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## Colorado Employers Face Significant Change In Vacation Pay Law

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“Use-it-or-lose-it” vacation pay policies are no longer permitted under Colorado wage and hour laws, according the Colorado Department of Labor Division of Employment’s current enforcement policy.

Although the Division has not released a formal written policy statement on the issue, this new position was recently unveiled at a September 2015 seminar. Fisher & Phillips has learned that the Division’s official policy will likely emerge in the coming months through Division wage and hour audits and appeals of such audits to the Division Hearing Officer. The Division feels confident that its position will be upheld by any state or federal court rulings which result from these initial cases.

### **New Position, Summarized**

The division’s new position will prohibit any vacation pay policy in which an employee loses earned vacation time if it is not used by a certain time. In other words, once vacation pay has been earned, it cannot be “unearned.” Earned and determinable vacation pay cannot be lost during employment or upon separation from employment.

You are still permitted to place caps on vacation accrual. Your policy or practice may require employees to use earned vacation during their employment, but if for some reason earned vacation is not used prior to separation from employment, you must pay it upon separation.

Colorado employers are not required to provide any sort of paid vacation benefit. However, if you do provide such a benefit, any vacation pay earned in accordance with the terms of any policy or practice constitutes wages and cannot be forfeited. This includes oral or written agreements.

These division rules regarding vacation time do not apply to sick leave or paid time off (PTO).

### **Consequences Of Violating The Law**

As a result of the passage of the Colorado Wage Theft Act, the Division may formally order you to pay wages, fines and penalties if it finds a violation regarding vacation pay earned on and after January 1, 2015, on a claim of \$7,500 or less. Such orders are enforceable as court orders. Claims regarding vacation pay earned prior to that date are subject to the Division’s efforts only to mediate the dispute.

Regardless of the amount claimed, employees may elect to file a lawsuit instead of asking the Division for assistance, or if they feel the Division fails to resolve their claim to their satisfaction.


### **What Should Colorado Employers Do Now?**

You should review your policies, practices and employment agreements to be sure they include a clear and uncontroverted definition of when vacation is earned. You should also remove any provisions requiring a forfeiture of earned and determinable vacation pay.

If you have any questions about this position or how it may affect your business, please contact your Fisher & Phillips attorney or one of the attorneys in our Denver office at (303) 218-3650.

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*This Legal Alert provides an overview of a specific Colorado Department of Labor Division of Employment enforcement policy. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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