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Colorado PTO: To Pay or Not to Pay

Colorado Vacation Statute Means What It Says: Employer Vacation Policies Govern Payout Requirements

Colorado employers gained clarity from the Colorado Court of Appeals on a closely watched Colorado wage and hour law issue—when it comes to payout of accrued vacation time upon termination, the written agreement or policy rules.

Colorado law regarding payment of accrued vacation upon termination

Colorado wage laws do not require that employers provide workers with paid vacation, but most employers do. The Colorado Wage Act (the “Wage Act”) provides that “vacation pay earned in accordance with the terms of any agreement” constitutes “wages” or “compensation,” and the employer must, upon an employee’s separation from employment, provide “all vacation pay earned and determinable **in accordance with the terms of any agreement between the employer and the employee.**” See C.R.S. § 8-4-101(14)(a)(III) (emphasis added). Under the plain language of the Wage Act, employers should be able to define how and when vacation time is paid out.

The CDLE’s interpretation of the law

The Colorado Department of Labor and Employment’s (“CDLE”) has not interpreted the statute in the obvious manner. For instance, in *Blount Inc. v. Colo. Dept. of Labor & Employment, et al.*,¹ an administrative decision now on appeal in the Colorado Court of Appeals, the CDLE is arguing that prospective vacation time, awarded at the start of each calendar year, constitutes “earned” wages subject to payout upon termination. The CDLE also takes issue with “use-it-or-lose-it” vacation policies, whereby an employee could potentially lose accrued vacation time before he or she has the opportunity to use it.

The Court of Appeals’ clarification of the law

The Colorado Court of Appeals recently confirmed that the language of the Wage Act means exactly what it says. In *Nieto v. Clark’s Market*, 2019 COA 98, the employer had a policy that employees who were discharged for any reason, or who voluntarily resigned without giving two weeks’ notice, forfeited any accrued but unused vacation time. The plaintiff employee was discharged and, in accordance with company policy, was not paid out for accrued vacation time. She sued. The district court granted the employer’s motion to dismiss, concluding that the Wage Act “**clearly and unambiguously gives employers the right to enter into agreements with [their] employees regarding vacation pay.**” The Colorado Court of Appeals affirmed the judgment, finding that the Wage Act does not create a substantive right to payment for accrued but unused vacation time, and that the agreement between the employer and employee (which can be a handbook policy, as it was here), governs. This is an important holding for employers, who previously lacked definitive guidance on this issue.

¹ Colorado Court of Appeals Case No. 18CA2455, appealing a district court order reversing and vacating the CDLE’s final agency action in favor of the employee (Case No. 17CV34019, November 7, 2018).

What this means for employers

The *Nieto* holding means that employers can safely implement a policy providing that accrued unused vacation will not be paid out upon termination in any circumstances, or under designated circumstances (e.g., in “cause” terminations, or where little or no notice of resignation is provided by the employee). An employer could also implement a policy providing that payout of accrued unused vacation is paid out at one-half the employee’s normal rate of pay or at some other rate.

Action items

Colorado employers should assess their current policies to determine whether they wish to modify their vacation payout policies for departing employees. If employers wish to limit payout, whether in whole or in part (including imposing conditions on payout), the policy, offer letter or individual employment agreement should clearly and unequivocally set forth those limitations and conditions. Note that some nuances remain regarding, for instance, how other categories of leave (such as “paid time off” or “sick leave”) might be construed under the Wage Act. Employers are advised to consult with legal counsel in updating their policies and to continue to monitor the Court of Appeals’ and CDLE’s guidance on this issue.

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This document is intended to provide you with general information regarding a recent Colorado Court of Appeals decision regarding payout of accrued paid time off upon termination and its impact on employers’ policies. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.