

LEGAL UPDATES

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No Vacation from Legal Uncertainty: Colorado's Conflicting Directions About Vacation Policies

May Colorado employers adopt “use-it-or-lose-it” vacation policies, in which employees lose paid vacation time if they do not use it within a certain time frame?

May Colorado employers refuse to pay out the cash value of unused vacation time to employees who resign without giving two weeks’ notice, who are terminated for cause, or who fail to satisfy other conditions in their vacation policy?

For quite some time, the answers to these important questions have been as clear as proverbial mud. Unfortunately, because of three recent events, the mud has only thickened:

First, in June 2019, a panel of the Court of Appeals decided *Nieto v. Clark’s Market*, 2019 COA 98 (Jun. 27, 2019), holding that an employer could, consistent with its vacation policy, decline to pay out vacation time to an employee who resigned and failed to provide adequate notice. This decision was significant because it contradicts the view of the Colorado Division of Labor Standards and Statistics (the “Division”) of when vacation time qualifies as “wages,” which must be paid out and cannot be forfeited under Colorado law. See Wage Protection Act Rules, 7 CCR 1103-7, Rule 2.15 (August 20, 2019) (stating that language in the Colorado Wage Claim Act “does not allow a forfeiture of any earned vacation pay”).

Second, the plaintiff in *Nieto* petitioned the Colorado Supreme Court for certiorari review, and both the Colorado Department of Labor and the Plaintiff Employment Lawyers Association have filed amicus curiae briefs asking the Colorado Supreme Court to weigh in. Given the widespread importance of vacation pay to Coloradans, the statutory-interpretation issues involved, and the fact that lack of clarity in this area significantly affects the Division's processing of vacation-pay related wage complaints, there is a very good chance that the Colorado Supreme Court will decide to review the *Nieto* decision. The consequences of this review on vacation policies could be significant.

Third, in August 2019, the Division issued an emergency rule (WPA Rule 2.15) imposing new limitations on vacation policies, including use-it-or-lose-it policies. This rule is already in effect, and it is scheduled to become permanent no later than December 19, 2019. The Department of Labor is applying this rule in the administrative hearings it conducts, and a public hearing concerning this rule change is scheduled to take place October 15, 2019. Many employers have no idea that WPA Rule 2.15 even exists.

While Colorado employers may wish to take a vacation from all this uncertainty—which may last for quite a while—they can't. Paid vacation is important for a well-functioning workforce, but as soon as employers decide to provide paid vacation, they must wrestle with these issues. Further, vacation pay is important to employees—take it away, and there is a heightened risk that employees will fight for it and file a complaint with the Division.

What should Colorado employers do?

Employers need targeted guidance to address these changing and important issues based on their own, specific vacation policies. In conversations with counsel, employers should assess how much their current vacation policy deviates from the Colorado Department of Labor's new rule, and make changes as appropriate. Even though this rule may change in the near future (whether because the Department changes it, because of Colorado Supreme Court review that may occur, because of a legal challenge, or because of interpretations of the rule), it provides the current standard the Department of Labor will use to assess whether and how employers pay out vacation time. There's no prohibition on more generous policies, but employers may be liable for non-compliance.

Under the new rule, employers are generally free to decide whether to provide paid vacation pay at all, how much paid vacation is provided, how vacation accrues and whether there is a cap on how much vacation an employee can accrue. But with one exception, employers cannot impose conditions that would result in employees losing their accrued vacation. For example, employers cannot refuse to pay

out employees for vacation if they are fired for cause. The one exception is that employers can choose to cap the amount of vacation time their employees earn, such that amounts in excess of the cap cannot be carried over from year to year. Nevertheless, according to the Division, the lowest that the cap can be set is one year's worth of vacation.

Other considerations for employers

Employers should also consider how they are communicating their vacation policies to employees. While employers have some flexibility with respect to paying vacation, Colorado law contemplates that employers exercise that flexibility through "agreements" with their employees. Is a handbook "policy" an "agreement"? In *Nieto*, the court assumed that the vacation policy in front of it was an agreement because the plaintiff alleged that it was and the defendant did not dispute the allegation. Thus, it is possible that a handbook policy governing vacation time could be challenged as unenforceable because most employer policies contain a disclaimer that they are not contracts for employment. To ensure that vacation policies are enforceable, employers should consider requiring employees to sign a separate agreement governing accrued but unused vacation time.

Finally, employers will want to keep a close eye on whether the Colorado Supreme Court reviews the *Nieto* case, as well as whether the Colorado Department of Labor's new rule is modified before it becomes permanent. If review is granted, Husch Blackwell will keep you updated.

Contact Us

If you have any questions about the implications of this case or a related issue, please contact Barb Grandjean, Chad Grell or your Husch Blackwell attorney.

Dana Dobbins was a contributing author of this content.