# Payment of Employee Vacation Time in Colorado

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*This article discusses recent Colorado Supreme Court and Colorado Department of Labor and Employment guidance on handling employees' vacation time when they separate from employment.*

Colorado has had a long and tortuous history regarding how to handle an employee's accrued but unused vacation at the time of employment separation. Court decisions conflicted with Colorado Department of Labor and Employment (CDLE) policy guidance, creating uncertainty for both employers and employees.

But the Colorado Supreme Court largely ended the confusion in *Nieto v. Clark's Market, Inc.* by stating that all earned and determinable vacation pay must be paid upon separation and that "any agreement purporting to forfeit earned vacation pay is void."[1] This article discusses *Nieto* and accompanying CDLE guidance.

## The *Nieto* Backstory

In *Nieto*, an employer declined to pay an employee's accrued but unused vacation time when the employee had been discharged because the employer's vacation policy provided that, "[i]f you are discharged for any reason or do not give proper notice, you will forfeit all earned vacation pay benefits."[2] The employer argued that this vacation policy was an agreement between the employer and employee under which the employee's vacation pay had not "vested."[3] Conversely, the employee argued that, under the Colorado Wage Claim Act (CWCA or Act), vacation time that is earned and determinable must always be paid out at separation and the forfeiture clause purporting to waive the employee's right to such payment was void under CRS § 8-4-121.[4] The Colorado Court of Appeals agreed with the employer.

The issue before the Colorado Supreme Court was how to properly interpret the CWCA. In pertinent part, the Act defines "wages" or "compensation" to include

> [v]acation 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.[5]

Employers have long relied on the Act's reference to vacation pay earned "in accordance with the terms of any agreement between the employer and employee"[6] to support their vacation policies proscribing payment of earned but unused vacation time upon separation from employment.

Before the Court's decision in *Nieto*, employers successfully argued that vacation pay must not only be "earned" and "determinable" to be paid out at separation but must also be "vested."[7] This argument was based on the CWCA provision stating that "[n]o amount is considered to be wages or compensation until such amount is earned, *vested*, and determinable . . . ."[8] Further, relying on a divorce case that addressed vacation pay in the context of dividing marital property,[9] employers successfully contended that vacation pay never vests when an employer's vacation policy does not require the payout of vacation time upon separation.

On the other hand, the CDLE's Division of Labor Standards and Statistics (Division) took the position that vacation time, once accrued, can never be taken away from employees, either at separation of employment or pursuant to "use-it-or-lose-it" vacation policies,[10] which generally provide that all accrued vacation time must be used by the end of the benefit year or be forfeited. In rebutting employers' arguments that the terms of their vacation policies control the issue, the Division (and the employee in *Nieto*) pointed to a CWCA provision stating that "[a]ny agreement, written or oral, by any employee purporting to waive or to modify such employee's rights in violation of the [CWCA] shall be void."[11]

In response to Colorado Court of Appeals rulings for employers based on the arguments set forth above, in 2019 the Division issued emergency rules, which later became permanent, codifying its position that vacation policies may never allow forfeiture of accrued vacation time.[12] These rules permit employers to decide whether they would provide vacation time at all; set a specific amount of total vacation time (e.g., per year or other period); and allow vacation time to accrue all at once or over defined periods (e.g., per week, month, etc.).[13] The Division's rules permit vacation policies to cap the amount of vacation time that can be accrued or used in a given year.[14] But such policies may never permit forfeiture of accrued vacation amounts, which may only be diminished through an employee's use.[15] Thus, the Division's rules effectively invalidated use-it-or-lose-it vacation policies in Colorado. Whether these rules were a permissible interpretation of the CWCA, however, was an open question before *Nieto*.

### The Supreme Court's Decision

In confronting this legal landscape, the Colorado Supreme Court in *Nieto* first considered the CWCA's provision that "[n]o amount is considered to be wages or compensation until such amount is earned, vested, and determinable" and held that "vested" either means the same thing as "earned" or, alternatively, the "vested" requirement does not apply to vacation time under the Act, as opposed to other types of "wages" or "compensation" that must be paid out under the Act.[16] The Court found that the employee had earned her vacation time because it was awarded under the employer's policy for work already performed and that the amount of the employee's earned vacation time was determinable.[17]

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The Court rejected the argument that the CWCA's reference to vacation pay being earned "in accordance with the terms of any agreement between the employer and employee" demonstrated that vacation payout rules as defined in the employer's own vacation policy control whether vacation time must be paid out at separation.[18] Although the Court found this statutory language to be ambiguous, it analyzed the Act's purpose, language, structure, and legislative history, along with the Division's interpretation of this statute as evidenced in its 2019 rules. This resulted in the Court's holding that if an employer chooses to provide vacation time, any contract term that purports to forfeit such time—for example, the forfeiture clause in the employer's vacation policy in *Nieto*—is void under the CWCA as an agreement "purporting to waive or to modify" employees' rights.[19]

Ultimately, the Court concluded 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."[20]

### The Demise of Use-It-or-Lose-It Policies

*Nieto* specifically invalidated an employer's vacation policy purporting to forfeit accrued, unused vacation time at separation of employment. By logical extension, the decision supports invalidation of use-it-or-lose-it vacation policies in general. While the Court did not directly discuss such policies, it addressed the Division's 2019 rules—that, as noted above, effectively invalidate use-it-or-lose-it vacation policies—stating that the rules are "consistent with the statute's purpose, language, structure, and legislative history."[21]

#### *Open Questions*

Notwithstanding the closed door on use-it-or-lose-it policies going forward, *Nieto* could prompt derivative litigation on related issues. For instance, if employers award vacation time prospectively (i.e., front-loading vacation time at the beginning of a benefit year) rather than


in return for past service, is such time actually "earned" within the meaning of the CWCA? And does *Nieto* apply equally to "paid time off" (PTO) even though the CWCA only expressly discusses the compensability of "vacation" pay? The old conflict between case law and CDLE guidance may yet be lurking.

The Division took a position on PTO in its recently issued Interpretive Notice and Formal Opinion (INFO) #14, stating that "vacation pay" as defined in CWCA § 8-4-101 includes "any paid leave that's usable for any purpose the employee chooses, at their discretion—unlike paid leave that's usable only for qualifying events like health needs, caretaking, bereavement, or public holidays. . . ."[22] Further, the Division expressly stated that leave includes "paid time off" or any similar leave, regardless of name,[23] and Wage Rule 2.17.2 (formerly Rule 2.15) suggests that the Division will consider front-loaded paid time off as "accrued."[24] But the *Nieto* Court found that "any vacation pay Nieto accrued prior to her termination was for 'work [she] already performed' and, thus, 'earned.'"[25] Therefore, an apparent conflict remains as to whether an employee "earns" PTO if it is front-loaded as opposed to "already performed."

As of the time of this writing, no Colorado courts have cited *Nieto*'s substantive holding, likely because it has foreclosed further litigation on the issue. Colorado has joined one other state—California—in effectively nullifying use-it-or-lose-it policies.

## Conclusion

In the wake of *Nieto*, employers with discretionary PTO plans must pay employees their earned accrued leave when they separate from employment, regardless of how leave is named or whether their vacation policies provide otherwise. Further, given the Division's position in INFO #14 and Rule 2.17, employers should ensure that their vacation/PTO caps comply with current law. Lastly, employers should consider the risks inherent in front-loading PTO rather than tying it to an employee's service hours. CL


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**NOTES**

1. *Nieto v. Clark's Mkt., Inc.*, 488 P.3d 1140, 1143 (Colo. 2021).
2. *Id.* at 1142.
3. *Id.*
4. *Id.*
5. CRS § 8-4-101(14)(a)(III).
6. *Id.*
7. *See, e.g.*, *Sutton v. A & A Quality Appliance, Inc.*, Case No. 2012-CV-3520, 2013 Colo. Dist. LEXIS 1850 at *41 (Dist. Ct. Denver Cty. July 2, 2013) (finding that plaintiff was not owed any vacation time because it had not vested under the employer's policy).
8. CRS § 8-4-101(14)(a)(I) (emphasis added).
9. *See In re Marriage of Cardona and Castro*, 316 P.3d 626, 634–35 (Colo. 2014) ("In some cases, the value of a spouse's accrued leave at the time of dissolution can be reasonably ascertained by looking to the terms of the employment agreement or policy that establishes the enforceable right" and "an employer may retain the right to change the terms of compensation for leave that has already accrued."). *See also Gomez v. Children's Hosp. Colo.*, Civil Action No. 18-cv-00002-MEH, 2018 U.S. Dist. LEXIS 111900 (D.Colo. July 5, 2018) (finding that plaintiff's accrued sick leave was not earned, vested, and determinable, citing to, among other things, *Cardona*).
10. *See* Brief of Amicus Curiae of the Colo. Dep't of Labor & Employment, Div. of Labor Standards and Statistics in Support of the Petition for Certiorari, 2019SC553, 2019 CO S.Ct. Briefs LEXIS 1081 at *13.
11. CRS § 8-4-121.
12. 7 CCR 1103-7, Rule 2.15 (effective Dec. 15, 2019).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Nieto*, 488 P.3d at 1145–46.
17. *Id.* at 1144–45.
18. *Id.* at 1149.
19. *Id.* at 1144.
20. *Id.* at 1150.
21. *Id.* at 1149.
22. CDLE INFO #14 at 1 (Mar. 4, 2022), https://cdle.colorado.gov/sites/cdle/files/INFO%20%2314_%20Payment%20of%20Earned%20Vacation%20upon%20Separation%20of%20Employment%203.4.22%20-%20CLEAN.pdf.
23. *Id.*
24. 7 CCR 1103-7, Rule 2.17.2 ("The 'earned and determinable in accordance with the terms' provision does not allow a forfeiture of any earned (*accrued*) vacation pay but does allow agreements on matters such as: . . . (3) whether vacation pay *accrues* all at once. . . .") (emphasis added). *See also* INFO #14, ex. 4.
25. *Nieto*, 488 P.3d at 1145.

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