COLORADO CHAMBER OF COMMERCE

Comments on Proposed Changes to Wage Protection Act (7 CCR 1103-7)

10.22.19

Background: The Colorado Chamber of Commerce represents hundreds of businesses of all sizes across the state which represent various types of industries, including over 40 local chambers of commerce, 30 trade associations & several economic development organizations. The Colorado Chamber frequently engages with the Colorado Department of Labor & Employment on various rules, regulations and legislation that affect employers across the State.

We hereby submit comments based on feedback it has received regarding the Division's proposed changes to the Colorado Wage Protection Act, and specifically section 2.15 regarding "Vacation Pay."

Comments on Rule 2.15 – Vacation Pay:
Concerns have been raised regarding the proposed changes to Rule 2.15 ("the Rule"), and specifically that it potentially removes the flexibility allowed to employers and employees under current law and does not consider programs that employers currently offer.

Under the current Colorado Wage Claim Act, C.R.S. § 8-4-101(14)(a)(III), "wages" include "[v]acation pay earned in accordance with the terms of any agreement." If an employer chooses to provide paid vacation, there is only one payment obligation the CWCA imposes on that employer: "[T]he 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." *Id.* The CWCA does not dictate whether an employer must provide vacation pay, how much vacation pay is earned and accrued, how vacation pay is earned and accrued (including any conditions the employee must satisfy), whether vacation pay may be capped, when vacation pay is earned, or the increments in which vacation pay is earned or used. Under statutory law, employers have the flexibility to make vacation pay decisions, subject only to the limitation that it must pay vacation pay to separated employees that is earned and determinable under their vacation pay agreements with employees.

The proposed Rule, however, removes employers of this statutory flexibility in two ways: (1) precluding the "forfeiture" of vacation pay, and (2) forcing employers that offer vacation pay to do so based on an arbitrary one-year accrual period. With respect to forfeiture, the Wage Act only requires payment of vacation pay that is "earned and determinable" under an agreement; it does not preclude employers from imposing thoughtful conditions on the payment of vacation pay. The court in *Nieto v. Clark's Market, Inc.*, 2019 COA 98 ¶ 11 stated the law correctly: "The question [of] whether particular compensation is 'earned, vested, [and] determinable,' and therefore due on termination, depends on the terms of the parties' agreement . . . ." No statutory obstacle precludes an employer from agreeing to pay vacation contingent on an employee's being in good standing or giving two weeks' notice prior to resignation. The Act contemplates that if an employee fails to satisfy such conditions, then the vacation pay is not "earned," and hence is not due upon separation. In contrast to the Act, the Rule creates a

broad view of forfeiture by making any initial, contingent award of vacation pay permanent, and removing any conditions imposed by an agreement.

We also have concerns with the proposed Rule imposing one-year accrual periods. The proposed language states that, "employers may have 'use it or lose it' policies that disallow carryover after employees accrue a year of vacation pay, but that do not forfeit any of that years' worth." Under current statute, employers are free to cap vacation pay based on any time period – not just a year. This one-year accrual period, coupled with the robust anti-forfeiture provision in the Rule, effectively provides employees with a severance payment in the amount of one year of vacation pay which we believe was not the intent of the Colorado General Assembly when the legislation was passed.

The proposed Rule is also confusing based on how the different concepts of "use it or lose it", accrual, and forfeiture are being applied. For example, the language states that employers "may provide that employees cannot accrue more than ten days, by disallowing carryover of unused vacation from year to year." But if an employee cannot accrue more vacation pay, that operates as a "cap" on accrual. No vacation pay is earned if a cap has been reached, and there is simply no reason to disallow the carryover of unused vacation pay since that vacation pay does not exist. But instead of simply acknowledging an employer's right to cap vacation pay, the proposed language oddly empowers employers to have use-it-or-lose-it policies with respect to earned vacation pay, so long as that pay is in excess of the first year of earned vacation pay.

Why can employers have "use it or lose it" policies for vacation pay earned after one year, but they cannot have "use it or lose it" policies for all vacation pay? Under the Act, employers are free to contract with employees for all vacation pay, which includes determining when and how vacation pay is earned.

The proposed Rule will discourage companies from continuing to offer flexible vacation pay programs for employees. An example of an existing program in Colorado that will be a casualty of this proposed definition is described below:

> *Example*: Employer A grants its employees their full annual allocation of time off during the first week January each year. The time off allocation is generous and ranges from 15 days to 30 days, depending on employee tenure, and is given in addition to paid holidays. Employees have the entire calendar year to use the time off allocation and employees receive a new full year grant each January. Because time off can only be used in the year it is granted, does not "roll over" from year to year and is not paid out upon separation from employment, employees must use the time off during employment.
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> This time off program was specifically designed to encourage employees to take time away from work and it resolves concerns of a de-facto severance payment if the time off were required to be paid out upon separation. In the event vacation pay is ultimately defined as currently proposed, to mitigate against the unintended severance-type payment of unused earned vacation pay at time of separation, Employer A would likely implement a time off policy whereby employees earn a maximum of 10 days off per year, which would be earned at a rate of 3 hours per pay-period. Ultimately, the employees are disadvantaged because they are granted *less* annual time off.

We appreciate the Division's consideration of these comments, and respectfully request the Division revise the proposed Rule in a manner that is consistent with current Colorado law. If you should have any questions or would like to discuss these comments further, please contact Loren Furman at lfurman@cochamber.com or at 303-866-9642.