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Colorado Court of Appeals: Terms of Employer's Vacation Policy Control Whether Accrued, Unused Vacation Time Must Be Paid Out at Separation

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The Colorado Court of Appeals issued a very favorable decision to employers today in a case litigated by Steve Gutierrez and Brad Williams of Holland & Hart, LLP. The case addressed an unsettled question under the Colorado Wage Claim Act ("CWCA")—namely, whether accrued, unused vacation time must be paid out at separation of employment where an employer's vacation policy states that it will not be. The Court of Appeals held that such time need not be paid out at separation, echoing a similar decision by the Court of Appeals in a similar case last year. The decision issued today—*Blount Inc. v. Colorado Department of Labor and Employment, Division of Labor Standards and Statistics*—adds fodder to a judicial debate over payout of vacation time that is likely to be resolved by the Colorado Supreme Court in 2021.

The CWCA requires that any unpaid wages and compensation must be paid to employees within specific time periods after their separation of employment. Amongst the wages and compensation that must be paid out is "vacation pay earned and determinable in accordance with the terms of any agreement between the employer and employee." Colorado law has long been unsettled regarding whether this provision requires payout of any vacation time after it is accrued (*e.g.*, on the theory that the vacation time is then "earned" and cannot lawfully be denied based on a separate section of the CWCA) or whether the terms of an employer's specific vacation policy determine whether or not vacation time must be paid out at separation of employment (and if so, under what circumstances). The Colorado Department of Labor and Employment, Division of Labor Standards and Statistics (the "Division"), has long taken the position that vacation time once "earned" must always be paid out at separation, and that vacation policies providing otherwise are illegal. However, the Division has also issued inconsistent guidance and administrative decisions on wage claims that call this position into question—including inconsistent guidance on whether "use-it-or-lose-it" vacation policies are legal under its interpretation of the CWCA.

In *Blount Inc.*, the employer's vacation policy broadly provided that accrued, unused vacation time did not need to be paid out at separation of employment. The Division determined in agency proceedings that this policy was illegal under the CWCA because the employee bringing the

wage claim had purportedly “earned” her vacation time by working at Blount, and because vacation time so “earned” cannot lawfully be forfeited through an employer's vacation policy. Blount appealed that administrative decision to the Colorado District Court, and ultimately to the Colorado Court of Appeals.

On appeal, Blount argued that the employee bringing her wage claim never “earned” her vacation time under Blount's vacation policy given the policy's provisions reciting that vacation time will not be paid out at separation, and also because vacation time was awarded prospectively to employees each year under Blount's policy (as opposed to being provided in exchange for past service). Based on an intervening Colorado Supreme Court decision issued after the agency proceedings—*Hernandez v. Ray Domenico Farms*—which clarified the interplay between various sections of the CWCA, Blount also argued on appeal that the accrued, unused vacation time did not need to be paid out at separation of employment because it was not “vested.” Specifically, Blount argued that this time was not “vested” because another Colorado Supreme Court decision—*In Re Marriage of Cardona & Castro*—had effectively held that vacation time never vests unless a policy providing for it permits an employee to receive money in lieu of unused vacation time.

The Colorado District Court agreed with Blount's argument on appeal that the employee's vacation time was never “earned” given both the language of the policy, and the fact that the policy provided for vacation time to be paid out prospectively. In the Colorado Court of Appeals decision just issued today, the Court of Appeals affirmed the District Court, but based on the “vested” argument. The Court of Appeals held that the intervening *Hernandez* decision did in fact clarify that vacation time must be “vested,” in addition to being “earned and determinable,” to be paid out at separation, and found that the vacation time at issue was not vested under Blount's policy because the policy stated that vacation time would not be paid out at separation of employment. The Court of Appeals also rejected any argument that the CWCA itself created any substantive right to paid vacation upon termination of employment—and instead held that an employer's policy alone controlled whether accrued, unused vacation time was compensable at separation.

The Court of Appeals' decision today in *Blount Inc.* complements a similar decision by the Colorado Court of Appeals last year—*Nieto v. Clark's Market*—which also held that an employer's vacation policy alone controls whether accrued, unused vacation time must be paid out at separation of employment—and if so, under what circumstances. *Nieto* was decided before *Blount Inc.*, but on grounds very similar to *Blount Inc.* The Colorado Supreme Court agreed in April 2020 to hear the *Nieto* case, and the matter is fully briefed before the Supreme Court. Oral argument has not yet been scheduled or held in *Nieto*, and the Supreme Court's decision is likely to issue sometime in 2021. The Division may also now seek cert. in the *Blount Inc.* case, as *Blount Inc.* was decided under a slightly different standard of review than *Nieto. Blount Inc.* arose in the context of an appeal from an administrative decision granting the employee's wage claim, whereas *Nieto* involved a direct lawsuit by an employee against her employer in relation to her wage claim; the *Nieto* matter was not first

adjudicated by the Division.

The *Blount Inc.* decision issued today also casts further doubt upon the legality of "emergency" regulations the Division issued last summer in relation to vacation pay (and which were issued after Blount had served its answer brief in the pending Court of Appeals case), which purport to define the permissible scope of agreements between employers and employees relating to vacation pay. The regulations became permanent last December, and purport to prohibit employers from refusing to pay out any accrued, unused vacation time at separation of employment under any circumstances. The regulations do permit an accrual cap of one year's worth (or more) of vacation, but provide that any accrued, unused vacation time must always be paid out at separation. The regulations neither acknowledge nor address the statutory requirement that vacation time must also be "vested" to be paid out at separation—as now recognized by both the Colorado Supreme Court in *Hernandez*, and the Colorado Court of Appeals in *Blount Inc.*

Although the Colorado Court of Appeals declined to address the legality of the Division's new regulations in its *Blount Inc.* decision today—because the regulations were not in effect at the time of the underlying agency proceedings being reviewed on appeal—the regulations may ultimately be addressed and invalidated in the Supreme Court's forthcoming *Nieto* decision. And they could also potentially be addressed by the Supreme Court in *Blount Inc*. if the Division seeks cert. and if the Supreme Court grants it. But even though the regulations have not yet been invalidated by any judicial decision, they are inconsistent with the reasoning behind *Blount Inc.* (and *Nieto*) and could presumably be profitably challenged on that basis in any appropriate proceeding.

Blount Inc. establishes a very favorable precedent for employers in Colorado and will presumably be considered by the Colorado Supreme Court in its upcoming *Nieto* decision. The case will also serve as an important precedent in further judicial review of the legality of "use-it-or-lose-it" and other vacation policies in Colorado.

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