LABOR & EMPLOYMENT ADVISORY

Vacation Pay Must be Paid Out Upon Termination in Colorado, Even if Employer's Policy Says Otherwise

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On June 14, 2021, the long-awaited decision was issued by the Colorado Supreme Court in *Nieto v. Clark's Market*. The Colorado Supreme Court has now definitively ruled that under the Colorado Wage Claim Act ("CWCA") employers must pay employees' earned and determinable vacation upon termination and that any policy or agreement provisions forfeiting employees' rights to such payments are void.

The decision comes approximately two years after the Supreme Court granted certiorari from the underlying Colorado Court of Appeals ("COA") decision, which held that employers could decline to pay out vacation time to employees upon termination if their vacation policy contains a forfeiture provision. Clark Market had a provision requiring employees to provide two weeks' notice before quitting or lose their right to be paid out their unused vacation pay upon separation. In August 2019, the Colorado Department of Labor ("CDLE") issued an emergency regulation, which later became permanent, in response to the COA's *Nieto* decision. The regulation directly contradicted the COA holding and states unequivocally that the CWCA "does not allow a forfeiture of any earned (accrued) vacation pay." It goes without saying that this contradiction created a difficult situation for Colorado employers attempting to understand their legal obligations over the last two years.

Nieto v. Clark's Market resolves that contradiction but not in the employers' favor. While Colorado law does not require employers to provide vacation time to their employees, for employers who do, the CWCA requires payout of any vacation that is earned (meaning owed as return for services performed) and determinable (meaning able to be ascertained) at the time of separation. The Supreme Court explained that the CWCA does not contain an additional requirement, as the COA had held, that vacation also be *vested*, despite other language in the CWCA explicitly requiring wages and compensation to be "vested" to be owed. In reaching its conclusion, the Supreme Court rejected Clark's Market's argument that the existence of a forfeiture provision means that vacation pay must vest before it is owed and might not vest at all if the terms of

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the vacation policy are not met. All that is needed before an employee is entitled to pay out upon termination is for the vacation pay to be "earned and determinable."

The Supreme Court further found language in the CWCA requiring that employers "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" ambiguous, finding it is unclear whether the "in accordance with the terms of any agreement" language permitted a forfeiture provision to be part of that "agreement between the employer and the employee." After analyzing the legislative history, the CLDE's 2019 regulation, and the intent of the statute, the Supreme Court determined that the Colorado General Assembly did not intend to provide a mechanism by which employers could "override" the statute's command to pay out vacation balances upon termination. Rather, the language simply qualifies whether, and when, vacation is earned and determinable. To hold otherwise, the Supreme Court reasoned, would negate the intent of the provision altogether.

In light of this decision, Colorado employers are advised to **immediately revisit their vacation policies** to determine whether they contain any "void" forfeiture provisions. In general, employees are now entitled to any earned and determinable vacation pay upon termination, even if an employer's policy provides certain additional conditions for entitlement to such pay (*e.g.*, providing two weeks' notice, termination being voluntary, etc.). Employers who elected to combine vacation and sick time when complying with Colorado's new Health Families and Workplaces Act ("HFWA") should also be aware of the implications of this decision on those policies. Further, although the decision did not directly address whether other so-called "use-it-or-lose-it" provisions that effectively forfeit employees' accrued vacation *before* separation of employment are void (*e.g.*, "any vacation time not used by the end of the year is lost"), the breadth of the language in the case appears to generally prevent application of any such provisions. As always, when in doubt, employers should consult legal counsel to ensure the legality of their vacation policy.