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# Colorado Supreme Court Holds 'Use-It-Or-Lose-It' Vacation Policies Are Void in Nieto v. Clark's Market

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On June 14, 2021, the Colorado Supreme Court provided an answer to the long-standing question of whether "use-it-or-lose-it" vacation policies are permissible under the Colorado Wage Claim Act (CWCA). In the case of *Nieto v. Clark's Market*, No. 19SC553, the Colorado Supreme Court held that an employer may not require an employee to forfeit vacation pay upon the termination of the employment relationship, and any agreement purporting to do so is void.

The *Nieto* case arose when an employer, relying on a policy in its employee handbook, refused to pay an employee her accrued vacation time upon the termination of the employment relationship. The policy stated that any employee discharged or voluntarily separated from employment without providing two weeks' written notice was not entitled to a payout of accrued but unused vacation time. The employer argued that in light of the forfeiture policy, the former employee's vacation pay, despite having been earned, had not vested; therefore, the employer argued, the CWCA did not apply. Both the trial court and the Colorado Court of Appeals in *Nieto* held that forfeiture was permissible where vacation pay had not vested under company policy.

In apparent response to the appellate court's *Nieto* decision, the Colorado Department of Labor and Employment's (CDLE) Division of Labor Standards and Statistics issued a final rule prohibiting forfeiture of earned and determinable vacation pay in December 2019. Because of the timing of the final rule, the CDLE's position was not considered in the underlying decisions.

Ultimately, the Colorado Supreme Court disagreed with the trial court and the Colorado Court of Appeals, relying on principles of statutory interpretation, the underlying purpose of the CWCA, and the CWCA's legislative history to hold that a discharged employee is entitled to a payout of all "earned" and "determinable" accrued vacation time. The legal issue centered on the omission of the word "vested" from the vacation pay provision of the CWCA, which states that an employer that offers vacation pay is obligated to pay "all vacation pay *earned* and *determinable* in accordance with the [employment] agreement" upon separation. (Emphasis added.) The CWCA generally defines "wages" and "compensation" as "earned, vested, and determinable." The supreme court concluded that this distinction was irrelevant because "vested" is synonymous with "earned." Assuming for the sake of argument that the words were not synonymous, the supreme court utilized principles of statutory construction to conclude that the legislature had intentionally left "vested" out and that vacation pay need only be "earned and determinable" to fall under the provisions of the

CWCA.

In conclusion, the Colorado Supreme Court held that though the “CWCA does not create an automatic right to vacation pay” or require an employer to provide it, “when an employer chooses to provide such pay,” the employee’s accrued but unused vacation pay under the policy must be paid out upon separation, and any agreement purporting to forfeit an employee’s vacation time is unenforceable.



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