



Paid Time Off Accruals are ‘Wages Due’ Terminating Employees under State Wage Payment Act, Nebraska High Court Rules

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“Paid time off” (PTO) hours are indistinguishable from earned vacation time under the Nebraska Wage Payment and Collection Act; accordingly, since that Act requires an employer to pay earned but unused vacation leave to an employee upon separation of employment, employers must likewise pay terminating employees their unused PTO benefits upon separation of employment, the Nebraska Supreme Court has ruled. *Fisher v. PayFlex Systems, USA, Inc.*, and *Norton v. PayFlex Systems, USA, Inc.*, 285 Neb. 808 (May 3, 2013).

Background

In 2007, the Nebraska legislature amended the Nebraska Wage Payment and Collection Act to require employees to pay earned but unused vacation leave to a separating employee:

Paid leave, other than earned but unused vacation leave, provided as a fringe benefit by the employer shall not be included in the wages due and payable at the time of separation, unless the employer and the employee or the employer and the collective-bargaining representative have specifically agreed otherwise.

See 2007 Neb. Laws, L.B. 255; Neb. Rev. Stat. Section 48-1229(4).

The Act does not define the term “vacation leave.”

Paid Time Off

The high court was presented in these consolidated cases with the question of whether “vacation leave” in the statute included “paid time off” (PTO) plans. PTO plans typically “bundle” various forms of paid leave (i.e., vacation, sick leave, and holidays) into a single, combined benefit package.

The employer in this case, PayFlex, USA, Inc., maintained a PTO plan that provided that PTO would not be paid out upon separation of employment. When plaintiffs Duane Fisher and Jason Norton were denied payment of their earned but unused PTO hours upon separation of employment, they filed suit alleging a violation of the law.

The Court first determined that traditional vacation leave plans and PayFlex’s PTO plan were indistinguishable. Employees earned paid leave under both plans and had the absolute right to take accumulated time off for any reason (i.e., the leave benefit is not contingent upon the occurrence of an event, such as is the case with holiday, funeral, and sick leave), subject only to the employer’s approval of the timing. Thus, the Court concluded that “vacation leave” was not ambiguous and, therefore, did not require it to review the legislative history of this amendment to the Act. (This conclusion is significant in that the legislative history of the amendment includes a statement made during floor debate by the sponsoring senator, Senator Abbie Cornett, to the effect that the Legislature meant to exclude other forms of paid leave, including PTO plans.) Therefore, since the Act required payment of earned but unused vacation leave upon separation of employment, the Court held it likewise required payment of earned but unused PTO upon separation.

The Court next addressed the question of attorneys' fees. Section 48-1231 of the Act provides that if an employee is represented by an attorney and secures a judgment against his or her former employer, the employee "shall be entitled to recover . . . all costs of such suit and . . . an amount for attorneys' fees assessed by the court, which fees shall not be less than twenty-five percent of the unpaid wages." The trial court had awarded the plaintiffs attorneys' fees in an amount in excess of 25 percent of the unpaid PTO hours, and PayFlex argued that attorneys' fees above the statutory minimum are available only upon a showing that the employer has acted unreasonably or in willful violation of the Act. The Court rejected this argument, concluding that the lower court had not abused its discretion considering:

- the nature of the litigation,
- the time and labor required,
- the novelty and difficulty of the questions raised,
- the skill required to properly conduct the case,
- the responsibility assumed,
- the care and diligence exhibited,
- the result of the suit,
- the character and standing of the attorney, and
- the customary charges of the bar for similar services.

Future for PTO Plans

Nebraska employers with PTO plans should consider reviewing their plans in light of the high court ruling and ensure that all earned but unused PTO hours are paid out upon separation of employment. Alternatively, employers might consider re-designing their PTO plans to reflect separate allocations for vacation leave, as distinguished from other forms of paid leave that are contingent upon the occurrence of an event, such as sick leave, holiday pay, and funeral leave. This would be consistent with the Court's reasoning in *PayFlex*. For example, an employer might allocate a percentage of the PTO hourly accrual as reflective of vacation leave, with the remainder allocated for other forms of paid leave that are contingent upon the occurrence of a specific event. Under this approach, only the corresponding percentage of earned hours attributable to vacation leave would be due and owing at termination.

Please contact Timothy D. Loudon, at (402) 391-1991 or LoudonT@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work if you have any questions about this decision or other workplace developments.

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