COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Certiorari to the Court of Appeals Case No. 19CA098 Opinion by Jones, J., Lipinsky and Martinez, JJ., concurring. District Court, Pitkin County No. 2018CV00008 Hon. Denise K. Lynch, District Judge	
Petitioner: Carmen Nieto, v. **Respondent:** Clark's Market, Inc.	▲COURT USE ONLY▲
Christopher L. Ottele, No. 33801 Stacey M. Bowman, No. 51654 Husch Blackwell LLP 1801 Wewatta St., Suite 1000 Denver, CO 80202 Tel: (303) 749-7200 Fax: (303) 749-7272 E-mail: chris.ottele@huschblackwell.com stacey.bowman@huschblackwell.com Attorneys for Amici Curiae Colorado Civil Justice League, Denver Metro Chamber of Commerce, and National Federation of Independent Business In Support of Respondent, Clark's Market, Inc.	Case No.: 19SC000553

BRIEF OF AMICI CURIAE COLORADO CIVIL JUSTICE LEAGUE, DENVER METRO CHAMBER OF COMMERCE, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules.

Specially, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

☑ It contains 4,443 words, excluding the caption, certificate of compliance, table of contents, table of authorities, and signature blocks.

This amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

☑ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Christopher L. Ottele
Christopher L. Ottele, No. 33801

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I. STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Colorado Civil Justice League ("CCJL") is a voluntary, non-profit organization dedicated to improving Colorado's civil justice system through a combination of public education and outreach, legal advocacy, and legislative initiatives. Its purpose is to advocate for a fair civil justice system in Colorado. A diverse coalition of large and small employers, individual citizens, and attorneys, the CCJL advocates for the integrity of Colorado's judicial system and its application of Colorado law. The CCJL and its members have an interest in ensuring that the Colorado Department of Labor and Employment ("CDLE") does not exceed its authority and promulgate a rule that effectively overturns judicial precedent and imposes arbitrary restrictions on employer and employee agreements. The CCJL also believes such a rule will result in the creation of severance packages where employees receive significant payouts upon separation of employment, which is contrary to the purpose of vacation.

The Denver Metro Chamber of Commerce ("DMCC") represents 3,000 organizations with over 400,000 employees. Over 90 percent of its members are small businesses. Its members work in every industry in Colorado and in all three sectors: public, private, and non-profit. While DMCC believes in providing vacation time, it is a voluntary benefit provided by employers and is subject to an

agreement between the employer and employee. DMCC believes CDLE does not have the authority to interfere with these private contracts.

The National Federation of Independent Business ("NFIB") is a non-profit corporation that advocates for small and independent businesses in such areas as taxes, healthcare, and regulation. NFIB is concerned that CDLE's rule conflicts with the purpose of vacation and the language of the Wage Claim Act, as well as interferes with employers' ability to condition the payout of vacation benefits. This will place significant burdens on small and independent businesses who cannot afford to pay out all unused accrued vacation time upon separation, which constitutes a *de facto* severance package.

II. STATEMENT OF THE ISSUES

Whether Section 8-4-101(14)(a)(III) of the Colorado Wage Claim Act allows an employment agreement to forfeit an employee's accrued but unused vacation pay upon separation of employment.

III. ARGUMENT

A. The Court should uphold decades of judicial precedent and the plain language of the Wage Claim Act allowing employers to place conditions on the payout of vacation time upon separation from employment.

It can hardly be disputed that, in general, the employee and employer relationship is one founded on freedom to enter into agreements concerning the

terms and conditions of employment, including the amount of compensation, working conditions, vacation benefits, and the like. After all, employers are in the best position to determine the terms they can afford to offer, those which ensure employee safety and boost morale, and those advisable to attract and retain appropriate talent. The courts' job has always been to enforce those agreements. *See Hartman v. Freedman*, 591 P.2d 1318, 1320 (Colo. 1979) (en banc) (where agreed-upon compensation included commissions and vacation pay, court resolved dispute as to the amount owed to employee under the agreement). The Colorado Wage Claim Act ("CWCA") does not override this freedom. Instead of imparting any substantive right to particular types or amounts of compensation, the CWCA "establishes minimal requirements concerning when and how agreed compensation must be paid and provides remedies and penalties for an employer's noncompliance with those requirements." *Barnes v. Van Schaack Mortg.*, 787 P.2d 207, 210 (Colo. Ct. App. 1990).

Consistent with these freedoms, but what Petitioner now decries as a "forfeiture," Colorado courts have, since at least 1992, upheld the rights of employers to "avoid demands on their resources for vacation pay by expressly providing in employment contracts that there is no right to vacation pay for unused accrued vacation time upon termination of the contract." *Thompson v. Cheyenne*

Mountain Sch. Dist. No. 12, 844 P.2d 1235, 1237 (Colo. Ct. App. 1992), aff'd and remanded, 861 P.2d 711 (Colo. 1993). On certiorari in *Thompson*, the Supreme Court affirmed the supremacy of the employment contract, and rejected the Court of Appeals' ruling that implied a right to accrued vacation time. *Thompson*, 861 P.2d at 715-16 (holding the contract was ambiguous and declining to "adopt the ruling of the court of appeals that found an implied right to compensation for unused vacation time at the termination of a contract").

In 2003, the General Assembly revised the CWCA and added the definition of "vacation pay" to the multi-faceted definition of "wages and compensation" in Section 8-4-101(14)(a). Petitioner cites testimony from a proponent of the revision that the intent was to "align the text of the CWCA with current Colorado case law interpreting the statute." Petitioner's Opening Brief at 15. But as shown above, in 2003 Colorado law expressly deferred to the employment agreement as to whether vacation pay was vested and payable upon termination. If, as Petitioner contends, the General Assembly wanted to give employees the right to payment for un-vested, unearned, but "accrued" vacation time merely because the employer "offered" vacation pay (*see* Petitioner Brief at 17, quoting bill drafter's testimony), it would have had to overrule *Thompson*. It did not. Instead, the 2003 CWCA amendment provides that vacation pay is that which is "earned" as per an

employment agreement, and only vacation pay that is "earned and determinable" in accordance with the employment agreement shall be paid upon separation of employment. C.R.S. § 8-4-101(14)(a)(III). There is no mention in the 2003 version of the CWCA of "accrued" vacation pay or that employees are entitled to vacation pay merely because an employer "offers" vacation. In fact, such language does not appear in the CWCA to this very day.

After "vacation pay" was added to Section 101(14)(a)(III) in 2003, and until 2019, the Colorado Department of Labor made no attempt to regulate or restrict the specific conditions to which employers and employees might agree as to vacation pay. Furthermore, in January 2014, the Colorado Supreme Court again followed *Thompson* which was still consistent with the CWCA's vacation payout provision, and held that the employment agreement governs "[w]hether an employee has an enforceable right to be paid for accrued leave" upon separation from employment. *In re Marriage of Cardona and Castro*, 316 P.3d 626, 634 (Colo. 2014) (citing *Thompson*, 861 P.2d at 716).

Though *Cardona* dealt with the more precise issue of whether accrued vacation time is marital property subject to division upon divorce, the Court's analysis is instructive. Surveying other jurisdictions, the court weighed whether vacation pay should be viewed as an alternative form of wages or a sort of deferred

compensation, in contrast to a speculative future right to time off that cannot be converted to cash value. Notably, the Court remarked that jurisdictions treating accrued vacation time as marital property "consistently require the employee spouse to have a *vested or contractual right* to receive payment for such leave." *Id*. at 631 (emphasis supplied) (*citing, e.g. Dye v. Dye*, 17 So.3d 1278, 1281 (Fla. Dist. Ct. App. 2009) (unused vacation and sick leave is a marital asset where there is a contractual payout provision for the cash value of such leave); *Schober v. Schober*, 692 P.2d 267, 268 (Alas. 1984) (husband's accumulated leave was subject to property division because, under collective bargaining agreement with his employer, it could be used or converted to cash); *Lesko v. Lesko*, 457 N.W.2d 695, 699 (Mich. Ct. App. 1990) ("banked" vacation leave was a marital asset where spouse was entitled to receive cash payment for unused leave upon retirement)). In addition, once again, the Court expressly approved an employment agreement that would result in what Petitioner calls a "forfeiture" of accrued leave, stating:

> We note that employment agreements and policies can vary substantially. Under some policies, different types of leave may be combined in one comprehensive paid time off ("PTO") plan, whereas other policies split vacation leave, sick leave, and/or personal leave into separate plans. Some employers allow leave to accrue and "roll over" from year to year, *while others adopt a "use it or lose it" approach, under which accrued leave is forfeited if the employee does not take time off*.

Id. at 634-35 (emphasis supplied). Therefore, from *Thompson* in 1992 to *Cardona* in 2014, it has remained true that Colorado law permits "use or lose it" provisions in employment agreements, and there is no rule, law, or precedent that bans "forfeitures" of any amount of unused vacation time.

A few months after *Cardona*, in May of 2014, the Wage Protection Act of 2014 (SB 14-005) ("WPA") was enacted. Its purpose was to enhance "enforcement processes for Colorado private sector employees who are owed wages" – not to provide any substantive rights to certain types of pay or benefits. *See* Wage Protection Act of 2014 Frequently Asked Questions ("FAQ").[1] Again, the General Assembly could have seen fit to codify restrictions on the terms to which employers and employees can agree about vacation pay, but did nothing of the sort. Nor did CDLE see fit to fill in any "gaps" about vacation agreements when it promulgated its WPA rules effective January 1, 2015. In fact, the rules (at 7 C.C.R. § 1103-7) did not even mention vacation pay.

In October 2015, CDLE issued Frequently-Asked-Questions concerning the WPA and included information about vacation pay. It re-affirmed employers' and

[1] *See* Colorado Department of Labor and Employment Division of Labor, Wage Protection Act of 2014 Frequently Asked Questions (Aug. 2016 version) at https://www.colorado.gov/pacific/sites/default/files/WPA%20FAQs%208-16-16.pdf (last accessed August 14, 2020).

employees' right to agree to conditions on when and if accrued vacation time becomes "earned" and payable at separation. Consistent with the CWCA's plain language, the FAQ properly focused on the terms to which the parties had agreed:

> **Can employers in Colorado have "use it or lose it" provisions in vacation agreements?**
>
> Yes. "Use-it-or-lose-it" policies are permissible under the Colorado Wage Protection Act, provided that any such policy is included in the terms of an agreement between the employer and employee. 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. The terms of an agreement between the employer and employee will dictate when vacation pay is "earned."

See Exhibit 1, October 2015 Frequently-Asked-Questions, Wage Protection Act (emphasis in original). The above language remained unchanged in the August 2016 version of the Division's FAQ document.[2]

Between July 2017 and November 2018, as the CDLE laid out in its *amicus* Brief, the Division issued four decisions that CDLE claims reflect a "consistent" interpretation supporting Petitioner's position. On the contrary, all those decisions reflect is that, as it had during the prior decades, CDLE interpreted the statute

[2] *See* Colorado Department of Labor and Employment Division of Labor, Wage Protection Act of 2014 Frequently Asked Questions (Aug. 2016 version) at https://www.colorado.gov/pacific/sites/default/files/WPA%20FAQs%208-16-16.pdf (last accessed August 14, 2020).

according to its plain meaning, relying on the employment agreement as to whether the employee had "earned" vacation pay. Nothing in those decisions reflects CDLE's current impermissible posture that "accrued" vacation time is the same as "earned" vacation pay and must be paid out upon separation.

Against this backdrop of a consistent deference to the employment agreement to determine when and if vacation pay became vested and payable upon separation, CDLE's change of course appears all the more surprising. It was swiftly after the Court of Appeals' June 2019 decision in favor of Respondent in this case, that CDLE took upon itself to attempt to change the CWCA's requirements. Instead of paying out "earned" and "vested" vacation pay as per the agreement, CDLE attempts to change the requirement to "accrued." CDLE revised the WPA rules at 7 C.C.R. § 1103-7 effective December 15, 2019, and added the word "accrued" (which does not appear in the statute) as if it were synonymous with "earned." This is a blatant attempt to overturn decades of judicial precedent with which CDLE now disagrees. *See* Exhibit 2, comparison of August 20, 2019 version of 7 C.C.R. § 1103-7 with December 15, 2019 version.

As explained in the next section, *infra*, not only does CDLE's new rule violate the plain meaning of the CWCA, but employers should not be subject to the whims of particular CDLE leadership who seek to issue rules supporting whatever

employee outcomes the agency considers fair or important at any given time. Agency rules that violate the enabling legislation are not entitled to any deference. CDLE's new rule dictates what are various permissible and impermissible conditions in vacation agreements, which, because they are untethered to the statutory language, are completely arbitrary. To credit CDLE's illegal attempt to exceed its authority or put any judicial stamp of approval on CDLE's statutory revisions, would undermine the legislative process and permit unelected agency officials to become unaccountable lawmakers.

B. The Wage Claim Act unambiguously defers to the employment agreement to determine both when vacation pay is "earned" and "vested" and when it must be paid out upon separation.

This Court should uphold the plain meaning of the Wage Claim Act. The "payment upon separation" requirement for vacation benefits is clear and complete in Section 101(14)(a)(III), and there is no conflict or ambiguity within it. Nor does construing it with Section 109(1)(a) — governing the immediate payment of wages and compensation upon separation —create an ambiguity.

Section 101(14)(a)(III) provides:

> "Wages" or "compensation" means: * * * (III) Vacation pay earned in accordance with the terms of any agreement. If an employer provides paid vacation for an employee, the employer shall pay upon separation from employment all vacation pay earned and determinable in accordance with the terms of any agreement between the employer and the employee.

Section 109(1)(a) reads:

> When an interruption in the employer-employee relationship by volition of the employer occurs, the wages or compensation for labor or service earned, vested, determinable, and unpaid at the time of such discharge is due and payable immediately.

Thus, the two sections make clear that vacation pay eligible for payout upon separation must be, first of all, earned and determinable, and that payout must occur immediately when it is vested yet unpaid. Petitioner tries to create an ambiguity where there is none. A little more than two years ago, this Court had no trouble harmoniously construing Section 109(1)(a) with the vacation pay definition in Section 101(14)(III), stating:

> Sections 109 and 101 (defining wages and compensation) demonstrate that the General Assembly understood that certain categories of wages or compensation—such as unused vacation time, bonuses, or commissions—would not be available until separation because they may not become "vested" or "determinable" under the employment agreement until [separation]. These types of compensation are therefore excluded from the regular paycheck provisions of section 103.

Hernandez v. Ray Domenico Farms, Inc., 414 P.3d 700, 703 (Colo. 2018) (emphasis supplied). Thus, the General Assembly made vacation pay potentially payable upon separation precisely *because* employers have the express right to place conditions on whether or not vacation pay becomes "vested" depending on the circumstances of the separation, as defined in the agreement.

Petitioner and her *amici* urge the Court to overturn *Hartman*, *Thompson*, *Cardona*, and *Hernandez* to automatically "vest" vacation time that has "accrued" over the past year. In effect, they ask the Court to adopt a new meaning of the words "earned" and "vested" to equate them with "accrued" so that every employee in Colorado would be entitled to the conversion any accumulated unused vacation time into cash upon separation. Indeed, CDLE's revised rule uses "earned" and "accrued" interchangeably, stating that the "earned and determinable" language in the CWCA "does not allow a forfeiture of any earned *(accrued)* vacation pay[.]") *See* Exhibit 2, comparison of 7 C.C.R. § 1103-7 at 2.17 (emphasis supplied). As shown below, "earned" and "accrued" have different definitions. CDLE goes so far as to require payout based on "an employee's number of days" of vacation time – without any specificity as to whether those "days" are accrued, earned, or merely available. *Id*. at example (c). Under CDLE's interpretation, vacation "offered" plus days "accrued" equals automatic payout upon separation. This is not what the statute says.

Agencies have no authority to enact rules that conflict with the language of a statute, nor do courts have authority to rewrite statutes. "Any rule...which conflicts with a statute shall be void." C.R.S. § 24-4-103(8)(a). Where a statute is clear, the Court does not try and determine whether the agency's rule was "reasonable" – the

matter is over and the statute wins. *Wine and Spirits Wholesalers of Colo., Inc. v. Colo. Dept. of Revenue, Liquor Enforcement Div.*, 919 P.2d 894, 897 (Colo. Ct. App. 1996); *see also Hernandez*, 414 P.3d at 702 (noting the Court's "fundamental duty in construing statutes is to give effect to the intent of the General Assembly…. We look first to the plain language of the statute; if it is clear and unambiguous, then we look no further").

Vacation pay "earned" or "vested" and vacation time (or days) "accrued" are wholly separate concepts. To "earn" means "1. To acquire by labor, service, or performance. … 2. To do something that entitles one to a reward or result, whether it is received or not." BLACK'S LAW DICTIONARY (11th ed. 2019). Thus, "earning" implies either the acquisition of or entitlement to a benefit. "Vested" means "having become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute." *Id*. In contrast, "to accrue" means (when not referring to the maturation of a cause of action) "[t]o accumulate periodically; to increase over a period of time." *Id*. The word "accrue" does not imply any contractual or other right to whatever is accrued. Given that "earned" or "vested" implies being entitled to or obtaining a consummated right, and because the CWCA does not provide any substantive right to vacation pay, the only potential source of a right to receive vacation pay is by a contract of employment.

It bears reminding that vacation is a voluntary benefit employers provide when they offer to pay an employee for time not worked. Just as the receipt of compensation is subject to a condition, i.e. that the employee renders labor or service for the employer, the provision of vacation by employers is subject to conditions. An offer that is subject to a condition cannot be deemed "vested." Some employers may offer vacation as a benefit for past work, and thus may provide in the employment agreement that vacation is earned or vested upon the completion of a certain number of years of service. Other employers may choose to offer vacation pay only when employers receive the benefit of a rejuvenated employee in exchange for the employee receiving pay for a day off. Either way, it depends on the employment agreement.

Petitioner assumes that allowing contractual freedom to decide when and how vacation pay is earned will lead to abuse by employers, who will routinely require an employee to "forfeit" benefits to which they have a right. Petitioner has chosen her word wisely, but overlooks that "forfeiture" is a term of art. It occurs only when there is a loss of a right due to breach of a contractual duty. *See* BLACK'S LAW DICTIONARY (defining forfeiture in relevant part as "destruction or deprivation of some estate or right because of the failure to perform some contractual obligation or condition."). Where an employee did not have a "vested"

(consummated) right to vacation pay in the first place, there cannot have been any forfeiture.

Finally, such conditions on vesting of vacation pay do not run afoul of Section 8-4-121 that invalidates any employment agreement purporting to "waive or to modify [an] employee's rights in violation of [the CWCA]." Nowhere does the CWCA provide a substantive right to vacation pay. Moreover, the statute does not leave employees powerless; employees have the right to negotiate the terms of their employment, including how vacation vests so as to be payable upon separation.

C. The Wage Claim Act allows employers and employees to agree concerning the conditions under which many types of pay become vested.

Contractual conditions on an employee's right to payment, for many types of compensation, are common, legal, and enforceable in Colorado. More pointedly, contractual conditions are expressly contemplated within the CWCA.

First, Section 8-4-105(1)(b) permits an agreement to deduct from an employee's paycheck amounts for "loans, advances, goods or services, and equipment or property provided by an employer to an employee…." Second, Section 8-4-109(2) does not require payment upon separation of "compensation not yet fully earned under the compensation agreement between the employee and

employer, whether written or oral." Third, bonuses and commissions are earned and payable "in accordance with the terms" of any employment agreement. Section 8-4-101(14)(a)(II). Finally, the concluding sentence of Section 8-4-109 (the payment upon separation provision), subsection (4), states: "Nothing in this section shall create a substantive right that does not exist in any agreement between the employer and the employee." C.R.S. § 8-4-109(4).

Not only are these permitted under the CWCA, contractual conditions in compensation agreements have for decades been upheld by Colorado courts. *See*, e.g. *Barnes*, 787 P.2d 207, 209 (Colo. Ct. App. 1990) (upholding employment agreement's "clear and unequivocal language" foreclosing payment of commissions on loan applications that closed after broker's termination); *Mapes v. City Council of Walsenburg*, 151 P.3d 574, 578 (Colo. Ct. App. 2006) (upholding contract language conditioning commissions on procuring a willing and able buyer); *Cherry Creek Realty, Inc. v. Amter*, 368 P.2d 787, 789 (Colo. 1962) (denying a claim for commissions because the sale was not closed); *In re Marriage of Miller*, 915 P.2d 1314, 1317 (Colo. 1996) (en banc) (confirming that rights to exercise stock options can be conditioned on continued employment); *Gruber v. Regis Corp.*, 1:18-CV-00757, 2019 WL 3943874 at *1, *10 (D. Colo., Aug. 21, 2019) (denying claim for equity acceleration as compensation because the

employee's failure to satisfy conditions made the equity acceleration severance to which employee had no right).

Allowing employers to place conditions on employees' receipt of vacation pay will not lead to "wage theft" as *amicus* Plaintiff Employment Lawyers Association ("PELA") exaggerates. Nothing in agreements about "vacation pay" could deprive an employee of the fair wage agreed-upon for a day's work. And, unlike bonuses, commissions, and vacation pay, the CWCA does not defer to the employment agreement to determine whether wages and compensation are "earned, vested, and determinable" so as to be payable. C.R.S. § 8-4-109(1)(a).

PELA also raises a false alarm by misstating the import of *Hallmon v. Advance Auto Parts*, *Inc.* where an employee, terminated one day before bonuses were to be paid out, was denied his bonus based on a "Frequently Asked Questions" document providing that employees "must be an active Team Member at time of payout" to receive bonuses. 921 F. Supp. 2d 1110, 1120 (D. Colo. 2013). The Court found that the FAQ document did not constitute an "agreement" and ordered the bonus be paid. *Id.* The Court did *not* rule on whether, had there been an "agreement" that bonuses were not payable to discharged employees, it would have been upheld. In any event, PELA compares apples to oranges. Unlike a bonus which is typically earned in exchange for additional "above and beyond" labor or

services, a paid vacation can be a benefit employers provide in exchange for an employee taking time off to become a more rested and productive employee. And whereas there was *dicta* in *Hallmon* about "public policy" reasons to ensure employees receive compensation they have rightly earned (*id.*), there is no public policy guaranteeing employees a right to receive pay for all accrued and unused vacation time upon separation, which amounts to a severance. As Petitioner agrees, neither the CWCA nor Colorado public policy provides a substantive right to a severance. Petitioner's Brief at 16-17.

D. Any rule or holding that every employer in Colorado must pay up to one year of "accrued" vacation time will lead to numerous unintended and perverse consequences, which will not benefit and may harm employees.

For all the talk about preventing "forfeitures" and protecting employees from "wage theft," in reality the interpretation proposed by Petitioner and her *amici* will not end up benefiting employees. Because there is no substantive right to vacation pay under any law, if this Court holds that employers cannot condition when and how vacation pay is "earned and determinable," many employers, especially small ones, may be forced to withdraw any offering whatsoever of vacation pay. As a result, they will be hampered in their efforts to attract talent, and will be required to scrutinize every employee vacation request. This cannot be consistent with public policy, which would support activities that sustain a healthy

workforce. Even for employers that would continue to offer vacation pay, Petitioner's misinterpretation of the CWCA creates a perverse incentive for employees to save up vacation time accrued, to the maximum extent possible, and then resign just after the beginning of the employer's benefit year in order to claim a payout. In effect, it creates a built-in severance package for each and every employee who works for any reputable employer that offers a vacation package. Vacation is not severance, and no rule should turn vacation into severance pay, thereby undermining the purpose of vacation to ensure a well-rested, rejuvenated and healthy workforce.

Along with providing little to no benefit to employees (other than giving them a severance), the rule places significant financial and operational burdens on employers. Not only can many employers not afford to pay lump-sum vacation every time they lose an employee, but very likely the rule will incentivize employees to change jobs as often as possible, increasing the cost of recruiting and training employees.

IV. CONCLUSION

The Colorado Wage Claim Act is unambiguous. Before payout of vacation time is required, all three statutory conditions must be met: it must be earned, vested, and determinable. Given that vacation pay is not a substantive right, the

General Assembly properly left it to the parties to the employment relationship to agree to whatever terms they deem appropriate to govern whether and if accrued vacation becomes payable at separation of employment. The Court should affirm the judgment in favor of Clark's Market, and hold that CDLE's interpretation as set forth in 7 C.C.R. § 1103-7 violates the statutory language and should not be accorded any deference.

Dated this 17th day of August, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the above and foregoing **BRIEF OF AMICI CURIAE COLORADO CIVIL JUSTICE LEAGUE, DENVER METRO CHAMBER OF COMMERCE, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS** by ICCES e-service, this 17th day of August 2020, addressed to the following:

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EXHIBIT 1

Wage Protection Act of 2014
Frequently Asked Questions

Colorado Department of Labor and Employment | Division of Labor
www.colorado.gov/cdle/labor

The answers to the following questions are intended to provide general information on the Wage Protection Act (WPA) of 2014, but should not be construed or relied upon as legal advice. If you or someone you know needs legal advice about your rights under the WPA, please consult with an attorney. If you need help finding an attorney, contact your local bar association.

Overview of the Wage Protection Act of 2014

In May of 2014, Governor John Hickenlooper signed the Wage Protection Act of 2014, SB 14-005 ("Act") into law. The Act amended the existing Colorado Wage Act, § 8-4-101 et seq., C.R.S., to provide new protections and enhanced enforcement processes for Colorado private sector employees who are owed wages for work performed in Colorado.

When does the Wage Protection Act take effect?

The core provisions of the Act go into effect for Colorado employers and employees on January 1, 2015. The new enforcement processes at the Colorado Division of Labor ("Division") apply to wages earned on and after January 1, 2015.

Have administrative rules been issued for the Act?

Yes. The Division has issued Wage Protection Act Rules, 7 CCR § 1103-7, which are effective January 1, 2015. The rules implement provisions of the Act and provide clarification on Division authority and enforcement processes.

Who enforces Colorado wage and hour laws under the Act?

Current or former private sector employees in Colorado may pursue wage complaints for unpaid wages through either:

(1) The judicial/court system

OR

(2) The Colorado Division of Labor wage complaint process.

The Division process is not required, and is not a prerequisite for independent legal action; you may pursue the matter in court without contacting the Division. However, if you have already pursued the wage complaint in court, you may not subsequently use the Division process to address the same wage complaint that you previously pursued in court.

Employees may also be able to file wage complaints under separate federal wage and hour laws; contact the U.S. Department of Labor at 720-264-3250 for more information.

How has the wage complaint process at the Colorado Division of Labor changed?

The Act has significantly altered the manner in which the Division investigates and adjudicates wage complaints.

For wages earned on and after January 1, 2015, the Division may:

1. Formally order the payment of unpaid wages up to $7,500 for current and former employees;
2. Impose penalties on unpaid wages for current and former employees;
3. Issue fines on employers for various violations of the Act;
4. Conduct hearings of appeals of investigatory decisions made by the Division.

How does the January 1, 2015 date affect my wage complaint filed with the Division?

1. If the unpaid wages were earned **solely before** January 1, 2015
   The Division will investigate the wage complaint and notify the employer of any violations, but the Division does not have the legal authority to order the payment of wages and penalties for wages earned before January 1, 2015.

2. If the unpaid wages were earned **solely on or after** January 1, 2015
   The wages are subject to the Division's full enforcement authority, and the Division may legally order the payment of wages up to $7,500, and penalties as appropriate.

3. If the unpaid wages were earned **both before and after** January 1, 2015
   The Division can only legally order the payment of wages and penalties for the portion of wages which were earned on or after January 1, 2015, up to $7,500.

Is there a minimum or maximum dollar limit on wage complaints filed with the Division?

There is no minimum dollar requirement for wage complaints filed with the Division. However, there is a maximum limitation on wages that the Division can order an employer to pay. The Act limits the Division's full enforcement authority to situations where the wages owed were earned on or after January 1, 2015, and are less than $7,500 in total.

If the Division determines that you are owed wages in excess of $7,500, the Division cannot legally order the payment of the wages in excess of $7,500. If you have reason to believe that you are owed more than $7,500 in wages, you may wish to contact an attorney for legal advice, or pursue your dispute in the appropriate court.

Who may file a wage complaint with the Division?

The wage complaint process provided by the Division is a free service, and is available to current and former Colorado private sector employees regardless of immigration status. The unpaid wages described in the Wage Complaint Form must have been earned for work performed in Colorado as an employee; independent contractors are not entitled to use the Division process.

When may an employee file a wage complaint with the Division?

Colorado wage and hour laws provide that the unpaid work must have occurred within 2 years of the date of filing the wage complaint with the Division, or 3 years if the Division determines that the non-payment was willful.

May I designate someone to assist or represent me in the wage complaint process?

Yes. You may designate an authorized representative to assist you and act on your behalf in the wage complaint process at the Division. You must complete and sign the Authorized Representative Form and submit it to the Division in order to designate a representative.

What types of complaints are covered by the Act and the Division wage complaint process?

The following represent common complaints which may be submitted on the Wage Complaint Form and are typically subject to the Division process:

- Non-payment of wages for work performed in Colorado in the last 2 years (or 3 years if willful)
- Minimum wage violations
- Unauthorized deductions from wages
- Non-payment of overtime in certain industries
- Non-payment of unused vacation pay earned in accordance with an employer's policy
- Dishonored (bounced) paychecks
- Tip or gratuity disputes
- Meal or rest period disputes in certain industries
- Unpaid commissions or bonuses

What types of complaints are NOT covered by the Act and are NOT entitled to the Division wage complaint process? (See the appropriate agency or an attorney for assistance in these areas).

- Non-payment of wages for work not performed in Colorado
- Independent contractor pay disputes
- Wrongful termination
- Discrimination
- Harassment or abusive treatment
- Expense reimbursements
- Employment references; slander or libel
- Access to personnel or medical records
- Government or school district employee disputes
- Severance pay
- Sick pay
- Pay disputes where an employer has filed for bankruptcy or has been seized by a creditor
- Health or life insurance coverage
- 401K, pension, or savings accounts
- Taxes

Do I have to send a written demand to my employer for unpaid wages?

No, although sending a written demand to your employer may assist you in recovering the wages, and may also increase the chance of obtaining monetary penalties from your employer if you subsequently pursue the matter in court or with the Division.

The Act amended Colorado wage and hour law regarding the use of written demands by an employee for payment of wages. Under previous Colorado law, employees were required to send a written demand for payment to the employer within 60 days of separation from employment in order to

potentially recover penalties. The Act eliminated the 60-day written demand requirement, and the Act also permits current employees to obtain penalties (not just employees who were separated from employment).

Written demands operate as follows under the Act:

1. The employee is not required to send a written demand to the employer in order to recover wages or penalties.
2. If the employee wishes to send the employer a written demand, he or she may use the Demand for Payment of Wages, provided by the Division as a courtesy.
3. If the employee sends the Demand for Payment of Wages to the employer, the employee may wish to send the demand via certified mail (or via other tracking methods), so that the mailing and receipt of the demand is tracked. The employee may also wish to keep any related records that prove when, and to whom, the demand was sent. Proof of sending the demand, and retaining a copy of the demand, may assist the employee in obtaining wages and penalties from the employer.
4. Sending a demand for payment of wages to the employer does not constitute filing a complaint with the Division. The employee must still complete and submit the separate Wage Complaint Form in order for the Division to investigate the complaint.
5. If the employee does not send a written demand to the employer, the Division's Notice of Complaint (sent to the employer by the Division to initiate the wage complaint investigation) constitutes a written demand for legal purposes.
6. If the employee has sent a written demand to the employer, or the Division has sent a Notice of Complaint to the employer, the employer generally has 14 days to pay all earned and unpaid wages to the employee.
    a. If the employer does not pay all earned and unpaid wages within 14 days after the written demand or Notice of Complaint is sent, the employer may be liable for penalties (in addition to the owed wages).

Can the Division impose penalties on employers who fail to pay wages?

Yes. If an employer fails to pay an employee in accordance with Colorado wage and hour law and the 14-day period described above, the Division may impose a penalty of 125% of the wages owed, or up to 10 days of the employee's average daily earnings, whichever is greater. The penalty would be payable to the employee, in addition to the owed wages. Penalties may subsequently be increased or decreased depending upon the specific circumstances, as described in the Act.

Does the Division issue fines against employers who violate wage and hour laws?

Yes. The Act provides three categories of possible fines on employers. Fines are payable to the State of Colorado, not to the employee.

1. A fine of up to $250 per employee, per month, for failures to retain or provide proper pay statements to the Division or to employee(s), with a maximum of $7,500.
2. A fine of up to $50 per day, per employee, for each failure to pay an employee, commencing from the date that the wages were due and payable to the employee(s).
3. A fine of $250 for each failure to respond to a notice from the Division that required a response.

Can employers in Colorado have "use it or lose it" provisions in vacation agreements?

Yes. "Use-it-or-lose-it" policies are permissible under the Colorado Wage Protection Act, provided that any such policy is included in the terms of an agreement between the employer and employee. 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. The terms of an agreement between the employer and employee will dictate when vacation pay is "earned."

What factors are used to determine if a specific "use it or lose it" provision is permissible?

If a party challenges the validity of a "use-it-or-lose-it" policy, the Division will initiate a wage complaint investigation. The Division will review the policy in conjunction with the remaining terms of the agreement between the employer and employee. In the event that an agreement is silent or ambiguous as to when vacation becomes "earned," the Division may consider the following factors in determining whether a "use-it-or-lose-it" provision is permissible under the CWA.

The employer's historical practices

- Industry norms and standards
- The subjective understandings of the employer and employee.
- And any other factual considerations which may shed light on when vacation time becomes "earned" under the agreement in question.

These factors are not exhaustive and may vary from case to case.

Does the Division award attorney fees in wage complaint processes?

No. The Act does not permit the Division to award attorney fees. Attorney fees can only be awarded in certain circumstances by a court.

What can I do if I disagree with the Division's determination at the conclusion of a wage complaint investigation?

After the Division has investigated a wage complaint and issued a written determination, both the employee and the employer have the right to appeal the Division's determination. The appeal must be filed with the Division within 35 days of the issuance of the determination. If the appeal is properly filed, a Hearing Officer at the Division will conduct an appeal to review the Division's determination. Contact the Division for more information on the appeal and hearing process.

In addition, employees have the right to terminate the Division's determination and preserve their right to private action (e.g., pursue the matter on their own in court). Termination of the Division's determination must occur within 35 days after the issuance of the determination. Contact the Division for more information on terminating the Division's determination.

If neither party appeals the Division's determination within 35 days, and the employee does not terminate the Division's determination within 35 days, the Division's determination is final.

Can I appeal the decision of a Division Hearing Officer?

Yes. The employee or employer may appeal the Hearing Officer's decision by commencing action in district court within 35 days of the mailing of the decision by the Division. Contact an attorney or the court system for more information.

May an employer retaliate or discriminate against me for filing a wage complaint?

No. Employers may be subject to civil or criminal penalties if they intimidate, threaten, restrain, coerce, blacklist, discharge, retaliate, or discriminate against you for filing a wage complaint with the Division. An employer who is found guilty of retaliation via applicable state and/or federal laws may be subject to both fines and imprisonment. See an attorney for legal advice on this topic.

What is the Division's contact information if I have additional questions?

You may contact the Division via phone at 303-318-8441, email: cdle_labor_standards@state.co.us or visit the Division website at www.colorado.gov/cdle/labor.

Resources

Wage Protection Act of 2014
Wage Protection Act Rules
Wage Act (includes new amendments)
Wage Act Fact Sheet (includes new amendments)
Minimum Wage Order Number 31
Minimum Wage Order Number 31 Fact Sheet
Wage Complaint Form and Instructions
Written Demand for Use by the Employee
Authorized Representative Form

EXHIBIT 2

Showing differences between versions effective August 20, 2019 to December 14, 2019 and December 15, 2019 to March 15, 2020

Key: ~~deleted text~~ **added text**

18 deletions · **13** additions

7 CCR 1103-7:2

1103-7:2. Definitions and Clarifications

~~<Section emergency effective until Dec. 15, 2019. See, also, section effective Dec. 15, 2019.>~~

2.1 "Administrative procedure" means the process used by the division to investigate wage complaints in accordance with § 8-4-111.

2.2 "Authorized representative" means a person designated by a party to a wage complaint to represent the party during the division's administrative procedure. To designate an authorized representative, the party must comply with the requirements of rule 4.3.

2.3 "Average daily earnings," as used in § 8-4-109(3)(b), will be calculated as follows, unless the division identifies a legitimate reason to use a different method of calculation:

2.3.1 The most recent typical workweek or pay period will generally be used to calculate the average daily earnings. The total gross amount of wages and compensation will be divided by the number of days worked.

2.3.2 If an employee is entitled to and has been paid less than the Colorado minimum wage, and has not earned more than the Colorado minimum wage, then the Colorado minimum wage will be used to calculate average daily earnings.

2.3.3 All compensation paid to employees including the hourly rate, shift differential, minimum wage tip credit, regularly occurring non-discretionary bonuses, commissions, and overtime may be included in the average daily earnings calculation.

2.4 "Certified copy," as used in § 8-4-113, means a copy of a final division decision (issued by a compliance investigator or hearing officer) signed by the director of the division, or his or her designee, certifying that the document is a true and accurate copy of the final decision. A certified copy must be requested in writing. A division decision (issued by a compliance investigator or hearing officer) will not be certified unless: either (1) all appeal deadlines have passed and no appeal has been filed or (2) if an appeal was timely filed, the decision was not superseded on appeal. A certified copy will not be issued in the event of termination pursuant to § 8-4-111(3).

2.5 "Determination" means a decision issued by a compliance investigator upon the conclusion of a wage complaint investigation. "Determination" includes: Citation and Notice of Assessment, Determination of Compliance, and Notice of Dismissal, if that Notice of Dismissal is issued after the Division initiated the administrative procedure as described in rule 4.4.

2.6 The "employer's correct address," as used in § 8-4-101(15), can include, but is not limited to, the employer's email address, the employer's address on file with the Colorado Secretary of State, and the address of the employer's registered agent on file with the Colorado Secretary of State.

2.7 A wage complaint or an appeal is considered "filed" with the division when it is received by the division via mail, fax, email, online submission, or personal delivery. Any wage complaint, appeal, or termination received after 11:59pm Mountain Time is considered filed the next business day.

2.8 When considering whether there is "good cause" for an extension of time, as used in § 8-4-113(1)(b), the division will determine whether the employer's reason is substantial and reasonable and must take into account all available information and circumstances pertaining to the specific complaint.

2.9 "Post," as used in § 8-4-107, may include electronic posting in a place readily accessible to all employees.

2.10 "Records reflecting the information contained in an employee's itemized pay statement," as used in § 8-4-103(4.5), may be kept electronically. The records are not required to be copies of the pay statements but must reflect all information contained in the pay statements.

2.11 "Terminated employee," as used in § 8-4-105(1)(e), includes any employee separated from employment, whether the separation occurs by volition of the employer or the employee.

2.12 The division may enforce the gratuity provisions described in § 8-4-103(6) through the administrative procedure described in § 8-4-111. The legal treatment of "tips," "gratuities," or other monies paid on a similar basis, in any source of law, is identical regardless of the terminology used.

2.13 § 8-4-103(1)(b) describes circumstances under which employers are "subject to the penalties specified in section 8-4-113(1)." Despite use of the word "penalty" in this section, this language does refer to the fine described in § 8-4-113(1) and is payable to the division.

2.14 A "written demand," as used in § 8-4-101(15), can be sent to the employer by electronic means, including but not limited to email and text message. Wages must be owed at the time of sending for the written demand to be considered valid.

2.15 "Vacation pay," as defined in C.R.S. § 8-4-101(14)(a)(III), includes in the definition of "'[w]ages' or compensation~~"~~ **"** :

> "Vacation pay earned in accordance with the terms of any agreement. If an employer provides paid vacation for an employee, the employer shall pay upon separation from employment all vacation pay earned and determinable in accordance with the terms of any agreement between the employer and the employee."
>
> The "earned and determinable in accordance with the terms" ~~rule~~ **provision** does not allow a forfeiture of any earned **(accrued)** vacation pay, but does allow agreements on matters such as: (1) whether there is any vacation pay at all; (2) the amount of vacation pay per year or other period; (3) whether vacation pay accrues all at once, ~~or instead accrues~~ proportionally each week, month, or other period; and (4) whether there is ~~an accrual~~ **a** cap of one year's worth (or more) of vacation pay. Thus, employers may have ~~"use it or lose it"~~ policies that ~~disallow carryover after~~ **cap** employees ~~accrue a year~~ **at a year's worth** of vacation pay, but that do not forfeit any of that year's worth. ~~For example, an agreement for ten vacation days per year:~~

For example, an agreement for ten paid vacation days per year:

> (a) *may* provide that employees ~~*can*~~ **can** accrue more than ten days, by allowing carryover of ~~accrued~~ vacation from year to year;

(b) *may* ~~provide that~~ **cap** employees ~~*cannot* accrue more than~~ **at** ten days~~, by disallowing carryover of unused vacation from year to year~~ ; but

(c) may *not* ~~provide that after an employee accrues ten~~ **diminish an employee's number of** days~~, that amount diminishes below ten days for any reason~~ **(other than due to use by the employee)**.

Credits

Adopted Dec. 30, 2014. Amended Sept. 1, 2017; emergency effective Aug. 20, 2019. **Amended Dec. 15, 2019.**

7 CCR 1103-7:2, 7 CO ADC 1103-7:2

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