

Paying for Unused Vacation Time

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Do You Know? Forfeiting Unused Vacation Time

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You may be familiar with Benihana, the Japanese-cuisine restaurants that feature knife-wielding, joke-cracking chefs who prepare your food. In 2011 a group of former managers filed a class action, alleging that Benihana's vacation policy violated California law by requiring employees to forfeit accrued, unused vacation time when their employment ends. This month Benihana agreed to pay \$600,000 to settle the case.

Do you know that the Kansas Wage Payment Act similarly prohibits employers from imposing a forfeiture of earned but unused vacation time? But that does not necessarily mean employers are always obligated to let employees cash out their unused vacation time upon termination. Confused? You should be, as Kansas law on this issue is tricky. Read on and I'll explain.

The KWPA provides that employers must pay all wages due, which includes vacation time and paid time off (PTO), provided the employee has met all the conditions required to be eligible for and earn that compensation. Kansas Department of Labor regulations prohibit employers from imposing a "condition subsequent" to an employee's entitlement to compensation that results in a forfeiture or loss of earned wages. This is in contrast to a condition precedent, which is something that must happen before the agreement becomes effective.

Still confused? The key point to understand here is that the way you set up and word your vacation or PTO policy determines whether you are obligated to pay employees for accrued, unused time upon termination. The question of what constitutes a lawful pre-condition to earn a benefit, versus an unlawful condition subsequent that causes the forfeiture of a benefit, often comes down to the language used.

So if you don't want to have to pay employees for their unused vacation or PTO time when they leave, or want to condition such payment on giving two weeks' notice or some other requirement, it's important to run the policy by an experienced employment lawyer to ensure that your policy is drafted in such a way to make it legal. Employers often are surprised and unhappy to learn that they are legally obligated to pay large amounts of unused vacation or PTO pay, as well as a 100% penalty, particularly in situations when the employee is fired for theft or other gross misconduct. And when that happens to you, you have only yourself—or whoever wrote your organization's policy—to blame, because you have wide discretion to fix the terms and conditions for earning a benefit in advance.