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State laws limit vacation forfeitures

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For many employers, vacation and other paid time off (PTO) are key benefits for recruiting and retention, enabling employees to relax, reduce stress, improve mental health, and return to work refreshed and recharged. To a degree, employers have latitude in determining eligibility, amount and accrual of these benefits. Employers should exercise caution, however, with use-it-or-lose-it provisions and the treatment of unused accrued paid leave upon employment separation in vacation policies. Many state laws limit vacation forfeiture.

State laws

No state currently requires employers to offer paid vacation, although three states — Maine, Nevada and effective Jan. 1, 2024, Illinois — require certain employers to provide paid time off that employees can use for any reason. For employers voluntarily providing paid vacation, state wage-and-hour laws often fail to specify whether the employer must pay out unused accrued vacation on employment separation or can implement a use-it-or-lose-it policy that requires forfeiture of vacation not used by a specified date — typically, by the end of a calendar year. Depending on the state, employers must navigate a maze of regulations, court rulings or other guidance to clarify these issues. In many states, employers may dictate the terms of vacation policies, as long as the policies are in writing and clearly communicated to employees. Most states consider PTO that has no special designation to be vacation.

Recent developments in Colorado, Illinois and Maine illustrate the mix of court rulings and state laws that employers must track when crafting vacation policies.

Colorado

In 2021, the Colorado Supreme Court ruled that employers must pay all earned vacation pay on separation from employment and any forfeiture provision was void (*Nieto v. Clark's Market, Inc.*, 2021 CO 48). The court analyzed the [Colorado Wage Act](#) (CWA) (CO Rev. Stat. §§ 8-4-101 to -125). That law generally defines wages and compensation as “earned, vested, and determinable” and expressly

includes “vacation pay” provided under the terms of any agreement as protected wages or compensation.

In response, the Colorado Department of Labor and Employment (CDLE) revised its wage protection rules ([7 CO Code Regs § 1103-7-2.17](#)) to clarify that this nonforfeiture prohibition extends to any accrued paid leave, including vacation. The regulation allows employers’ vacation agreements to contain provisions detailing:

- Whether the employee will receive any vacation pay at all
- How much vacation pay per year or other period the employee will earn
- Whether vacation pay will accrue all at once or proportionally each week, month, or other period
- Whether a cap of one year’s worth (or more) applies to vacation pay accruals

As a result, employers may have policies that cap employees’ vacation pay accruals to one year or some other limit, but cannot require forfeiture of any accruals earned.

The rules broadly define vacation pay 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).” For more details on these developments, see [Colorado high court bans use-it-or-lose-it vacation policies](#) (Nov. 30, 2021).

Illinois

Illinois does not require employers to provide vacation leave, but if they do, the wage and hour law prohibits forfeiture of earned vacation on employment separation. However, the law allows a use-it-or-lose-it provision in vacation policies (see chart below). Beginning Jan. 1, 2024, the [Paid Leave for All Workers Act](#) (2023 Pub. Act 102-1143, SB 208) requires Illinois employers to provide earned paid leave that employees can use for any reason (as in Maine and Nevada). The new earned paid leave law requires payout of unused leave time on employment separation only if the leave time is credited to the employee’s PTO bank or vacation account. Further clarification from the Illinois Department of Labor would be helpful. For more details, see [Illinois requires paid leave for any reason starting in 2024](#) (April 11, 2023).

Maine

After enacting a law requiring earned paid leave for any reason, Maine later addressed vacation payout on employment separation ([26 ME Rev. Stat. Ann. § 626](#)). Effective Jan. 1, 2023, all unused paid vacation must be paid on cessation of employment, except for:

- Employers with fewer than 10 employees
- State or local governmental employers

- Employees subject to a collective bargaining agreement

By contrast, the [Maine Earned Paid Leave \(MEPL\) law](#) and its [regulations](#) do not require a covered employer to pay out unused accrued paid leave on separation, unless the employer’s policy requires doing so. MEPL may be used for any reason. In [published guidance](#), the Maine Department of Labor’s Wage and Hour Division (WHD) clarified that § 626 does not apply to any leave time other than vacation, and employers can have separate vacation and earned leave policies. If an employer’s vacation policy is used to satisfy the MEPL requirement, however, “WHD will consider the employer’s policy or practice to cover earned paid leave as well,” so the leave will be subject to the § 626 requirement. For more information on the MEPL law, see [Maine’s earned paid leave begins accruing Jan. 1, 2021](#) (Nov. 12, 2020).

Chart of relevant state laws

The chart below lists states that require payout of unused vacation time upon employment separation and identifies for each if a use-it-or-lose-it provision in a paid vacation policy is prohibited:

States requiring payout on employment separation	Use-it-or-lose-it provision prohibited?	Citations
California	Yes	CA Lab. Code §§ 201(a) and 227.3 ; Dep’t of Indus. Rel. FAQs ; Suastez v. Plastic Dress Up , 647 P.2d 122 (1982)
Colorado	Yes	CO Wage Act ; 7 CO Code Regs. § 1103-7-2.17 ; Nieto v. Clark’s Market, Inc. , 2021 CO 48
Illinois	No	820 IL Comp. Stat. §§ 115/5 , 300.520(e) and (f)(3) ; and IL Lab. Dep’t FAQs
Iowa	Unclear	IA Code §§ 91A.2 and 91A.4
Louisiana	No	LA Rev. Stat. § 23:631(A) and (D) ; and Wyatt v. Avoyelles Parish Sch. Bd. , 831 So. 2d 906 (2002)
Maine	No	26 ME Rev. Stat. Ann. §§ 626 and 637
Massachusetts	No	MA Gen. Laws Ch. 149 § 148 ; Elec. Data Sys. Corp. v. Att’y Gen. , 907 N.E.2d 635 (2009); Att’y Gen. Advisory 99/1
Montana	Yes	Langager v. Crazy Creek Prods. , 954 P.2d 1169 (1998); Att’y Gen. Opinion No. 56, Vol. 23 (1949); MT Dep’t of Lab. & Indus. FAQs

States requiring payout on employment separation	Use-it-or-lose-it provision prohibited?	Citations
Nebraska	Unclear	<i>Fisher v. Payflex Sys. USA, Inc.</i> , 829 N.W.2d 703 (2013); NE Rev. Stat. § 48-1229 ; NE Lab. Dep't FAQs
North Dakota	No	ND Cent. Code § 34-14-09.2 ; ND Admin. Code § 46-02-07-02(12) ; ND Lab. Dep't FAQs
Rhode Island	Unclear	RI Gen. Laws § 28-14-4(b)

In most states other than those in the chart above, an employer's policy or employee contract governs whether earned unused vacation is paid on employment separation and/or forfeited if not used by a specified date. Some states specifically require payout of *vested vacation* on employment separation, and generally allow the terms of an employer's vacation policy to dictate whether vacation vests.

Federal law

Federal law does not mandate paid vacation, unless an employer agrees to provide vacation as part of a federal contract. Federal contractors subject to [rules](#) under the [Davis-Bacon and Related Acts](#) and [McNamara-O'Hara Service Contract Act](#) that require a minimum amount of fringe benefits, including paid vacation. Employers must pay out any unused accrued vacation that qualifies as a bona fide fringe benefit before the earliest of these dates:

- Mutually agreed-upon date
- Next employment anniversary date
- Employment termination date
- Contract completion date

Employer actions

Establishing a uniform policy is challenging for multistate employers. Employers in states prohibiting use-or-lose vacation provisions may want to explore capping accruals. For example, a policy could limit accruals to 80 hours so employees reaching that limit cannot accrue additional time before using some of the vacation already earned.

Additional actions for employers designing or reconsidering a vacation policy could include:

- Determine which states have vacation forfeiture limitations where employees work (not where they reside).

- Decide on a carryover provision, where allowed by law.
- Consider limiting accruals in states that ban use-or-lose vacation provisions.
- Develop a written vacation/PTO policy detailing how time is accrued and what employees can do with the accrued time, making any needed allowance when a state law dictates a deviation from standard terms.
- Clearly communicate the vacation/PTO policy's terms (for example, by including in the employee handbook).
- Ensure that any changes to accrual, usage or other terms apply only on a prospective basis.
- Do not forfeit any accrued, unused vacation or PTO unless permitted by state law and described in a written policy communicated to employees.
- Establish a process for consistent administration of the policy, including calculation of accrued time and payment, if applicable.
- Review payroll system and confirm with payroll vendor that vacation payout complies with applicable state law(s).
- For employers with employees in Illinois, Maine or Nevada, ensure that vacation policies comply with both the law to provide paid leave (usable for any reason) and any applicable law on vacation forfeiture.
- For employers with an unlimited vacation policy in states requiring payout on employment separation, work with legal counsel on how to address vacation payout.
- Consult with employment law counsel when establishing or reviewing a vacation policy to confirm compliance with the various state wage and employment laws.

Related resources

Non-Mercer resources

Federal

- [Davis-Bacon and Related Acts](#), Pub. L. No. 107-217 (2002)
- [McNamara-O'Hara Service Contract Act](#), Pub. L. No. 89-286 (1965)
- [29 CFR § 4.173\(c\)](#) (Department of Labor)

State

- CA Lab. Code §§ [201\(a\)](#) and [227.3](#) (Legislature)

- CA [FAQs](#) (Department of Industrial Relations)
- [Suastez v. Plastic Dress Up](#), 647 P.2d 122 (CA Supreme Court, 1982)
- [Colorado Wage Act](#) (CO Rev. Stat § 8-4-101 et seq.)
- [7 CO Code Regs. § 1103-7-2.17](#) (Department Labor & Employment)
- [Niето v. Clark's Market, Inc.](#), 2021 CO 48 (CO Supreme Court)
- 820 IL Comp. Stat. §§ [115/5](#), [300.520\(e\)](#) and [\(f\)\(3\)](#) (Legislature)
- IL [SB 208](#), Paid Leave for All Workers Act (Legislature)
- IL [FAQs](#) (Labor Department)
- IA Code §§ [91A.2](#) and [91A.4](#) (Legislature)
- LA Rev. Stat. § [23:631\(A\)](#) and [\(D\)](#) (Legislature)
- [Wyatt v. Avoyelles Parish Sch. Bd.](#), 831 So. 2d 906 (LA Supreme Court, 2002)
- MA Gen. Laws Ch. 149 § [148](#) (Legislature)
- [Elec. Data Sys. Corp. v. Att'y Gen.](#), 907 N.E.2d 635 (MA Supreme Court, 2009)
- MA [Advisory 99/1](#) (Attorney General)
- 26 ME Rev. Stat. Ann. §§ [626](#) and [637](#) (Legislature)
- ME [Interpretive Guide Policy 22-01](#) (Department of Labor, Bureau of Labor Standards, Wage and Hour Division)
- [Langager v. Crazy Creek Prods.](#), 954 P.2d 1169 (MT Supreme Court, March 3, 1998)
- MT [Opinion No. 56, Vol. 23](#) (Attorney General)
- MT [FAQs](#) (Department of Labor & Industry, Employment Standards Division)
- [Fisher v. Payflex Sys. USA, Inc.](#), 829 N.W.2d 703 (NE Supreme Court, 2013)
- NE Rev. Stat. § [48-1229](#) (Legislature)
- NE [FAQs](#) (Department of Labor)
- ND Cent. Code § [34-14-09.2](#) (Legislature)
- ND Admin. Code § [46-02-07-02\(12\)](#) (Labor Department)
- ND [FAQs](#) (Labor Department)

- [40 OK Stat. §§ 165.1\(7\) and 165.3 \(Legislature\)](#)
- [RI Gen. Laws § 28-14-4\(b\) \(Legislature\)](#)

Mercer Law & Policy resources

- [Illinois requires paid leave for any reason starting in 2024 \(April 11, 2023\)](#)
- [Roundup: State accrued paid leave mandates \(April 29, 2022\)](#)
- [Colorado high court bans use-it-or-lose-it vacation policies \(Nov. 30, 2021\)](#)
- [Maine's earned paid leave begins accruing Jan. 1, 2021 \(Nov. 12, 2020\)](#)

Other Mercer resources

- [Life, absence & disability management](#)

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