

Colorado Employees Entitled to Unused Vacation Time Pay Despite Forfeiture Agreements

Article By:

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This summer, the Colorado Supreme Court addressed whether employers may implement practices by which employees forfeit accrued, unused vacation pay upon the termination of employment. In [*Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, 2021 Colo. LEXIS 423 \(Colo. June 14, 2021\)](#), the Court [held](#) that the Colorado Wage Claim Act (“CWCA”) requires employers to pay employees for earned but unused vacation upon the separation of their employment. The requirement applies irrespective of an employment agreement or policy forfeiting an employee’s right to such payment.

In *Nieto*, the employer’s vacation policy included a provision whereby employees forfeited unused vacation pay upon separation of employment. In response to an employee lawsuit over unused vacation pay, the district court dismissed the complaint, concluding that the terms of the vacation policy governed because the CWCA “clearly and unambiguously gives employers the right to enter into agreements with its employees regarding vacation pay.”

After analyzing the statute’s purpose, its language and structure, the legislative history, and the administrative interpretation by the agency charged with the statute’s enforcement, the Supreme Court concluded that the CWCA protects accrued vacation time just as it protects other wages or compensation. The Court also found that, “[a]lthough the CWCA does not create an automatic right to vacation pay, when an employer chooses to provide such pay, it cannot be forfeited once earned by the employee.” Accordingly, any agreements or terms that forfeit vacation pay are void.

It is important to note that Colorado employers may still restrict the amount and use of vacation days. The *Nieto* decision does not appear to affect the state’s [Wage Protection Rules](#), which permit employers to cap the accrual of vacation days (e.g., at ten days paid vacation days per year), as long as the employee does not forfeit any time already accrued.

However, it is unclear how *Nieto* applies to other common time off policies. For example, neither the *Nieto* decision nor the Wage Protection Rules offer specific guidance regarding whether employees may lose any frontloaded vacation time not taken by a certain date (e.g., a calendar year), even though the employer simultaneously provides additional vacation days in equal or greater number to replace the forfeited time off. It is also uncertain whether *Nieto* requires employers to pay employees for some or all accrued but unused leave provided under a single-bucket “paid time off” policy, which combines all forms of paid time off (e.g., vacation, personal, and sick time) into one

leave policy. Because employees may use such leave for any purpose, including those reasons protected by Colorado's [paid sick leave law](#), presumably some portion of an employee's accrued but unused paid time off is beyond the reach of *Nieto* and need not be paid out upon separation of employment.

In light of the Colorado eSupreme Court's decision, Colorado employers should review their existing vacation policies and employment agreements and reassess any provisions that could require employees to forfeit vacation days.

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