

Sweeping Changes Coming to Colorado Wage and Hour and Vacation Pay Rules

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The Colorado Department of Labor and Employment (the “Department”) has published [proposed regulations](#) that would make significant changes to the state’s wage and hour laws. The proposed provisions, collectively termed the Colorado Overtime & Minimum Pay Standards Order (“COMPS Order”), would impact a broad range of subjects, including coverage under the wage and hour laws, overtime exemptions, and administering rest breaks.

In addition, on December 19, 2019, the Department will adopt its proposed rule on vacation pay, placing certain restrictions around “use-it-or-lose-it” provisions and requiring that unused vacation pay be paid out upon separation of employment.

The following is an overview of the new vacation pay rules, as well as a summary of some of the key provisions of the proposed COMPS Order.

Vacation Pay

Colorado law provides that, upon separation of employment, an employer must pay an employee all vacation pay “earned and determinable in accordance with the terms of any agreement.” In June 2019, the Colorado Court of Appeals held that an employer may place restrictions on payment of accrued but unused vacation pay at separation as part of its policies or agreements. In that case, the court upheld an employer’s policy stating that employees “forfeit all earned vacation pay benefits” upon discharge for any reason.

In response to the Court of Appeals decision, and as part of broader amendments to its [rules on the state’s Wage Protection Act](#), the Department issued the new regulation, stating that Colorado’s vacation pay law does not allow for forfeiture of any earned vacation upon separation of employment. That is, under the new regulation, separating employees must be paid out for any “earned and determinable” vacation and employers cannot maintain a policy that requires employees to forfeit their earned vacation pay upon separation.

In addition, the regulation provides that employers may maintain “use-it-or-lose-it” vacation policies that “disallow carryover after employees accrue a year of vacation pay,” but only where such policies “do not forfeit any of that years’ worth.” So, for example, an agreement or policy providing for ten paid vacation days per year may provide that employees can accrue more than ten days by allowing carryover of vacation from year to year or may cap employees at ten days, but it may not provide that after an employee accrues ten days, that amount diminishes below ten days for any reason, other than due to use by the employee.

Proposed COMPS Order: Employer/Employee Coverage

Currently, the Colorado wage and hour provisions (referred to as the Minimum Wage Order) apply only to employees in the Retail and Service, Food and Beverage, Commercial Support Service, and Health and Medical industries (as defined in the existing Order). The proposed COMPS Order would expand coverage to employees across all industries, unless otherwise specifically excluded. Certain individual and industry-specific exemptions would be provided, including “owners” of a business and “proprietors” of a non-profit (as defined in the proposed COMPS Order), certain interstate transportation and taxi drivers, certain “in residence” workers (such as property managers who reside in the property being managed), and certain salespersons and mechanics.

Minimum Salary for Exempt Status

Under the current Minimum Wage Order, an executive, professional, or administrative employee may be classified as exempt from overtime eligibility and required meal and rest breaks under state law if they perform certain exempt duties and receive a minimum annual salary of \$35,568. Under the proposed COMPS Order, beginning July 1, 2020, the salary threshold for such exemptions would increase to \$42,500, with annual fixed adjustments thereafter until reaching \$57,500 in 2026 (after which adjustments would be based on the Consumer Price Index).

Calculating Pay Rates For Non-Exempt Employees Not Paid Hourly

The proposed COMPS Order also would clarify how to calculate regular and overtime pay rates for non-exempt employees with salaried or other non-hourly pay structures.

Specifically, the proposed COMPS Order would allow for the use of the so-called “fluctuating workweek” calculation as follows—a non-exempt employee’s weekly salary or other non-hourly pay may be paid as straight time pay for all work hours, and the regular rate each workweek would be the total paid divided by hours worked, if the parties have a “clear mutual understanding” that the salary is: (1) compensation for all hours each workweek, apart from any overtime premium; (2) at least the applicable minimum wage for all hours in workweeks with the greatest hours; (3) supplemented by extra pay for all overtime hours at one-half of the regular rate; and (4) paid for whatever hours the employee works in a workweek.

In situations where the above requirements are not met, however, an employee’s hourly regular rate for purposes of overtime pay calculation would be the applicable weekly pay divided by 40, the number of hours presumed to be in a workweek for an employee who receives no overtime.

Wage Credits and Security Deposits

The proposed COMPS Order would continue to allow employers to reduce employee wages by taking a “credit” for providing meals or lodging, but would modify the rules for such credits.

For meal credits, the proposed COMPS Order would eliminate the existing requirement that a meal “must be consumed before deductions are permitted,” and would instead only require that accepting a meal be voluntary for the employee. The existing requirement that meals must be provided at cost or value would be maintained.

For lodging credits, the proposed COMPS Order would increase the dollar limit for such credits, and also would add requirements that the employee’s acceptance of the lodging be voluntary, that it be for the employee’s benefit and not primarily for the employer’s own convenience, and that the lodging agreement be appropriately documented.

The proposed COMPS Order also would prohibit employers from requiring employees provide a security deposit for required work uniforms.

Rest Periods

Colorado employers generally are required to permit a compensated 10-minute rest period for every four hours of work, or major fractions thereof. The proposed COMPS Order clarifies that, “to the extent practical,” rest periods shall be provided in the middle of each four-hour work period. In addition, employees who do not receive such required paid rest breaks must be provided with an additional 10 minutes’ worth of compensation.

Notice to Employees

While employers in Colorado presently are required to display a Minimum Wage Order poster in each workplace, the proposed COMPS Order states that if such posting is impractical given the nature of the workspace or where employees work remotely, the employer must instead provide a copy of the posting (or of the COMPS Order itself) to each employee.

Employers with Spanish-speaking employees would be required to display a Spanish language version of the COMPS Order poster. For employees speaking languages other than English or Spanish, employers would be required to contact the CDLE and request a copy of the COMPS Order poster in the employees’ spoken language. Employers who fail to display or distribute the COMPS Order poster in accordance with these provisions would be prohibited from claiming any employee-specific exemptions or credits under the Order.

In addition, employers would be required to include a copy of the COMPS Order or the COMPS Order poster in their employee handbook. Further, if employers require employees to sign a handbook acknowledgment, employees also must sign an acknowledgment stating they received either the COMPS Order or poster.

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Comments are [currently being accepted](#) on the proposed COMPS Order through December 31, 2019, and the final version is anticipated to be released and adopted by January, with a proposed effective date of March 1, 2020 for most provisions (other than the exempt salary threshold changes which, as noted above, would take effect on July 1, 2020).

In anticipation of the vacation pay changes and the final COMPS Order being issued, Colorado employers should review their current policies to determine where changes may be necessary to comply with these provisions.

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