

Vacation Float: Managing (and Recouping) Unearned Vacation Time

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Summertime is vacation time. And vacation time means headaches for employers who engage in vacation float. Vacation “float” is the practice of advancing vacation to employees before they actually accrue it under an employer’s vacation policy. So the question becomes, if you allow an employee to take vacation time the employee hasn’t actually earned, how do you get the value of that time back if the employee leaves before “repaying” it?

Today’s staggering rate of employee mobility creates compliance challenges for employers with generous paid time off programs. This problem is particularly vexing for employers in states like California and Massachusetts that classify accrued vacation as an earned wage. Like an employee’s paycheck, vacation time has an actual cash value, and once that cash is provided, it can’t be recouped – or can it?

Assume you hire a new employee and, for a variety of really good reasons (among them, a pre-planned, pre-purchased vacation booked before job offer and acceptance, typically involving extended travel or worse, extended travel with extended family), the employee must take vacation relatively early in the employee’s tenure – and before the employee has banked enough paid vacation. In this instance, the employer “advances” vacation time.

The employee takes and enjoys the vacation, returns from vacation and then resigns (or is fired), leaving a debt to the employer in the amount of salary paid, but not technically earned.

Some employers may operate under the assumption that the employer can simply withhold the employee’s final paycheck in the amount of the advanced but unearned vacation. But in California and Massachusetts (and many other states), this would be an illegal withholding of wages, subject to statutory punishment. So what is an employer to do in those states that treat vacation as earned wages?

The easiest approach would be for an employer to adopt a bright line approach and refuse to permit an employee to take paid vacation time until that vacation time is accrued. An alternative (but more complex) approach would be to adopt the unlimited paid time off approach that is becoming so common (in which case there is no liability for accrued vacation when an employee terminates, which is frankly a more material problem dollar-wise for employers than vacation float).

Another approach is for the employer to sue an employee to recover paid but unearned wages. But that approach is impractical and inefficient.

Another approach, which only works if the employee returns to work for a period of time before termination, would be to stop vacation accruals until the advanced vacation balance is repaid. This is perfectly legal, but requires administrative attention and really only works if the employee stays long enough to earn and then repay the advanced time.

Another method is the middle ground of permitting vacation but at a lower salary level. This might not be palatable to employees, particularly high-income earners with significant financial responsibilities.

An employer could also treat the advanced vacation time as a retention bonus – which is due and payable if the employee leaves employment prior to a designated date. That makes the voluntary repayment of the advanced sums more likely – but doesn’t solve the problem presented in California and other states that flatly prohibit employer self-help repayment schemes from final paychecks.

The moral of the story is this: vacation float will continue to happen as long as employers condition vacation time on employment tenure. But employers who still use paid time off schemes should carefully monitor vacation float and closely administer it to prevent abuse and attendant financial liability, particularly in jurisdictions that treat vacation time like a wage. Happy summer to all.

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Jennifer B. Rubin is a Mintz Member who advises clients on employment issues like wage and hour compliance. Her clients range from start-ups to Fortune 50 companies and business executives in the technology, financial services, publishing, professional services, and health care industries.