

THE EMPLOYER'S ADVISORY

PERIODICAL NEWSLETTER

HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES

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CDLE Changes Handling of Paid Time Off (“PTO”) Policies

Recently, the Colorado Department of Labor and Employment released new Wage Protection Rules. As background for the changes in those Rules, we need to go back to *Nieto v. Clark’s Market*. Of course, in that case, the Colorado Supreme Court determined that once an employee accrues “vacation” leave, that vacation leave cannot be taken away. In short, while there’s been a lot of debate in the last 20 years regarding whether use-it-or-lose-it vacation leave policies are lawful, the Colorado Supreme Court definitively stated that such policies are unlawful.

The *Nieto* case just addressed the issue of “vacation” policies; not PTO policies. That limited ruling left many wondering if that same requirement applied to Paid Time Off policies that incorporated, generally, vacation and sick leave (e.g., leave under the Colorado Healthy Families and Workplaces Act). Well, the CDLE decided it would clear up this issue; though that effort seems to have raised as many questions as it answered.

In short, in COMPS Order #38 and Wage Protection Rule 2.17, the CDLE identified a broader

definition of “vacation pay.” That term is now defined as:

Pay for leave, regardless of its label, that is usable at the employee’s discretion (other than procedural requirements such as notice and approval of particular dates), rather than leave usable only upon occurrence of a qualifying event (for example, a medical need, caretaking requirement, bereavement, or holiday).

So, under this new rule, PTO policies that have an element of leave that is at the employee’s discretion, like traditional vacation leave policies, are now also subject to full pay upon termination; just like vacation policies.

Of course, this definition raises questions about whether a PTO policy that specifically combines vacation and HFWA leave falls under the same requirements to pay out upon termination. After all, the Colorado HFWA statute specifically states that employers are not required to pay out HFWA – either HFWA Sick Leave or HFWA Public Health Emergency Leave – upon termination. So, does that mean that Colorado employers need to pay out accrued PTO, which

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also has leave for HFWA in it? Unfortunately, nowhere in the new COMPS or in the Wage Protection Rules, does the CDLE address or even reference that this issue is out there.

So, based on this less-than-clear guidance on this issue, the Employer's Advisory recommends that employers who do not want to pay either HFWA Sick Leave or HFWA Public Emergency Leave upon termination separate those policies from their PTO policies (i.e., have a stand-alone vacation-leave policy and stand-alone HFWA policies) so it will be clear that the organization does not have to pay accrued HFWA leave upon termination. And if you have any questions regarding such policies, please feel free to contact the Employer's Advisory group.

The Only Constant in Wage Laws is Change – More Changes on the Horizon

As Charles Darwin once said, "it is not the strongest of the species that survives, nor the most intelligent that survives, it is the most adaptable to change." So, to that end, and as evidenced by the above article, employers need to constantly monitor changes imposed by the Colorado Department of Labor and Employment ("CDLE"), the Federal Department of Labor ("DOL"), and Courts because they are always revisiting and revising wage requirements and the employer's responsibility under those requirements.

2020-2021 CHANGES

The last year brought many changes for employers, including regarding wage-and-hour issues. For example,

- In late 2020, the Colorado Department of Labor issued an order that entitled non-exempt, or hourly, employees to breaks

throughout the day. Under this new rule an employee is entitled to a break and if they do not receive this break, they should be compensated an additional 10 minutes of time depending on how long they worked. The CDLE made clear in subsequent announcements that employers cannot simply pay an employee for the break time and have employees work through breaks. This break issue has become a hot topic for litigation and class actions in the last year. After all, without documentation that an employee took a break, it is hard to prove that such a break existed. As a result, the best practice for employers is to develop a documentation system for breaks, even if such system is just a sign in/sign out, handwritten sheet and to develop policies that inform all nonexempt employees that they are always "authorized and permitted" to take the rest breaks.

- Colorado laws have traditionally indicated that the requirement for employers to retain wage records is three (3) years. This requirement is mostly due to the three (3) year statute of limitations on claims under the FLSA and Colorado's Wage Claim Act. This means that an employee can only bring wage claims going back two to three years under these laws. But in the last year, some Federal Courts have started ruling that certain wage claims, specifically claims for minimum wage, have a six (6) year statute of limitations. The argument is that Colorado's minimum wage law does not have a specific statute of limitations written into the law. As a result, these Federal Courts have applied the statute of limitations for contract claims, which is six (6) years, to these claims. Accordingly, while these decisions are still changing, we recommend that employers now retain pay

records for six (6) years in case such a claim may come along.

Things to Come

Here are a few things coming in the new year to be aware of:

- The DOL issued a new minimum wage for federal contractors. Starting January 1, 2022, the minimum wage for federal contract employees is increasing to \$11.25 per hour. However, starting January 30, 2022, all new or renewed contracts with the federal government will be indicating a \$15 per hour minimum wage. Employers that contract with the federal government, should be prepared for these changes now.
- The Colorado Minimum wage is increasing as well. The minimum wage is going from \$12.32 (or \$9.30 for tipped employees) to \$12.56 (or \$9.54 for tipped employees). Employers should review their compensation plans and modify wages accordingly

- The minimum salary threshold for exempt employees will be \$45,000.00-a-year (\$865.38 per workweek), which had been \$40,500 in 2021.

- Colorado passed an Agricultural Labor Rights and Responsibilities Act, which it codified in the new COMPS #38. This new law provides minimum wage, overtime, and breaks to certain agricultural workers. So employers who have agricultural employees should review the soon-to-be released COMPS Order #38 to see how this law will affect them.

As Charles Darwin observed about adaption, the key for employers is to keep track of these changes and adopt pay practices that are compliant.