

Nebraska Supreme Court Holds that PTO Must Be Paid Out Upon Termination

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PRACTICE AREAS

Employee Benefits and ERISA
Employment and Labor

The Nebraska Wage Payment and Collection Act ("Wage Act") governs the manner in which an employer must pay its employees wages both during employment and following separation of employment. In 2007, the Nebraska legislature amended the Wage Act in response to the Nebraska Supreme Court's decision in *Roseland v. Strategic Staff Management*. The Wage Act now provides that "[p]aid 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 the employee...have specifically agreed otherwise." As previously reported, although this amendment to the Wage Act clarified that employers must pay employees for unused vacation leave with their final paycheck, it did not clarify much else. For example, the law does not expressly address paid time off ("PTO") policies which often combine vacation leave, personal leave, sick leave, etc., or those vacation or PTO policies that provide for the forfeiture of all or part of an employee's unused leave at the end of an employment year.

On May 3, 2013, in the case of *Fisher v. Payflex*, the Nebraska Supreme Court resolved some of this uncertainty by holding that accrued, unused PTO must be paid to employees upon termination of employment. In *Fischer*, the employer argued that it was not required to pay employees for unused PTO because PTO was a hybrid benefit that differed from vacation leave because it combined vacation leave, sick leave and

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personal leave into one leave bank. The Court rejected this argument and held that the definition of vacation leave was indistinguishable from the employer's definition of its PTO benefit. As such, the Court held that the employer was required to pay employees for accrued, unused PTO despite the employer's policy that specifically stated that employees would not be paid for accrued, unused PTO upon termination of employment. The Court reaffirmed its earlier position that sick leave is distinguishable from vacation leave, and as such, unused sick leave still does not need to be paid at termination of employment – that is, unless, the sick leave is combined in a PTO bank. As a result of the Court's decision in *Fischer*, employers need (at a minimum) to review their PTO policies to ensure they reflect that unused PTO will be paid out upon termination of employment. Employers may also want to consider whether a return to the historical practice of maintaining separate vacation leave and sick leave policies might be appropriate.

As a final point, we note that this may not be the end of the Wage Act saga. The *Fischer* case only addressed one of the identified uncertainties in the Wage Act. Outstanding questions remain regarding employees' rights with respect to accrued, unused vacation or PTO that is earned during employment but modified in some way. For example, are policies that prohibit employees from carrying over unused PTO to subsequent calendar years the next challenge for the Court? Are year-end caps on PTO balances lawful? Practically, there are various ways to draft vacation and PTO policies to avoid potential problems related to these unanswered questions.