

Colorado Labor Agency Proposes Revisions to Wage Rules that Include Bar on Vacation Pay Forfeiture

By Ryan P. Lessmann

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The Colorado Department of Labor and Employment (CDLE) has proposed amendments to its [Wage Protection Act Rules](#) (Proposed WPA Rules) that include a prohibition against forfeiture of vacation pay under the Colorado Wage Claim Act (CWCA).

CDLE adopted the Proposed WPA Rules as temporary rules effective as of August 20, 2019, and proposed making them permanent no earlier than December 19, 2019.

The proposed rule prohibiting forfeiture of vacation pay is consistent with CDLE's previous informal guidance on "use-it-or-lose-it" vacation policies and appears to be in response to a state court's opinion upholding a forfeiture provision in an employer's workplace policy.

Vacation Pay Proposed Rule

On vacation pay (Proposed WPA Rule 2.15), the proposal states:

"Vacation pay" ... includes in the definition of "[w]ages' or compensation":

"Vacation 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."

The "earned and determinable in accordance with the terms" rule does not allow a forfeiture of any earned vacation pay, but does allow agreements on matters such as: (1) whether there is any vacation pay at all; (2) the amount of vacation pay per year or other period; (3) whether vacation pay accrues all at once, or instead accrues proportionally each week, month, or other period; and (4) whether there is an accrual cap of one year's worth (or more) of vacation pay. Thus, employers may have "use it or lose it" policies that disallow carryover after employees accrue a year of vacation pay, but that do not forfeit any of that year's worth. For example, an agreement for ten vacation days per year:

- (a) may provide that employees can accrue more than ten days, by allowing carryover of accrued vacation from year to year;
- (b) may provide that employees cannot accrue more than ten days, by disallowing carryover of unused vacation from year to year; but
- (c) may not provide that after an employee accrues ten days, that amount diminishes below ten days for any reason.

[Emphasis added.]

Proposed WPA Rule 2.15 prohibiting forfeiture of vacation pay does not reference paid time off (PTO) or sick time. Thus, Proposed WPA Rule 2.15 is ambiguous as to whether it applies to these policies. However, because the CWCA references only vacation pay, Proposed WPA Rule 2.15 presumably does not apply to PTO or sick time.

Appeals Court Opinion

The Colorado Court of Appeals in *Nieto v. Clark's Market, Inc.*, 2019 COA 98 (Colo. App. June 27, 2019), upheld an employer policy on forfeiture of vacation pay when an employee is discharged. (See our article, [Colorado Employer's Vacation Policy that Included Forfeiture Provision Upheld.](#)) After the



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Court released *Nieto*, CDLE removed its informal guidance on “use-it-or-lose-it” vacation policies from its website. That guidance stated:

A “use-it-or-lose-it” policy may not operate to deprive an employee of earned vacation time and/or the wages associated with that time. Any vacation pay that is “earned and determinable” must be paid upon separation of employment.

In Support of Vacation Pay Proposed Rule

In its Statement of Basis, Purpose, Specific Statutory Authority, and Findings for Adoption as Temporary Rules with the Proposed WPA Rules, CDLE stated:

Recent interpretations that unused vacation pay is forfeited upon employment separation is contrary to the text and legislative intent of the vacation pay statute, which states that the “[w]ages’ or ‘compensation” that cannot be forfeited 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.” The legislature expressly rejected a prior version of that provision that would have allowed an “agreement between the employer and the employee that requires or results in loss or forfeiture of accrued vacation pay.”

The Division, based on its expertise in the field and its detailed investigations and careful analyses of a vast number of vacation pay cases, (a) finds the statutory text clear in barring forfeiture, (b) finds clear evidence of legislative intent to bar forfeiture in the legislature’s express rejection of the draft statutory provision allowing forfeiture clauses, and (c) has issued many years of consistent interpretations and rulings holding vacation pay non-forfeitable.

[Footnote omitted.]

Next

CDLE will hold a public hearing on the Proposed WPA Rules on October 15, 2019, and may make revisions before the rules become permanent.

Jackson Lewis will continue to monitor the progress of the Proposed WPA Rules through the permanent rulemaking process. Please contact a Jackson Lewis attorney if you have any questions about workplace developments.

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