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GRIST

Colorado high court bans use-it-or-lose-it vacation policies

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Colorado employers that provide vacation cannot include a forfeiture provision in the policy, the state supreme court has ruled. In *Nieto v. Clark's Market, Inc.*, 2021 CO 48 (June 14, 2021), the court held that employers must pay all earned vacation pay on separation and any agreement permitting forfeiture of earned vacation pay is void. The ruling reverses an appellate court decision upholding use-it-or-lose-it policies. A few months later, the Colorado Department of Labor and Employment (CDLE) revised the [wage protection rules](#) to clarify that the nonforfeiture policy applies to any accrued paid leave available to use at the employee's discretion, including, but not limited to, vacation.

Vacation forfeiture policy prohibited

The case arose from a terminated employee denied payout of her earned, accrued vacation. The employer relied on its policy, which stated that any employee discharged or voluntarily separated without two weeks' written notice would not receive payout of unused, accrued vacation time.

The [Colorado Wage Act](#) (CWA) generally defines wages and compensation as "earned, vested, and determinable." The law expressly includes "vacation pay" as a type of protected wage or compensation. However, the employer argued that the CWA doesn't apply in this case because the earned but unused vacation time never vested in light of the policy's forfeiture provision. Both the trial court and the appeals court agreed, finding the forfeiture permissible.

Agency action

After the appeals court issued its opinion in 2019, the Colorado Department of Labor and Employment (CDLE)'s [Division of Labor Standards and Employment](#) issued a rule (7 Colo. Code Regs. § [1103-7-2.17](#)) contradicting the appellate court holding. The rule notes that language added to the wage law in

2003 requiring an employer to pay out unused vacation time on separation “in accordance with the terms of any agreement” did not allow forfeitures.

Final ruling

Reversing the appellate court, the high court held that the CWA doesn’t create a right to vacation pay, but when an employer chooses to provide paid vacation, it is no less protected than other wages and compensation and does not have to be vested. Under the CWA, employers must pay all earned and determinable vacation time on separation, and *any* agreement calling for forfeitures of earned vacation pay is void. The court also reviewed the CDLE rule on vacation forfeiture and found that the agency’s interpretation conforms with the statute’s purpose, language, structure, and legislative history.

Vacation regulation

In accordance with CDLE wage protection rule 2.17, forfeiture of earned vacation is impermissible, but employers’ vacation agreements with Colorado employees may contain the following provisions:

- Whether the employee will receive any vacation pay at all
- How much vacation pay per year or other period the employee will earn
- Whether vacation pay will accrue all at once or proportionally each week, month, or other period
- Whether a cap of one year’s worth (or more) applies to vacation pay accruals

As a result, employers may have policies that cap employees’ vacation pay at a year’s worth of accruals or some other accrual limit, but cannot require forfeiture of any of the accruals earned.

Vacation pay defined

The CDLE has updated the state’s wage protection rules (7 CO Code Regs. § [1103-7](#)) to further clarify “vacation pay” subject to the nonforfeiture policy. Effective Jan. 1, 2022, rule 2.17.1 defines vacation pay as “pay for leave, regardless of its label, that is usable at the employee’s discretion (other than procedural requirements such as notice and approval of particular dates), rather than leave usable only upon occurrence of a qualifying event (for example, a medical need, caretaking requirement, bereavement, or holiday).” According to the [statement of purpose](#), uncertainty over the pay protection rule’s application to programs labeled “annual leave,” “paid time off,” “personal days” and other types of leave gave rise to disputes between employers and employees, often leading to litigation. The revised rule clarifies that if accrued paid time off — regardless of its label — is usable for vacation, then it is “earned and determinable” and must be paid at termination rather than forfeited, even if the leave can be used for other reasons.

Other states' forfeiture rules

State wage laws often fail to specify whether an employer must pay out unused, accrued vacation at termination or can implement a use-it-or-lose-it strategy. Instead, regulations, court rulings or both clarify this issue. In general, many states allow an employer to dictate the terms of its vacation policy, as long as it's in writing and clearly communicated to employees. In addition, most states consider paid time off (PTO) that has no special designation to be vacation.

The chart below includes a sampling of states with relatively clear positions on vacation forfeiture. In some cases (e.g., Illinois and Massachusetts), the law requires payout at termination but allows a clearly stated use-it-or-lose-it provision, as long as the policy gives employees a reasonable amount of time to use earned vacation before losing it. In other cases (e.g., California, Colorado and Montana), earned vacation cannot be forfeited at any time, but in other states, the issue remains unclear.

State	Payout due at termination?	Use-it-or-lose-it provision OK?	Citations
California	Yes	No	CA Lab. Code §§ 201(a) and 227.3 ; FAQs from regulators ; Suastez v. Plastic Dress Up , 647 P.2d 122 (1982)
Colorado	Yes	No	CO Wage Act ; Nieto v. Clark's Market, Inc. , 2021 CO 48 (June 14, 2021); 7 CO Code Regs. § 1103-7-2.17
Illinois	Yes	Yes	820 IL Comp. Stat. §§ 115/5 , 300.520(e) and 300.520(f)(3) ; and IL Lab. Dep't FAQs
Iowa	Yes	Unclear	IA Code § 91A.4
Louisiana	Yes	Unclear	LA Rev. Stat. § 23:631(A) and (D) ; and Wyatt. Avoyelles Parish Sch. Bd. , 831 So. 2d 906 (2002)
Massachusetts	Yes	Yes	Elec. Data Sys. Corp. v. Att'y Gen. , 907 N.E.2d 635 (2009); Att'y Gen. Advisory 99/1
Montana	Yes	No	Langager v. Crazy Creek Prods. , 954 P.2d 1169 (1998); Att'y Gen. Opinion No. 56, Vol. 23 (1949); MT Dep't of Lab. & Indus. FAQs
Nebraska	Yes	Unclear	NE Rev. Stat. § 48-1229 ; NE Lab. Dep't FAQs
North Dakota	Yes, with limited exceptions	Yes	ND Cent. Code § 46-02-07-02(12) ; ND Lab. Dep't FAQs

State	Payout due at termination?	Use-it-or-lose-it provision OK?	Citations
Rhode Island	Yes (after one year on job)	Unclear	RI Gen. Laws § 28-14-4(b)

Employer takeaways

States have different positions on whether vacation and PTO policies must provide for payout at termination or can include a use-it-or-lose-it provision. Some states require payout of unused, accrued vacation unless the employer's written policy and consistent practice in administering that policy clearly indicate when forfeiture of accruals may occur. Businesses that want to curtail accruals in states that ban use-it-or-lose-it provisions may want to explore capping accruals. For example, a policy could limit accruals to 80 hours so employees hitting that limit can't accrue additional time before using some.

The following approaches may guide employers' vacation policy designs:

- Determine the law of the state where employees work, regardless of where they reside
- Decide on a carryover provision, where permitted
- Consider a cap on accruals in states that don't allow a use-it-or-lose-it provision
- Develop a written PTO or vacation policy detailing how time is accrued and what employees can do with the accrued time
- Provide clear employee communications on the policy's terms (consider including in the employee handbook)
- Changes accrual and usage terms only on a prospective basis
- Do not forfeit any accrued vacation or PTO except as permitted by state law and outlined in the written policy and other employee-facing communications
- Establish a process for consistent administration of the policy, including calculation of accrued time and payment, if applicable

Related resources

Non-Mercer resources

- [Nieto v. Clark's Market, Inc.](#), 2021 CO 48 (June 14, 2021)

- [Colorado Wage Act](#) (CO Rev. Stat § 8-4-101 *et seq.*)
- [7 Colo. Code Regs. § 1103-7-2.17](#) (effective Jan. 1, 2022)
- [Statement of basis, purpose, specific statutory authority and findings](#) for updated wage protection rules (CO Division of Labor Standards and Statistics, Nov. 10, 2021)
- [7 Colo. Code Regs. § 1103-7-2.17](#) (effective April 14, 2021)

Mercer Law & Policy resources

- [Paid sick leave mandates continue to expand at state level](#) (Feb. 8, 2021)
- [Maine's earned paid leave begins accruing Jan. 1, 2021](#) (Nov. 12, 2020)
- [California appeals court examines unlimited vacation policies](#) (May 21, 2020)

Other Mercer resources

- [Life, absence & disability](#)

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