

## COLORADO EMPLOYEES LOSE IT OVER USE-IT-OR-LOSE-IT VACATION POLICIES

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Colorado employees are pushing back against the recent decision allowing use-it-or-lose vacation policies in Colorado.

In *Nieto v. Clark's Market, Inc.*, 2019 COA 98 (Colo. App. June 27, 2019), a division of the Colorado Court of Appeals held that the Colorado Wage Claim Act does not prohibit employers from imposing conditions on the right to be paid for accrued but unused vacation upon termination. In that case, the employer's policy provided that terminating employees would not be paid for accrued but unused vacation if they were discharged or if they resigned with less than two weeks' notice. The Court held that the Wage Claim Act only requires payment of vacation that has been "earned in accordance with the terms of any agreement" and that employers and employees may agree to impose conditions on payment for accrued but unused vacation. Therefore, under *Nieto*, use-it-or-lose-it vacation policies are now permissible in Colorado.

Not surprisingly, employees (and their lawyers) are pushing back, focusing on two unanswered questions in the *Nieto* decision.

Seizing upon the word "agreement" in the statute, some employees contend that *Nieto* applies only to actual contracts between the employer and the employee and not to policies unilaterally imposed by the employer. The Court in *Nieto* expressly declined to address this issue because neither party had raised it. While individual vacation agreements with each employee would be unwieldy and impractical in most cases, employers should at least consider ensuring that all employees have received a copy of the vacation policy – either in an employee handbook or as a stand-alone policy – and have signed a written acknowledgment of receipt. An employee who received and signed for a vacation policy and elected to continue working under the terms of that policy should find it difficult to argue successfully that he or she had not agreed to those terms.

Another argument relates to the retroactive effect of a revised vacation policy. If an employer changes its vacation policy to "use-it-or-lose-it" or to impose other conditions upon payment at time of termination, is that change effective as to vacation earned prior to the change? Or is that a prohibited forfeiture of vacation that was earned under the previous version of the policy? To protect against this argument, employers should consider making any changes to the vacation

policy prospective only, so that the change applies only to vacation that accrues after the employee has received and signed for the new vacation policy.

Finally, employers should be wary of imposing unduly harsh conditions on the right to be paid for unused vacation – such as providing that terminating employees will be paid for their unused vacation only if they have been performing satisfactorily as determined by the employer in its sole discretion. Such conditions might prompt a different division of the Court of Appeals – or the Colorado Supreme Court itself – to reconsider the wisdom of the decision in *Nieto*.

*Nieto* gave Colorado employers a gift. They should use it wisely.

*Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers review their employee policies. If you or your organization would like more information on any state-specific laws or any other employment issue, please contact an attorney in the Employment and Labor practice group.*

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