Legal Update Article

Colorado Employer's Vacation Policy that Included Forfeiture Provision Upheld

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Related Services

Wage and Hour

An employer's vacation policy did not violate the Colorado Wage Claim Act (CWCA), despite stating that employees forfeit earned vacation pay if they are discharged or quit without giving two weeks' notice, the Colorado Court of Appeals has held. *Nieto v. Clark's Market, Inc.,* 2019 COA 98 (Colo. App. June 27, 2019).

Background

Carmen Nieto worked at Clark's Market and accrued vacation time under the vacation policy in the Market's employee handbook. The Market's handbook stated that if an employee is discharged, with or without cause, or if the employee fails to give two weeks' notice before quitting, the employee "forfeits all earned vacation pay benefits."

After Nieto's discharge, the Market, citing its policy, refused to pay her the vacation time she accrued, but did not use. Nieto sued the employer, seeking payment for her unused, accrued vacation time.

The District Court found in favor of the Market. Nieto appealed.

Vacation Pay Statute

The Colorado Court of Appeals affirmed the lower court decision. Former Colorado Supreme Court Justice Alex Martinez sat on the panel by assignment of the Chief Justice.

The Court held that the Market's policy did not violate the CWCA because vacation pay depends on the parties' employment agreement.

The CWCA states, "the wages or compensation for labor or service earned, vested, determinable, and unpaid at the time of such discharge is due and payable immediately." It also states that "wages" or "compensation" includes "vacation pay earned in accordance with the terms of any agreement."

The Court clarified that the CWCA "merely 'establishes minimal requirements concerning when and how *agreed* compensation must be paid.'" (Emphasis in original.) (Quoting *Barnes v. Van Schaack Mortgage, Division of Van Schaack & Co.,*787 P.2d 207, 210 (Colo. App. 1990).) Thus, the Court explained it must look to an employment agreement to determine whether the particular compensation is "earned, vested, and determinable."

The Court relied on its 1990 opinion in *Barnes,* in which it ruled that an employee could not recover a bonus earned before his termination because the bonus was not vested under the agreement until after his termination. Thus, the *Barnes* plaintiff was not entitled to bonuses for the loans he originated that closed in the month following his termination, because the employment agreement "expressly and unequivocally provide[d] that [the] plaintiff [was] entitled to incentive fee commissions only if he generated loan applications that resulted in loan closures during the calendar month when his employment terminate[d]."

Similarly, Nieto's right to compensation for accrued, unused vacation depended on the vacation policy in the Market's employee handbook, the Court explained. The vacation policy clearly stated that the vacation pay Nieto sought "wasn't vested given the circumstances under which she left the Market's employ."

Implications

After the Court released *Nieto,* the Colorado Department of Labor and Employment (CDLE) removed its informal guidance on "use-it-or-lose-it" vacation policies from its website. Previously, the CDLE 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.

Nieto could be reexamined by the Colorado Supreme Court if Nieto seeks review.

Please contact a Jackson Lewis attorney to discuss these developments and your specific organizational needs.

We thank summer clerk Perdeep S. Badhesha, in our Denver office, for his assistance with this article.