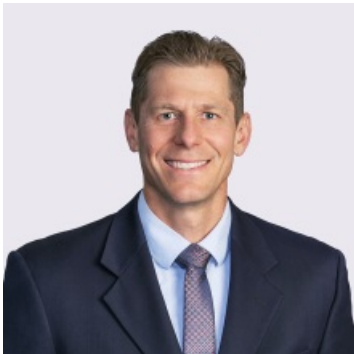


New Colorado Overtime and Minimum Pay Standards Order #37 Revises Exemptions and More

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December 1, 2020

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Related Services

Wage and Hour

Colorado has followed the sweeping changes to its minimum wage, overtime, and other wage and hour rules implemented under Colorado Overtime and Minimum Pay Standards (COMPS) [Order #36](#) with more changes, including a revamped transportation worker exemption. New [COMPS Order #37](#) also expands the administrative and professional employee exemptions, incorporates the Colorado Healthy Families and Workplaces Act (HFWA), and mandates pay adjustments for certain employees. COMPS Order #37 goes into effect January 1, 2021.

Transportation Worker Exemption

Perhaps the most significant revision in COMPS Order #37 concerns the transportation worker exemption. While COMPS Order #36 allowed certain transportation workers to be fully exempt, under COMPS Order #37, only certain taxi cab drivers remain fully exempt. Other transportation workers may be exempt only from the overtime and meal and rest break rules. Similarly, while COMPS Order #36 provided an exemption for certain drivers, drivers' helpers, or loaders or mechanics of a motor carrier, COMPS Order #37 limits the exemption only to certain drivers and drivers' helpers. Conversely, while under COMPS Order #36 the transportation worker exemption applied only to workers who physically crossed state lines in the course of their work, under COMPS Order #37, drivers and drivers' helpers will no longer be required to cross state lines to be exempt from overtime and meal and rest break rules, provided they meet certain other requirements.

To satisfy the transportation worker exemption, drivers or drivers' helpers must:

1. Be covered by the federal Motor Carrier Act (MCA) exemption;
2. Work on non-passenger, commercial motor vehicles (CMVs) requiring a commercial driver's license (CDL) under 49 C.F.R. § 383.5 (GCWR or GCW of 26,001 pounds or more), but not driving vehicles transporting workers to and from other manual labor jobs (such as landscaping, construction, and janitorial) that do not require a CDL; and
3. Be paid compensation equivalent to 50 hours at the standard Colorado minimum wage rate with overtime (*i.e.*, \$677.60 per week as of 2021), paid on hourly, salary, piece rate, or other basis.

Rule 2.4.6.

The language of the revised exemption is unclear as to whether the compensation requirement establishes a "floor" beneath which a driver or drivers' helper weekly pay may not fall or whether each week "stands alone" so that if a driver or drivers' helper — for whatever reason — is paid less than the above amount in a given week, such employee does not qualify for the exemption only for that week.

Administrative Employee Exemption

The language of the administrative employee exemption has been revised, in theory, to

broaden its coverage. Under revised Rule 2.2.1, the administrative employee exemption covers

a salaried employee, paid at least the applicable salary in Rule 2.5, who directly serves *an* executive, and regularly performs duties important to the decision-making process of *that* executive. The *executive and* employee must regularly exercise independent judgment and discretion in matters of significance, with a primary duty that is non-manual in nature and directly related to management policies or general business operations.

(Emphasis added).

Previously, the language of the exemption referred to “the” executive rather than “an” executive, which the Colorado Division of Labor Standards and Statistics concluded could have been interpreted too narrowly so as to apply only to employees who directly served the top-level executive. Under the revised language, the exemption applies “as long as ‘an’ executive is no less engaged in higher-level, non-manual work than the ‘administrative employee’ serving them[.]”

Professional Employee Exemption

Rule 2.2.3 of COMPS Order #37 includes a “creative professional” employee exemption, similar to that found under the Fair Labor Standards Act (FLSA):

Professional employees. This exemption covers a salaried employee, paid at least the applicable salary in Rule 2.5, employed in a field of endeavor whose primary duty is work that requires (A) the consistent exercise of discretion and judgment, as distinguished from routine work that is mental, manual, mechanical or physical, and (B) either (1) knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, or (2) invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work, or work that primarily depends on intelligence, diligence and accuracy. The professional employee must be employed in the field in which s/he was trained.

As of January 1, 2021, to qualify for either the administrative or professional exemption, employees must be paid at least \$778.85 per week (\$40,500.20 per year).

Healthy Families and Workplaces Act (HFWA)

Rule 1.5 of COMPS Order #37 specifies that an “employee” is defined differently under the HFWA than under the Colorado Wage Act and COMPS Order. Under the HFWA, the definition of “employee” excludes those subject to the federal Railroad Unemployment Insurance Act, as defined in 45 U.S.C. § 351(d), while such employees are not excluded from the provisions of the Colorado Wage Act and COMPS Orders. In addition, Rule 1.11 includes paid sick leave under the HFWA as a form of “wages” or “compensation” under the COMPS Order.

Seasonal Camp and Outdoor Education Field Staff Exemption

COMPS Order #37, Rule 2.2.7(F), applicable to the exemption for field staff of seasonal camps or seasonal outdoor education programs, now specifies that such staff may reside either on-premises “or in the field.” Furthermore, Rule 2.2.7(F)(1) revises the minimum pay

requirements that must be satisfied for this exemption to apply. To qualify for the exemption, such employees must be paid either: (a) “the applicable Colorado minimum wage for all hours worked,” or (b) a salary equivalent to one of the following:

Type of Employee & Employer	Non-Profit Employer, \$25 Million or Less	All Other Employers
Adult	\$231.20 per week	\$317.44 per week
Minor	\$153.58 per week	\$239.82 per week

COMPS Order #37 does not change the definition of “seasonal,” which “means a camp or program that either (a) does not operate for more than seven months in a year, or (b) during the preceding calendar year had average receipts for any six months of not more than one-third ($\frac{1}{3}$) of its average receipts for the other six months.” Rule 2.2.7(F)(2).

Minimum Wage and Salary Threshold Increases

Under COMPS Order #37, the standard minimum wage will increase from \$12.00 an hour to \$12.32 an hour, while the minimum cash wage for tipped employees increases from \$8.98 an hour to \$9.30 an hour (the maximum \$3.02 tip credit remains the same).

The salary threshold for certain exempt employees — including those under the administrative, executive, and professional exemptions — will increase from \$684.00 per week (\$35,568 per year) to \$778.85 per week (\$40,500.20 per year). Employees falling under the “highly technical computer-related occupation” exemption must be paid at least (a) the salary threshold under Rule 2.5.1 (*i.e.*, \$778.85 per week/\$40,500.20 per year beginning in 2021) or (b) \$28.38 an hour.

Takeaway

Although COMPS Order #37 does not bring anywhere near the comprehensive regulatory changes its predecessor did, it nevertheless includes some important changes. Accordingly, all Colorado employers should review their current policies and practices now to ensure compliance by the effective date.

If you have questions about COMPS Order #37 or any other wage and hour issues, please contact a Jackson Lewis attorney.

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