



COLORADO SUPREME COURT RULES EARNED VACATION PAY MUST BE PAID UPON SEPARATION FROM EMPLOYMENT

On June 14, 2021, the Colorado Supreme Court clarified that vacation pay is classified as earned pay that must be paid to the employee upon separation from the employer. *Nieto v. Clark's Market, Inc.*, 2021 CO 48. Of course, paid vacation time must satisfy the earned and determinable requirements of sections 8-1-101(14)(a)(III), C.R.S. (2020), and 8-1-109(1)(a), C.R.S. (2020), but this is not a high threshold to cross. Essentially, an employer who chooses to provide earned vacation pay cannot, by contract, avoid paying all earned vacation pay to the employee upon separation, regardless of what any employment contract might state.

The Court, appearing to give employers an out, made a point of clarifying that earned vacation time is not a right owed to employees, but nevertheless reasoned if an employer decides to provide earned vacation time, then the employee has a right to that earned income just as they would have a right to earned hourly wages.

This decision settled a dispute arising under subsection (14)(a)(III) of the Colorado Wage Claim Act ("the Act"), which was added in 2003, and which defined vacation pay as a type of protected wages and compensation. Since a protected wage cannot be forfeited unless otherwise permitted by the Act, and the Court deemed subsection (14)(a)(III) to be ambiguous in that respect, the Court turned to the statutory language and structure, the Act's remedial purpose, the statute's legislative history, and the relevant agency interpretation to determine if earned vacation pay can be forfeited.

The terms "earned" and "determinable" are not defined by the Act, leaving the Court to apply their common and ordinary meanings, i.e., their dictionary definitions. The Court defined earned as, "return for . . . work done or services rendered[.]" and determinable as, "able to be determined or ascertained."

Since the employment contract at issue in *Nieto* defined how the employee earned vacation time and how that earned vacation time was determined, based on years worked for the employer, the vacation time was earned and determinable. Meaning, per the Act, Ms. Nieto's vacation pay was a protected wage according to the plain language of subsection (14)(a)(III), and her employer was on the hook.

Since section 8-4-109 of the Act requires payment of all earned but unpaid compensation after separation from employment, and section 8-4-121 nullifies an employer's attempt to contract around the Act's requirements, an employee's earned vacation time must now be paid to them regardless of what their employment contract(s), or agreement(s) might state.

The Court's decision appears consistent with the intent of the Act, to

protect employees from exploitation, fraud, and oppression. Since statutes, such as this one, must be liberally construed to carry out their purpose, the Court determined it would be contrary to the Act's purpose to construe subsection (14)(a)(III) to permit the contractual forfeiture of earned vacation time. The Court concluded that to construe the statute as permitting this type of forfeiture by contract could allow the employer to carry out precisely the kind of exploitation, fraud, and oppression that the Act aims to prevent. In *Nieto*, it was even suggested that the employers fired Ms. Nieto to avoid having to pay her earned vacation time, which was substantial.

The Court further applied the intent of the legislature, by reference to hearing committee testimony and agency deference, reaffirming that earned vacation pay cannot be forfeited once it is earned and determinable. Though the Supreme Court acknowledged that hearing committee testimony is not dispositive, it noted that statements such as "if you do offer it [earned vacation pay] and you do have a policy for vacation, then you would have to pay it out as earnings," support the interpretation of subsection (14)(a)(III) to require payment of all earned vacation pay upon separation.

Lastly, the Court noted that its interpretation of the Act is consistent with an agency rule promulgated by the Colorado Department of Labor and Employment which prohibits the forfeiture of earned vacation time. Although the Supreme Court acknowledged that Courts do not have to follow agency rules when a statute is ambiguous, they admitted such rules should still be given due consideration, and clearly did that here.

For all of these reasons the Supreme Court concluded that earned vacation time is a protected wage and cannot be forfeited by an employment contract.

Though the immediate and longer-term effects of this decision remain to be seen, we can and should expect employers to begin moving toward a different system of paid vacation accrual. Even prior to this decision, and for a variety of reasons, many employers have begun transitioning to a system of unlimited paid time off with no long-term accrual to help mitigate the cost of earned time payouts to ex-employees. The cost-benefit and risk-need analysis will be unique for each employer, but it is important to engage in this analysis quickly and implement a system that works best for the employer's business.

If you would like further details about this case and its implications for your business, please contact: [Alison Burke](mailto:alison@hallevans.com), 303.628.3492; or [Matthew Hegarty](mailto:matthew@hallevans.com), 303.628.3418.