

IN COLORADO, EMPLOYERS MAY GIVETH – BUT THEY MAY NOT TAKETH AWAY

Jul 06, 2021

Last month, the Colorado Supreme Court finally resolved a longstanding issue in Colorado employment law: whether employers may have a policy or agreement that provides for forfeiture of accrued but unused vacation. The Court's answer was "no."

In deciding *Nieto v. Clark's Market*, No 19SC553 (Colo. June 14, 2021), the Court clarified the meaning of a troublesome provision of the Colorado Wage Act. C.R.S. 8-4-101(14)(a)(III) defines "wages" to include:

(III) Vacation pay earned in accordance with the terms of any agreement. If an employer provides paid vacation for an employee, the employer shall pay upon separation from employment all vacation pay earned and determinable in accordance with the terms of any agreement between the employer and the employee.

The employer in *Nieto* case argued (among other things) that the phrase "in accordance with the terms of any agreement between the employer and the employee" modified the phrase "the employer shall pay," thus allowing employers to avoid the obligation to pay for unused vacation by adopting a policy to the contrary. The Colorado Supreme Court disagreed, holding that the phrase in question modifies the phrase "earned and determinable." Therefore, under the Act, whether vacation is "earned and determinable" is determined "in accordance with the terms of any agreement between the employer and the employee." But once vacation has been earned, the employer must pay it out upon termination of employment if it remains unused.

As a result of the *Nieto* decision, it is now clear that the Wage Act prohibits use-it-or-lose-it vacation policies, restrictions on the ability to carry over unused vacation from one year to the next, or any other policy or agreement that would cause an employee to lose vacation that he or she has already earned. In short, Colorado employers decide when and how vacation is earned – but once earned, it cannot be forfeited. Employers giveth, but they may not taketh away.

For employers concerned about excessive accrual of vacation, a common approach is to place a "cap" on the amount of vacation that an employee may accrue at any one time and prohibit the employee from earning any new vacation until the employee has used some of the accrued

vacation. This approach is recognized by the Colorado Department of Labor and Employment in its Wage Protection Rules. See 7 CCR 1103-7, Rule 2, §2.17.

Employers with employees in Colorado should review their vacation and paid-time-off (PTO) policies to ensure that they comply with the Wage Act as clarified by *Nieto*.

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