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The Nitty Gritty on COMPS Order #36: Just How Rockier Is It for Colorado Employers?

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Existing Colorado Wage & Hour Law

“Nil Sine Numine.”

(Nothing without providence)

-Colorado motto

Colorado Wage Act – C.R.S. 8-4-101 *et seq.*

- 80 years old.
- Statutory and regulatory – regs set forth in “Minimum Wage Orders”
- Minimum wage, overtime rules, breaks, and recordkeeping requirements all in Minimum Wage Orders
- Up until March 16, 2020, only applied to 4 industries.

What's Changed?

01

Removes ban on localities setting minimum wage higher than Colorado state minimum

02

Eliminates industry focus (i.e., minimum wage, overtime, exemptions, meal and rest break, and recordkeeping regs apply to **all** employers)

03

Raises salary minimum for exempt employees

04

Must pay for missed rest breaks

05

Arguably broader definition of “time worked.”

COMPS 36 Overtime Requirements for Non-Exempt Employees

- Requires 1.5x regular rate of pay for:
 - More than 12 hours in a workday;
 - 12 consecutive hours (even if those cross over “workday” as defined by employer);
or
 - 40 hours per workweek, ***whichever measure pays the most.***



COMPS 36 Overtime Exemptions – New Salary Requirements



- Salary level will exceed federal minimum by January 2021.
–\$778.85 per week
- 4 year phase in to get to \$1,057.69 per week in Jan. 2024; annual CPI adjustment each subsequent year
- Salary basis requirement now an express requirement

COMPS 36 Overtime Exemptions – Other New Pay Requirements

- Computer employee exemption can be paid salary or hourly under FLSA and Colorado
 - Presently \$27.63 per hour under both
- But as of 2021, Colorado may have higher threshold because will be CPI-adjusted annually

White-Collar Overtime Exemptions – Duties Requirement

- Administrative – directly serve?
- Executive – 50% supervision
- Outside Sales – 80%
- No more *Encino* – Colorado exemptions construed narrowly, against exemption, not given “fair reading” as in FLSA
- Learned Professionals
- What about creative professional?
- Computer Employees – 50%

More Exemptions

- Owners
 - those who own 20% or more of an employer who are actively engaged in management.
- Interstate transport workers and government-regulated taxi drivers
- In-residence workers
- Volunteers
- Elected Officials

COMPS 36 Meal and Rest Breaks

- Uninterrupted, completely duty free meal breaks of at least 30 minutes for 5+ hour shifts.
- 10 minute rest breaks for each 4 hour shift, or major fraction of a 4 hour block.
- **New** in COMPS 36: failure to authorize and permit rest breaks = failure to pay wages.

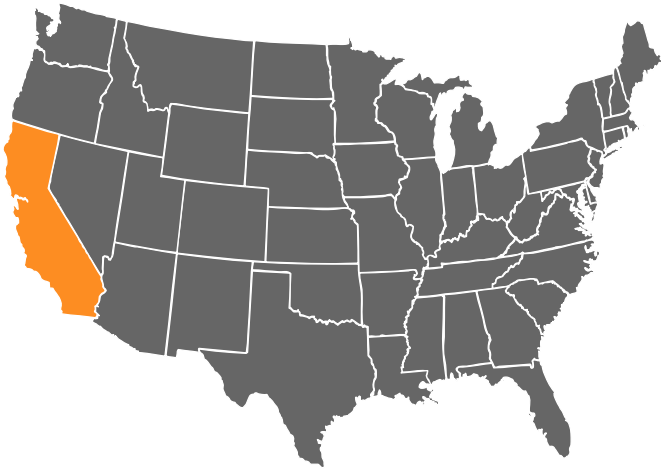


Rest Break Redux



- Some flexibility – 10 minute requirement can be split in half (2-5 minute breaks given) if employee agrees w/o coercion.
- CBAs can specify any split so long as breaks total 10 min per 4 hours worked, and employee gets at least 5 minutes of rest every 4 hours.
- Even if less than 10 mins, authorize and permit applies and must pay additional for already-paid rest break time if employee says could not take

Is New Rest Break Rule the Colorado Equivalent of California's *Brinker* Standard?



- Short answer – Yes.
- “If an employer asserts that an employee had permission to take a rest period, but in reality the employee was discouraged or unable to do so, then the employer has not “authorize[d] and permit[ted]” the required rest periods. This rejection of a narrow, formalistic interpretation of “authorize and permit” gives meaning to both “permit” and “authorize”: “authorize” is the formal permission to take a break, but “permitting” means that, given the realities of the workplace, the employee actually was able to take a break without repercussion. A handbook, policy, or employee schedule is not dispositive evidence that a break was authorized or permitted, if the employee produces evidence that the realities of the workplace created pressure to forego or practical obstacles to the employee’s ability to take a break.”

Compensable Worktime



- “All time performing labor or services for an employer’s benefit.”
- Includes time employers require or permit employees on premises, on duty, or at workstations.
- COMPS 36 expressly rejects Portal-to-Portal

Compensable time includes:



- Doffing and donning required work clothes.
- At work awaiting assignment or when to begin.
- Receiving/sharing work-related information.
- Clean-up.
- Security and safety screenings.
- Clocking in and out.
- Waiting for any of the above.

No De Minimis Exception



- De minimis says employers may disregard infrequent and insignificant periods of time beyond the scheduled working hours, which cannot as a practical matter be precisely recorded for payroll purposes.
- COMPS 36 says the exception has no basis in and does not apply to Colorado law for 4 reasons:
 - No Colorado analog to 29 C.F.R. § 785.47.
 - Colorado law requires payment of “all” wages.
 - Modern technology enables capture of the “split-second absurdities” original de minimis rule was meant to preclude.
 - Liberal construction required resolves any ambiguity in favor of paying wages.

Deductions and Credits

- Lodging credits allowed
- Meal credits allowed
- Uniforms – employers must pay for if they are particular or special
- Tip credits – no more than \$3.02/hour offset.

New Posting Requirements

- Rule 7.4.1 of COMPS 36 says a 1 page poster must be posted in worksites.
- Distribution of the poster is required when:
 - posting is not practicable (e.g. remote workers with Colorado home offices)
 - whenever a handbook, manual, other posted policies, or an acknowledgment of a handbook, manual, or policy is distributed.
 - no need to distribute poster when COMPS 36 goes into effect. **Do** distribute if handbook or manual is updated and employees are asked to acknowledge.
 - unclear if e-distribution suffices.
- Rule 2.2 says exempted positions are not subject to recordkeeping and posting requirements.

Statute of Limitations?



- Unclear
- Rule 8.2 of COMPS 36 provides that a complaint must be “registered” with the Division within 2 years of the violation, except that willful actions may be brought within 3 years after the action.
 - All prior wage orders said the same.
- *But see Sobolewski v. Boselli & Sons, LLC*, 342 F. Supp. 3d 1178 (D. Colo. 2018), which suggests 6-year statute of limitations for private right of action

**thank
you**

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