



# Colorado Supreme Court Says Employers Can't Maintain "Use-it-or-Lose-it" Vacation Pay Policies

Insights

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The Colorado Supreme Court issued its long-awaited decision on vacation pay yesterday, ruling that an employer must pay an employee's earned but unused vacation pay upon separation from employment – and any agreement or policy forfeiting this pay is void as a matter of law. Colorado employers do not have to offer vacation pay to their workers as nothing in state law creates an automatic right to vacation pay. However, as confirmed by the June 14 decision in *Nieto v. Clark's Market*, once an employer chooses to provide vacation pay, it cannot be forfeited once earned. What do Colorado employers need to know about this critical decision?

## Case Analysis

Carmen Nieto worked for Clark's Market for eight-and-a-half years until she was fired in March 2017. The company policy at the time provided that vacation time was earned during the anniversary year prior to when it was used, and the amount earned based on length of employment. However, the policy further provided that employees forfeited all earned vacation pay benefits if their employment was terminated.

Ms. Nieto alleges that she had accumulated at least 136 hours of unused paid vacation, worth a total of \$2,244. She sued Clark's Market under the Colorado Wage Claim Act seeking recovery of this amount. The lower courts dismissed Ms. Nieto's claim finding that her vacation pay had not vested under company policy, and therefore, could be forfeited based on the policy language.

The Colorado Supreme Court rejected this analysis, finding that vacation pay did not have to be vested in order to be "earned and determinable" and thus not subject to forfeiture under the Colorado Wage Claim Act. The Court concluded that the Wage Act applies to all vacation pay

that, upon separation, is owed as return for work done or services rendered by an employee. Here, Ms. Nieto's vacation pay accrued prior to termination and thus was for work she had already performed. Therefore, the Court concluded that the vacation pay was "earned." Additionally, because the policy provided the amount of vacation pay, it was likewise "determinable."

## Warning Shots Fired?

The Court supported its holding by noting that the Wage Act's purpose was to protect employees from "exploitation, fraud, and oppression." Allowing an employer to manipulate contractual language to avoid paying rightful wages to employees contravenes these purposes behind the Wage Act, it concluded. Employers should now tread cautiously when it comes to Colorado wage and hour law compliance, as this extremely broad language and reasoning could be used in the future by opportunistic plaintiffs' attorneys and sympathetic judges to expand the Wage Act's reach.

At the end of its decision, the Court also made a key finding with respect to the amount of deference that courts need to pay to state regulatory agencies. Shortly after the Appeals Court's decision in this matter rejecting Ms. Nieto's claim, the Colorado Department of Labor and Employment promulgated a rule contradicting the Appeals Court's holding. The Supreme Court recognized the agency's reasoning as ultimately persuasive in ruling in favor of Ms. Nieto, but expressly declined to adopt a rule requiring courts to defer to a reasonable agency interpretation of an ambiguous statute. Agency interpretations are not binding on the Court, and thus, not entitled to the level of deference afforded agencies on the federal level.

### **What Employers Should Do Now**

The good news is that the Colorado Supreme Court has specifically held employers in Colorado do *not* have to provide vacation pay. The bad news: if you choose to do so, you must pay out vacation pay at termination. This decision requires you to consider some critical steps:

- You should review your handbooks and policies and make whatever changes are necessary to ensure that any earned and determinable vacation pay is not forfeited either at year end or at termination. Any such "use-it-or-lose-it" language you have in your written policies is now considered void thanks to yesterday's decision.
- Train your managers and other staff involved in terminations and wage and hour compliance about this new law so that violations do not occur in the future.
- If you have recently terminated an employee and not paid out vacation pay, you should coordinate with your Fisher Phillips attorney to determine if you have any outstanding obligations and whether you should take any affirmative steps.
- There is a silver lining. Last year, Colorado enacted the Healthy Families and Workplaces Act explicitly requiring employers to provide sick leave. However, under that new law, sick leave does not need to be paid out at termination, and nothing in yesterday's decision changes that.

We will continue to monitor developments related to Colorado state law and provide updates as necessary, so make sure you are subscribed to Fisher Phillips Insight service to receive the latest news directly to your inbox. If you have questions, feel free to contact your Fisher Phillips attorney, the author of this Insight, or any member of our Denver office.

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**Kristin R.B. White**

Partner

303.218.3658

Email

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