



California appeals court examines unlimited vacation policies

By Catherine Stamm and Fernanda Zendejas
May 21, 2020

An uncapped vacation policy must comply with California's vacation-payout law (Cal. Lab. Code [§ 227.3](#)) for terminating employee if the policy has an implied cap and the employer fails to inform employees about their rights, according to a state appellate court (*McPherson v. EF Intercultural Found., Inc.*, No. B290869 (Cal. Ct. App. 2d April 1, 2020)). However, truly unlimited time-off policies may escape the law if certain conditions are met.

California vacation-payout law

Under California law, vacation pay is treated like wages and cannot be forfeited under a use-it-or-lose-it policy. As a result, terminating employees must receive payment of any accrued but unused vacation. Under a 1982 state supreme court ruling, any promised vacation must vest incrementally, so an employee terminating before year-end has a vested right to a proportionate share of his or her vacation pay (*Suastez v. Plastic Dress-Up Co.*, 31 Cal.3d 774 (1982)).

Facts in the case

In *McPherson*, the employer didn't have a vacation policy for certain managers or use a system to track their number of vacation days taken. Instead, managers simply had to notify their supervisors before taking time off. The employer never told managers that they had unlimited paid vacation, and the company didn't have a written policy or agreement to that effect. However, testimony indicated that company practices placed "implied cap" on managers' vacation use. The court used this implied cap to calculate the terminated managers' accruals.

Court holding

The court noted that employers can't sidestep the California vacation-payout law and vesting rights by simply failing to specify the amount of vacation available to employees. Offering vacation time in an undefined amount merely presents a problem of proof as to what the employer's policy provides. That implied policy is determined by the employer's conduct and circumstances, rather than through an explicit statement. In this case, the employer's past practices placed an understood cap on vacation days.

'Truly unlimited' vacation

While concluding the state's vacation-payout law applies to the managers in this case, the court said the law might not apply to "truly unlimited" time-off policies. To avoid triggering the law, an unlimited vacation policy would need to be in writing and include the following elements:

- Clearly provide that paid time off is not a form of additional wages for services performed, but part of flexible work options that include employees' ability to decide when and how much time to take off
- Spell out the employee's and employer's rights and obligations and the consequences of failing to schedule time off
- In practice, allow sufficient opportunity for employees to take time off or work fewer hours in lieu of taking time off
- Be administered fairly so the time-off policy doesn't become a *de facto* "use-it-or-lose-it policy" or result in inequities, with some employees working many hours with minimal time off and others working fewer hours but taking more time off

Employer takeaways

Employers that have or are looking to institute an unlimited vacation policy in California may want to review the court's guidelines and adjust written policies accordingly. Although not legally binding, the appellate court's recommendations for a "truly unlimited" vacation policy could carry great weight in any dispute over whether the state's vacation-payout law applies.

Related resources

- [Cal. Lab. Code § 227.3](#) (California Legislature)
- [McPherson v. EF Intercultural Found., Inc.](#), No. B290869 (Cal. Ct. App. 2d, April 1, 2020)
- [Suastez v. Plastic Dress-Up Co.](#), 31 Cal.3d 774 (1982)

Note: Mercer is not engaged in the practice of law, accounting or medicine. Any commentary in this article does not constitute and is not a substitute for legal, tax or medical advice. Readers of this article should consult a legal, tax or medical expert for advice on those matters.