

Colorado Implements Sweeping Changes to Wage and Hour Law Through COMPS Order #36

Article By:

Raul Chacon, Jr.

Michelle B. Muhleisen

Roger G. Trim

In 2020, as part of its annual wage order rulemaking, the Colorado Department of Labor and Employment's Division of Labor Standards and Statistics adopted [Colorado Overtime and Minimum Pay Standards \(COMPS\) Order #36](#), a measure that will bring sweeping change to the state's rules governing overtime, minimum wage, and working conditions standards. The COMPS Order was adopted in final form on January 22, 2020, and most of its provisions will become effective on March 16, 2020.

The COMPS Order replaces the Minimum Wage Orders previously issued by the division and represents some of the most significant changes to Colorado wage and hour law in two decades. The COMPS Order supplements requirements under the federal Fair Labor Standards Act (FLSA), and makes clear that whenever employers are subject to the COMPS Order as well as federal and/or local law, the law providing the greater protection to employees or setting the higher standard shall apply.

Expanded Coverage Applies to Most Colorado Employees

Beginning March 16, 2020, the COMPS Order presumptively applies to all Colorado workers, unless specifically exempted. Under the Minimum Wage Orders, only the following industries were covered: (A) retail and service; (B) commercial support service; (C) food and beverage; and (D) health and medical.

Instead of exempting employees by industry, as the Minimum Wage Orders had done previously, the COMPS Order predominately exempts from its coverage certain employees based on the type of work they perform. Certain salaried employees are exempt from most provisions of the COMPS Order, including administrative, executive, and professional employees, provided they are paid on a salary basis and their salaries meet the minimum threshold. The COMPS Order also largely exempts from its coverage, among others, certain outside salespersons, business owners or proprietors, taxicab drivers and interstate transport workers who cross state lines, in-residence workers, and

employees in highly technical computer-related occupations. In some cases, these exemptions are significantly narrower than their analogous exemptions under the FLSA. For example, under the federal Motor Carrier Act exemption to the FLSA's overtime provisions, certain drivers may be exempt so long as they could, in the regular course of employment, reasonably be expected to make an interstate journey. In contrast, the COMPS Order requires that such drivers actually cross state lines to qualify as exempt. Additionally, the COMPS Order exempts other specified employees from its provisions relating to minimum wage or overtime compensation.

New Minimum Salary Thresholds for Exemption From Overtime to Begin July 1, 2020

Effective July 1, 2020, the COMPS Order will establish a new minimum salary for certain “white collar” employees to qualify as exempt from portions of the COMPS Order, including its overtime provisions, applying to four exemptions: administrative employees, executives or supervisors, professional employees, and proprietors of nonprofit organizations. By July 1, 2024, the COMPS Order will impose a \$55,000 minimum salary threshold for an employee to qualify as exempt. The new minimum salary thresholds will be phased in over 4 1/2 years.

On July 1, 2020, the annualized salary for exempt employees will be set at \$35,568 (equal to the federal exemption salary under the FLSA). There are limited carve-outs for the increase in 2020 for nonprofit employers with annual total gross revenues of under \$50 million and for-profit employers with annual total gross revenue of under \$1 million.

After 2020, the salary threshold for exempt employees will apply to all employers and will rise to \$40,500 on January 1, 2021; \$45,000 on January 1, 2022; \$50,000 on January 1, 2023; and \$55,000 on January 1, 2024. Beginning in 2025, the minimum annualized salary for exempt employees will be indexed every January 1 by the Consumer Price Index.

Additional Changes Affecting Most Colorado Employers

The COMPS Order imposes a wide swath of additional requirements, not all of which will be applicable to every employer or employee. For example, some of the COMPS Order are applicable only to certain industries and categories of employees. However, a number of requirements imposed by the COMPS Order have broad applicability to most employers.

For example, the COMPS Order clarifies requirements with regard to meal and rest periods. Employers must still provide employees an unpaid and uninterrupted 30-minute meal period within a shift of over 5 hours. The COMPS Order specifies, however, that the meal period should not be, to the extent practicable, in the first or last hour of a shift.

Likewise, employees are also still afforded a 10-minute rest period every 4 hours or major fraction thereof. Notably, the COMPS Order requires an employer to “authorize and permit” the break, but does not require the employee to actually take the rest break authorized by the employer. An employer may not discourage an employee from taking a rest break where its policies otherwise authorize an employee to take a rest break. The COMPS Order also specifies that such rest periods, subject to certain limitations, can occur over the course of two five-minute rest periods with employee agreement.

In the event an employee is deprived of a rest period, the COMPS Order requires that the lost rest

time constitute time worked for which the employee has not been compensated and included in calculating minimum wages and overtime. Similarly, in the event an employee is required to perform any work during a 10-minute rest period, the entire rest break is deemed additional work that automatically requires 10 minutes of additional compensation. Moreover, the COMPS Order expressly states that there is no minimum claim size for an employee seeking recovery of unpaid wages, and it authorizes civil actions for recovery of any amount of wages or compensation for any violation. The COMPS Order also adopts specialized rules relating to rest periods for employees subject to a collective bargaining agreement or working in Medicaid-funded residential in-home services.

Additionally, the COMPS Order clarifies that employers must compensate employees for “time worked” in a manner that requires employers to pay employees for certain pre- and postliminary activities otherwise excluded by the FLSA as compensable time. For example, Colorado’s “time worked” definition in the COMPS Order does not incorporate federal law that excludes certain times for changing clothes or washing at the beginning or end of each workday. Additionally, the COMPS Order clarifies that certain time that may not be compensable under the federal Portal-to-Portal Act of 1947 is compensable under Colorado law, including, for example, security or safety screenings, donning and doffing required uniform or gear, remaining at the place of employment awaiting a decision on job assignments, and work-related meetings.

Further, the COMPS Order imposes new posting and distribution requirements on employers. Employers are required to physically post a COMPS Order poster unless such posting is impractical. In such cases, employers must provide a copy of the COMPS Order or poster to each employee within the first month of employment in addition to the prior requirement to make the poster available upon request. Employers that fail to comply with the posting requirements will be ineligible for employee-specific credits or exemptions. The COMPS Order also requires that employers that publish or distribute handbooks, manuals, or other written or posted policies include a copy of the COMPS Order or a COMPS Order poster with any such handbook, manual, or policy, and have the employee sign an acknowledgment of receipt of the COMPS Order or poster.

Compliance Considerations for Employers

The COMPS Order represents a significant change to pay practices and working standards affecting employers, and may affect employers that were never previously subject to the Minimum Wage Orders. Most employers in Colorado will be subject to the COMPS Order. Employers may want to determine whether the COMPS Order applies to them, and if so, to which employees. Employers may also need to adjust practices relating to pay, overtime, overtime exemption classifications, and working standards. The COMPS Order also imposes burdens on employers beyond those otherwise required by federal law, and employers in full compliance with the FLSA may need to take steps to comply with applicable state and local laws. Employers may want to begin preparing in advance of the March 16, 2020, and July 1, 2020, effective dates of the COMPS Order and keep apprised of any future developments.

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