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Vacation Leave and Paid Time Off: Say *Bon Voyage* to “Use It or Lose It” Policies Under Nebraska Law

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Notwithstanding Nebraska’s consistent treatment of vacation leave as wages for over a decade, many employers still fail to comply with this legal requirement by improperly retaining “use it or lose it” policies. In preparing for the new calendar year, employers should ensure their vacation leave and related paid leave policies are up-to-date and consistent with Nebraska law. This article addresses Nebraska law’s treatment of vacation leave and related paid leave policies, as well as recommendations for avoiding a forfeiture of wages.

A. Accrued Vacation Leave is “Wages” Under Nebraska Law

Most employers know that under the Nebraska Wage Payment and Collection Act (“NWPCA”), employees are entitled to all accrued wages upon separation from employment. The NWPCA defines “wages” as follows:

[C]ompensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis.ⁱ

But what role does vacation leave occupy in this definition?

In 2006, in *Roseland v. Strategic Staff Management*, the Nebraska Supreme Court answered that question by holding that employers were required to pay employees all earned, unused vacation leave benefits upon termination of employment.ⁱⁱ

Following the *Roseland* decision, the Nebraska Legislature amended the NWPCA’s definition of “wages” to state as follows:

“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 employee . . . have specifically agreed otherwise.ⁱⁱⁱ

Put another way, this means that vacation leave *is* wages for purposes of Nebraska law and must be paid out upon an employee’s separation from employment.

In contrast, however, sick leave is not included in the definition of wages that must be paid out upon termination of employment under Nebraska law.

B. Accrued Paid Time Off is Also “Wages” Under Nebraska Law

The NWPCA’s definition of “wages” expressly includes vacation leave. However, the NWPCA does not specifically address the treatment of “paid time off” (“PTO”), “paid leave,” or “personal time,” which typically combine the philosophy of vacation leave and other types of paid leave into one policy.

In 2013, the Nebraska Supreme Court resolved the issue of PTO and related paid leave in *Fisher v. Payflex Systems USA, Inc.*, finding that PTO, which generally can be used without restriction, was so similar to vacation leave as to make it a wage payable upon separation from employment.^{iv} To decide otherwise, the Court held, would allow employers to avoid paying accrued vacation leave by simply characterizing all leave time as PTO, even when it encompassed and resembled vacation leave. In reaching that holding, the Court noted that the NWPCA does not define the term “vacation leave” as distinguished from other types of “paid leave.” However, the Court reasoned:

[A] “vacation” from work is ordinarily understood to mean a paid leave of absence granted to an employee for rest and relaxation. . . . Paid vacation leave is not conditioned upon an event, such as a holiday, an illness, or a funeral: [I]t is not conditioned upon anything other than the employee’s rendering services for the employer. Instead, an employee may use his or her earned vacation leave for any personal reason without conditions, including for an illness or disability.^v

The Nebraska Supreme Court recognized that with both vacation and PTO hours:

[A]n employee earns the leave and has an absolute right to take this time off for any purpose, subject to the employer's approval of the timing. So the definition of vacation leave is indistinguishable from [the employer’s] definition of its PTO benefit. For this reason, legal commentators advise employers subject to similar statutes to maintain separate accounts for employees' accrued vacation leave and sick leave, or to pay employees their unused PTO hours upon separation if they combine vacation leave and sick leave into a single PTO policy. Moreover, in determining whether an employer has a duty to pay PTO hours upon separation of employment, courts have used the terms vacation and “paid time off” interchangeably.^{vi}

In recent years, many employers have changed their vacation leave and sick leave policies to combine the two types of leave benefits for easier administration. Unfortunately, when employers lump those benefits together in one paid leave policy, without placing any restrictions or contingencies on their use (i.e., an employee does not have to be sick or go to the doctor to use the benefit), then the paid leave looks and feels like vacation leave. If so, employees are entitled to be paid out for all accrued, unused paid leave benefits upon separation from employment.

C. “Use It or Lose It” Vacation Leave Policies Violate Nebraska Law

Once an employee has accrued and earned vacation leave or similar paid leave benefits (where the paid leave includes vacation leave without any contingencies on its use), the employee *cannot lose* those benefits. In other words, those accrued benefits cannot be forfeited or eliminated once they are allocated to the employee. Accordingly, a “use it or lose it” policy whereby an employee forfeits their paid leave if the employee does not use it within a certain period of time is improper under Nebraska law.

If a forfeiture of accrued vacation leave (and related paid leave) occurs under a “use it or lose it” policy, or if the employer fails to pay the employee for all accrued, unused vacation leave upon termination of employment (regardless of the reason), the employer may be subject to damages for a violation of the NWPCA, including payment of the employee’s attorney’s fees.

D. Recommendations for Vacation Leave and Related Paid Leave Policies

In light of the current state of Nebraska law on vacation leave and related paid leave policies, employers should keep the following recommendations in mind:

- Regardless of an employment policy or agreement to the contrary, all accrued, unused vacation leave (and paid leave that resembles vacation leave) must be paid to any separating employee.
- “Use it or lose it” policies, whereby employees forfeit accrued and unused vacation leave at the end of the year, are impermissible and should be amended or removed immediately. Employees must be allowed to carry over all accrued, unused vacation leave and related paid leave from year to year.
- An employer may place a “cap” on accrual of hours that prevents the accumulation of excess vacation leave, allowing employees only to accrue leave up to a specific point, with accrual then ceasing until the employee has used accrued leave.
- Employers wishing to avoid paying out a portion of accrued PTO (where vacation leave and sick leave are combined into one policy) should consider restructuring their leave policy by doing away with PTO and implementing a bifurcated system which explicitly separates vacation and sick leave, as sick leave does not have to be paid out upon termination of employment under Nebraska law.
- Because of potential tax consequences, employers should consult with legal counsel before giving employees the option of cashing out accrued, unused vacation leave and related paid leave each year.

Editor’s Note: This article is not intended to provide legal advice to its readers. Rather, this article is intended to alert readers to new and developing issues and to provide some common sense answers to complex legal questions. Readers are urged to consult their own legal counsel or the author of this article if the reader wishes to obtain a specific legal opinion regarding how these legal standards may apply to their particular circumstances. The author of this article, Tara A. Stingley, as well as other members of Cline Williams’ Employment Law Section, can be contacted at Cline Williams Wright Johnson & Oldfather, L.L.P., 12910 Pierce Street, Suite 200, Omaha, NE 68144, (402) 397-1700, tstingley@clinewilliams.com, or www.clinewilliams.com.

ⁱ NEB. REV. STAT. § 48-1229(6) (emphases added).

ⁱⁱ See *Roseland v. Strategic Staff Mgmt.*, 272 Neb. 434 (2006).

ⁱⁱⁱ NEB. REV. STAT. § 48-1229(6) (emphasis added).

^{iv} *Fisher v. Payflex Systems USA, Inc.*, 285 Neb. 808 (2013).

^v *Id.* at 815.

^{vi} *Id.* at 816.