer may structure a use-it-or-lose-it vacation policy in a way that will not deprive employees of any earned vacation. The Division's position appears to be that once vacation is “earned,” it cannot be lost.

The second FAQ addresses which factors the Division will use to determine whether a specific use-it-or-lose-it policy is permissible. The Division first will look to whether the policy states when vacation pay is earned. If the policy does not state, or is ambiguous as to when vacation pay is earned, the Division will consider the following factors in determining whether the use-it-or-lose-it policy is permissible:

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

Takeaways For Use-It-Or-Lose-It Vacation Policies

Because of the many unanswered questions related to the validity of use-it-or-lose-it vacation policies, Colorado employers should exercise caution. Points to consider include:

- The Division's jurisdiction is limited to claims of \$7,500 or less;
- The Division's interpretation of the Wage Protection Act and vacation policies may or may not be accepted by courts; and
- To avoid any potential challenge, consider a maximum accrual policy instead of a use-it-or-lose-it policy (e.g., once an employee hits a certain accrual, the employee will not earn more vacation or PTO until the employee falls below the maximum).

The best practice, if you want to maintain a use-it-or-lose-it vacation or PTO policy, is to review your policy with experienced employment counsel to determine if/how to revise your policies in light of the new guidance from the Division.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys

other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.