

California Class Action An Occasion For All Employers To Review Vacation Practices

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[CurrentsLetterV](#) Many employers will have noted the decision last month where a federal court in California held that approximately 65,000 class members could maintain a class action against J.C. Penney's under California law. That lawsuit challenges the company's policy that employees forfeit accrued vacation benefits on termination. The issue in [this decision](#) was whether the plaintiffs met the commonality tests that allow a matter to be advanced as a class action rather than as a series of individual actions – individual actions that likely would not be brought given the small amounts at issue for individual employees. How that case plays out in the litigation going forward remains to be seen, but the case is a good occasion to remind employers that forfeiture of vacation and other leave can be a tricky issue. Here are a few pointers:

- o Know your state(s) law. This is another area where state laws vary significantly and importantly. Not surprisingly, California is a tough venue for employers, but many states have statutes that may relate to this issue, and even some states that do not may have court decisions that make forfeiture a tricky area.
- o Have a crystal clear policy on accrual. Many vacation policies do not clearly address what happens to vacation and other time off on termination, leaving a void that can be filled by employees' claimed understandings of practices and unwritten communications. If you do one thing after reading this post, go read your policy and see if it addresses this question with complete clarity.
- o Communicate any forfeiture as clearly as possible. (One issue in the JC Penney case is whether the policy was clearly communicated to the employees.) This area warrants an individualized policy signoff. Signing off on receipt of a broader handbook may be sufficient for most policies, but harassment and technology use policies are ones where a signature specifically on THAT policy can be helpful in litigation. The same is true with the loss of leave time.
- o Consider monthly rather than lump sum accrual. Some

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employers accrue time off for the year at the start of the year. There is some administrative ease in that, but it does more accrued leave on the table when employees leave in the first part of the year. A monthly accrual lowers the stakes of forfeiture somewhat.

- o Cutting back on a generous past accrual policy is especially tricky. It is not uncommon to hear from a client that realizes the actual or potential expense of a very general accrual policy where individuals have built up dozens if not hundreds of vacation days. It is one thing to characterize a gradual accrual of a couple days per month, it is quite another to RE-characterize a past practice with much higher stakes. That is not to say it can't be done, but it is a higher stakes and likely more difficult issue.

This is another one of those areas where a little analysis up front can go a long way for employers.