

CLINE WILLIAMS

CHANGES TO THE LAW: IMPORTANT CONSIDERATIONS FOR EMPLOYERS WITH COLORADO EMPLOYEES

The Colorado legislature has been busy at work implementing new labor and employment laws. Some of these laws have gone into effect and will continue to evolve in 2021, and some go into effect on January 1, 2021. Employers with Colorado employees must be aware of these new laws as they may significantly impact operations and may require policy modification or other compliance strategies.

A. New Colorado Wage Laws for 2020 and 2021 – Colorado Overtime and Minimum Pay Standards (COMPS) Orders #36 and #37

Colorado implemented two new wage laws over the past year that have significant ramifications for employers in the state. COMPS Order #36 is the currently-effective state wage and hour law for employers in Colorado and includes significant new wage rights and responsibilities beyond those contained in federal law. The second, COMPS Order #37, goes into effect on January 1, 2021, and includes additional important changes of which employers should be aware.

1. COMPS Order #36

The Colorado Department of Labor and Employment (CDLE) adopted COMPS Order #36 in early 2020, which implemented multiple significant changes to wage law across the board. One of its two greatest changes is its expanded scope of coverage for Colorado's wage and hour laws. Prior to COMPS Order #36, Colorado's applicable wage and hour laws applied to only four industries: (1) retail and service; (2) food and beverage; (3) commercial support services; and (4) health and medical. COMPS Order #36 expands the scope of Colorado's wage and hour laws to cover all private industry employers unless explicitly exempted. This means that, as of COMPS Order #36's effective date, a large number of Colorado employers who were previously unaffected by Colorado's overtime, wage and hour, meal period, and rest break laws must now comply with state law on those issues, among others.

COMPS Order #36's second substantial change is an increase in the salary threshold for employees to be exempt from Colorado wage and hour law. Beginning January 1, 2021, the salary threshold established by COMPS Order #36 will significantly exceed the federal salary threshold for exempt employees established by the Fair Labor Standards Act (FLSA):

NEW SALARY THRESHOLDS ESTABLISHED BY COMPS ORDER #36					
Effective Date:	7/1/2020	1/1/2021	1/1/2022	1/1/2023	1/1/2024
Salary Threshold:	\$35,568/year \$684/week	\$40,500/year \$778.85/week	\$45,000/year \$865.38/week	\$50,000/year \$961.54/week	\$55,000/year \$1,057.69/week

Beginning January 1, 2025, the salary threshold will be adjusted on an annual basis by the same Consumer Price Index that adjusts the Colorado minimum wage.

For an employee to qualify as exempt from the wage and hour requirements of COMPS Order #36 (including requirements related to minimum wage and overtime), employees must be paid the applicable salary threshold set forth in the table above and qualify for one of the delineated exemptions based on their actual job duties. Rule 2 of COMPS Order #36 also sets forth available exemptions depending on job duties. Colorado employers should closely scrutinize the specific criteria set forth for each exemption in determining its applicability to specific employees.

COMPS Order #36 does not alter Colorado law with regards to meal periods and rest breaks, but imposes a new requirement that employers pay an additional 10 minutes of wages if an employee is not provided a 10-minute paid rest break to which he or she is entitled. Additionally, COMPS Order #36 also defines as “time worked” any tasks taking over one minute, imposing on employers a more burdensome requirement than that imposed by the FLSA, which has generally been interpreted to not require employers to pay employees for *de minimis* (generally, up to a few minutes) periods of time worked.

2. COMPS Order #37

In November 2020, the CDLE published COMPS Order #37, which goes into effect on January 1, 2021. When it goes into effect, COMPS Order #37 will replace COMPS Order #36, although the sweeping changes implemented by COMPS Order #36 as discussed above carry through in COMPS Order #37.

COMPS Order #37 modifies the exemption available for administrative employees and transportation workers, and includes a creative professional employee exemption similar to that set forth in the FLSA. Further, COMPS Order #37 clarifies the definition of “employee” in light of Colorado’s Healthy Families and Workplaces Act (HFWA), which provides paid sick leave for Colorado employees. It also makes clear that paid sick leave under the HFWA counts as a form of wages or compensation under COMPS Order #37.

COMPS Orders #36 and #37 represent a sweeping change to Colorado wage and hour law and have significant ramifications for employers. Employers who were previously subject to Colorado’s wage and hour laws should review their policies and procedures to ensure compliance with the significant changes that have been thrust upon them by COMPS Orders #36 and #37. Employers who have never previously been required to comply with Colorado’s wage and hour laws should review the significant differences between Colorado and federal law and implement policies and procedures to comply with the significantly more demanding state wage and hour law scheme. Employers with questions or concerns regarding compliance with Colorado wage and hour laws should contact legal counsel.

B. Paid Sick Leave – the Healthy Families and Workplaces Act (HFWA)

In mid-2020, Colorado passed the HFWA, which fills certain gaps in federal COVID-19 legislation and imposes on employers the obligation to provide 1 hour of paid sick leave for every 30 hours worked.

The timing of an employer’s obligation to provide paid sick leave under the HFWA depends on its size. Specifically, the paid sick leave provisions of the law go into effect on January 1, 2021, for employers with 16 or more employees, and on January 1, 2022, for all Colorado employers.

Employees begin to accrue paid sick leave when their employment begins, and they must be allowed to use accrued paid sick leave as it is accrued. Employees may take accrued paid sick leave when the employee or an employee's family member has a mental or physical illness, injury, or health condition that prevents the employee from working; seeks a doctor's care or diagnosis; needs to obtain preventative medical care; seeks medical attention, victim services, mental health services, or legal services as a result of domestic abuse, sexual harassment, or harassment; and if a public official has ordered school or business closures due to a public health emergency.

Under the HFWA, employees must be allowed to roll accrued paid sick leave forward from one year to the next. However, employers may both limit accrual and cap usage of paid sick leave at 48 hours in a year. The law specifically allows employers to satisfy its annual accrual requirements by providing employees with a lump sum amount of at least 48 hours of paid sick leave at the beginning of the year. Employers can provide more generous amounts of paid sick leave. Accrued, but unused, paid sick leave does not have to be paid out upon an employee's separation from employment.

In addition to the obligation to provide paid sick leave as set forth above, employers will be required to provide additional paid sick leave if a "public health emergency" is declared by a federal, state, or local health agency, or a "disaster emergency" is declared by the Governor of Colorado. Under these circumstances, on the date a public health or disaster emergency is declared, employers must provide up to 80 hours of paid sick leave, as required by law.

In recent guidance, the CDLE clarified that the aforementioned supplemental leave provisions of the HFWA shall go into effect on January 1, 2021. Accordingly, as of that date, employers must supplement the paid sick leave balance of all Colorado employees to ensure they have up to 80 hours of paid sick leave to deal with effects of COVID-19. Moreover, the supplemental paid sick leave provisions of the HFWA apply to all employers in the state as of January 1, 2021, regardless of size. Notwithstanding that employers in Colorado with less than 16 employees will be exempt from the general requirement to provide at least 48 hours of paid sick leave in 2021, they will nevertheless be required to provide supplemental paid sick leave of up to 80 hours for employees to deal with effects of COVID-19 as of January 1, 2021. The Governor's current disaster emergency declaration expires on January 26, 2021.

The HFWA restricts the ability of Colorado employers to request documentation from employees regarding paid sick leave. Pursuant to the HFWA, employers can request "reasonable documentation" related to paid sick leave only under specific circumstances when an employee's requested leave is for four or more consecutive days.

C. Equal Pay for Equal Work Act – A Strict New Pay Equity Act

On January 1, 2021, Colorado's Equal Pay for Equal Work Act (EPEWA) goes into effect and applies to all Colorado employers. The purpose of the EPEWA is to protect employees from discrimination in pay based on their sex, or discrimination based on their sex in combination with another protected status. To accomplish that goal, the EPEWA imposes significant new notice requirements, including: (1) employers must make reasonable efforts to announce all promotion opportunities to all current employees on the same calendar day; and (2) employers must disclose in each posting for each job opening the hourly or salary rate of pay, or a range of the hourly or salary rate of pay, and a general description of all benefits and other compensation offered.

The regulations implementing the EPEWA address jobs performed outside of Colorado and require employers to inform all Colorado employees of promotional opportunities anywhere, both inside and outside of Colorado. Moreover, if an employer posts a job that can be performed remotely from any location—including Colorado—the job posting must include the compensation and benefits information for the position. If a 2020 job posting extends past January 1, 2021, it must be taken down or modified to comply with the EPEWA if it remains posted past February 1, 2021.

Additionally, the EPEWA prohibits employers from seeking the wage history of job applicants, relying on wage history to set an employee's wage rate, discriminating or retaliating against an applicant for failing to disclose his or her wage history, and preventing employees from discussing their compensation with others.

The EPEWA provides employees with a private right of action to sue their employers, authorizes significant remedy provisions, and contains strict recordkeeping requirements. The EPEWA provides a safe harbor for employers who conduct a proactive and comprehensive self-evaluation of their compensation practices with the specific goal of identifying and remedying unlawful pay disparities. Pursuant to the EPEWA, employers who conduct such an audit of their pay practices within two years prior to a lawsuit may avoid application of liquidated (double) damages.

D. On the Horizon – Paid Family and Medical Leave

Colorado voters approved the Paid Family and Medical Leave Insurance Act (PFMLA) at the ballot box in November 2020. The PFMLA provides up to 12 weeks of paid family and medical leave for Colorado employees, which is separate from the paid sick leave provided by the HFWA as discussed above. Paid family and medical leave benefits available to employees will be administered by the state of Colorado and funded by a payroll tax, which will be split evenly between employers and employees. Employers must begin remitting payroll taxes to fund the program on January 1, 2023, and employees will be eligible to begin taking paid family and medical leave on January 1, 2024.

E. Takeaways for Colorado Employers

Employers with Colorado employees will be subject to a variety of new obligations and requirements concerning wage and hour law, paid sick leave, and procedures concerning hiring and promotion of employees. In light of the potentially significant consequences associated with these new laws, Colorado employers should seek legal counsel with questions or to discuss strategies for compliance.

For more information on these issues, please reach out to a member of Cline Williams' [Labor and Employment Law Section](#).

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