

## Telling Time In Colo. Use-It-Or-Lose-It Vacation Policies

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Recently, the Colorado Department of Labor and Employment-Division of Labor (CO DOL) issued much-needed guidance confirming that use-it-or-lose-it vacation policies can be permissible in Colorado. The guidance brings some clarity to the recent hullabaloo generated by several commentators (who were reporting on alleged statements from CO DOL representatives) that use-it-or-lose-it policies violate Colorado law.

### Colorado Wage Act on Vacation Pay

Colorado law does not require that an employer provide paid vacation or establish a vacation policy. However, employers that choose to do so are subject to the provisions of the Colorado Wage Act regarding vacation pay. Specifically, Colo. Rev. Stat. § 8-4-101 states that “wages” or “compensation” includes: “Vacation pay earned in accordance with the terms of an agreement.” Further, “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.” Another relevant provision of the Act, § 8-4-121 states: “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.” While these provisions have been in place for years, there is no helpful case law interpreting these various provisions with respect to vacation pay or policy requirements.

For years, a sizable number of Colorado employers have maintained policies requiring employees to use their allotted vacation time by a date certain — for example, the end of the calendar year — and if the employees did not, they would lose that vacation time and any pay associated with it. Mountain States Employers Council reported that according to its most recent survey of paid time off policies, 15 percent of Colorado employers and 19 percent of Colorado resort employers had policies allowing an employee to carry over only a portion of earned vacation from one year to the next.

### Commentator Statements

In September 2015, several commentators reported that Colorado Labor Department Deputy Director Peter Wingate made statements indicating that the CO DOL was taking the position that use-it-or-lose-it vacation policies were not permitted under Colorado wage-and-hour laws. Reports indicated Wingate stated, “If I earned vacation throughout the year, then an employer has to pay it out.” Additionally,



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Wingate reportedly stated: “Once vacation pay has been earned, it cannot be unearned. Forfeiture clauses are not permitted in vacation agreements.” The headlines and commentary generally agreed, that as a result of these CO DOL statements, employers should lose their use-it-or-lose-it vacation policies.

### **October 2015 CO DOL Guidance**

Following on the heels of this controversy, the CO DOL finally issued guidance in the middle of October announcing that use-it-or-lose-it vacation policies are permissible provided that the policy is included in the terms of an agreement between an employer and employee. However, the guidance also states that a use-it-or-lose-it policy may not deprive an employee of earned vacation time or the wages associated with it. And, any earned and determinable vacation pay must be paid when an employee separates from employment.

The fact that the guidance continues to state that a policy cannot deprive an employee of earned vacation time or the wages associated with it sounds like a contradiction to the announcement in the same guidance that use-it-or-lose-it policies are permissible. Indeed, the overarching concept of use-it-or-lose-it policies is that earned vacation time is forfeited if it is not used by a particular time. However, the most reasonable interpretation is that an employer cannot refuse to pay an employee accrued, unused vacation time at the time of termination.

The CO DOL guidance also noted that challenges to a use-it-or-lose-it policy will prompt a wage complaint investigation. As part of the investigation, the CO DOL will review the policy along with the terms of the agreement between the employer and employee. If the agreement is silent or ambiguous about when vacation is “earned,” the CO DOL may consider the following factors, which are not exhaustive and may vary by case:

- the employer’s historical practices;
- industry norms and standards;
- 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.

The guidance, in the form of FAQs with answers, is part of a larger document interpreting the Wage Protection Act of 2014. Generally, the Wage Protection Act amended the Colorado Wage Act to provide new enforcement authority to the CO DOL to investigate and adjudicate complaints by employees of private employers regarding unpaid wages of \$7,500 or less. The Wage Protection Act applies to wages earned on or after Jan. 1, 2015. While employees can pursue such complaints with the CO DOL, they are not required to do so prior to commencing legal action in a court (i.e., this is not an administrative remedy exhaustion requirement similar to those under many employment discrimination statutes). Further, employees who choose the CO DOL complaint process may still later choose to terminate that process — even after the CO DOL issues a determination — and retain their right to bring a private action.

### **Considerations for Colorado Employers in Light of CO DOL Guidance**

While the CO DOL’s recent guidance on vacation policies is helpful, it is important to understand the limitations of the guidance. First, and most importantly, the guidance is not binding law or legal advice.

Rather, it is the current interpretation of the CO DOL of the Colorado Wage Act. In effect, this guidance is what the CO DOL will follow when it is exercising its new enforcement authority under the Wage Protection Act and adjudicating low-value wage complaints by employees who choose to submit their complaints to the CO DOL. But, this guidance could change, or it could be challenged in litigation and not followed by courts.

The guidance is, however, helpful to clarify and understand the CO DOL's current position on vacation policies. Given the recent reporting regarding the statements by CO DOL representatives, this guidance should give Colorado employers some assurance that their use-it-or-lose-it policies are permissible — at least according to the CO DOL at this time — provided they do not call for a forfeiture of accrued vacation time upon termination. In other words, such a policy can provide that vacation time must be used by the end of the calendar year. A policy cannot say: Use your vacation before you are terminated, or you'll lose it.

Employers may also consider adding language clarifying that the vacation time that is “earned” may only be used in the calendar year (or fiscal year, or whatever period the employer chooses) in which it is earned. In taking this approach, employers are defining and limiting what is earned and when it may be used. Further, employers should make clear that all accrued, unused vacation time will be paid out upon termination.

Finally, many employers, especially multistate employers, may still want to consider a “maximum accrual” policy, which is also permissible under the Colorado Wage Act. “Maximum accrual” policies allow an employee to accrue up to a certain amount of vacation time, at which point, the employee stops accruing unless he or she first uses some of the vacation time. “Maximum accrual” policies generally comply with many state laws that are more restrictive and do not permit use-it-or-lose-it policies. Further, “maximum accrual” policies may be easier to administer and preferable to employees who want to be able to carry over vacation time from year to year or to take a vacation at the beginning of a calendar year.

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