



EMPLOYERS MAY WANT TO RETHINK USE-IT-OR-LOSE-IT VACATION POLICIES

Colorado does not require employers to provide paid vacation or to establish vacation policies. Nonetheless, many employers do both. Employers commonly have use-it-or-lose-it policies, which limit the amount of vacation an employee may carry forward from year to year. For example, if an employee receives 10 days of vacation annually and does not take all vacation time by year end, she forfeits those unused vacation days for the following year. In recent years, legislation and enforcement of wage law have changed, causing employers to rethink these use-it-or-lose-it policies.

The Colorado Wage Act, C.R.S. §§ 8-4-101 et seq. treats earned vacation as wages.¹ In Colorado, earned vacation becomes immediately due and payable “[w]hen an interruption in the employer-employee relationship by volition of the employer occurs.”² Further, “[w]hen an employee quits or resigns such employee’s employment, the wages or compensation shall become due and payable upon the next regular payday.”³ Employers and employees cannot contract around the provisions of the Colorado Wage Act.⁴ Essentially, if the employee leaves his job, the employee must be paid earned vacation. This is a well-established area of the law with which employers are familiar.

However, employers may not be aware the Colorado Department of Labor and Employment, which investigates wage complaints and enforces Colorado wage laws, prohibits use-it-or-lose-it vacation policies where the use-it-or-lose-it policies “deprive an employee of earned vacation time and/or the wages associated with that time.”⁵

Where a use-it-or-lose-it policy is silent or ambiguous on when the vacation pay becomes “earned,” the Colorado Department of Labor and Employment states it will investigate the following factors to determine whether the policy complies with wage laws:

- 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.⁶

The Colorado Department of Labor and Employment states, “[t]hese factors are not exhaustive and may vary from case to case.”⁷ With these vaguely defined factors, the Colorado Department of Labor and Employment provides little concrete guidance about which policies may comply with the law and which policies may not. Plaintiffs’ attorneys are now arguing that “use it or lose it” policies deprive an employee of his earned vacation time based on Department of Labor’s interpretation to challenge the policies. While Colorado courts have not adopted the Department’s interpretation of use-it-or-lose-it policies, employers are left in unknown territory, facing the risk that any use-it-or-lose-it policy in place may receive challenge and being unsure how the Department or the courts will rule on those challenges.

The Department of Labor’s increased scrutiny of these policies have changed how employers view them. For employers wanting to avoid such legal uncertainty and reduce risk, it may want to move away from use-it-or-lose-it vacation policies. One popular alternative is the implementation of a vacation or paid-time-off accrual carry-over cap. Whereas a use-it-or-lose-it policy results in forfeiture of accrued vacation, a carry-over cap simply places a limit on the amount of vacation that may accrue. When the cap is reached, vacation or paid-time-off accrual stops until the employee uses sufficient paid vacation time to bring the accrued amount below the cap. Employers interested in pursuing such an alternative approach to a use-it-or-lose-it vacation policies should consult legal counsel to review the policy and the terms of the accrual cap to ensure the policy does not simply transform into a forfeiture provision.

If you have any questions about this update, please contact Kendra Kutko, kutkok@hallevans.com.



¹ C.R.S. § 8-4-101 (14)(a)(III) (“Wages” or “compensation” means “[v]acation 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”).

² C.R.S. § 8-4-109(1)(a) (“When an interruption in the employer-employee relationship by volition of the employer occurs, the wages or compensation for labor or service earned, vested, determinable, and unpaid at the time of such discharge is due and payable immediately”).

³ C.R.S. § 8-4-109(1)(b) (“When an employee quits or resigns such employee’s employment, the wages or compensation shall become due and payable upon the next regular payday”).

⁴ C.R.S. § 8-4-121 (Nonwaiver of Employee Rights: “Any agreement, written or oral, by any employee purporting to waive or to modify such employee’s rights in violation of this article shall be void”).

⁵ See <https://www.colorado.gov/pacific/cdle/vacation>

⁶ See *id.*

⁷ See *id.*