

Attention Colorado Employers: Significant Wage and Hour Rule Changes Are on the Way

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Wage and Hour

Beginning March 16, 2020, sweeping minimum wage, overtime, and other rules affecting the payment of wages will take effect in Colorado. The changes are included in the Colorado Overtime & Minimum Pay Standards (COMPS) Order, formerly known as the Colorado Minimum Wage Order.

COMPS Order No. 36, issued on January 22, 2020, represents a dramatic shift from previous wage orders, significantly increasing the coverage of the rules, placing greater limitations on exemptions from the overtime requirements, expanding the definition of time worked, and imposing other requirements and potential liability on employers. Given that these rules take effect in just over a month, employers must begin preparing for compliance immediately. The following is a summary of the more impactful changes.

Employee Coverage

In a major departure from previous wage orders, under the new COMPS Order virtually all private employees in all industries will be covered by the Colorado's minimum wage, overtime, and working condition rules, unless they fall within one of the enumerated exemptions. In the past, wage orders covered employees only in four industries: retail and service, food and beverage, commercial support service, and health and medical. Perhaps most notably, employees in the manufacturing industry will now be covered by the rules set forth in the COMPS Order.

Compensable Time

Tracking, recording, and compensating non-exempt employees for all time worked is critical. The COMPS Order now defines "time worked" as all time for which the employer requires or permits an employee

to be on the employer's premises, on duty, or at a prescribed workplace (but not merely permitting an employee completely relieved from duty to arrive or remain on-premises) — including but not limited to, if such tasks take over one minute, putting on or removing required work clothes or gear (but not a uniform worn outside work as well), receiving or sharing work-related information, security or safety screening, remaining at the place of employment awaiting a decision on job assignment or when to begin work, performing clean-up or other duties "off the clock," clocking or checking in or out, or waiting for any of the preceding[.]

COMPS Order Rule 1.9.1.

Thus, unlike the law developed under the Fair Labor Standards Act (FLSA), which generally allows employers to disregard infrequent or insignificant (*i.e.*, "de minimis") periods of time — as much as 10 minutes — that may be difficult or impossible to track, Colorado now has formally imposed a requirement on employers to track any and all time exceeding *one* minute. As a result, employees must be more vigilant in recording hours

worked, even time that might be deemed *de minimis* under federal law.

New Exemptions, But with An Old Analytical Standard

As with previous wage orders, the COMPS Order exempts certain employees from its coverage. COMPS Order Rule 2.2. The COMPS Order, however, expands that list. An exemption now exists, for example, for “employees in highly technical computer-related occupations.” COMPS Order Rule 2.2.10. Although this exemption generally parallels a similar exemption found under the FLSA, Colorado’s rules mandate that such employees spend at least 50 percent of their workweek performing one or more specifically enumerated job duties, such as computer systems or program analysis or design. By contrast, the FLSA merely requires that a computer professional’s “primary” duty be the performance of specified work in the field.

But all of the exemptions, old and new, come with a caveat: while Colorado will construe the rights and protections afforded to employees liberally, it will construe the Order’s exceptions and exemptions *narrowly*. COMPS Order Rule 8.7(A). In adopting a “narrow construction” standard with respect to exemptions, Colorado formally rejects the U.S. Supreme Court’s decision in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2018), holding that with respect to the FLSA, exemptions are to be given a “fair reading,” rather than a narrow construction. As a result, Colorado employers will continue to face the more demanding, pre-*Encino Motorcars* standard when facing state law claims that employees were improperly classified as exempt.

New, Higher Minimum Salary Requirement for Exemptions

In previous years, Colorado’s wage orders did not establish a specific minimum salary for the executive, administrative, and professional (often referred to as the “white collar”) exemptions. Thus, by default, the FLSA’s minimum salary applied, as of January 1, 2020, is \$684 per week (\$35,568 per year). The COMPS Order now officially adopts the minimum salary rules of the FLSA, but with a twist.

While the FLSA’s current minimum salary will apply beginning July 1, 2020 (January 1, 2021, for some non-profits and small employers), that will last only for six months. Beginning in 2021, the minimum salary will increase annually over the following four years, exceeding the federal salary minimum (\$35,568) as follows:

- January 1, 2021: \$778.15/week (\$40,500/year)
- January 1, 2022: \$865.38/week (\$45,000/year)
- January 1, 2023: \$961.54/week (\$50,000/year)
- January 1, 2024: \$1,057.69/week (\$55,000/year)

Beginning in 2025, the minimum salary may adjust further based on the same Consumer Price Index (CPI) that is used to determine any increase in Colorado’s minimum wage. With these increased minimum salary requirements, Colorado will join a handful of other states that require a minimum salary for exempt employees exceeding that set forth under federal law.

New Rest Period Requirements

While previous wage orders generally required employers to provide paid, 10-minute rest periods to employees for every four hours (or “major fraction thereof”) worked, the COMPS Order now establishes a specific schedule for such breaks, as follows:

<u>Work Hours Per Day</u>	<u>Rest Periods Required</u>
2 or fewer	None
More than 2, less than 6	1
More than 6, less than 10	2
More than 10, less than 14	3
More than 14, less than 18	4
More than 18, less than 22	5
More than 22	6

An employer and employee may agree on a given day, or in writing for up to one year, that two 5-minute breaks will be provided in lieu of a single 10-minute break, as long as that provides sufficient time for the employee to use the restroom and/or use a “bona fide” break area. In addition, some modified break rules may be applied to employees governed by a collective bargaining agreement and to certain employees providing Medicaid-funded, residential in-home services.

Most notably, the COMPS Order provides that if an employee is not authorized and permitted to take a 10-minute rest period as required under the Order, his or her employer must pay an *additional* 10 minutes of wages for each missed rest period. COMPS Order Rule 5.2.4.

Employer Uniforms

The COMPS Order makes one notable revision to the previous wage orders setting forth the rules pertaining to employer-provided uniforms or other apparel. Previously, an employer could require a reasonable security deposit, of up to one-half of the actual cost the uniform or other apparel, as a means of incentivizing employees to return uniforms upon separation (and to offset the cost of non-returns). That security deposit provision has been eliminated.

Posting and Record Requirements: Comply or Beware

As set forth in the COMPS Order, employers will now be subject to new posting requirements. Employers must display a COMPS Order poster in an area frequented by employees and where it may be easily read or, if such a location does not exist, a copy of the poster (or the Order itself) must be provided to all employees within the first month of employment. Additionally, a copy of the Order or poster must be provided at any time upon employee request.

Furthermore, a copy of the COMPS Order must be included when any handbook, manual, or policy is published or distributed to employees, and if an employer requires employees to sign the handbook, manual, or policy, it also must require its employees to sign an acknowledgment that they have been provided a copy of the Order or poster.

Furthermore, if an employee has limited English language ability, the employer must use the Spanish-language version of the COMPS Order and poster if an employee speaks Spanish, or must contact the Division to request that it provide versions of the Order and poster in that employee’s language.

With respect to the maintenance and retention of records, the COMPS Order eliminates the requirement that employers keep a record of employee Social Security Numbers but provides that employers must retain the remaining information contained in the employee's itemized earnings statement not only for at least three years, but "for the duration of any pending wage claim pertaining to the employee" (a wise practice even if not required).

Most significantly, the COMPS Order provides that if an employer does not comply with the posting requirements, it shall be *ineligible* for any employee-specific credits, deductions, or exemptions in the COMPS Order[.]” COMPS Order Rule 7.4.1. How broadly this preclusion rule will be applied remains to be seen.

Wage Theft Law Incorporated

Under the 2019 Wage Order, an employer or individual who paid, or caused to be paid, an employee less than the minimum wage could be found guilty of a misdemeanor and, if convicted, be subject to a fine of up to \$500 and a year in jail, as set forth in C.R.S. § 8-6-116. That provision still exists in the COMPS Order but, in addition, Colorado's wage theft law, passed in 2019, has been incorporated into the Order. Now, if an employer or agent "willfully refuses to pay wages or compensation, or falsely denies the amount of a wage claim, or the validity thereof, or that the same is due," with either the intent to reduce its or his indebtedness or to "annoy, harass, oppress, hinder, coerce, delay, or defraud" the employee, that employer or agent may be found guilty of theft, with the potential jail time and fine dependent upon the amount of unpaid wages. In other words, a wage theft conviction could result in a felony conviction and a fine as high as \$1,000,000.

The Takeaway

The COMPS Order is a comprehensive regulatory change to Colorado minimum wage, overtime, and working condition rules, and imposes significant new obligations and restrictions on employers. As a result, all Colorado employers must review their current policies and practices immediately to ensure compliance by next month's effective date. A copy of COMPS Order No. 36 itself may be found [here](#).

If you have questions about the new requirements or any other wage and hour question, please contact a Jackson Lewis attorney.

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