

## Service

Labor & Employment

# Colorado May Target 'Use It or Lose It' Vacation Policies

The Colorado Division of Labor (the Division) recently directed its compliance officers to find “use it or lose it” vacation policies or agreements in violation of the Colorado Wage Act, C.R.S. § 8-4-101 *et seq.* (the Wage Act). Such policies require employees to use their vacation time by a certain date, often in a calendar year, or lose the time. For years, the Division had advised informally that such policies or agreements were permissible so long as the consequences for failing to use accrued vacation were clear.

The Division has since advised Husch Blackwell and others that the enforcement priority remains under review and that it will issue written guidance to employers in the near future. Because this issue has received considerable attention in the legal and business media in recent days, we are alerting our clients to its potential implications, even though those implications remain uncertain.

### Background

The Wage Act does not require employers to provide employees with paid vacation, but it does require that employers pay to employees all earned, vested and determinable wages upon separation of employment. With respect to vacation, the Wage Act provides (emphasis added):

‘Wages’ or ‘compensation’ means ... Vacation 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*.

For years, Colorado's employers have interpreted the Wage Act to permit "use it or lose it" policies so long as the policy or agreement is clear. Employers thus had the discretion and flexibility under the Wage Act to establish the terms of the vacation time they were granting to employees, including vacation caps, carryover rules, accrual rates and use requirements.

Colorado courts, without directly addressing the enforceability of "use it or lose it" policies, have issued decisions premised on this understanding. For example, the Colorado Supreme Court last year ruled on whether accrued but unused vacation pay could be equitably divided at divorce. In answering yes, the Court cautioned that the division of accrued vacation pay will depend on an employer's vacation policies or agreements. "Whether an employee has an enforceable right to be paid for accrued leave will depend on the terms of any agreement between the employee and the employer." *In re Marriage of Cardona and Castro*, 316 P.3d 626, 634 (Colo. 2014).

### **The Division's Contemplated New Position**

The Division claims that the passage of the Wage Protection Act (WPA), which took effect January 1, 2015, has prompted it to take more formal positions on wage and hour issues not directly addressed by the Wage Act, including "use it or lose it" vacation policies. The WPA provides a mechanism for employees to file wage claims with the Division and gives compliance officers authority to enforce violations, an authority the Division previously lacked.

If the Division follows through on its announced position, it will make the elimination of "use it or lose it" vacation policies, which presumably will include prohibitions on carryover limits, an enforcement priority. The Division would consider a "use it or lose it" policy, even when clear, the same as an illegal forfeiture of wages because once vacation is "earned," it cannot be unearned.

The Division has shared some of the direction it gave to its compliance officers with Husch Blackwell:

The proposed prohibition on "use it or lose it" policies applies only to vacation time earned after January 1, 2015.

Sick leave or paid time off (PTO) policies are not subject to the proposed limitation because the statutory definition of wages does not include sick leave, only vacation. PTO is a combination of sick leave and vacation time, and the Division will not attempt to arbitrarily divide PTO between the two.

Caps on vacation accrual would still be permitted.

Employers may require employees to use their vacation time during their employment and discipline employees who fail to do so. However, upon separation of employment, employees must be paid their earned but unused vacation time.

### **What This Means to You**

Once the Division has published its more formal guidance, which should happen in the near future, we will be able to advise on whether to enforce a “use it or lose it” policy. If the Division follows through with its proposal, the legality of “use it or lose it” policies will be in question until answered by the Colorado courts.

In the meantime, if you have any questions, please contact one of Husch Blackwell’s Labor & Employment attorneys in Colorado.