

## Blog Post

# Colorado Employers May Need to Pay Out Accrued Vacation on Termination

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By [Brian Nugent](#) and [Melissa L. Cizmorris](#)

Colorado employers should carefully review their vacation and paid time off policies following a recent decision from the Colorado Supreme Court. On June 14, 2021, the Colorado Supreme Court held in *Nieto v. Clark's Market* that although the Colorado Wage Claim Act (CWCA) does not require employers to provide employees with vacation pay, if the employer does elect to provide vacation pay, all accrued but unused vacation pay must be paid to employees upon termination of employment. This ruling is a reversal from precedent set by the Colorado Court of Appeals.

In *Nieto*, the Court reviewed the following question: “Whether section 8-4-101(14)(a)(III) of the [CWCA] allows an employment agreement to forfeit an employee’s accrued but unused vacation pay upon separation of employment.” In June 2019, the Colorado Court of Appeals answered the question in the affirmative, holding that an employer could create a policy that would be more stringent than the CWCA. This led Colorado employers to create vacation policies that placed conditions on how or when an employee actually “accrues” or “earns” vacation pay or must otherwise be paid for accrued but unused vacation.

Following the Court of Appeals’ decision, the Colorado Department of Labor (CDOL) amended the

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CWCA Regulations in November 2019 to state that once accrued, or in the CDOL's terms "earned and determinable," vacation may not be forfeited for any reason, including if based on criteria within a properly implemented written PTO policy. The emergency rule created much confusion among Colorado employers because it contradicted the holding in the *Nieto* Court of Appeals decision.

The Colorado Supreme Court resolved the conflict and reversed the Court of Appeals' decision. It confirmed that although Colorado law does not require an employer to provide vacation time, "when an employer chooses to provide it, such pay is no less protected than other wages or compensation and, thus, cannot be forfeited once earned." The key to the Court's analysis is whether vacation time/pay that has accrued is the equivalent of accrued wages under the CWCA, and therefore not subject to forfeiture. The Court applied a broad interpretation of the term "accrued," which, based on the facts of the *Nieto* case, includes vacation time subject to a time-vesting formula that is subject to a future event (the manner of termination). According to the Court, any term of an agreement or employer policy that arguably results in a forfeiture of otherwise accrued but unused vacation time during or after employment will be deemed void, including attempts to define the term "accrued" in a way that "works a forfeiture" of time that arguably was earned. According to the Court, when the employer terminates an employee with accrued vacation time, it must pay the employee such vacation time in same time and manner as it is required to pay wages under the Colorado Wage Act.

Based on this new case, employers should consult with their employment law counsel to ensure that their PTO policies conform to this new interpretation of Colorado law. For assistance with these or other workplace issues, contact your Akerman attorney.

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