

L&E Live

Colorado Wage & Hour Traps for the Unwary

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New Era of Colorado Wage & Hour Law

- **Colorado's Wage Theft Law**
(effective January 1, 2020)
 - **Equal Pay for Equal Work Act**
(effective January 1, 2021)
 - **COMPS Orders**
(#36 effective March 16, 2020; #37 effective January 1, 2021)
- ****Healthy Families and Workplaces Act******
(Effective July 15, 2020 and January 1, 2021)

Colorado's Wage Theft Law

Colorado's Wage Theft Law

- An employer who willfully refuses to pay wages or compensation, or falsely denies the amount of wages owed, commits theft as defined in 18-4-401 (a.k.a. **felony theft or larceny**)



Wage Theft in All its Forms...

- Since April 2017, more than 1,100 Colorado businesses have been cited for wage-theft according to the CDLE
 - Underpay
 - Unauthorized payroll deduction (uniforms, meals, etc.)
 - Miscalculating time (travel time, breaks, etc.)
 - No pay
 - Minimum wage
 - Overtime
 - Properly calculated?
 - Salary threshold for certain exempt employees
 - Paid Sick Leave
 - Misclassify employees
 - “Independent contractors”
 - Exempt vs. Non-exempt



Who is Protected?

- **Any person** performing labor or services **for the benefit** of an employer in which the **employer may command** when, where, and how much labor or services are performed or who performs work that **is an integral part of the employer's business**.
- Only an individual **primarily free from control and direction** in the performance of service, both under contract and in fact, and who is customarily engaged in an independent trade, occupation, profession or business **related to the service performed** is not covered.

Who is Liable?



- Any person, including any officer, agent, or employee of an entity acting directly or indirectly in the interest of an employer in relation to an employee
 - Most public sector employers not covered

Individual liability!!!

What Can Get You in Trouble?

- Willfully refusing to pay wages or compensation
- Falsely denying the amount of a wage claim or the validity thereof or that the same is due
 - With intent to secure for self or another person any discount upon amount owed, or
 - With intent to annoy, harass, oppress, hinder, coerce, delay or defraud the person to whom such wages are due
- Willfully paying or causing to be paid a wage less than minimum wage

What if You Get it Wrong?

- \$2,000 or higher = Felony
- One (1) to twenty-four (24) years in **prison; and/or**
 - Possibility of probation as an alternative to prison
- A **fine** between \$1,000 to \$1,000,000; **and restitution** to the victim

- Less than \$2,000 = Misdemeanor
 - Fines between \$50 and \$5,000
 - Possibility of up to 18 months in jail
 - Restitution

- Repeat offender = Increased punishment

Colorado's Equal Pay for Equal Work Act

EPEW Act

- An employer shall not discriminate between employees on the basis of sex **by paying** an employee of one sex less than the rate paid to an employee of a different sex for **substantially similar work**.



No “Get Out of Jail Free” Card...

- **NOT** “any factor other than sex.”
- **MUST** show because of:
 - Seniority system;
 - Merit system;
 - System that measures earnings by quantity or quality of production;
 - Geographic location where the work is performed;
 - Education, training or experience to the extent that they are reasonably related to the work in question; or
 - Travel, if travel is a regular and necessary condition of the work performed.



Strict Construction of the Factors...

- Each factor must be applied **reasonably**
- Each factor relied on must account for the **entire** wage rate differential
- Must **show** that **prior wage history** was not relied on to justify a disparity in current wage rates.

A Whole New “No-no” List

- Cannot:
 - Seek or rely on the **wage rate history** of a prospective employee;
 - Discipline an employee for invoking rights **on behalf of anyone**;
 - Discharge, discipline, discriminate against, coerce, threaten, or interfere with an employee or other person because the employee or person **inquired about, disclosed, compared, or otherwise discussed wage rates**;
 - Require an employee to **waive the right** to disclose wage rate information.

And a Whole New “To Do” List

- Must:
 - Post **all** promotions
 - To **all** current employees...
 - Post **all** openings
 - Include compensation **and** benefits information
 - Keep more records, longer
 - Job descriptions and wage rate history
 - Employment, plus two years



When You Get it Wrong...

- Up to three years' worth of this back pay
 - Amount employee would have received had there been no discrimination vs. amount employer actually paid
- Liquidated damages in an amount equal to economic damages
- Other legal and equitable relief, including reinstatement, promotion, pay increase, etc.
- Attorney fees and reasonable costs

Colorado Overtime & Minimum Pay Standards Order

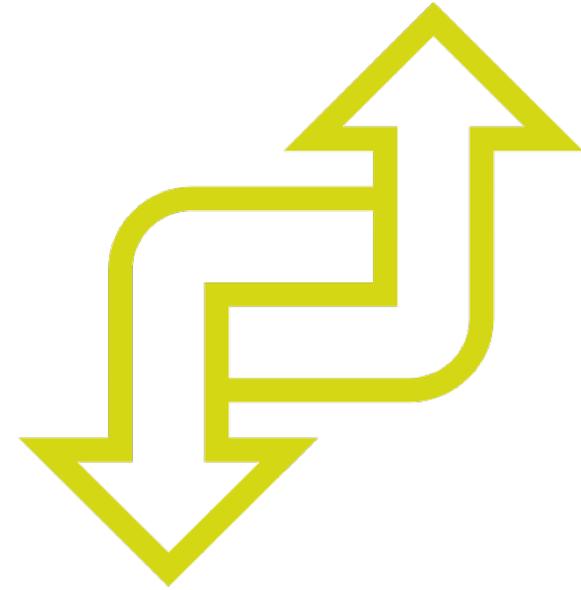
COMPS Order

Wage Order 35 → COMPS #36

1. Expanded coverage
2. Broad definitions
3. New mandates

COMPS #36 → COMPS #37

- Few substantive revisions



Expanded Coverage

Wage Order #35 (the law through March 16, 2020)

- Only applicable to 4 industries
 - Retail & Service
 - Food & Beverage
 - Commercial Support Service
 - Health & Medical

COMPS Order #36 (and #37)

- Covers **all** employees unless specifically excluded

Still Some Exemptions...

- **Exempted** employees:
 - Outside salespersons
 - Owners or proprietors
 - Interstate transportation
 - In residence workers
 - Etc.
- Exempted **if salary threshold** is met
 - Administrative, Executive, Professional (including creative professionals)
 - Highly technical computer-related occupations*
- Agriculture exemption



Salary Threshold

Date	Weekly Overtime-Exempt Salary (& Rounded Annual Equivalent)
July 1, 2020	\$684.00 per week (\$35,568 per year)
January 1, 2021	\$778.85 per week (\$40,500 per year)
January 1, 2022	\$865.38 per week (\$45,000 per year)
January 1, 2023	\$961.54 per week (\$50,000 per year)
January 1, 2024	\$1,057.69 per week (\$55,000 per year)
January 1, 2025	The 2024 salary adjusted by the same CPI as the Colorado Minimum Wage

Exempt Duties + **Sufficient Salary***

Exempt From Overtime Only

- Certain salespersons and mechanics
- Commission sales
- Ski industry
- Medical transportation
- Eight and Eighty Rule

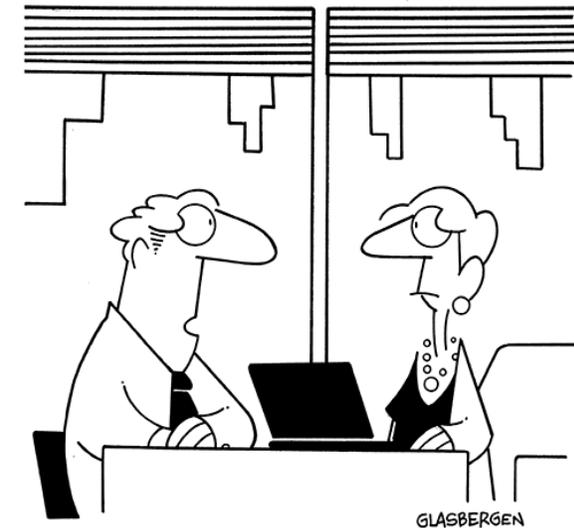


Broad Definitions

- “Time worked . . . employee is performing labor or services for the benefit of an employer, including all time s/he is suffered or permitted to work, whether or not required to do so.”
 - Donning and doffing
 - Receiving or sharing work-related information
 - Security or safety screening
 - Remaining at the place of employment awaiting a decision on job assignment or to begin work
 - Clean-up or other “off-the-clock” work

Travel Time

- New Travel Time provision
 - Travel time is “time worked” and generally includes any time spent on travel for the benefit of an employer, excluding normal home to work travel



“If my job takes me to Hell and back every day, don’t I deserve a travel allowance?”

(Not So) New Mandates - Overtime

- Employees shall be paid time and one-half of the regular rate of pay for any work in excess of:
 - 40 hours per workweek;
 - 12 hours per workday; or
 - 12 consecutive hours without regard to the start and end time of the workday.

New Mandates - Rest Breaks

Work Hours	Rest Periods
2 or fewer	0
2-6	1
6-10	2
10-14	3
14-18	4
18-22	5
22+	6

Every employer shall authorize and permit a compensated 10-minute rest period for each 4 hours of work:

- **Narrow** exceptions (generally by written agreement)
- Rest periods in the middle of each 4 hour work period
- Rest periods = compensable work time
- Work during a rest period is additional work for which additional pay is not provided a/k/a failure to pay 10 minutes of wages

New Mandates – Meal Periods

- Employees shall be entitled to an uninterrupted and duty-free meal period of at least 30-minute duration when the shift exceeds 5 consecutive hours
 - At least 1 hour after start and 1 hour before end of shift
 - Completely relieved of all duties and permitted to pursue personal activities
 - When circumstances make an uninterrupted meal period impractical, employee shall be permitted to consume an on-duty meal while performing duties
 - If on-duty meal, must be meal of their choice and must be fully compensated for the on-duty meal period without any loss of time or compensation

New Mandates - Uniforms

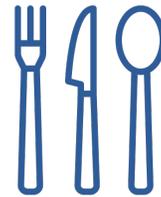
- **Uniforms:**
 - No security deposit for uniform
 - If particular uniform is a condition of employment, the employer must pay the cost of purchase, maintenance, and cleaning except if the uniform is plain and washable without special care
 - The cost of ordinary wear and tear should not be deducted
 - **PPE:** Keep in mind the PHEW

New Mandates - Credits



Lodging Credit

- Pick the Smallest:
 - The employer's cost;
 - The fair market value; or
 - \$25/week in shared residence, dorm, or hotel, or \$100/week for private apartment or house



Meal Credit

- Reasonable cost or fair market value
- No profit permitted
- Acceptance must be voluntary and "uncoerced"



Tip Credit

- Tip credit cannot exceed \$3.02
- Limits on tip pooling if you take the credit

New Mandates - Posting

Noncompliant posting?  No exemptions or credits!

- **Posting:** If physical posting is impracticable, then employer shall provide a copy to each employee within her first month of employment and each time it is requested
- **Distribution:** Must be distributed with handbooks, manuals, and policies
- **Translation:** 1 or more employees with limited English language skills?
 - Contact Division and request poster in relevant language.

Other Miscellaneous but Important Requirements

- Minimum wage
- Earning statement
- Recordkeeping



COLORADO
Department of
Labor and Employment

COMPS Order #36 Poster
Colorado Overtime and Minimum Pay Standards Order
Division of Labor Standards & Statistics

Colorado Minimum Wage: \$12.00 per hour, or \$8.98 for Tipped Employees, effective 1/1/2020.

- The minimum wage adjusts annually by inflation; next year's COMPS Order and Poster will provide the 2021 minimum wage.
- The minimum wage applies to all adults and emancipated minors, whether paid hourly or other basis (salary, commission, piecework, etc.), unless exempted by COMPS Order Rule 2. Unemancipated minors may be paid 15% below the minimum.
- The federal minimum wage (\$7.25) and any local minimum wages (including \$12.85 in Denver as of 1/1/20) may also apply. If work is covered by multiple minimum or overtime wage rules, the one with the higher wage or standard applies.

Overtime: 1½ times the regular pay rate for hours over 40 weekly, 12 daily, or 12 consecutive.

- Hours in two or more weeks cannot be averaged in computing overtime.
- Employers may not provide time off (often called "comp time") instead of time-and-a-half premium pay for overtime hours.

Meal Periods: 30 minutes uninterrupted and duty-free, for shifts over 5 hours.

- Employees must be completely relieved of all duties, and allowed to pursue personal activities, for meal periods to be unpaid.
- If work makes uninterrupted meal periods impractical, using an on-duty meal must be permitted, and the time must be paid.
- To the extent practical, meal periods must be at least 1 hour after starting and 1 hour before ending shifts.

Rest Periods: 10 minutes, paid, every 4 hours.

Work Hours:	Up to 2	>2, up to 4	>4, up to 6	>6, up to 8	>8, up to 10	>10, up to 12	>12, up to 14	>14, up to 16	>16, up to 18	>18, up to 20	>20, up to 22	>22
# Rest Periods:	0	1	2	3	4	5	6	7	8	9	10	11

- Rest periods need not be off-site but must not include work and should be in the middle of the 4 hours to the extent practical.
- Two 5-minute rest periods, instead of one 10-minute, are permitted if employees and employer agree voluntarily and without coercion, and if 5 minutes is enough to go back and forth to a bathroom or other place where a genuine break would be taken. Additional flexibility with 5-minute periods applies to agriculture, Medicaid home care, and collectively bargained work.
- Employees that do not authorize and permit rest periods must pay extra for the work time that would have been rest periods.

Time Worked: Time employers allow for performance of labor/services for their benefit must be paid.

- All time on-premises, on duty, or at prescribed workplaces (but not just letting off-duty employees be on-premises), including:
 - putting on or removing work clothes/gear (but not clothes worn outside work), clean/strip, or other off-the-clock duty;
 - meeting assignments at work, or receiving or sharing work-related information; or security/safety screening, clock-in/checking in or out; or
 - waiting for any of the above tasks.
- Travel for employer benefit in time worked; normal home/work travel is not.
- For more on travel time and duty time, see Rule 1.9.2.

Deductions, Credits, & Charges from Wages: Subject to limits in C.R.S. 8-4-105 and below.

- Tip credits of up to \$3.02 per hour (lowering minimum wages to \$8.98) are allowed for those regularly, customarily receiving over \$30 per month in tips. If hourly pay plus tips is below the full minimum wage, the employer must pay the difference.
- Meal credits are allowed for the cost or value (whichever employer profits) of a voluntarily accepted meal.
- Lodging deductions are allowed only if housing is voluntarily accepted by the employee, primarily for the employer's (not employer's) benefit, recorded in writing, and limited to \$25 or \$100 per week (depending on the housing type).
- Uniforms that are ordinary clothes, without special material or design, need not be provided; other uniforms must be provided at no cost. Employers must pay for any special cleaning required, and cannot require deposits or deduct for ordinary wear and tear.

Exemptions from the COMPS Order: All listed in Rule 2; key exemptions listed below.

- Executive/supervisors, decision-making administrative employees, and professionals (Rule 2.2.1-3) paid the exempt salary:

Salary through 6/30	7/30 - 12/31	2021	2022	2023	2024	Each Year After 2024
Equal to at least minimum wage for all hours	\$35,568	\$40,500	\$45,000	\$50,000	\$55,000	Prior year's salary, inflation-adjusted

- 20% owners, or at a non-profit the highest-paid highest-ranked employee, if actively engaged in management (2.2.5).
- Highly technical computer-related employees (defined in 2.2.10), if paid at least \$27.63 per hour.
- Various non-residence workers, including property managers, range work ers, and campus/dorm education field staff (2.2.7).
- Various, but not all, types of salespersons (2.2.4, 2.4.1, 2.4.2) and transportation workers (2.2.6).
- Certain medical transportation and hospital/nursing home employees have modified overtime rules (2.4.4, 2.4.5).
- Downhill ski/lift/board employees, including on-mountain food but not lodging, are exempt from 40-hour overtime (2.4.3).
- Agriculture jobs are exempt from overtime and meal periods, and have more flexibility as to rest periods (2.3).

Complaint & Anti-Retaliation Rights.

- The Division of Labor Standards and Statistics (contacted info at the bottom of this Poster) accepts complaints for unpaid minimum or overtime wages required by federal, state, or local law. Alternatively, employees may file lawsuits in court.
- Parties liable for unpaid wages include the employer, an entity, and individuals with operational control over the entity.
- Employees cannot retaliate by threatening, coercing, or discriminating for purposes of reprisal, interference, or obstruction, as to actual or anticipated wage investigations, hearings, complaints, or proceedings.
- Violations of wage or anti-retaliation provisions may be reported to the Division as complaints or as anonymous tips.

Posting & Translation of COMPS Order Poster.

- Posting: Employers must display this Poster where employees can easily read it during the workday. If physical posting is impractical, employers must provide copies of this Poster or the COMPS Order to each employee in the first month of work.
- Distribution: Employers must provide this Poster upon request, and include a copy with any written handbook or policies.
- Translation: If employees have limited English language ability and speak Spanish, employees must post this Poster in Spanish. If employees speak a language other than Spanish, the employer must ask the Division for a Poster in that language.

This Poster summarizes key wage rules in the COMPS Order, but not all, and should not be relied upon as complete information on wage rules. For the full COMPS Order and other wage law information, or with wage law questions, contact: Division of Labor Standards and Statistics, coloradolaborlaw.gov, cdle_labur_standards@state.co.us, 303-318-8441 / 888-390-7936.

Effective March 16, 2020

When You Get it Wrong...

- Employee may recover wages, attorney fees, and court costs
- Employee may pursue complaint through Division's administrative procedure (Colorado Wage Act)
- Division has authority to investigate
- Prohibition against reprisals
- Criminal charges

Healthy Families and Workplaces Act

Healthy Families and Workplaces Act

- Some provisions effective now, others become effective January 1, 2021
 - For now, comply with FFCRA/EPSLA
 - January 1, 2021, Colorado-based employees earn 1 hour of paid sick leave (“PSL”) for every 30 hours worked, up to 48 hours per year
 - Unless it’s a public health emergency (“PHE”)
- **PSL will be considered wages under COMPS 37**



PSL During a Public Health Emergency

- When a PHE is declared, each employer must add to each Colorado-based employee's accrued PSL enough time to ensure that the employee may take 2 weeks of PSL during the emergency.
- Additional permitted uses during a PHE
 - Self-isolation because employee has symptoms or diagnosis
 - Employee seeks preventative care
 - Employee needs to seek care for family member
 - The employer, or a local, state, or federal health official determines employee's presence on the job would jeopardize the health of others
 - Employee needs to care for child or family member when provider is unavailable
 - Employee is unable to work because employee's own health condition increases susceptibility or risk
 - Employee needs to care for a family member (under certain circumstances)

PSL Use

- Employee illness, injury, or health condition prevents the employee from working
- Employee seeks medical diagnosis, care, or treatment
- Employee must care for a family member who has a physical or mental illness, injury, or needs to obtain medical care



PSL Use

- Employee or a family member has been the victim of domestic abuse, sexual assault, criminal harassment and needs medical attention or counseling, or needs to relocate or seek legal services as a result of the abuse or assault, etc.
- Due to a PHE, a public health official has ordered closure of the employee's place of business or the school or daycare of the employee's child and the employee must care for the child

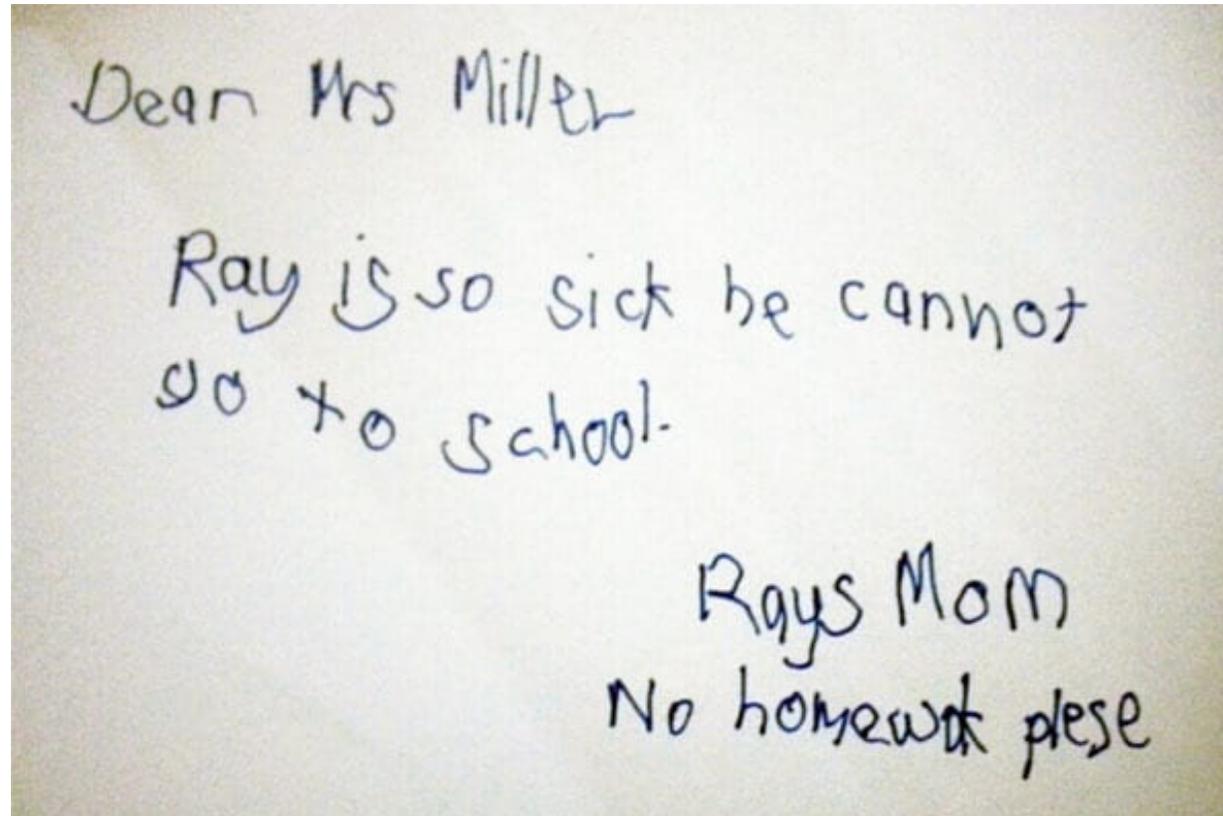
Safe Harbor

- Existing policy may be sufficient
 - *All* reasons covered
 - At least 48 hours of leave accrued at 1 hour per 30 hours worked
 - Increments equal to (or smaller than) 1 hour
- Employer may enact reasonable policy requirements, but employee's failure to comply with policy may not serve as a basis to deny employee's use of PSL

HFWA Requirements

- Employers must notify employees of right to PSL
- Posting
- Recordkeeping
- No requirement to pay out accrued PSL upon termination of employment
- Rehire within 6 months of separation?
 - Employer must reinstate the employee's bank of accrued but unused paid sick leave
- PSL days cannot be counted as absences leading toward discipline, discharge, demotion etc.
- No waiver of HFWA rights

Documentation?

A photograph of a handwritten note on a piece of paper. The text is written in blue ink and reads: "Dear Mrs Miller", "Ray is so sick he cannot", "go to school.", "Rays Mom", and "No homework please".

Dear Mrs Miller

Ray is so sick he cannot
go to school.

Rays Mom
No homework please

When You Get it Wrong...

- Employee must submit a complaint to the CDLE or make a written demand to the employer
 - The employer has 14 days to respond
 - CDLE will investigate and make a determination
- Employee may file civil action in Colorado state district court within 2 years of alleged violation
 - Reinstatement, promotion, payment of lost wages, liquidated damages, reasonable costs and attorney fees

Questions?

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