

Service

Labor & Employment

Colorado Issues Guidance on 'Use It or Lose It' Vacation Policies

The Colorado Division of Labor (the Division) recently issued its much anticipated guidance on “use it or lose it” vacation policies. As we wrote last month in a legal alert, the Division had considered prohibiting “use it or lose it” policies that require employees to use vacation time on an annual or other basis. In response to legal and media attention, the Division has attempted to clarify its position; however, questions remain.

The Division’s Guidance

In a new Frequently Asked Questions posting on its website, the Division declared that a “use it or lose it” policy is permissible so long as “such policy is included in the terms of an agreement between the employer and employee.” As most employers already knew, employers must pay out vacation pay that is earned and determinable upon separation. The Division’s focus, and thus the crucial issue for employers, is when vacation time is considered “earned.” The Division will first look to the terms of the vacation policy. If the policy is silent, then the Division will look to the employer’s historical practices, industry norms, subjective understandings of the employer and employee, and other case-specific factors.

The Division’s guidance, while generally favorable for employers, still leaves some open questions. In particular, the Division cautioned employers that a vacation policy may not “operate to deprive an employee of earned vacation time and/or the wages associated with that time.” The Division did not give examples of or additional guidance on what would constitute a prohibited policy. Under one interpretation, the Division is merely counseling employers that they may not implement a vacation policy that results in forfeiture of vacation time earned under a previous policy or agreement. But under a more expansive interpretation, the Division may be asserting that when a policy provides that vacation is “earned,” it cannot later be lost as a result of a

carryover limit or other use requirement, even if those requirements are spelled out in the policy.

The Division did not address whether paid time off (PTO) policies, which combine sick leave and vacation leave into one leave bank, are subject to the same requirements as stand-alone vacation policies. The Division's guidance and the Colorado Wage Act refer only to "vacation," so arguably the prohibition does not apply to PTO. The Division also did not address how it views a vacation policy within an employee handbook containing an explicit disclaimer that it is not a contract. In such cases, there may be a question of what is the "agreement" between the employer and the employee.

What This Means to You

Although the Division's guidance does not have the legal effect of a statute or regulation, it does describe its enforcement priorities under the Wage Protection Act that took effect January 1, 2015.

Employers have options to consider with respect to their vacation policies:

For employers that seek to maintain use requirements or carryover limits, consider declaring that vacation is not "earned," but rather made available for use like sick leave. Or consider providing that vacation time is only "earned" once it is used.

Set an accrual cap that limits the total number of vacation hours an employee may earn.

Consider removing vacation policies from a handbook, guidelines or other policies that disclaim the existence of a contract. Instead, describe the terms of vacation accrual and use in a separate agreement as you do for confidentiality and noncompetition agreements.

Until the courts provide clarity on these issues, employers should be aware that employees (and their attorneys) may challenge their vacation pay-out policies, particularly the applicability of these rules to common practices such as PTO banks and annual carryover limits. Vacation policies vary according to each employer's business needs. To assess the likelihood that a particular policy will withstand scrutiny requires an individualized assessment of the policy's terms in light of the Colorado Wage Act and the Division's guidance.

For more information on these options, contact one of Husch Blackwell's Labor & Employment attorneys in Colorado.