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Colorado Moves the Goalposts Again on White-Collar Exemptions

Article By:

Michael H. Bell

In November 2020, the Colorado Department of Labor and Employment (CDLE) adopted Colorado Overtime and Minimum Pay Standards Order (COMPS) #37, which went into effect on January 1, 2021. COMPS #37, like its predecessor orders, outlined the requirements for employees to qualify for exemption from Colorado's overtime and minimum wage requirements. Among other things, COMPS #37 clarified a point that employers had long struggled with: Colorado's requirement that an employee "directly serve[]" an "executive" to qualify for the administrative exemption.

Rule 2.2.1 of COMPS #37 changed the relevant exemptive language from "*the* executive" to "*an* executive" [emphasis added], making it clear that an employee need not serve the ultimate executive to qualify for the administrative exemption, so long as both the employee and the executive he or she serves (1) "regularly exercise independent judgment and discretion in matters of significance" and (2) have "a primary duty that is non-manual in nature and directly related to management policies or general business operations."

This revision, in effect, allowed many employers to rest easy in the knowledge that their exemptions were sound for administrative employees serving any "executives," not just company presidents or chief executive officers. Logically, many employers looked to the *very next rule* in COMPS #37—Rule 2.2.2—for guidance as to the definition of "executive," which (unchanged from prior orders) provides that the "executive" exemption covers salaried employees who supervise the work of at least two full-time employees (with at least 50 percent of the executive's time devoted to supervisory duties) and have authority to hire and fire, or at least recommend such action.

Unfortunately, this reliance may have been misplaced. On July 12, 2021, the CDLE published Interpretive Notice and Formal Opinion (INFO) #1A, purporting to clarify that

while Rule 2.2.2 defines "executive" for exemption purposes to include low- to mid-level managers supervising two or more employees … such lower-level managers are not the sorts of higher-level executives that the Rule 2.2.1 "administrative" exemption envisions. Consequently, an administrative employee who "directly serves" lower-level managers would not qualify for exemption.

This new interpretation creates a gray area as deep as the Black Canyon of the Gunnison. Though the interpretation gives employers some basis to be reasonably confident that C-suite executives will

be able to support the administrative exemption for their direct reports, below the C-suite level, such exemptions may be at risk.

The CDLE also takes the position in INFO #1A that, unlike the corresponding federal administrative exemption, the duties of consulting with an employer's customers or clients as to *their* management or business operations are not exempt administrative duties. As with the guidance's new definition of "executive," there is nothing in COMPS #37 that specifically provides for such a distinction. Instead, the CDLE appears to rely heavily on its deletion from COMPS #37 of an incorporation by reference of the Fair Labor Standards Act (FLSA) and the agency's addition of language stating that the COMPS provisions govern in all respects, regardless of any analogous statutes.

Curiously, while INFO #1A evinces a robust effort to tighten the administrative exemption, it appears to relax some requirements for the executive exemption. Specifically, it provides that COMPS #37's requirement that a manager "supervise[] the work of at least two full-time employees" may be satisfied by the supervision of the *equivalent* of two full-time employees, such that "an employee who supervises four employees each working 20 hours per week meets this requirement." This clarification aligns with FLSA regulations (INFO #1A even cites the relevant U.S. Department of Labor (DOL] fact sheet), which is a surprising approach given the CDLE's efforts elsewhere to distance its COMPS interpretation from that of its federal counterpart. The potential effect of these clarifications is even stranger, as a low-level manager entrusted with little authority beyond supervising a few part-time workers would likely be exempt under the executive exemption, while a sophisticated advisor to a regional director, entrusted with robust authority to advise clients regarding their business operations, might fall short of the requirements of the administrative exemption.

Lastly, the new guidance contained in INFO #1A provides at least one troubling example of how to administer the exemptions that could lead employers astray. Specifically, the guidance suggests that a restaurant's head chef might qualify under the executive exemption some of the time, but "if the chef's duties varied, and in some weeks they just cooked, with little interaction with subordinate employees … the head chef *would not qualify as an exempt supervisor in those weeks*." (Emphasis added.)

It is strange that the CDLE would cite as authority for this proposition a 2019 Colorado Division of Labor Standards and Statistics hearing officer decision that actually found such a head chef *to be exempt*. Further, the guidance appears to encourage employers to engage in week-by-week evaluations of whether employees' duties satisfy their exemptions, and, potentially, pay them as exempt one week and nonexempt the next. While conducting regular audits of exempt positions may be sound practice, flip-flopping between exempt and nonexempt treatment might prove impractical and jeopardize an otherwise sound exemption.

In summary, INFO #1A represents yet another compliance challenge for employers in the Centennial State and an excellent reason to take a hard look at whether employees satisfy these demanding standards.

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