

# Legislative and Administrative Update

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# Legislative and Administrative Updates

- What will we cover today:
  - Colorado Equal Pay Act
  - Family Medical Leave Insurance Program
  - Colorado Overtime and Minimum Pay Standards (COMPS)



# **Concerning the Creation of the “Equal Pay for Equal Work Act” in Order to Implement Measures to Prevent Pay Disparities**

## **(Senate Bill 19-085)**

# Equal Pay Act

## Senate Bill 19-085

- Equal Pay Act contains the following:
  - “Employer” means the state or any political subdivision, commission, department institution, or school district thereof, and every other person employing a person in the state.
  - “Wage Rate” means all compensation received and benefits received by the employee, including benefits.

# Equal Pay Act

## Senate Bill 19-085

- Requirements: “An employer shall not discriminate between employees on the basis of sex ... by paying an employee of one sex a wage rate less than the rate paid to an employee of a different sex for substantially similar work, regardless of job title, based on composite of skill and effort...”

# Equal Pay Act

## Senate Bill 19-085

- “By paying an employee of one sex a wage rate less than the rate paid to an employee of a different sex....
- For substantially similar work...,
- Regardless of job title....,
- Based on composite of skill and effort...;
- And responsibility.”

# Equal Pay Act

## Senate Bill 19-085

- 1. That the wage differential is based on:
  - a) A seniority system
  - b) A merit system
  - c) A system that measures earnings by quantity or quality of production
  - d) Geographic location

# Equal Pay Act

## Senate Bill 19-085

- e) Education, training, or experience to the extent reasonably related to the work in question.
- f) Travel, if the travel is a regular and necessary condition of work performed.

# Equal Pay Act

## Senate Bill 19-085

- 2. That each factor is applied reasonably
- 3. That each factor, to the extent relied upon, accounts for the entire wage differential
- 4. That prior wage rate history was not relied on to justify disparity in current wage rate

# Equal Pay Act

## Senate Bill 19-085

- So employers need to consider establishing:
  - A seniority system;
  - A merit system;
  - A system that measures earnings by quantity or quality of production;
  - Geographic distinctions;
  - Education, training, or experience if they are related to the work; or
  - Travel, if travel is a regular and necessary condition of the work performed.

# Equal Pay Act

## Senate Bill 19-085

- These terms and requirements are defined in the Bill as follows:
  - .....
  - .....
  - .....
  - .....
  - .....

# Equal Pay Act

## Senate Bill 19-085

- A seniority system:
  - Generally, some employee rights and/or benefits are tied to the employee's length of service for an organization.
  - A simple example: vacation accrual increases based on the length of time an employee has been employed.

# Equal Pay Act

## Senate Bill 19-085

### A seniority system:

Length of service	Position	Amount of compensation
1-3 years	Administrative Assistant	\$20,000-\$23,000
3-5 years	Administrative Assistant	\$23,000-\$25,000
5-7 years	Administrative Assistant	\$30,000-\$35,000
7-10 years	Administrative Assistant	\$40,000-\$45,000
10-15 years	Administrative Assistant	\$50,000-\$55,000
15-20 years	Administrative Assistant	\$60,000-\$65,000
20-25 years	Administrative Assistant	\$70,000-\$75,000
25+ years	Administrative Assistant	\$80,000-\$85,000

# Equal Pay Act

## Senate Bill 19-085

- A seniority system:
  - A table like that would need to be created for each position.
  - Analyze within the pay range whether men and women are paid equally, or whether one gender or the other is paid more or less than the other.
  - As a pure seniority system, it limits consideration of other factors like productivity or merit.

# Equal Pay Act

## Senate Bill 19-085

- A merit system:
  - A system in which ability is prioritized.
  - To implement a system, employers must have measurable goals for each position.
  - Those measurable goals must be able to be evaluated in a neutral way.
  - Based on the evaluations, employees' compensation then must be tied to a range of compensation, like the one we saw with respect to seniority.

# Equal Pay Act

## Senate Bill 19-085

- A merit system:
  - Any testing or other neutral evaluation must not have an inherent bias toward one gender or another.
  - Consider hiring a professional to develop targeted measuring techniques or processes for your organization.
  - Analyze within the pay range whether men and women are paid equally, or whether one gender or the other is paid more or less than the other.

# Equal Pay Act

## Senate Bill 19-085

- Measuring quantity or quality:
  - This option depends upon having an end product that can be measured in a neutral way.
  - For example, it is possible to measure the number of widgets. And if the widgets must all be 1" x 1" and be smooth on all sides, it is possible to evaluate the quality of each widget.

# Equal Pay Act

## Senate Bill 19-085

- Geographic location:
  - How far geographically is far enough?
  - Denver versus Los Angeles?
  - Denver versus Colorado Springs?
  - Consider obtaining cost of living and other economic data if geographic differences contribute to differences in pay.

# Equal Pay Act

## Senate Bill 19-085

- Education, training, or experience:
  - Must be reasonably related to the work at issue.
  - Keep resumes.
  - Likely will need to inquire during interviews and keep those notes.
  - If education, training, or experience can be verified, verification may be necessary.

# Equal Pay Act

## Senate Bill 19-085

- Travel, if travel is a regular and necessary condition of the work.
  - Document why travel is regular and necessary for one position and not another.
  - Keep records of such travel.

# Equal Pay Act

## Senate Bill 19-085

- Whatever basis/bases account(s) for a pay differentiation, it/they must be the reason for the entire difference in pay.

# Equal Pay Act

## Senate Bill 19-085

- The bill also prohibits an employer from:
  - Seeking the wage rate history of a prospective employee;
  - Relying on a prior wage rate to determine a wage rate;
  - Discriminating or retaliating against a prospective employee for failing to disclose the employee's wage rate history;

# Equal Pay Act

## Senate Bill 19-085

- Discharge, discipline, discriminate against, coerce, intimidate, threaten, or interfere with an employee or other person because the employee or person inquired about, disclosed, compared, or otherwise discussed the employee's wage rate.
- Prohibit as a condition of employment, an employee from disclosing the employee's wage rate.

# Equal Pay Act

## Senate Bill 19-085

- Other requirements:
  - Employer shall make reasonable efforts to announce, post, or make known **all opportunities for promotion to all current employees on the same calendar day and prior to making the decision.**
  - Employer shall disclose in each posting the compensation rate (or range) and general description of all the benefits and other compensation to be offered to the **hired applicant.**

# Equal Pay Act

## Senate Bill 19-085

- Other requirements:
  - Employer shall keep records of job descriptions and wage-rate history for each employee for the duration of employment plus two years in order to determine if there is a pattern of wage discrepancy.

# Equal Pay Act

## Senate Bill 19-085

- The bill removes the requirement of the CDOL's Division Director to enforce wage discrimination complaints based on an employee's sex and instead permits an aggrieved person to bring a civil action in district court to pursue remedies specified in the bill.
- The bill still permits an employee to file a claim with the Civil Rights Division.

# Equal Pay Act

## Senate Bill 19-085

- In fact, the Bill authorized the Director of the CDOL to create and administer a process to accept and mediate complaints and to provide legal resources regarding alleged violations of the Equal Pay Act and to promulgate rules for this purpose.
- The process created does not affect or prevent the right of an aggrieved person from commencing a civil action.

# Equal Pay Act

## Senate Bill 19-085

- Two year statute of limitations, but damages can go back three years.
- Damages: Lost pay plus liquidated damages unless employer demonstrates that the act or omission giving rise to the violation was in good faith and employer had reasonable grounds for believing employer did not violate the statute.
- Employee can also recover reasonable attorney fees.

# Liquidated Damages

- If the employer demonstrates (i.e., it is the employer's burden) that the act or omission giving rise to the violation was in “good faith and the employer had reasonable grounds for believing that the employer did not violate the law,” the Court shall not award liquidated damages.

# Liquidated Damages

- “In determining whether the employer’s violation was in good faith, the fact finder may consider evidence that within two years prior to the date of the commencement of the civil action, the employer completed a thorough and comprehensive pay audit of its workforce, with the specific goal of identifying and remedying unlawful pay disparities.

# Equal Pay Act

## Senate Bill 19-085

- Hiring:
  - Employers must “make reasonable efforts” to tell employees on the same day a job opens, and prior to making a decision about job openings (“opportunities for promotion”).
  - Do all employees have email?
  - Do all employees access email?
  - Can notices be posted close to a timeclock?

# Equal Pay Act

## Senate Bill 19-085

- Hiring:
  - Develop a standard system to provide notices to employees, likely in multiple ways or formats.
  - The notice must state: (1) the position: (2) the hourly rate of pay or wage rate; (3) any benefits that are not provided to all employees.

# Equal Pay Act

## Senate Bill 19-085

- Job descriptions:
  - This Bill expressly states that employers must keep records of job descriptions and wage rate history for each employee and for two years after the employee's employment ends.
  - There is no qualifying language.
  - If your organization does not have job descriptions at all, or if job descriptions have not been updated in a while, create or revise those job descriptions now.

# Equal Pay Act

## Senate Bill 19-085

- If Division determines employer failed to comply, it may order employer to pay a fine of no less than \$500.00 and no more than \$10,000.00.
- In litigation, if an employer does not have the identified records, the court will tell jury to presume the records would have contained information favorable to the employee and instruct the jury that failure to keep records can be considered evidence that the violation was not made in good faith.
- The Bill becomes effective on January 1, 2021.



# A Bill for an Act Concerning the Creation of a Family and Medical Leave Insurance Program

Senate Bill 19-188

And Soon-to-be House Bill 20-001

# FAMLI Bill

## Senate Bill 19-188

- The bill accommodates up to 12 weeks leave, with up to \$1,000 a week in benefits, depending on income. Premium payments would begin in 2021 with the first benefits available in 2022; though there also appears to be concessions offered that may delay those.
- Provides 12 weeks of paid leave, which can be taken as intermittent leave like the Federal FMLA; though there's a reference to such leave being an hour or less.

# FAMLI Bill

## Senate Bill 19-188

- Task force must have all appointments completed by July 1, 2019.
- Deadlines then set to occur over the following months after the collection of certain information.
  - November 1, 2019: Initial recommendation by the task force.
  - December 1, 2019: Independent actuarial analysis must be completed.
  - January 8, 2020: Final recommendations from task force.

# FAMLI Bill

## Senate Bill 19-188

- Recommendations must review, evaluate and assess, at least the following elements without limitation:
  - The purposes of the leave, including serious illness, caring for a love one with a serious illness, bonding with a new child, and needs arising from military deployment and the effects of domestic violence, stalking, and sexual assault;
  - Self-employed workers' access to paid Family and Medical Leave and a mechanism to allow self-employed workers to participate;
  - Eligibility to take leave;

# FAMLI Bill

## Senate Bill 19-188

- The definition of “family” or “family member” for whom an individual may take leave for purposes of providing care;
- Job protections and other employment protections, including their effect on individuals’ ability to take leave;
- The duration of leave;
- The amount of the wage replacement;
- The maximum weekly wage replacement amount;
- The program funding structure;

# FAMLI Bill

## Senate Bill 19-188

- Program implementation;
- The role of third-party vendors on program sustainability;
- The solvency of a paid Family and Medical Leave fund under various models;
- The portability of paid Family and Medical Leave benefits;
- The sustainability of a paid Family and Medical Leave program; and
- How a paid Family and Medical Leave program would interact with other benefits.

# FAMLI Bill

## Senate Bill 19-188

- Additional deadlines “assumed” in the Bill:
  - July 1, 2020: The Family and Medical Leave Program will be established.
  - January 1, 2022: The public education and outreach campaign begins.
  - January 1, 2023: The funding for the program will begin.
  - January 1, 2024: The program will start paying benefits.



# COLORADO OVERTIME & MINIMUM PAY STANDARDS ORDER #36

# Wage-and-Hour Background

## Wage-and-Hour Laws That Cover Colorado Employers:

- 1. Fair Labor Standards Act:** covers almost every employer.
- 2. Colorado Minimum Wage Order:** currently, four “industries.”
- 3. Colorado Wage Act:** covers all employers in Colorado, except state public organizations.

# COMPS Relevant Dates

- Colorado Department of Labor and Employment / Division of Labor Standards and Statistics set forth the following deadlines:
  - **Pre-rulemaking comment period:** March 6, 2019
  - **Pre-rulemaking public testimony:** August 28, 2019
  - **Proposed rule filed:** November 15, 2019
  - **Official publication of proposed rule:** November 25, 2019
  - **Anticipated effective date of rule:** Sunday, March 16, 2020, except July 1, 2020 for new exempt salaries; duty-tests become effective March 1, 2020

# COMPS Definitions

- “Employee” means any person performing labor or services for the benefit of an employer.
- Relevant factors in determining whether a person is an employee include the degree of control the employer may or does exercise over the person and the degree to which the person performs work that is the primary work of the employer

# COMPS “Time Worked”

- “**Time worked**” means time during which an 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.
- Examples of time worked:
  - Requiring or permitting employees to be on the employer's premises, on duty, or at a prescribed workplace (but not merely permitting an employee completely relieved from duty to arrive or remain on-premises), over one minute,

# COMPS “Time Worked”

- Putting on or removing required work clothes or gear (but not a uniform worn outside work as well),
- Receiving or sharing work-related information, security or safety screening,
- Remaining at the place of employment awaiting a decision on job assignment or when to begin work, or to performing clean-up or other duties "off the clock,"
- Clocking or checking in or out, or waiting for any of the preceding

# COMPS Definitions

- “Employee” continued:
  - An individual who is primarily free from control and direction in the performance of the service, both under his or her contract for the performance of service and in fact, and who is customarily engaged in an independent trade, occupation, profession, or business related to the service performed is not an “employee.”

# Independent Contractor – Colorado Statute

C.R.S. § 8-70-115(1)(b):

1. No Control Allowed.
2. Separate Business Required.
3. In considering the dynamics of the relationship, the *Softrock* Supreme Court held that the following factors should be considered :
  - the relevant factors in C.R.S. 8-70-115(1)(c);
  - factors considered in other Colorado appellate cases; and
  - other factors in the relationship.

# Colorado Minimum Wage Order

- The current Colorado Minimum Wage Order applied to employers in:
  - (1) Retail and Service;
  - (2) Food and Beverage;
  - (3) Commercial Support Services; and
  - (4) Health and Medical.

# Colorado Minimum Wage Order

- The current Order specifically excludes:
  - (1) the state or its agencies or entities, counties, cities and counties, municipal corporations, quasi-municipal corporations, school districts, and irrigation, reservoir, or drainage conservation companies or districts;
  - (2) the insurance industry;
  - (3) manufacturing industry;
  - (4) community centered boards; and
  - (5) construction industry.

# COMPS Definitions

- “Employer” has the same meaning as in the Federal Fair Labor Standards Act, except that the provisions of the COMPS do not apply to:
  - State or its agencies or entities
  - Counties and cities
  - Municipal corporations
  - Quasi-municipal corporations
  - School districts
  - Irrigation, reservoir, or drainage conservation companies or districts

# Exemptions Background

- To be exempt, the employer must meet two tests with respect to the employee:
  - Salary-Basis Test
  - Duty-Basis Test
- *Meeting one of the tests is insufficient.*

# COMPS Salary Thresholds

<u>Date</u>	<u>Salary Requirement</u>
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)

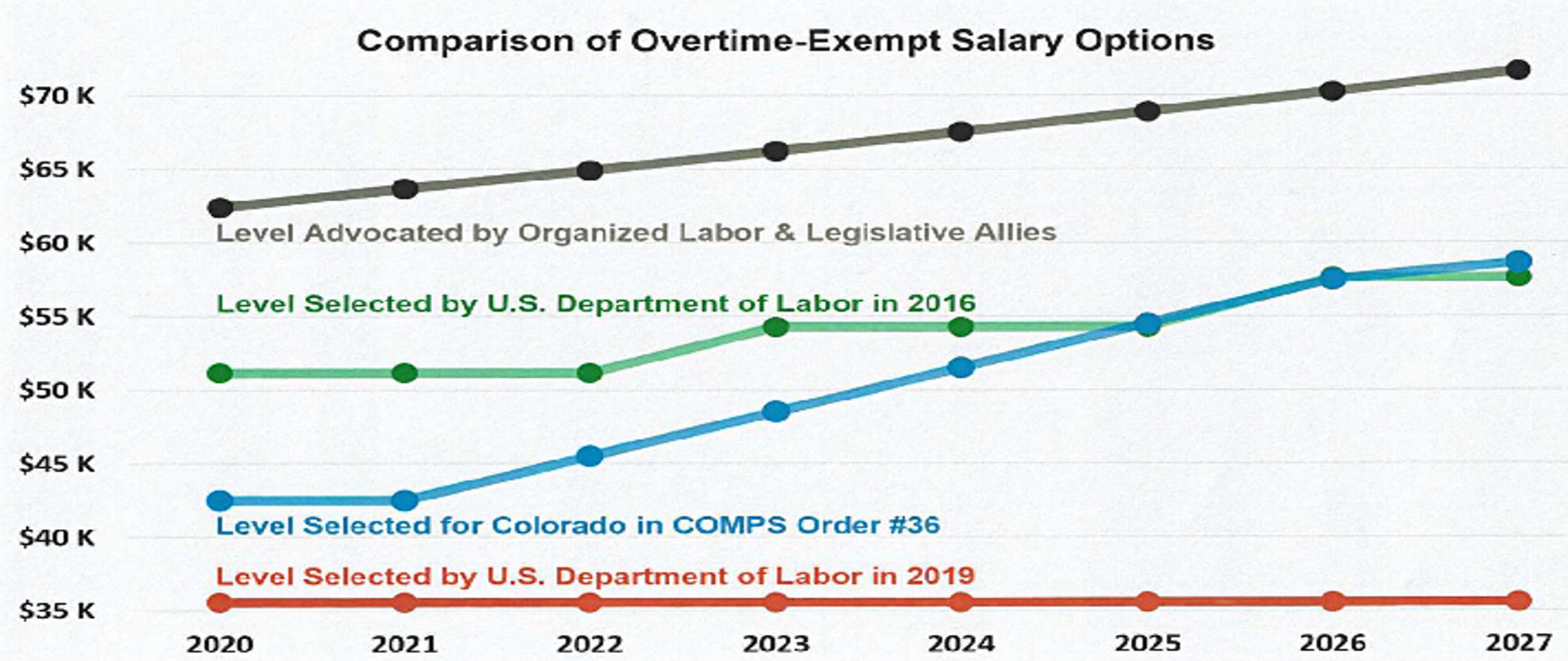
Except the 2020 salary does not apply to the following two categories of employers, to whom the salary schedule applies only as of January 1, 2021 — (A) non-profit employers with annual total gross revenue of under \$50 million, and (B) for-profit employers with annual total gross revenue of under \$1 million..

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January 1, 2020  
(\$35,568 per year)

Federal law (FLSA): \$684.00 per week

# Comparison of Salary Options



# FLSA/COMPS White-Collar Exemptions

- Administrative
- Executives & Supervisors
- Professional
- Outside Sales
- Other Exemptions
  - COMPS states that it shall be liberally construed, except the exemptions, which shall be narrowly construed.

# FLSA Exemptions

- Overtime exemption for certain employees of an independently owned and controlled local enterprise engaged in the wholesale or bulk distribution of petroleum products.
- Overtime exemption for certain commissioned employees in retail and service establishments.
- Partial overtime exemption for employees of establishments engaged in care of sick, aged, or mentally ill.
- Partial overtime exemption for fire protection and law enforcement employees.

# FLSA Exemptions

- Partial overtime exemption for certain employees stripping, grading, handling, stemming, re-drying, packing or storing tobacco.
- Overtime exemption for outside buyers of poultry, eggs, cream, or milk.
- Overtime exemption for employees engaged in the processing of maple sap into sugar or syrup.
- Overtime exemption for certain employees engaged in the transportation of fruits or vegetables.
- Overtime exemption for taxicab drivers.

# FLSA Exemptions

- Overtime exemption for seaman.
- Overtime exemption for certain employees of small town radio and television stations.
- Overtime exemption for salesmen, partsmen and mechanics primarily engaged in selling or servicing automobiles, trucks or farm implements.
- Overtime exemption for trailer, boat and aircraft salesmen.
- Overtime exemption for certain drivers and drivers' helpers making local deliveries and paid by the trip.

# FLSA Exemptions

- Partial overtime exemption for rail, trolley and bus drivers engaged in charter activities.
- Minimum wage and overtime exemption for employees of seasonable amusement or recreational establishments.
- Minimum wage and overtime exemption for switchboard operators for small telephone companies.
- Minimum wage and overtime exemption for seaman on non-American vessels.
- And there are many, many more.....

# FLSA/COMPS White-Collar Exemptions

- Administrative
- Executives & Supervisors
- Professional
- Outside Sales
- Other Exemptions

# Federal Administrative Exemption

- 1) The employee must make the federally-required weekly salary;
- 2) The employee must have the primary duty of performing office or nonmanual work that is directly related to the management or general business operations of the employer or its customers; and
- 3) The employee's primary duty must include the exercise of discretion and independent judgment on significant matters.

# COMPS Administrative Exemption

1. Meets the then-current salary-basis test.
2. Directly serves the executive, and regularly performs duties important to the decision-making process of the executive.  
  
\*The term “executive” is not defined in COMPS.
3. The employee must regularly exercise independent judgment and discretion in matters of significance, with a primary duty that is nonmanual in nature and directly related to management policies or general business operations.

# Depends how you define the word “The”?

- Merriam-Webster’s Online Dictionary: “Used as a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance.” For example, “put the cat out” vs. “put a cat out.” Also, “used as a function word to indicate that a following noun or noun equivalent is a unique or a particular member of its class.” For example, “the President” or “the Lord.”
- Dictionary.com: “used, especially before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an.” For example, the book you gave me; Come into the house.
- Lexico powered by Oxford: “Denoting one or more people or things already mentioned or assumed to be common knowledge.” For example, “what's the matter?”

# Organizational Chart Example



# Federal Executive Exemption

- 1) The employee must make the required rate on a salary basis, exclusive of board or lodging;
- 2) The employee must have the primary duty of management of the enterprise in which he or she is employed, or manage a customarily recognized department;
- 3) The employee must customarily and regularly direct the work of at least two other employees or their equivalent; and
- 4) The employee must have the authority to hire or fire employees, or their recommendations about hiring, firing, advancement, promotion, etc. must be given particular weight.

# COMPS Executive Exemption

1. Meets the then-current federal salary-basis test.
2. Supervises the work of at least two full-time employees.
3. Has the authority to hire and fire, or to effectively recommend such action.
4. The employee must spend a minimum of 50% of the workweek in duties directly related to supervision.

# COMPS Executive Exemption

- Generally, “management” includes, but is not limited to, activities such as:
  - Interviewing, selecting, and training of employees;
  - Setting and adjusting rates of pay and hours of work;
  - Directing the work of employees;
  - Maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status;
  - Handling employee complaints and grievances; disciplining employees;

# COMPS Executive Exemption

- Planning the work; determining the techniques to be used; apportioning the work among the employees;
- Determining the type of materials, supplies, machinery, equipment or tools to be used, or merchandise to be bought, stocked and sold;
- Controlling the flow and distribution of materials or merchandise and supplies;
- Providing for the safety and security of the employees or the property;
- Planning and controlling the budget; and
- Monitoring or implementing legal compliance measures.

# Federal Professional Exemption

- 1) The employee must be compensated on a salary at a rate not less than the required weekly salary;
- 2) The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

# Federal Professional Exemption

- 3) The advanced knowledge must be in a field of science or learning; and
- 4) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

# COMPS Professional Exemption

1. Meets the then-current salary-basis test.
2. Employed in a field or endeavor who has knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.
3. A professional employee must be employed in the field in which s/he was trained.

# Hypothetical under COMPS

- Jane has been an employee with the organization for a long time. She started as a registered nurse and, so, we classified her as an exempt employee because she met the professional exemption.
- Recently, we promoted Jane to Manager of the Department. She oversees a lot of critical work in the organization and reports to the Chief Nursing Officer.
- Can we treat Jane as exempt?

# Federal Outside Sales Exemption

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.
- The salary requirements of the regulation do not apply to the outside sales exemption.

# COMPS Outside Salesperson Exemption

1. This exemption covers an employee working primarily away from the employer's place of business or enterprise for the purpose of making sales or obtaining orders or contracts for any commodities, articles, goods, real estate, wares, merchandise, or services.
2. The employee must spend a minimum of 80% of the workweek in activities directly related to his or her own outside sales.
3. No reference in COMPS to any pay requirements for this exemption.

# Other COMPS Exemptions

- **Owners or proprietors.** This exemption covers a full-time employee actively engaged in management of the employer who either:
  - (A) owns at least a bona fide 20% equity interest in the employer; or
  - (B) for a non-profit employer, is the highest-ranked and highest-paid employee, and is paid at least the salary threshold.

# Other COMPS Exemptions

- **Interstate transportation workers and taxi cab drivers.** This exemption covers
  - (A) an employee who is a driver, a driver's helper, or a loader or mechanic of a motor carrier, if the employee crosses state lines in the course of his or her work, and
  - (B) taxi cab drivers employed by a taxi service provider licensed by a state or local government.

# In-Residence Exemptions Under COMPS

- **Casual babysitters** employed in private residences directly by households, or directly by family members of the individual(s) receiving care from the babysitter.
- **Property managers** residing on-premises at the property they manage.
- **Student residence workers** working on premises where they reside for sororities, fraternities, college clubs, or dormitories.
- **Laundry workers** who (a) are inmates, patients, or residents of charitable institutions; and (b) perform laundry services; and (c) in institutions where they reside.

# Other COMPS Exemptions

- **Bona fide volunteers and work-study students.** This exemption covers those who need not be compensated under the Federal Fair Labor Standards Act as either:
  - (A) enrolled students receiving credit for an unpaid work-study program or internship; or
  - (B) bona fide volunteers for non-profit organizations.
- **Agriculture Jobs.** Workers in jobs in agriculture are exempt from minimum wage, overtime and meal periods, if they are not covered by, or are exempt from, the minimum wage provisions of the Federal Fair Labor Standards Act. Agriculture workers also are entitled to modified rest periods.

# Other COMPS Exemptions

- **Employees in highly technical computer-related occupations.** This exemption covers an employee who
  - (A) is a skilled worker employed as a computer systems analyst, computer programmer, software engineer, or other similarly highly technical computer employee;
  - (B) who has knowledge of an advanced type, customarily acquired by a prolonged course of specialized formal or informal study; and
  - (C) spends a minimum of 50% of the workweek in any combination of the following duties:

# Other COMPS Exemptions

- (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications,
- (2) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications, or
- (3) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems.

# COMPS Exemptions from Overtime

- **Certain Salespersons and Mechanics.** Salespersons, parts-persons, and mechanics employed by automobile, truck, or farm implement (retail) dealers; and salespersons employed by trailer, aircraft, and boat (retail) dealers.
- **Commission Sales.** Sales employees of retail or service industries paid on a commission basis, provided that at least 50% of their total earnings in the pay period are derived from commission sales, and their regular rate of pay is at least one and one-half times the minimum wage.

# COMPS Exemptions from Overtime

- **Ski Industry Employees.**
- **Medical Transportation.** Employees of the medical transportation industry who work 24-hour shifts are exempt from the 12-hour overtime rules if they receive the required weekly / 40-hour overtime pay.
- **Eight and Eighty Rule.** A hospital or nursing home may seek an agreement with individual employees to pay overtime pursuant to the provisions of the Federal Fair Labor Standards Act "8 and 80 rule" whereby employees are paid time and one-half their regular rate of pay for any work performed in excess of 80 hours in a 14 consecutive day period and for any work in excess of 8 hours per day.

# COMPS Exemptions from Overtime

- Range workers in jobs related to herding or production of livestock on the range who occupy employer-provided housing as part of their employment and are provided without cost or deduction any housing, food, transport, and equipment required for H2-A visa range workers by federal regulations.
- Field staff of seasonal camps or seasonal outdoor education programs who primarily provide supervision or education of minors, or education of adults; are required to reside on-premises; are provided adequate lodging and all meals free of charge and without deduction from wages; and as of January 1, 2021, are paid minimum wage.

# Three Notable FLSA Exemptions Not in COMPS

- 1. **Highly-Compensated Employee.** Starting in 2020 under federal law, the total annual compensation amount for the “highly-compensated employee” exemption will increase to \$107,432. This exemption requires the employee’s primary duty to include performing office or non-manual work and at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.
- 2. **Fluctuating Workweek Method.** This compensation method is not referenced in COMPS. So, there’s an argument that this may not be permitted as a compensation method or defense.

# Three Notable FLSA Exemptions Not in COMPS

- **3. Catch-up Payments.** The FLSA's final rule also allows nondiscretionary bonuses, incentive compensation, and commissions to apply to part of a white-collar exempt employee's required compensation, but only up to 10% of the required salary amount.
- Such nondiscretionary bonuses, incentive compensation, and commissions must be paid at least annually, or on any other more-frequent schedule, as determined by the organization.

# Three Notable FLSA Exemptions Not in COMPS

- For employers who use this new rule, the new regulations importantly state that if an employee is below the minimum salary amount at the end of the annual period, employers can make a “catch-up” payment not later than the next pay period after the end of the annual period, and this “catch-up” payment will be credited to the annual period that just ended and not to the next period.
- But as this catch-up payment is not mentioned in COMPS, it is probably not permitted.

# COMPS Definitions

- “Regular rate of pay” means the hourly rate actually paid to employees for a standard, non-overtime workweek.
- If pay is on a piece-rate, salary, commission, or other non-hourly basis, any overtime compensation is based on an hourly regular rate calculated from the employee’s pay.

# COMPS “Regular Rate”

- **Pay included in regular rate.** The regular rate includes all compensation paid to an employee, including set hourly rates, shift differentials, minimum wage tip credits, nondiscretionary bonuses, production bonuses, and commissions used for calculating hourly overtime rates for non-exempt employees.
- **Pay not included in regular rate.** Business expenses, bona-fide gifts, discretionary bonuses, employer investment contributions, vacation pay, holiday pay, sick leave, jury duty, or other pay for non-work hours may be excluded from regular rates.

# Federal Travel Time Rules

## General federal rules regarding travel

- Travel to and from home
- Travel “all in a day’s work”
- Special one-day trips (driver vs. passenger)
- Overnight travel (driver vs. passenger)
- Travel to work when work keeps moving
- Using employer’s vehicle for travel

# COMPS Travel Definitions

- “Travel time” means time spent on travel for the benefit of an employer, excluding normal home to work travel, and shall be considered time worked.
- At the start or end of the workday, travel to or from a work station, entirely within the employer's premises and/or with employer-provided transportation, shall not be considered time worked, except that such travel is compensable if it is otherwise considered work time or it is travel in employer-mandated transportation (1) that materially prolongs commute time or (2) in which employees are subjected to heightened physical risk compared to an ordinary commute.

# Other COMPS Exemptions

- **Exemption for Certain Professionals Exempt from the Salary Requirement under Federal Wage Law:**
  - The salary rules do not apply to the following professionals
    - (A) Doctors,
    - (B) Lawyers, and
    - (C) Teachers who qualify as exempt professional employees

# Minimum Wage Requirements

- If an employee is covered by multiple minimum or overtime wage requirements, the requirement providing a higher wage, or otherwise setting a higher standard, shall apply.
- Reduced Minimum Wage for Certain People with Disabilities and Minors. The minimum wage may be reduced by 15% for (a) non-emancipated minors and (b) persons certified to be less efficient in performance of their job duties due to a physical disability.

# COMPS Overtime

- Employees shall be paid time and one-half of the regular rate of pay for any work in excess of any of the following, except as provided below:
  - (A) 40 hours per workweek;
  - (B) 12 hours per workday; or
  - (C) 12 consecutive hours without regard to the start and end time of the workday.

# COMPS Meal and Rest Periods

- **Meal Periods.** Employees shall be entitled to an uninterrupted and duty-free meal period of at least a 30-minute duration when the shift exceeds 5 consecutive hours.
- Such meal periods, to the extent practical, shall be at least one hour after the start, and one hour before the end, of the shift.
- Employees must be completely relieved of all duties and permitted to pursue personal activities for a period to qualify as non-work, uncompensated time.

# COMPS Meal and Rest Periods

- When the nature of the business activity or other circumstances make an uninterrupted meal period impractical, the employee shall be permitted to consume an on-duty meal while performing duties.
- Employees shall be permitted to fully consume a meal of choice on the job and be fully compensated for the on-duty meal period without any loss of time or compensation.

# COMPS Meal and Rest Periods

- Every employer shall authorize and permit a compensated 10-minute rest period for each 4 hours of work, or major fractions thereof, for all employees, as follows:

<u>Work Hours</u>	<u>Rest Periods Required</u>
2 or fewer	0
Over 2, and up to 6	1
Over 6, and up to 10	2
Over 10, and up to 14	3
Over 14, and up to 18	4
Over 18, and up to 22	5
Over 22	6

# COMPS Meal and Rest Periods

- Rest periods shall be 10 minutes unless, on a given workday, or in a writing covering up to a one-year period that is signed by both parties, the employee and the employer agree, voluntarily and without coercion, to have two 5-minute breaks, as long as 5 minutes is sufficient, in the work setting, to allow the employee to go back and forth to a bathroom or other location where a bona fide break would be taken.

# COMPS Meal and Rest Periods

- If the below conditions are met, rest periods need not be 10 minutes every 4 hours for any employees:
  - i) governed by a collective bargaining agreement at any employer, or
  - (ii) during time they are providing Medicaid-funded residential in-home services for an employer receiving at least 75% of its annual total gross revenue from federal and/or state Medicaid funds for providing such services.

# COMPS Meal and Rest Periods

- 1) rest periods that average, over the workday, at least 10 minutes per 4 hours worked; and
- (2) at least 5 minutes of rest in every 4 hours worked.
- Such an agreement does not change an employee's right to pay for rest periods under.
- Rest periods, to the extent practical, shall be in the middle of each 4-hour work period. It is not necessary that the employee leave the premises for a rest period.

# COMPS Meal and Rest Periods

- According to COMPS, “when an employee is not authorized and permitted does not have a required 10-minute rest period, his or her shift is effectively extended by 10 minutes without compensation. Because a rest period requires 10 minutes of pay without work being performed, work during a rest period is additional work for which additional pay is not provided.” Therefore, a failure by an employer to authorize and permit a 10-minute compensated rest period is a failure to pay 10 minutes of wages at the employee’s agreed-upon or legally required (whichever is higher) rate of pay.
- The proposed version of COMPS stated, “when an employee does not have a required 10-minute rest period,...”

# COMPS Tipped Employees

- “Tipped employee” means any employee engaged in an occupation in which s/he customarily and regularly receives more than \$30 per month in tips.
- Nothing in COMPS prevents an employer from requiring employees to share or allocate such tips or gratuities on a pre-established basis among other employees who customarily and regularly receive tips.
- Employer-required sharing of tips with employees who do not customarily and regularly receive tips, such as management or food preparers, or deduction of credit card processing fees from tipped employees, shall nullify allowable tip credits towards the minimum wage.

# COMPS Deductions, Credits, and Charges

- **Lodging Credit.** A lodging credit for housing furnished by the employer and used by the employee may be considered part of the minimum wage if it is:
  - (A) no greater than the smaller of (1) the reasonable and actual cost to the employer of providing the housing, (2) the fair market value of the housing, or (3) \$25 per week for a room (in a shared residence, dormitory, or hotel) or \$100 per week for a private residence (an apartment or a house);
  - (B) accepted voluntarily and without coercion, and primarily for the benefit or convenience of the employee, rather than of the employer; and
  - (C) recorded in a written agreement (electronic form is acceptable) that states the fact and amount of the credit (but need not be a lease).

# COMPS Deductions, Credits, and Charges

- **Meal Credit.** A meal credit, equal to the reasonable cost or fair market value of meals provided to the employee, may be used as part of the minimum hourly wage. No profits to the employer may be included in the reasonable cost or fair market value of such meals furnished. Employee acceptance of a meal must be voluntary and uncoerced.

# COMPS Uniforms

- Where wearing a particular uniform or special apparel is a condition of employment, the employer shall pay the cost of purchases, maintenance, and cleaning of the uniforms or special apparel and not charge a deposit, with the following exceptions:
  - (A) if the uniform furnished by the employer is plain and washable, and does not need or require special care such as ironing, dry cleaning, pressing, etc., the employer need not maintain or pay for cleaning; and
  - (B) clothing that is ordinary, plain, and washable street wear that is prescribed as a uniform need not be furnished by the employer unless a special color, make, pattern, logo, or material is required.

# Employer Record-Keeping and Posting Requirements

## □ Posting and Distribution Requirements:

- **Posting.** Every employer subject to the COMPS Order must display a COMPS Order poster published by the Division in an area frequented by employees where it may be easily read during the work day.
- If the work site or other conditions make a physical posting impractical (including private residences employing only one worker, and certain entirely outdoor worksites lacking an indoor area), the employer shall provide a copy of the COMPS Order or poster to each employee within his or her first month of employment, and shall make it available to employees upon request.

# Employer Record-Keeping and Posting Requirements

- **Distribution.** Every employer publishing or distributing to employees any handbook, manual, or written or posted policies shall include a copy of the COMPS Order, or a COMPS Order poster published by the Division, with any such handbook, manual, or policies.
- Every employer that requires employees to sign any handbook, manual, or policy shall, at the same time or promptly thereafter, include a copy of the COMPS Order, or a COMPS Order poster published by the Division, and have the employee sign an acknowledgement of being provided the COMPS Order or the COMPS Order poster.

# Recovery of Wages

- An employee receiving less than the full wages or other compensation owed is entitled to recover in a civil action the unpaid balance of the full amount owed, together with reasonable attorney fees and court costs, notwithstanding any agreement to work for a lesser wage, pursuant to C.R.S. §§ 8-4-121, 8-6-118.
- Alternatively, an employee may elect to pursue a complaint through the Division's administrative procedure as described in the Colorado Wage Act, C.R.S. § 8-4-101, *et seq.*

# Investigations

- The Director of the Department of Labor or a designated agent shall investigate and take all proceedings necessary to enforce the payment of the minimum wage and other provisions of the COMPS Order, pursuant to COMPS and C.R.S. Title 8, Articles 1, 4, and 6. Violations may be subject to the administrative procedure as described in the Colorado Wage Act, C.R.S. § 8-4-101, *et seq.*

# Violations

- It is theft under the Criminal Code (C.R.S. § 18-4-401) if an employer or agent:
  - (A) willfully refuses to pay wages or compensation, or falsely denies the amount of a wage claim, or the validity thereof, or that the same is due, with intent to secure for himself, herself, or another person any discount upon such indebtedness or any underpayment of such indebtedness or with intent to annoy, harass, oppress, hinder, coerce, delay, or defraud the person to whom such indebtedness is due (C.R.S. § 8-4-114); or
  - (B) intentionally pays or causes to be paid to any such employee a wage less than the minimum (C.R.S. § 8-6-116).

# Division and Dual Jurisdiction

- The Division shall have jurisdiction over all questions arising with respect to the administration and interpretation of the COMPS Order.
- Whenever employers are subjected to Colorado law as well as federal and/or local law, the law providing greater protection or setting the higher standard shall apply.

# What Can Organizations Do To Prepare?

- How long has it been since you last performed an evaluation of your exemptions under the current/proposed regulations?
  - Baseline information
  - Gives a starting point
  - Tailor an evaluation based on upcoming changes
  - Salary Basis + Salary Level + Duties
- Be cognizant that employees may not like changing to nonexempt.

# What Are the Worker Options?

- Exempt employee – meets salary and duty bases tests.
- Hourly nonexempt employee – receives, at least, the applicable minimum wage and overtime after 40 hours in a week/12 in a day (if applicable).
- Salaried nonexempt employee.
- Independent contractor.
- Upcoming public hearings and public-comment period.



## EMPLOYMENT LAW FOR BUSINESSES

ATTORNEYS

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- § Employee Handbooks and Policies
- § Day-to-Day Employment-Law Questions
- § Wage and Hour Issues
- § Contracts/Agreements
- § HR and Manager Training
- § Recruiting and Hiring Procedures
- § Termination Letters/Separation Agreements
- § Department of Labor Audits
- § Compliance with FMLA, ADA, FLSA, etc.
- § Defending Your Organization Against Employee Claims, Charges, and Litigations
- § And Much More!

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