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CDLE Proposes New Rules: PTO, Use It or Lose It, and Overtime Exemptions

The Colorado Department of Labor approved the COMPS Rule 38, 2022 Publication And Yearly Calculation of Adjusted Labor Compensation (2022 PAY CALC) Order, 7 CCR 1103-14 and Wage Protection Rules, 7 CCR 1103-7.

The Colorado Department of Labor and Employment (CDLE) has proposed new rules to Colorado's ever-changing laws on overtime, minimum wage, and vacation requirements. As with other changes to Colorado employment law in recent years, this year's proposed changes will be significant if implemented. The proposed rules and more information on the comment period can be found [here](#).

Wage Protection Rules (7 CCR 1103-7)

The most consequential proposed change is to Colorado's Wage Protection Rules following the Colorado Supreme Court's significant decision earlier this year: *Nieto v. Clark's Market, Inc.* In *Nieto*, the Court held that "use-it-or-lose-it" vacation policies were prohibited and that all "earned" and "determinable" vacation pay must be paid at the end of an employment relationship regardless of any purported forfeiture agreement. Even before *Nieto*, the Colorado Wage Protection Act made it clear that employers must pay out unused and accrued vacation time at the end of employment. But the CDLE had informally advised that because paid time off (PTO) was a combination of vacation, sick leave, holidays, and personal days, PTO was not required to be paid out upon separation. Following *Nieto*, however, employers knew that the applicability of that informal advice was likely short lived.

The proposed Wage Protection Rules will define vacation pay as “pay for leave, regardless of its label, that is usable at the employee’s discretion (other than procedural requirements such as notice and approval of particular dates), rather than leave usable only upon occurrence of a qualifying event (for example, a medical need, caretaking requirement, bereavement, or holiday).” Assuming this proposed rule goes into effect, it would seem to capture most employers’ use of PTO which, by design, is almost always used at an employee’s discretion.

The proposed rules do not further define “qualifying event,” and the CDLE provides employers little guidance on how to distinguish between discretionary and non-discretionary leave. What is clear, however, is that the intent of the new rule is to subject standard PTO to *Nieto’s* “use-it-or-lose-it” prohibition. Employers who want to avoid having to account for and pay out significant accrued vacation or PTO should consider imposing accrual caps or switching to a flexible leave policy.

The rulemaking is currently in process, and a final rule should be issued before year end.

COMPS Order #38

The CDLE also proposed its Colorado Overtime and Minimum Pay Standards Order #38 (COMPS Order #38), which serves as the annual update to Colorado’s regulations governing minimum wage and hour standards, replacing the current COMPS Order #37, on January 1, 2022.

The proposed rules create significant new exceptions and exemptions to the current COMPS Order. Most notably, this includes a new overtime exemption for “highly compensated employees.” For years, Colorado has declined to adopt this exemption which the federal Fair Labor Standards Act (FLSA) recognizes. Colorado’s omission of this exemption created uncertainty about compliance with state law. Under COMPS Order #38, the highly compensated employee exemption applies to employees (1) who are paid on a salary basis of at least \$101,250 annually and at least \$865.38 per week; (2) who customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee; and (3) whose primary duty is office or non-manual work. Colorado’s salary threshold is slightly lower than the FLSA (\$101,250 compared to \$107,432 in the FLSA). This should be a welcome addition for Colorado employers who can now utilize this exemption for both state and FLSA purposes.

In light of the recent agricultural law passed by the General Assembly, COMPS Order #38 also establishes a minimum wage of \$12.56 per hour in 2022 for agricultural workers, with “range workers” still exempted. COMPS Order #38 further requires employers to pay agricultural employees overtime pay beginning November 2022.

Other changes in COMPS Order #38 include (1) a new minimum wage and overtime exemption for temporary employees employed for the annual National Western Stock Show; (2) a new overtime

exemption for “direct support professionals/direct care workers” meeting certain criteria; (3) a new method for calculating the regular wage rate for employees who work two or more non-exempt jobs at different hourly pay rates for the same employer; and (4) the proposed adoption of a new Publication And Yearly Calculation of Adjusted Labor Compensation Order (PAY CALC Order). The proposed 2022 PAY CALC Order provides a consolidated list of periodically-adjusted rates for minimum wage, minimum pay, and income levels for exemptions under the COMPS Order.

Employers should watch to determine when and if the rules become final.

Contact us

If you have questions about the new rules regarding vacation, overtime, and minimum pay in Colorado or a related issue in the changing labor and employment landscape, please contact Barb Grandjean, Ashley Jordaan, Chris Ottele, Sonia Anderson, Shawna Ruetz, Owen Davis or your Husch Blackwell attorney.