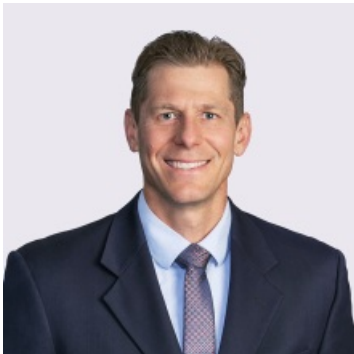


Colorado Supreme Court Strikes Down Employer's Vacation Forfeiture Policies

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Wage and Hour

In a highly anticipated decision, the Colorado Supreme Court has concluded that, under the Colorado Wage Claim Act (CWCA), Colorado employers must pay employees for all earned and accrued vacation time at separation, even if company policies expressly provide for forfeiture of unused time. *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, 2021 Colo. LEXIS 423 (Colo. June 14, 2021).

This decision has ramifications for many employers with Colorado employees and resolves a conflict between the Colorado Court of Appeals, which had concluded that such vacation forfeiture provisions were permissible, and the Colorado Department of Labor and Employment (CDLE), whose informal guidelines explicitly prohibit forfeiture agreements that diminish an employee's earned vacation time.

Background

The CWCA provides that, upon discharge of an employee, "the wages or compensation for labor or service earned, vested, determinable, and unpaid at the time of such discharge is due and payable immediately." Since 2003, the statute has in part defined "wages" or "compensation" to include "vacation pay earned and determinable in accordance with the terms of any agreement between the employer and the employee. C.R.S. § 8-4-101(14)(a).

When Carmen Nieto was fired from Clark's Market in 2017 after about eight years of employment, she had accrued at least 136 hours of paid vacation, worth more than \$2,200, under the company's policy. However, the policy stated that if an employee was involuntarily discharged, or if the employee failed to give two weeks' notice before quitting, the employee "forfeits all earned vacation pay benefits." Thus, Clark's Market omitted any pay for Nieto's accrued-yet-unused vacation time from her final pay. When the company refused her subsequent demand for such payment, she sued. The district court granted the company's motion to dismiss and Nieto appealed.

In 2019, the Colorado Court of Appeals upheld the dismissal of Nieto's claim, noting, "Nieto's right to compensation for accrued but unused vacation pay depends on the parties' employment agreement. And that agreement unequivocally says that the vacation pay she seeks wasn't vested given the circumstances under which she left [the company's] employ." The Court of Appeals added that the CWCA "creates [no] substantive right to payment for accrued but unused vacation time." Rather, it "merely 'establishes minimal requirements concerning when and how *agreed* compensation must be paid.'"

Colorado Supreme Court Decision

The Colorado Supreme Court agreed to consider whether requiring forfeiture of earned, unused vacation pay upon separation was permissible under the CWCA. In reversing and remanding the case, the Supreme Court held:

Although the CWCA does not entitle an employee to vacation pay, when an employer chooses to provide it, such pay is no less protected than other wages or compensation and, thus, cannot be forfeited once earned. Accordingly, under the CWCA, all vacation pay that is earned and determinable must be paid at the end of the employment relationship ... and any term of an agreement that purports to forfeit earned vacation pay is void[.]

The Court rejected the position, adopted by the lower court, that because the company's employees must earn their vacation time in accordance with the employment agreement, the agreement's forfeiture provision properly limits an employee's earned vacation time under the CWCA. On the contrary, the Supreme Court explained, the "in accordance with the terms of the agreement" language of the CWCA intends to protect vacation time that is earned through an employment agreement. Because employees are not automatically entitled to paid vacation under the CWCA, if an employer offers this benefit, it cannot deprive employees of the benefit through any contractual agreement. In support of its decision, the Supreme Court noted that, while debating one proposed version of the statute's vacation pay provisions, the Colorado legislature considered, but declined to adopt, an amendment explicitly allowing forfeiture of earned vacation pay.

The Takeaway

The Colorado Supreme Court's decision makes clear that an employer is under no obligation to offer paid vacation time to its employees, but if it does, it cannot implement a policy requiring forfeiture of any accrued, unused vacation time, whether by agreement or otherwise.

While the decision expressly invalidates only provisions requiring forfeiture of vacation pay upon separation of employment, the Court's holding potentially could extend to *any* "use-it-or-lose-it" policy that purports to result in employee forfeiture of pay during the employment relationship, such as a paid-time-off forfeiture policy or a policy requiring an employee to forfeit unused vacation hours at the end of each year. Notably, CDLE regulations allow employers to cap the amount of vacation time an employee may accrue.

If you have any questions about the *Nieto* decision, forfeiture policies, or any other wage and hour issue, please contact the Jackson Lewis attorney(s) with whom you regularly work.

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