

THE ORANGE COUNTY

REGISTER

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BUSINESS MONDAY

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Use the vacation time you earn

Employers can enforce limits on time off, but it's up to you to get away

Q. My company has a use it or lose it policy for vacation. I thought that vacation was considered earned income and could not be forfeited. They do not pay for any unused vacation, and at certain times of the year (peak season) they do not allow vacation time more than a day here and there.

Do I have any recourse for unused, unpaid vacation?

A. Remember, vacation time is a bonus. In California, employers don't have to offer you any vacation time. If they do, they can put limits on when you take it. Typically, the limits are created with good intentions: to run the business efficiently, not to make

your life miserable.

Companies give their workers vacation time so they can recharge and come back ready to be productive. If you bank the hours for long periods, you're defeating the purpose. And yet, 56 percent of U.S. workers fail to take all of their vacation days, according to a survey conducted for Hudson, the staffing and outsourcing arm of Hudson Highland Group in New York.

Other insights from the survey:

- Most workers - 49 percent - get more than 11 days of vacation per year; 33 percent get less than a week.
- One in four workers says the boss expects them to be accessible while on vacation; one in three managers has that burden.
- Twenty percent plan to take long weekends rather than full vacations.

For a legal response to your question, I contacted Keith G. Bremer, a partner at the Newport Beach firm of Bremer, Whyte, Brown & O'Meara (bremerandwhyte.com). The firm handles issues including family law, real estate

and construction litigation.

Bremer suggested a practical first step: Contact your human resources representative, and review your employee handbook to learn about the policies regarding vacation time. If you're unclear about the wording of the policies, ask for clarification.

Based on details you provided, it's possible that your employer has reserved the right to control when you can use your vacation time, Bremer said.

He added: "In California law, it is unlawful for an employer to implement a 'use it or lose it' policy, i.e. any policy that (requires you to forfeit) vacation pay not used by a certain time.

"If an employer chooses to offer vacation time - which most, if not all employers choose to do in an effort to attract and retain employees - employers may adopt a policy that limits the amount of vacation an employee is permitted to accrue. For example, an employer can implement a policy that employees can (build up) no more than two weeks of vacation, and no additional vacation time will accrue until those vacation hours have been used.

"Employers are also adopting policies that prohibit vacation time from being utilized during certain portions of the year, usually based on work conditions that tend to re-occur seasonally.

"Vacation pay in California is deemed another form of wages, which vests as it is earned. As such, when an employment relationship ends, an employer is required to pay an employee all earned but unused vacation time.

"If you feel that your employer's vacation policy is unreasonable, you should contact an attorney."

FINAL CHECK DUE IN 72 HOURS

Q. I recently resigned and haven't received my final check. I am owed for five days of va-

cation, three personal days, one floating holiday and one day worked. Don't they have to give me a check within 72 hours? What are penalties for not doing so?

A. You're right, they have three days to pay you. But if you gave the boss at least 72 hours' notice that you were leaving, then the employer should have prepared a check and handed it to you on the way out the door.

As layoffs increase, particularly in companies with financial trouble, employers might get caught with cash-flow problems. Tough luck. If they don't pay you on time, then you have the cash-flow trouble.

If it goes past 72 hours, you can file a complaint with the state labor commissioner. In Santa Ana, the number is 714-558-4574. Information is available in English, Spanish and Vietnamese. Online, you can search through the prompts for "wage claim" at www.dir.ca.gov.

If the employer has to pay a penalty for the late paycheck, you get the penalty fee, says James J. McDonald, managing partner at the Irvine office of Fisher & Phillips LLP. He also verified that California law gives employers 72 hours to cut a final check if no notice was given. Fisher & Phillips specializes in employment law, representing employers.

"Sometimes employers have difficulty meeting this deadline," McDonald said, "because the personnel and information required to calculate payroll deductions and provide an accurate pay stub to go with the final paycheck are not immediately available.

"Nonetheless, California law provides that a 'waiting time penalty' may be recovered by the employee of one day's pay for each day beyond the deadline the final check is delayed, up to a maximum of 30 days' pay. This penalty may be pursued through the state Labor Commissioner's office, and the penalty, if awarded, goes to the employee."



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