



Interpretive Notice & Formal Opinion (“INFO”) #3E: Payment of Earned Vacation upon Separation of Employment

Overview: this INFO covers —

- how employees must be paid all earned “vacation pay” when a job ends (“separation of employment”),
- the rule against employment policies, or agreements, that waive or forfeit any earned vacation, and
- what kinds of paid time off do, and do not, count as protected “vacation pay.”

Requirement To Pay Earned Vacation When Employment Ends

- Employers are not required to offer paid vacation, but (as with other wages) may do so in writing, verbally, or based on their custom or practice. Employers who do offer paid vacation may set key terms, including —
 - the amount of paid vacation time,
 - how vacation pay is earned (accrued) — for example, based on hours, weeks, or years of work, and
 - whether there is a “cap,” or maximum, on the amount of paid vacation that employees can save up.¹
- Vacation pay is a form of wages protected by the [Colorado Wage Act \(“Wage Act”\)](#), C.R.S. § 8-4-101, et seq.
 - Under the Wage Act, once employees earn wages, their right to payment is guaranteed, regardless of whether the amount was determined by law (e.g., a minimum wage law), by agreement, or by practice — and any agreement that forfeits earned compensation is void and unenforceable.²
 - Like other wages, unused vacation must be paid when employees separate from employment, whether they are fired with or without cause, resign with or without notice, or separate for another reason.³

What Counts As “Vacation Pay” That Must Be Paid When An Employee Separates from Their Job

- “Vacation pay” is any paid leave usable for any purpose the employee chooses, at their discretion — unlike paid leave usable only for qualifying events like health needs, caretaking, bereavement, or public holidays, as [Wage Protection Rule 2.17.1](#) details.⁴ Because vacation pay is usable without a qualifying event, it is a form of guaranteed pay that an employee can use, or save for eventual payout, at their discretion.
- Some paid leave meets this “vacation pay” definition, but has a different name — “personal days,” “paid time off” (“PTO”), “annual leave,” “floating holiday,”⁵ etc. Labor rights depend on how employment works in reality, not just how it’s labeled.⁶ If paid leave by any name meets the “vacation pay” definition, then it counts as “vacation pay” that the Wage Act requires to be paid when an employee separates from their job.⁷

¹ [Wage Protection Rules](#), 7 CCR 1103-7, Rule 2.17.2 (employer/employee agreements set whether, how, and how much vacation pay is earned, and can cap vacation at a year’s worth or more, but still can’t forfeit or waive earned vacation pay).

² [Nieto v. Clark’s Market, Inc.](#), 488 P.2d 1140, 1143, 1149 (Colo. 2021) (agreement that firing, or resignation without notice, forfeits earned vacation violates Wage Act ban on forfeiture; employers with such a policy or agreement still owe departing employees’ earned vacation pay) (citing [C.R.S. § 8-4-121](#): “Any agreement ... to waive or to modify ... [Wage Act] rights ... shall be void”); [Colo. Civil Constr. Inc.](#), DLSS Case #3944-19, at 4-5 (Hearing Officer Decis. #21-069, June 21, 2021) (policy that quitting without notice forfeits earned vacation violates C.R.S. § 8-4-121); [In re Ocdeon II, LLC](#), DLSS Case #4109-17, at 7 (Hearing Officer Decis. #18-081, Nov. 16, 2018) (vacation owed at separation; Wage Act “prohibit[s] ... forfeiture because vacation pay was provided ... pursuant to an agreement ... , determinable at ... separation, and ... earned for service”).

³ [C.R.S. §§ 8-4-101\(14\)\(a\)\(III\)](#) (“[T]he employer shall pay upon separation ... all vacation pay earned”); 8-4-109(1)(a) (right to payment of final wages upon separation); [Nieto v. Clark’s Market, Inc.](#), 488 P.2d at 1143 (“[W]hen an employer chooses to provide vacation pay to its employees, an employee is entitled to receive all that is earned but still unpaid upon separation from employment”). For rules on final payment of wages, including vacation, upon separation, see [INFO #3A](#).

⁴ See [Statement of Basis, Purpose, Authority, & Findings](#) (“Statement of Basis”), Wage Protection Rules, 7 CCR 1103-7 (Nov. 10, 2021), at 2-3 n.4 (citing cases).

⁵ Floating holidays are vacation pay if usable any day employees select, subject to ordinary vacation scheduling/approval.

⁶ [Colo. Custom Maid, LLC v. Indus. Claim Appeals Office](#), 441 P.3d 1005, 1007 (cleaning workers’ right to unemployment compensation depends on “the realities of [employer’s] relationship with its cleaners,” not employer’s labeling of workers as independent contractors); [Jackson Cartage, Inc. v. Van Noy](#), 738 P.2d 47, 48 (Colo. App. 1987) (“we are primarily concerned with what is *done* under the contract and not with what the contract says”) (emphasis in original).

⁷ See [Statement of Basis](#), p.2 (PTO qualifies as vacation pay): “The Division has researched how ‘vacation pay’ is defined in ... states with a similar vacation pay statute. *Every* such state ... [with] a similar statute, and to have addressed the issue, has applied the same distinction — which the Division finds ... sound, and consistent with *Nieto*.” (citing cases in each state).

Example 1: Company A employees have multiple forms of paid leave: (a) “sick days” usable if they have any of a broad range of health needs; (b) “bereavement and caretaking leave” usable if a family member has caretaking needs or passes away; and (c) “holiday pay” usable for any holiday the employee celebrates. These forms of paid leave are usable in a wide range of circumstances. But they aren’t paid leave usable for any purpose the employee chooses, at their discretion. Instead, each form of paid leave is usable only for specific qualifying events — which an employee is not guaranteed to have before separating from their job. Company A’s paid leave doesn’t meet the “vacation pay” definition, and Company A need not pay employees for these forms of unused paid leave when they separate from their jobs.

Example 2: Company B provides ten paid “personal days” that employees can use for any purpose, as long as they give reasonable notice to their supervisor. Because Company B’s “personal days” lack pre-conditions for their use, the pay is guaranteed rather than conditional, so the “personal days” meet the definition of “vacation pay” that must be paid at separation. In contrast, Company C provides ten paid “personal days” that employees can use for only specified personal needs: holidays when the company is open; health or family needs; or bereavement. Company C’s “personal days” are usable only upon the occurrence of specified conditions that may or may not occur during the employee’s tenure, so its “personal days” do not meet the definition of “vacation pay,” and need not be paid upon separation.

Rule Against Forfeiture of Earned Vacation

- Employer policies or agreements can set whether, how much, and how to offer vacation pay. But under the Wage Act, no policy or agreement can say that an employee’s performance, termination, resignation, or other events can forfeit or waive already-earned vacation pay.⁸ A 2021 Colorado Supreme Court ruling explained why, and affirmed Division rules and decisions that had required the same:

Although the [Wage Act] does not entitle an employee to vacation pay, when an employer chooses to provide it, such pay is no less protected than other wages or compensation and, thus, cannot be forfeited once earned. Accordingly, under the [Wage Act], all vacation pay that is earned and determinable must be paid at the end of the employment relationship, and any term of an agreement that purports to forfeit earned vacation pay is void.⁹

- To be payable upon separation, the amount of vacation pay must be “determinable” — able to be calculated. The calculation can be from a written document, verbal policy, or informal practice.
 - If an employer provides “unlimited PTO,” that ordinarily is *not* payable upon separation, because the amount isn’t “determinable.”¹⁰ But if an employer says it offers “unlimited PTO,” yet actually doesn’t let employees take more than a certain amount of paid time off, then what it provides isn’t really “unlimited,” it’s a limited, determinable amount of PTO.¹¹

Example 3: Company C states that it provides “unlimited” PTO, but doesn’t actually let employees take over 120 hours in any year. What Company C provides isn’t actually “unlimited” PTO, it’s 120 hours of PTO per year. So departing employees must be paid any unused portion of their 120-hour allotment.

⁸ [C.R.S. §§ 8-4-101\(14\)\(a\)\(III\)](#) (“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.”); [8-4-121](#) (“Any agreement, written or oral, by any employee purporting to waive or to modify such employee’s rights in violation of this article shall be void.”).

⁹ [Nieto](#), 488 P.2d at 1141-42; see also *id.* at 1143, 1149-50; [Wage Protection Rules](#), 7 CCR 1103-7, Rule 2.17.2 (Wage Act “does not allow a forfeiture of any earned (accrued) vacation pay”); [Colo. Civil Constr. Inc.](#), DLSS Case #3944-19 (same).

¹⁰ *E.g.*, [McPherson v. EF Intercultural Foundation, Inc.](#), 47 Cal. App. 5th 243, 262-65 (2020) (circumstances when payout of unused vacation may be required, even if an employer policy purports to offer “unlimited” vacation).

¹¹ See note 6 (labor law focuses on “the realities of” employment relationships, and thus is “primarily concerned with” what is *done* under contracts, not what contracts say).

- Employers and employees can agree on the amount of vacation employees can take, such as by setting:
 - *rates* of accruing (earning) vacation (example: one day earned per month);
 - *limits on how much can be accrued* in any time period (example: a cap of 12 vacation days, reflecting one year of accruing one vacation day per month); and/or
 - *limits on how much can be used* in a time period (e.g., a year) — but as noted below, no earned vacation can be forfeited, and employers using PTO to cover paid sick leave can't apply a limit lower than the Healthy Families and Workplaces Act ("HFWA") requires (for more on HFWA, see [INFO #6B](#)).

That means a vacation pay policy or agreement:

- (A) *can* cap how much vacation employees accrue or use in a year, or in total — because that doesn't forfeit any already-earned vacation; but
- (B) *cannot* cap how much already-accrued vacation pay carries over to the next year — because that does forfeit already-earned vacation.

Example 4: Company D's handbook provides that, when they start employment, its employees have access to four "sick days" and ten "personal days" per year. Company D announces that rather than provide additional paid "sick days" to provide the earned (accrued) paid sick leave required by HFWA, existing employees no longer have access to four of their "personal days"; instead, these four days only are available for HFWA-qualifying leave (so employees now have eight "sick days" and six "personal days" per year). Because "sick days" can only be used for qualifying illnesses or conditions, Company D's policy violates the Wage Act by causing employees with at least four unused "personal days" to forfeit those days. However, Company D may amend its handbook to provide *new* employees with eight "sick days" and four "personal days" per year, because new employees would not have already earned four "personal days."

Example 5: Company E's handbook says that employees fired for misconduct, or who quit with less than two weeks' notice, will not receive vacation pay when they separate from their jobs. That policy violates the Wage Act, because once vacation pay is earned, it can't be waived or forfeited due to later events.¹²

Example 6: Company F's policy says: (a) employees accrue one paid vacation day per month; (b) they stop earning more after accruing 20 days; (c) when they drop below 20 days by taking vacation, they earn more again, but only until accruing 20 days. This policy is permissible: it doesn't take away already-earned vacation pay; it just sets a cap on how much is earned.

Example 7: Company G's policy says: (a) employees accrue 15 paid vacation days per year; (b) but no more than 12 days may be "carried over" to use in future years. This policy impermissibly takes away vacation already earned, from those with over 12 unused days by year's end, *unless* the employer brings them down to 12 days by year's end, such as by requiring time off or paying for some vacation days.

Example 8: Later, Company G (from Example 7) announces a new policy: (a) employees accrue one paid vacation day per month; (b) they stop earning more after accruing 12 days; (c) when they drop below 12 by taking vacation, they earn more again, but only until accruing 12. The new policy is permissible — it's the same policy as in Example 6, just with a 12- rather than 20-day cap — with one limit on how it can apply. If, at the time of the new policy, an employee had over 12 accrued vacation days, they can't be reduced to 12, because no policy can take away already-earned vacation days. But once that employee takes enough vacation to drop to 12 or fewer accrued days, it is permissible for the new policy to cap them at 12 days.

- Unlike for some other pay types, the Wage Act does *not* require vacation to be "vested," in any way other than being "earned," for it to be payable at separation.¹³ Once vacation pay is earned, no extra vesting conditions can be added, and all unused vacation time must be paid when employees separate from jobs.

¹² [Colo. Civil Constr. Inc.](#), DLSS Case #3944-19.

¹³ [Niето](#), 488 P.3d at 1146 ("[E]ven if vested means something other than earned, its exclusion" from the statute requiring payment of earned vacation pay at separation "signals that the legislature did not intend it to apply in this context").

Employer Discretion Over How, And At What Rate, To Pay for Vacation

- An employer can define vacation pay as any amount of time — hours, days, weeks, etc. The amount due when an employee departs is whatever they would have been paid for that amount of work time, based on their “regular rate” of pay, as defined by the [COMPS Order](#).¹⁴ That is the same rate they would have been paid if they had used the vacation — the rate they were paid immediately before they told the employer they were resigning, or before the employer decided to terminate them (unless a pre-existing employer policy had said vacation time is paid at whatever rate the employee was being paid when they earned the vacation).
- If an employer cuts an employee’s pay rate based on an upcoming termination or resignation,¹⁵ then just as it can’t lower pay rates for *time already worked*,¹⁶ it similarly can’t lower pay rates for *vacation already earned*. That means it must pay out vacation earned before the rate cut at the rate it paid before the cut.

Example 9: Dwight earns one day of paid vacation each month. He had four unused vacation days as of the morning of March 1, when he told his boss Michael he’s resigning, with March 31st as his last day. Michael responds that Dwight’s hourly pay rate is now cut from \$30 to \$15. Dwight is paid monthly, on the 7th of each month. Assuming the pay cut isn’t unlawful for another reason, then:

- (a) Michael *can* pay Dwight at the new lower rate for time worked in March, but *not* for time worked *before* March. So Dwight’s March 7th paycheck for his February time worked must be at the prior, higher rate.
 - (b) Michael *can* apply the new lower pay rate to any vacation Dwight earned in March, but *not* to vacation earned *before* March. As of his departure, Dwight must be paid for five vacation days: the four earned before March, plus one earned in March. Michael must pay the four days earned before March at the \$30 hourly rate, but can pay the one day earned in March at the \$15 hourly rate.
- Wage law lets employers choose to pay out vacation in lieu of allowing time off, or make employees take time off to use their vacation. If so, the employer still must pay, or let employees keep, any remaining unused vacation. But no payout, or other employer practice, can leave employees with less paid leave than HFWA requires: If an employer covers all absences, including HFWA paid leave, with a general PTO policy, then a payout of PTO can’t leave employees with less paid sick leave than HFWA requires.¹⁷

For More Information: Visit the Division [website](#), call 303-318-8441, or email cdle_labor_standards@state.co.us.

¹⁴ [Colorado Overtime and Minimum Pay Standards Order](#) (“COMPS Order”), 7 CCR 1103-1, Rule 1.8.

¹⁵ This discussion assumes the cut isn’t unlawful under any of the many labor laws disallowing “adverse actions” (including pay rate cuts) taken for various reasons — for example, discrimination, retaliation, or interference with rights.

¹⁶ Compare [Colorado Civil Construction Inc.](#), DLSS Claim #3944-19 (Hearing Officer Decis. #21-0169, June 21, 2021) (“The employer cannot decrease a claimant’s wages after they have performed the work to earn those wages”), and [Mountain Top Ventures, Inc. d/b/a SHC Nursery & Landscape Co.](#), DLSS Claim #5449-18 (Hearing Officer Decis. #19-070, Oct. 1, 2019) (employer cannot pay for time worked at a lower rate than the rate to which the parties previously agreed), with [Avery Asphalt, Inc.](#), DLSS Claim #0047-19 (Hearing Officer Decis. #19-072, Oct. 15, 2019) (employer’s decision to rescind a raise was consistent with parties’ prior agreement about the raise’s conditions).

¹⁷ [C.R.S. § 8-13.3-403, -405, -416](#). For more on the HFWA requirements of employer-provided paid leave, see [INFO #6B](#).