



COMPLIANCE ALERT

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EMPLOYERS MUST PAY EMPLOYEES UNUSED VACATION PAY AT THE END OF EMPLOYMENT

New Colorado Supreme Court Decision Could Impact Employers:

This week the Colorado Supreme Court weighed in on whether the so called “use-it or lose-it” vacation pay policies are prohibited by law. In a pivotal decision, the Court held that the Colorado Wage Claim Act (CWCA) bars employers from implementing policies that require employees to forfeit their earned but unused vacation pay upon separation.

Nieto v. Clark’s Market

- **Background**

Upon termination, Clark’s Market refused to compensate Ms. Nieto for her earned but unused vacation pay pursuant to its “use-it or lose-it” policy as outlined in its employee handbook. The problematic provision read:

In the event you voluntarily leave Clark’s Market and give at least two (2) weeks written notice, you will receive vacation benefits earned as of your last anniversary date but not taken by the date of separation. . . . If you are discharged for any reason or do not give proper notice, you will forfeit all earned vacation pay benefits.

- **What is at issue?**

The Colorado Supreme Court reviewed the question of whether the CWCA allows an employment agreement to forfeit an employee’s accrued but unused vacation pay upon separation of employment. Disagreeing with the lower courts, the Colorado Supreme Court held that vacation pay need not meet the requirements of “wages” as defined elsewhere, which includes the requirement of being “vested,” but instead need only be “earned and determinable.” The Court ultimately found that Ms. Nieto’s vacation pay was “earned” as it was accrued in exchange for the work she performed as well as “determinable” because the total amount of vacation pay could be easily ascertained through Clark’s Market’s policies.

Next, the Court addressed whether employment agreements waiving the payout requirements are void as a matter of law. The Court upheld the Colorado Department of Labor and Employment’s regulation prohibiting use-it or lose-it policies. Thus, the Colorado Supreme Court in Nieto presents an important holding for Colorado Employers—**use-it or lose-**

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it agreements which purport to forfeit an employee's earned but unused vacation pay are void as a matter of law in Colorado.

What does this mean for Employers?

At its core, the holding in Nieto means that employers should no longer create employment policies which seek to waive an employee's right to unused vacation pay at the time of separation. Employers should be wary of existing policies and provisions which seek to eliminate the need to pay out earned vacation pay, as they are no longer enforceable.

Employers should carefully consider their current vacation pay policies. Although the Court determined that employers cannot waive vacation pay upon separation, employers still retain control over capping the amount of vacation pay an employee may receive, or offering vacation pay at all.

Please do not hesitate to contact Messner Reeves attorneys Allison Dodd or Ben Brittain if you have any questions.