Colo. Wage Rules Present Big Employer Compliance Hurdles

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On Jan. 22, Colorado finalized rules regulating employee wage payments. The new rules are encompassed in the Colorado Overtime and Minimum Pay Standards Order 36, or COMPS Order,[1] succeeding the currently operative Amended Minimum Wage Order 35.[2]

More than just a name change, the new COMPS Order contains the most sweeping revisions to wage regulations that Colorado's private employers have seen in over 20 years. In past years, generally only the state minimum wage has increased on an annual basis.

However, the new COMPS Order impacts both hourly and salaried employees and imposes significant compliance adjustments for employers. These new changes — many of which are employee-friendly — will become effective March 16, and every private employer with employees working in the state of Colorado will be impacted to some extent unless explicitly exempted.

In a nutshell, employers must take swift action to verify coverage, identify required practice changes, revise policies and handbooks, and satisfy posting requirements to ensure timely compliance. Specifically, employers should consider the following actions and considerations:

Verify Coverage: Now, Most Private Colorado Employers Are Covered

In the past, only four specifically delineated industries were covered by Colorado's wage laws (retail and service, commercial support service, food and beverage, and health and medical). Now, pursuant to Rule 2.1, virtually all of Colorado's private employers are covered by these rules, unless an explicit exemption is listed at Rules 2.2–2.4.

Public employers continue to be excluded from the definition of employer. Because the previous four industries defined were narrow in scope, in the increasingly modern and evolving workplaces, numerous industries were not covered. Therefore, to the extent an employer construed its industry to be outside of coverage or was not covered, the employer should now revisit whether an exemption applies, and if not, take steps to get in compliance with the COMPS Order.

Adjust Hourly Worker Practices

The Colorado Department of Labor and Employment's Division of Labor Standards and Statistics has conferred Colorado's hourly employees with myriad increased protections.

Rest Periods

Perhaps one of the most striking — and California-like — adjustments to Colorado's wage laws for hourly employees will be that, to the extent hourly employees are not authorized and permitted their 10-minute rest period for every four hours of work (or major fraction

thereof), employers must pay an additional 10 minutes of wages for each missed rest period pursuant to Rule 5.2. This payment is in addition to the already-paid rest time, described as effectively extending the shift by 10 minutes.

Rest periods shall be 10 minutes unless employers implement an agreement, a collective bargaining agreement controls, or the employee is providing Medicaid-funded residential in-home services for an employer receiving 75% or more of its revenue from Medicaid funds. As to the agreement, employers and employees may now agree in writing for a one-year term to:

> voluntarily and without coercion ... have two 5-minute breaks [in lieu of one 10-minute break], as long as 5 minutes is sufficient, in the work setting, to allow the employee to go back and forth to a bathroom or other location where a bona fide break would be taken.

The collective bargaining and Medicaid exceptions are detailed in Rule 5.2.1.

Employers should carefully consider how to develop not only policies and procedures consistent with the new rest period requirements, but also, critically, consider the feasibility of a timekeeping method to track rest periods, to satisfy the record-keeping requirements under Rule 7, and to defend against allegations that rest periods were not authorized and permitted. Even more critically, employers should likewise implement a system to ensure an employee may report and be paid if the employee feels the rest period was not authorized and permitted.

Time-Worked Payments

Failing to follow well-established federal guidance on compensable time concepts issues, the division has determined that compensation is required for certain pre- and post-shift tasks that take more than one minute pursuant to Rule 1.9. Thus, "time worked" now includes, but is not limited to, putting on or removing work clothes or gear; receiving or sharing work-related information; security or safety screenings; certain travel-related time; clocking or checking in or out; and time spent waiting for any of the preceding.

Not only will employers be required to review their hourly employees' practices in these spaces, but employers will also have to develop timekeeping mechanisms to capture such discrete increments to ensure proper payment. This one-minute threshold may be problematic for many employers.

For example, employers who utilize computer-based timekeeping systems should consider whether it takes longer than one minute to turn on the computer and clock in at the beginning of a shift. Employers who utilize wall clocks for timekeeping should consider whether employees wait in line longer than one minute to clock in.

If a pre- or post-shift debriefing is practiced, employers should determine how long it lasts. If employees are subject to a metal detector or other security or safety screening measures before or after a shift, employers should ensure employees are compensated if the screening takes longer than one minute.

For the many industries that require donning of specialized gear before a work shift, employers should determine whether additional compensation and record-keeping is warranted. Even if such activities take less than one minute, employers should likewise take measures to capture that time to ensure compensation is not required and to protect against allegations of uncompensated pre- and post-shift activities.

Under the federal Portal-to-Portal Act[3] and corresponding regulations, these types of pre- and post-shift activities are generally noncompensable. Accordingly, to the extent employers have followed federal guidelines on these issues, adjustments are necessary.

Other Changes

The division also adjusted language regarding meal, lodging and tip credits; uniform deposit; regular rate calculations for nonhourly pay; requirements for a reduced wage to minors and disabled individuals; and record-keeping requirements. All private employers in Colorado should carefully review the new COMPS Order to identify applicable revisions and implement appropriate changes.

Salaried Employee Considerations

Unlike previous revisions, the new COMPS Order will impact salaried workers — for the first time, Colorado will impose a salary basis requirement for salaried workers to qualify as exempt under state law.

Salary Requirements and Increases

At the outset, effective July 1, 2020, unless subject to an exception, the minimum required salary for exempt employees will be $35,568 per year. This salary is consistent with the current salary level required under the federal Fair Labor Standards Act, which increased this year from $23,660.[4] The vast majority of Colorado's employers subject to the FLSA should already be paying salaried exempt employees at the $35,568 threshold, and to the extent they are not, should make that adjustment immediately.

However, unlike the FLSA, the Colorado salary threshold is slated to increase each year — by nearly $20,000 in four years — to $55,000 per year by Jan. 1, 2024. Starting Jan. 1, 2025, the salary basis will be adjusted consistent with the Consumer Price Index, similar to the annual Colorado minimum wage change. Colorado is the fourth state to set a salary threshold requirement that will be roughly equivalent with the Obama administration's proposal.

In the near term, effective in less than one year on Jan. 1, 2021, the salary requirement for an employee to be classified as exempt will then increase to $40,500. Looking ahead to the 2021 increase and beyond, employers should start to plan and budget now by evaluating positions that earn close to the anticipated salary thresholds to confirm that such employees are properly classified as exempt under the FLSA and the COMPS Order pursuant to their duties, and if so, whether the employer will gross up the salary to meet the revised salary requirements, or convert the employee to nonexempt, which will require tracking hours worked, providing meal and rest periods, and paying overtime.

Delayed Salary Basis Implementation for Certain Employers

In 2020, Colorado's nonprofits with an annual total gross revenue of under $50 million and for-profit employers with an annual total gross revenue under $1 million will not be subject to the salary threshold requirements until Jan. 1, 2021. However, as a threshold matter, these employers must confirm coverage under the FLSA.

If FLSA-covered, then they remain required to pay $35,568 per year to maintain the exemption. And, starting Jan. 1, 2021, all will be required to comply with the $40,500 annual or $778.85 per week salary requirements as well as the subsequent increases and should start planning for the same.

New Exemptions

The COMPS Order regulates the wages, hours and working conditions of Colorado employers and employees unless an exemption applies.

To that end, pursuant to Rules 2.2-4, there are several new exemptions, including for highly technical computer-related occupations, which is generally consistent with the FLSA, but imposes a 50% test, requiring that the employee spend a minimum of 50% of the workweek on the enumerated duties, as opposed to the primary duty test under the FLSA.

The new exemptions are also for seasonal camp/outdoor education program field staff; H2-A visa range workers; certain owners or proprietors; interstate transportation workers and taxi drivers; certain in-residence workers; bona fide volunteers and work-study students; elected officials and their staff; and certain agriculture-related workers. Employers should carefully study the new exemptions to see if any apply to their salaried workforce.

New Posting, Acknowledgement and Translation Requirements

The division has bolstered posting, acknowledgement and translation requirements, and added corresponding penalties for violating the posting provision. Pursuant to Rule 7.4, the division's COMPS Order poster must be displayed or provided to all employees within the first month of employment.

Additionally, a copy of the division's COMPS Order or the poster must be included with every handbook, manual or other policy distributed. To the extent the employer collects acknowledgements regarding an employee's receipt of a handbook, manual or policy, the employer will now also be required to "have the employee sign an acknowledgement of being provided the COMPS Order or the COMPS Order poster."

Finally, to the extent employers employ individuals with limited English language abilities, the employer shall be required to provide the COMPS Oder and the division's poster in Spanish or request that the division provide a version in another language if needed. Failure to follow the posting requirements may result in ineligibility for certain employee-specific credits, deductions or exemptions.

Denver Employers: Don't Forget the Denver Minimum Wage Ordinance

In addition to these changes, the Colorado Legislature passed H.B. 1210, effective Jan. 1, 2020, which permits Colorado municipalities to raise the minimum wage above and beyond the state and federal minimum wage. Denver was the first city to increase the minimum wage within the city's limits, with a minimum wage of $12.85 effective Jan. 1, 2020, and increasing incrementally to $15.87 in 2022. We expect to see other municipalities follow suit and employers should be sure to adjust wages for hourly employees in Denver to the extent they have not already.

What Didn't Change?

As to hourly employees, the Rule 5.1 meal period standard is generally unchanged. As to exempt employees, the regular white collar exemptions remain intact and Colorado still has no highly compensated worker exemption.

Further, the COMPS Order did not explicitly address concepts of joint employment or independent contractors directly. However, we predict that the revised Rule 1.5 "employee" definition indicates the division's preference for employer/employee — as opposed to independent contractor — relationships, because it emphasizes the "degree of control" and "primary work of the employer" concepts.

Finally, uncertainty remains regarding vacation payout and agreements.[5]

COMPS Order Will Be Liberally Construed With Narrow Exemptions

Although employers need not make specific policy or practice changes based on Rule 8.7 of the COMPS Order, this section indicates the division's intent that the employee protections are broad.

Specifically, contrary to the U.S. Supreme Court's 2016 decision in Encino Motorcars LLC v. Navarro, under Rule 8.7, the division states that the "COMPS Order shall be liberally construed, with exceptions and exemptions accordingly narrowly construed." In contrast, the U.S. Supreme Court found in Encino that exemptions under federal wage law should be given a fair, rather than narrow, reading.

Conclusion

The division's leadership should be applauded for conducting a robust rulemaking process, with significant opportunities for notice and comment, as detailed in its press release[6] and statement of basis, purpose, authority and findings.[7] Further, the division has indeed modernized and made clearer certain areas that have caused persistent confusion among employers and employees alike. The division also intends to promulgate a fact sheet to replace the rescinded advisory bulletin and related guidance to provide further clarity on additional topics.

Despite these efforts, aspects of the COMPS Order generally fall short for Colorado's employers by failing to address the operational reality and the corresponding administrative, financial and resource burdens imposed. For example, timekeeping systems do not generally track rest periods.

Moreover, the COMPS Order provided few protections or incentives for Colorado's well-meaning employers. Consequently, the COMPS Order is likely to continue the trend of relentless compliance-related claims, both at the state level — where our review of claims filed shows that the division sides with the employee in over 90% of claims filed — and by the private bar in court.

Meanwhile, Colorado's private employers are mired in employment rules that are increasingly burdensome and strikingly at odds with federal and other states' requirements. As a result, employers that pride themselves on taking care of their workforces must consider the viability of continuing operations in this jurisdiction, eliminating other employee benefits, and creative and nonmarket solutions to ensure compliance.

At this juncture — and particularly given the short time frame — it is critical that all Colorado employers conduct a privileged review and revision of their wage policies and practices. Absent a legal challenge or further changes, the COMPS Order will become effective — and compliance will be required — on March 16.

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[1] https://www.colorado.gov/pacific/sites/default/files/7%20CCR%201103-1%20Adopted%20COMPS%2036%20Clean.pdf.

[2] https://www.colorado.gov/pacific/sites/default/files/7%20CCR%201103-1%20Amended%20Minimum%20Wage%20Order%2035.pdf.

[3] 29 U.S.C. §§ 251, et seq.

[4] 29 U.S.C. §§ 201, et seq.

[5] Compare the Wage Protection Act, 7 Colo. Code. Regs. 1103-7(2.15) to Nieto v. Clark's Market and determination pending in Blount Inc. v. Colo. dept. of Labor & Employment.

[6] https://www.colorado.gov/pacific/cdle/news/labor-department-adopts-new-colorado-overtime-and-minimum-pay-standards-rule.

[7] Basis, Purpose, Authority, & Findings: Colorado Overtime & Minimum Pay Standards (COMPS) Order #36 p.19/40.