

# But I Earned Those Commissions, Didn't I?

By Ben Lebsack

A common clause in a commission or sales agreement is that the sales person must be employed at the time a commission payment is due to receive the payment. This means an employee may forfeit commissions despite doing all of the work that would otherwise entitle her to the commission if she resigns or is terminated before the pay date. These clauses purportedly allow employers to terminate employees the day before a commission is due to avoid payment. These clauses also make it difficult for a sales person to leave an abusive or unhealthy workspace for fear of losing a sizable commission.

But the Colorado Wage Claim Act's definition of wages, right to payment of earned, vested, and determinable wages, and anti-waiver provision mean that a commission agreement may not modify or waive an employee's right to receive commissions that are earned, vested, and determinable according to the commission agreement. Because the anti-waiver provision voids any agreement that waives an employee's rights under the CWCA, the CWCA's definition of wages supersedes a contradictory definition in an employment or sales agreement. While some "active employment clauses" may be enforceable, when they forfeit earned, vested, and determinable wages, they are void.

Court decisions on the definition of wages has followed the statutory language of the CWCA, but one case, *Barnes v. Van Schaack Mortgage, a Div. of Van Schaack & Co.*, has caused confusion among practitioners as to the enforceability of provisions that forfeit commissions or other wages, leading many to conclude that an unambiguous forfeiture provision is enforceable. But *Barnes* does not generally hold that commission forfeiture clauses are enforceable. Nor does *Barnes* hold that the CWCA enforces all aspects of an employment agreement. *Barnes* merely holds that the CWCA enforces agreements that define when a commission is earned, even if the definition results in the forfeiture of earnable, but not yet earned, commissions

## Wages Under the Colorado Wage Claim Act

The purpose of the Colorado Wage Claim Act "is to ensure that wages are paid in a timely manner and to provide adequate judicial relief in the event wages are not paid[.]" and its provisions are liberally construed to serve that purpose.<sup>1</sup>

The CWCA defines wages as

(I) All amounts for labor or service performed by employees, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculating the same or whether the labor or service is performed under contract, subcontract \* \* \* or other agreement for the performance of labor or service if the labor or service to be paid for is performed personally by the person demanding payment. No amount is considered to be wages or compensation until such amount is earned, vested, and determinable, at which time such amount shall be payable to the employee pursuant to this article.

(II) Bonuses or commissions earned for labor or services performed in accordance with the terms of any agreement between an employer and employee[.]<sup>2</sup>

Under the CWCA, "compensation is earned 'if it is vested pursuant to an employment agreement at the time of an employee's termination.'"<sup>3</sup> Because of these definitions, the CWCA enforces agreements between employers and employees as to how commissions and other wages are earned. The CWCA does not itself define how wages are earned. As noted in *Barnes v. Van Schaack Mortgage, a Div. of Van Schaack & Co.*, 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. The employee's substantive right to compensation and the conditions that must be satisfied to earn such compensation remain matters of negotiation and bargaining, and are determined by the

parties' employment agreement, rather than by the statute.<sup>4</sup>

While the CWCA enforces agreements as to how wages are earned, it does not generally enforce every agreement between employers and employees about wages. It includes an anti-waiver provision, which states that “[a]ny agreement, written or oral, by any employee purporting to waive or to modify such employee’s rights in violation of this article shall be void.”<sup>5</sup>

Compensation is “earned and, therefore, became vested and determinable as of the date of termination, even though not due and payable for [some time] thereafter.”<sup>6</sup> When agreements provide for payment after the date of termination, and the employee resigns, the wages are “due and payable upon the next regular payday.”<sup>7</sup> But when the employer terminates the employment relationship, the employee’s unpaid earned, vested, and determinable wages are “due and payable immediately.”<sup>8</sup>

Because the CWCA establishes a right to payment of wages that are earned, vested, and determinable, an employment or commission agreement may not modify this right. An agreement may specify when wages are earned or vested, but cannot “provide[] a condition for the payment of bonuses that otherwise have already vested and are already determinable within the meaning of the CWCA.”<sup>9</sup>

### How Commission Agreements Define the Earning of Wages

Commission agreements typically give the employee a percentage of booked or closed sales. Under these agreements, the commission is usually earned and vested upon some action or actions, like booking and first or final payment by the customer. Often these agreements scale commissions on a

series of actions, like 30% of a percentage of the sales price on booking, 30% on down payment, and 40% on final payment. Because of the agreements’ formulas for calculating commissions, the commissions are determinable.

Some commission agreements contain provisions forfeiting potential commission payments after an employee’s termination or resignation.

Some of these provisions forfeit earnable, but not yet earned commissions. For instance, a provision may require that a person be employed on the date a customer makes final payment in order to receive a full commission. These clauses make sense. Absent such a provision, a former employee would receive a full commission despite the burden of collecting payment falling on “other salespersons unfamiliar with the earlier transaction who would receive nothing for their efforts.”<sup>10</sup> And these clauses are likely enforceable because they do not forfeit earned commissions.

But some provisions forfeit earned commissions. For instance, a provision may require that a person be employed on the date a commission is to be paid in order to receive the commission, despite the commission being earned and vested because of some action, like booking a sale or a customer making final payment, and determinable according to the agreement’s formula.

### The (Un)Enforceability of Forfeiture Provisions

Historically, Colorado has disfavored clauses that forfeit commissions. In 1964, the Colorado Supreme Court held that language forfeiting commissions for orders shipped after termination of employment was “unconscionable, arbitrary and unreasonable and results in an unjust enrichment of the defendant.”<sup>11</sup> Other states have policies against

such clauses too.<sup>12</sup> Before the CWCA, for a forfeiture provision to be enforceable, it had to be clear and unambiguous, and “[a]ny ambiguity in the employment contract . . . [was] construed against . . . the forfeiture of earned commissions.”<sup>13</sup>

But with the CWCA, even a clear and unambiguous clause that forfeits earned commissions is unenforceable because it waives an employee’s right to receive payment of earned wages.<sup>14</sup>

Despite the strong pre-CWCA case law against forfeitures, which the CWCA’s anti-waiver provision bolsters, the 1990 decision, *Barnes*, which held a provision that defines how commissions are earned is not void under the anti-waiver provision, has been misunderstood to mean that any unambiguous provision in an employment agreement related to wages, especially a provision that forfeits wages, is enforceable.

### *Barnes v. Van Schaack Mortgage*

In *Barnes*, the agreement stated that the sales person “will not receive origination fees for loans, whether approved or not, which close subsequent to the last day of the month in which termination occurs.”<sup>15</sup> The sales person brought a claim under the CWCA for commissions on loans closed after the last day of the last month of his employment. The Court decided two issues: (1) whether the commission agreement’s “forfeiture provision [was] ambiguous and thus unenforceable;”<sup>16</sup> and (2) whether “the forfeiture provision of the incentive agreement was void under” the anti-waiver provision of the CWCA.<sup>17</sup>

*Barnes* concluded that the provision was unambiguous and enforceable. It also concluded that the provision did not violate the anti-waiver provision of the CWCA. In concluding that the provision was not void under the

anti-waiver provision of the CWCA, *Barnes* held that the “plaintiff did not earn incentive fee compensation under the employment agreement for loans that closed after [the last day of the month in which termination occurred], and hence, he did not waive or modify any rights conferred under the Wage Claim Act.”<sup>18</sup>

*Barnes* does not generally hold that forfeiture provisions do not violate the anti-waiver provision of the CWCA. The forfeiture clause in *Barnes* did not apply to earned and vested commissions. Rather it applied to commissions that would become earned and vested after the employee’s termination occurred had the employee remained employed. Because the commissions were not earned at the time of termination, the agreement not to pay those commissions to the plaintiff after his termination did not violate the provision of the CWCA requiring the employer to pay the employee’s unpaid, earned, vested, and determinable wage immediately upon termination under C.R.S. § 8-4-109(1)(a). As Judge R. Brooke Jackson explained of the provision in *Barnes*, “the employment agreement effectively defined the “vesting” of his bonuses under the CWCA—i.e., his bonuses vested only once the applications resulted in a loan closure before or during the month of termination.”<sup>19</sup>

Provisions that forfeit already earned commissions are distinguishable from the provision in *Barnes*. Where a commission forfeits earned commissions, it violates C.R.S. § 8-4-109(1)(a) because the wages are “earned and, therefore, became vested and determinable as of the date of termination.”<sup>20</sup> This is true even if the commission agreement provides for the payment of the commission sometime after termination had the employee remained employed.<sup>21</sup>


For instance, in *Hallmon v. Advance Auto Parts, Inc.*, the employer had a policy on bonuses stating “that employees ‘must be an active Team Member at time of payout’ to receive bonuses after termination.”<sup>22</sup> Relying on the policy, the employer refused to pay a former employee his earned and vested bonuses for the last two periods of his employment. And relying on *Barnes*, the employer argued that the policy defined when the bonuses were earned and vested. The court disagreed, explaining that the policy

does not redefine when Mr. Hallmon has earned his bonuses or when they have vested. Rather, it provides a condition for the payment of bonuses that otherwise have already vested and are already determinable within the meaning of the CWCA. Adopting *Advance’s*

argument would allow employers to manipulate similar contractual language to avoid paying rightful wages to employees by conveniently terminating them shortly before their payday, contravening the public policy behind the CWCA.<sup>23</sup>

When representing employees who have not received commissions because of an employer’s reliance on a forfeiture provision, first examine the agreement is definition of how a commission is earned, vested, and determined. Even absent a clause forfeiting earned commissions upon termination, the employee may not have a claim for the commissions because they are not earned, vested, and determinable as of the date of termination. For instance, a sales person is not entitled to a commission

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if the person resigned before the customer paid and the agreement defines earned to include the condition that the employer receives payment from the customer. But if the commissions are earned, vested, and determinable, a clause forfeiting these wages upon termination is unenforceable and should not dissuade a person owed the wages from pursuing a claim.

When language apart from the forfeiture provision defines how a commission is earned, vested, and determined, a forfeiture provision is more likely to be void because it waives an employee's right to earned wages.

Distinguishing between clauses that forfeit commissions depending on whether the employee is fired or quits makes some sense from a policy perspective. An employer may terminate someone's employment to avoid paying a large commission.<sup>24</sup> But such distinctions may have the effect of forcing employees to remain in unhealthy work environments and gives employers an incentive to bully an employee into resigning. And such distinctions are not relevant under the CWCA as it relates to the earning of wages or forfeiture of earned wages. The distinction applies to when an employer must pay wages after the end of the employment relationship, but has no relevance to whether an employer must pay earned wages. Even an employee who resigns for "bad reasons" is entitled to the payment of earned wages on the next regular payday.<sup>25</sup>

When an employer terminates an employee, the employee may have an additional claim for intentional interference with contractual relations against the supervisor.<sup>26</sup> But whether an employee resigns or is terminated has no bearing on the employee's right to earned commissions.

## Conclusion

The CWCA enforces agreements that define when a commission is earned, even if the definition results in the forfeiture of earnable, but not yet earned, commissions when the employee resigns or is terminated. But when a forfeiture clause does not define when commissions are earned and instead forfeits commissions already earned under a different term of the agreement, the CWCA voids the forfeiture provision, and the employee is entitled to the commissions as wages under the CWCA. ▲▲▲

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## Endnotes:

<sup>1</sup> *Fang v. Showa Entetsu Co.*, 91 P.3d 419, 421 (Colo. App. 2003) (citing *Montemayor v. Jacor Communications, Inc.*, 64 P.3d 916, 923 (Colo. App. 2002)).

<sup>2</sup> C.R.S. § 8-4-101(14)(a).

<sup>3</sup> *Fang v. Showa Entetsu Co.*, 91 P.3d 419, 422 (Colo. App. 2003) (citing *Barnes v. Van Schaack Mortgage*, 787 P.2d 207, 209 (Colo. App. 1990)).

<sup>4</sup> *Barnes v. Van Schaack Mortgage, a Div. of Van Schaack & Co.*, 787 P.2d 207, 210 (Colo. App. 1990).

<sup>5</sup> C.R.S. § 8-4-121.

<sup>6</sup> *Rohr v. Ted Neiters Motor Co.*, 758 P.2d 186, 188 (Colo. App. 1988).

<sup>7</sup> C.R.S. § 8-4-109(1)(b).

<sup>8</sup> C.R.S. § 8-4-109(1)(a).

<sup>9</sup> *Hallmon v. Advance Auto Parts, Inc.*, 921 F. Supp. 2d 1110, 1120 (D. Colo. 2013).

<sup>10</sup> *Am. Software, Inc. v. Ali*, 46 Cal. App. 4th 1386, 1393, 54 Cal. Rptr. 2d 477 (1996).

<sup>11</sup> *Moorman Mfg. Co. v. Rivera*, 395 P.2d 4, 6 (Colo. 1964).

<sup>12</sup> *Geysen v. Securitas Sec. Servs. USA, Inc.*, No. MMXCV095007429S, 2012 WL 3854653, at \*7 (Conn. Super. Ct. Aug. 9, 2012) (provision depriving salesperson of earned commissions is "unenforceable because it violates two public policies: the first, which strongly favors the payment of wages and the second, which disfavors forfeitures."); *Haines & Co., Inc. v. Stewart*, 2001 WL 166465, at \*2 (Ohio App Feb. 5, 2001) "Contracts which provide for forfeiture of earned commissions or bonuses are not generally enforced."; *Weiner v. Diebold Grp., Inc.*, 173 A.D.2d 166, 167 (N.Y. 1991) (recognizing "long standing policy against the forfeiture of earned wages which applies to earned, uncollected commissions as well.").

<sup>13</sup> *Schaefer v. Horton-Cavey*, 692 P.2d 1132, 1135 (Colo. 1984) (citing *Moorman*, 395 P.2d 4).

<sup>14</sup> C.R.S. § 8-4-121.

<sup>15</sup> *Barnes v. Van Schaack Mortgage, a Div. of Van Schaack & Co.*, 787 P.2d 207, 209 (Colo. App. 1990).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 210.

<sup>19</sup> *Hallmon v. Advance Auto Parts, Inc.*, 921 F. Supp. 2d 1110, 1120 (D. Colo. 2013).

<sup>20</sup> *Rohr v. Ted Neiters Motor Co.*, 758 P.2d 186, 188 (Colo. App. 1988).

<sup>21</sup> *Id.*

<sup>22</sup> *Hallmon v. Advance Auto Parts, Inc.*, 921 F. Supp. 2d 1110, 1120 (D. Colo. 2013).

<sup>23</sup> *Id.*

<sup>24</sup> *Hofer v. Polly Little Realtors, Inc.*, 543 P.2d 114, 116 (Colo. App. 1975) (any other interpretation would lead to the unjust result that salesman employed on a commission basis could be terminated with impunity prior to the closing and thus deprived of large commissions obtained for their employers as a result of their efforts).

<sup>25</sup> C.R.S. § 8-4-109(1)(b).

<sup>26</sup> *Trimble v. City and County of Denver*, 697 P.2d 716, 726 (Colo. 1985) (Employee actor motivated solely by desire to harm, can be liable for interference of contract). *Zappa v. Seiver*, 706 P.2d 440, 442 (Colo. App. 1985) (motivation by desire to induce breach not acting in official capacity of corporate officer).