COLORADO
Department of
Labor and Employment

Division of Labor Standards and Statistics
633 17th Street, Suite 600
Denver, CO 80202-2107 | (303) 318-8441 | www.coloradolaborlaw.gov

NOTICE OF ADOPTION AS TEMPORARY OR EMERGENCY RULES

Colorado Overtime and Minimum Pay Standards Order ("COMPS Order") #36, 7 CCR 1103-1 (March 16, 2020)

I. Adopted Temporary Rules. As authorized by C.R.S. Title 8, Articles 1 and 6, and the Colorado Administrative Procedure Act, C.R.S. § 24-4-103, notice is hereby given of the adoption on a temporary basis of the following rules, the text of which accompanies this notice:

> Colorado Overtime and Minimum Pay Standards Order ("COMPS Order") #36,
> 7 CCR 1103-1 (Mar. 16, 2020)

II. Basis, Purpose, and Specific Statutory Authority for Adoption of Temporary Rules. A Statement of Basis, Purpose, Specific Statutory Authority, and Findings accompanies this notice and is incorporated by reference.

III. Findings, Justifications, and Reasons for Adoption of Temporary Rules. The Findings, Justifications, and Reasons for Adoption as Temporary Rules, within the incorporated Statement of Basis, Purpose, Specific Statutory Authority, and Findings, are incorporated by reference.

IV. Effective Date of Adopted Temporary Rules. These rules are being adopted as temporary rules on March 16, 2020, effective immediately on March 16, 2020, pursuant to C.R.S. § 24-4-103(6), and remaining in effect for 120 days after adoption, through July 14, 2020.

Scott Moss
Director
Division of Labor Standards and Statistics
Colorado Department of Labor and Employment

March 16, 2020
Date

COLORADO
Department of
Labor and Employment

Division of Labor Standards and Statistics
633 17th Street, Suite 600
Denver, CO 80202-2107 | (303) 318-8441 | www.coloradolaborlaw.gov

STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY, AND FINDINGS FOR ADOPTION AS TEMPORARY OR EMERGENCY RULES

Colorado Overtime and Minimum Pay Standards Order ("COMPS Order") #36, 7 CCR 1103-1 (March 16, 2020)

(1) BASIS. The Director ("Director") of the Division of Labor Standards and Statistics ("Division") has authority to adopt rules and regulations on minimum and overtime wages, and other wage-and-hour and workplace conditions, under the authority listed in Part 2, which also is incorporated into Part 1. These temporary or emergency rules respond to recent federal developments that require two changes to Colorado Overtime and Minimum Pay Standards Order ("COMPS Order") #36, and two issues that stakeholders called to the Division's attention with the wording of the version of COMPS Order #36 adopted on January 22, 2020.

(2) SPECIFIC STATUTORY AUTHORITY. The Director is authorized to adopt and amend rules and regulations to enforce, execute, apply, and interpret Articles 1, 4, and 6 of Title 8, C.R.S. (2020), and all rules, regulations, investigations, and other proceedings of any kind pursued thereunder, by the Administrative Procedure Act, C.R.S. § 24-4-103, and provisions of Articles 1, 4, and 6, including C.R.S. §§ 8-1-101, 8-1-103, 8-1-107, 8-1-108, 8-1-111, 8-1-130, 8-4-111, 8-6-102, 8-6-104, 8-6-105, 8-6-106, 8-6-108, 8-6-109, 8-6-111, 8-6-116, 8-6-117, and 8-12-115. Each of the preceding provisions is quoted in Appendix A to COMPS Order #36, with summaries of key provisions in Part IV(B)(1) of the "Statement of Basis, Purpose, Specific Statutory Authority, and Findings" accompanying COMPS Order #36 as adopted on January 22, 2020 (the "January 2020 COMPS Findings"). COMPS Order #36 Appendix A and January 2020 COMPS Findings Part IV(B)(1) are incorporated herein by reference.

(3) FINDINGS, JUSTIFICATIONS, AND REASONS FOR ADOPTION AS TEMPORARY RULES. Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds as follows:

(A) Demonstrated need exists for the rules. The specific findings in Part (4) below are hereby incorporated into this finding as well.

(B) Proper statutory authority exists for the rules. The specific statutory authority in Part (2) above is hereby incorporated into this finding as well.

(C) To the extent practicable, the rules are clearly stated so that their meaning will be understood by any party required to comply.

(D) The rules do not conflict with other provisions of law.

(E) Any duplicating or overlapping of the regulation is explained by the agency.

(4) SPECIFIC FINDINGS FOR ADOPTION AS TEMPORARY RULES. Pursuant to C.R.S. § 24-4-103(6), the Director finds as follows.

(A) Joint Employment: This amendment freezes the status quo standard for "joint employment" under Colorado wage and hour law, pending planned upcoming permanent rulemaking.

(1) The existing doctrine under federal law.

For over 70 years, the "joint employment" rule under federal wage law, the Fair Labor Standards Act ("FLSA"), has defined when employers are responsible for illegal wages paid by contractors with which they share control over the work, corporate ties, or other linkages. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (noting that the FLSA's definitions are "broad" because they "derive[] from the child labor statutes" and holding "de-boning" meat workers were employed by both (A) the labor contractor who hired and paid them, and (B) the meat company where they did their slaughterhouse work). After *Rutherford Food* and other cases, the United States Department of Labor ("USDOL") promulgated the basic standard as a regulation in 1958 that has remained with little change:

§ 791.2 Joint employment.

(a) A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act.[4] On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek.[5] In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.

[4] *Walling v. Friend, et al.*, 156 F. 2d 429 (C. A. 8).

[5] Both the statutory language (section 3(d) defining "employer" to include anyone acting directly or indirectly in the interest or an employer in relation to an employee) and the Congressional purpose as expressed in section 2 of the Act, require that employees generally should be paid overtime for working more than the number of hours specified in section 7(a), irrespective of the number of employers they have. Of course, an employer should not be held responsible for an employee's action in seeking, independently, additional part-time employment. But where two or more employers stand in the position of "joint employers" and permit or require the employee to work more than the number of hours specified

> in section 7(a), both the letter and the spirit of the statute require payment of overtime.
>
> (b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:
>
> (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees;[6] or
>
> [6] *Mid-Continent Pipeline Co., et al. v. Hargrave*, 129 F. 2d 655 (C.A. 10); *Slover v. Wathen*, 140 F. 2d 258 (C.A. 4); *Mitchell v. Bowman*, 131 F. Supp., 520 (M.D. Ala. 1954); *Mitchell v. Thompson Materials & Construction Co., et al.*, 27 Labor Cases Para. 68, 888; 12 WH Cases 367 (S.D. Calif. 1954).
>
> (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee;[7] or
>
> [7] Section 3(d) of the Act; *Greenberg v. Arsenal Building Corp., et al*., 144 F. 2d 292 (C.A. 2).
>
> (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.[8]
>
> [8] *Dolan v. Day & Zimmerman, Inc.*, et al., 65 F. Supp. 923 (D. Mass. 1946); *McComb v. Midwest Rust Proof Co*., et al., 16 Labor Cases Para. 64, 927; 8 WH Cases 460 (E.D. Mo. 1948); *Durkin v. Waldron., et al.*, 130 F. Supp., 501 (W.D. La. 1955). *See also Wabash Radio Corp. v. Walling*, 162 F. 2d 391 (C.A. 6).

29 C.F.R. § 791.2.

Caselaw and commentary have evolved in the decades since, but without substantial change; the doctrine has remained robust, preventing evasion of wage obligations and redressing the problem of often-insolvent contractors being deemed the only "employer." Two sources have been the leading guidance of recent years. First, USDOL promulgated an "Administrator's Interpretation" in 2016 with a highly detailed analysis of different forms of joint employment:

> [T]he Department of Labor's Wage and Hour Division (WHD) regularly encounters situations where more than one business is involved in the work being performed and where workers may have two or more employers. More and more, businesses are varying organizational and staffing models by, for instance, sharing employees or using third-party management companies, independent contractors, staffing agencies, or labor providers. As a result, the traditional employment relationship of one employer employing one employee is less prevalent. … The growing variety and number of business models and labor arrangements have made joint employment more common. …

> Horizontal joint employment exists where the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee. The analysis focuses on the relationship of the employers to each other. … [G]uidance provided in the FLSA joint employment regulation — which focuses on the relationship between potential joint employers — is useful when analyzing potential horizontal joint employment cases.
>
> Vertical joint employment exists where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and the economic realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work. This other employer, who typically contracts with the intermediary employer to receive the benefit of the employee's labor, would be the potential joint employer. Where there is potential vertical joint employment, the analysis focuses on the economic realities of the working relationship between the employee and the potential joint employer. … [G]uidance provided in the MSPA [Migrant and Seasonal Agricultural Worker Protection Act] joint employment regulation [29 C.F.R. § 500.20(h)(5)(iii)] is useful when analyzing potential vertical joint employment.
>
> The structure and nature of the relationship(s) at issue in the case, reflecting potentially horizontal or vertical joint employment or both, should determine how each case is analyzed.

USDOL Wage & Hour Division, "Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act" (Administrator's Interpretation 2016-1, Jan. 20, 2016) (footnotes omitted) (detailing separate multi-factor tests for horizontal and vertical joint employment).

Second, *Salinas v. Commercial Interiors, Inc.,* surveyed the caselaw since *Rutherford Foods*, examined the joint employment regulation, and noted that:

> in amending the FLSA in 1988, Congress recognized the "FLSA joint employment rule," explaining that "there are some situations in which an employee who works for two separate employers or in two separate jobs for the same employer has all of the hours worked credited to one employer for purposes of determining overtime liability." [Citing 1985 legislative history.] Congress also endorsed the FLSA's joint employment doctrine in enacting the Migrant and Seasonal Agricultural Workers Protection Act, … which uses the same definition of "employ" as the FLSA. [Citing 1982 legislative history that in adopting MSPA, Congress adopted ''[t]he exact same principles to define the term 'employ' in … joint employment situations as are used under FLSA'.']

848 F.3d 125, 135 (4th Cir. 2017). *Salinas* then detailed a multi-factor test to analyze joint employment:

> (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;

> (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment;
>
> (3) The degree of permanency and duration of the relationship between the putative joint employers;
>
> (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
>
> (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
>
> (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.
>
> We emphasize that these six factors do not constitute an exhaustive list of all potentially relevant considerations. To the extent that facts not captured by these factors speak to the fundamental threshold question that must be resolved in every joint employment case—whether a purported joint employer shares or codetermines the essential terms and conditions of a worker's employment—courts must consider those facts as well.

848 F.3d 125, 141-142 (4th Cir. 2017).

Salinas quickly became a leading national case on joint employment, including in Colorado. Multiple courts in Colorado followed *Salinas*; none rejected it. *E.g., Merrill v. Pathway Leasing LLC*, 2018 WL 2214471 (D. Colo. May 14, 2018) ("[T]he Court agrees … [that] [t]he *Hall-Salinas* test properly determines whether more than one person or entity are putative joint employers…. The Court therefore utilizes the *Hall-Salinas* test below in determining whether Defendants are joint employers.") (citing *Sanchez v. Simply Right, Inc.*, 2017 WL 2222601 (D. Colo. May 22, 2017) ("The Court … agrees ... that the test set forth in *Salinas* focuses upon the relevant relationship….")); *Valverde v. Xclusive Staffing, Inc.*, 2017 WL 3866769 (D. Colo. Sept. 5, 2017) (citing only *Salinas* as joint employment authority, framing the issue as follows: "*if* Defendants are joint employers and *if* such joint employment renders them jointly and severally liable, *see Salinas*").

(2) The new U.S. Department of Labor policy and regulation.

The above state of affairs has been upset, and thrown into substantial uncertainty, by the U.S. Department of Labor's repudiation of the existing Administrator's interpretation and, more recently, its promulgation of a new regulation that abrogates essentially all existing joint employment law. 85 Fed. Reg. 2820, 2820-21 (published Jan. 16, 2020, effective March 16, 2020) (revising 29 C.F.R. §§ 791.1-791.2). As noted by an article in the Society for Human Resources Management, USDOL's new rule "narrow[s]" when employers are responsible for ensuring wages are legal, because it repeals the long-established "right to control" factor; under the new rule, unlike in the past, the "right to control the employee's working conditions would not be enough to show that a business is a joint employer; the

company would have to actually exert that control … day-to-day." Lisa Nagele-Piazza, "Labor Department Releases Final Joint-Employer Rule," (SHRM, Jan 13, 2020). USDOL acknowledged that its new rule "may reduce the number of persons who are joint employers in one scenario and as a result, employees will have the legal right to collect wages due under the Act from fewer employers," and that "there may be transfers from employees to employers" — but USDOL claimed it "lacks the data needed to calculate the potential amount or frequency of these transfers." 85 Fed. Reg. at 2821, 2853. However, the Economic Policy Institute, in an analysis co-authored by the former Chief Economist of USDOL, estimates that the new rule could cost workers more than a billion dollars a year, both from encouraging more employers to outsource work, and from increased wage theft:

> First, this rule would incentivize workplace "fissuring," … reliance on contractors, temporary help agencies, and franchises rather than hiring employees directly. Research shows that these business models suppress wages…. [W]hile DOL states that it "does not expect this rule to generate transfers … from workers that currently have one or more joint employers," it neglects to account for the reduction in wages … as more employers are incentivized to … boost their reliance on domestic outsourcing. We … estimate that in the long run, the increase in workplace fissuring … would result in a transfer of at least $954.4 million from workers to employers annually….
>
> Second, this rule would increase … wage theft .... [USDOL] hints that it understands that … when it states that "*assuming that all employers always fulfill their legal obligations*, … [the rule] would not result in any reduction in wages received ...." However, rather than performing a careful analysis of … [when] the assumption that all employers always fulfill their legal obligations … does not hold, … the Department remarkably ends any discussion of the impact of wage theft with the assumption that it does not occur. We conservatively estimate that … wage theft as a result of the rule will … transfer at least $138.6 million from workers to employers annually.
>
> Putting together these two estimates—more than $954.4 million lost … due to an increase in workplace fissuring and more than $138.6 million in losses … as a result of wage theft—we estimate that each year workers will lose more than a billion dollars as a result of this rule….

Celine McNicholas & Heidi Shierholz, "EPI comments regarding the Department of Labor's proposed joint-employer standard" (June 25, 2019) (emphases added).

The State of Colorado on February 26, 2020, filed a federal lawsuit against USDOL, in collaboration with 17 other states, arguing that the new USDOL rule was unlawfully adopted and an improper policy change at odds with core FLSA principles, and therefore should be enjoined to prevent its alteration of the pre-existing "joint employer" standards in caselaw and regulations.

In sum, USDOL's promulgation of its new rule threw well-established joint employment law into uncertainty, adopted a standard so narrow that it will deny redress to workers paid unlawful wages, and in the judgment of the State of Colorado was improper both procedurally and substantively.

(3) The state of joint employment under Colorado wage and hour law.

Last May, Colorado enacted HB 19-1267, declaring that under state wage law, "employer … has the same meaning as set forth in the federal 'Fair Labor Standards Act', 29 U.S.C. Sec. 203(d)." C.R.S. § 8-4-101(6). In adopting the new "employer" definition in May 2019, Colorado expressly referenced

the FLSA statutory definition, making clear it was codifying FLSA law as it existed at that point in time — which is a well-established rule of Colorado statutory interpretation as well:

> When a statute specifically incorporates enumerated provisions of another statute, in contrast to referring to another law in general terms, the General Assembly is considered to be adopting the contents of the other provision *as of the time of the adoption*. … [A]bsent express legislative declaration to the contrary, subsequent amendments to the adopted statute will not affect the terms originally adopted.

Ball Corp. v. Fisher, 51 P.3d 1053, 1058 (Colo. App. 2001) (emphasis added; citation and quotation marks omitted); *see Sch. Dist. No. 1 in Arapahoe Cnty. v. Hastings*, 220 P.2d 361, 364 (Colo. 1950) ("It is a general rule that when a statute adopts a part or all of another statute ... by a specific and descriptive reference thereto, the adoption takes the statute as it exists at that time, *and does not include subsequent additions or modifications of the adopted statute*, where it is not expressly so declared") (emphasis added; quotation marks omitted); *Accord Brizzee v. Fred Meyer Stores, Inc.*, No. CV04-1566-ST, 2006 WL 2045857, at *11–12 (D. Or. July 17, 2006) (a state statute "cannot incorporate future federal regulations not yet promulgated at the time of the enactment"; doing so amounts to an unconstitutional delegation of power to amend state statutes to federal regulatory authorities, and Oregon legislature did not intend to "empower the [US]DOL to fill in any gaps in the [Oregon Family Leave Act]. Instead, it authorized … the Oregon Bureau of Labor and Industries"); *State v. Rodriquez*, 365 So. 2d 157, 160 (Fla. 1978) (Florida Legislature intended "to incorporate federal law and regulations in effect at the time [the law] was enacted"; "to adopt in advance any federal act or ruling of any federal administrative body which may be adopted in the future would amount to an unlawful delegation of legislative authority"); *Advocates for Effective Regulation v. City of Eugene*, 1981 P.2d 368, 379 (Or. App. 1999) ("A state statute … cannot incorporate future federal regulations not yet promulgated at the time of enactment; the effect of doing so is to delegate the power to amend the statute to the federal regulatory authority").

Thus, Colorado law follows FLSA caselaw and regulations as they existed in May 2019, not the new USDOL regulation adopted in 2020. However, without further elaboration, confusion could result. A Colorado statute stating that "employer … has the same meaning as set forth in the federal 'Fair Labor Standards Act'" could lead a reader interpreting Colorado law to assume that the *current* state of all FLSA law, including the new USDOL regulation adopted in 2020, applies. At least one attorney has already expressed that view to the Division, and while the Division provides guidance to any employer, employee, attorney, or other stakeholder who asks, the Division cannot assume that all stakeholders will contact the Division, rather than make the mistaken assumption that the new USDOL joint employment regulation applies to Colorado wage and hour law.

(4) The present need for joint employment rulemaking under Colorado law.

Based on the above, the Division sees a need to promulgate an immediate rule to clarify that the new USDOL joint employment regulation does not apply to Colorado wage and hour law. The Division will carefully consider exactly what joint employment rule to adopt. Many different views were expressed in a stakeholder meeting the Division held before adopting this temporary or emergency rule; there is not a clear consensus, and there are many complex sources of guidance to consider, including *Salinas*, the 2016 Administrator's Interpretation, the longstanding prior USDOL joint employment regulation, and other sources of law and of interpretive guidance. The Division therefore is taking time to research the issue exhaustively, and whatever rule it proposes may well see change in the rulemaking process, when the Division — as it did with the COMPS Order — genuinely listens to stakeholder

comments, and considers changing its proposed rules based on informed input from stakeholders in the rulemaking process.

Because the Division is open to changing whatever joint employment rule it proposes, it does not codify one specific legal standard in this temporary or emergency rule — because that could codify one rule for the next 3-4 months, only to be replaced by a different rule when and if stakeholder feedback justifies changing the permanent rule. This temporary or emergency rule therefore simply freezes the status quo, by providing:

> "Joint employment under Colorado wage and hour law shall continue to be analyzed under the versions of the federal Fair Labor Standards Act and applicable FLSA regulations that were in effect as of the enactment of H.B. 19-1267 by the State of Colorado on May 16, 2019."

This assures no immediate change to joint employment under Colorado wage and hour law, because the January 2020 COMPS Findings — citing *Salinas* and other caselaw citing the longstanding FLSA joint employment regulation as it existed before the new USDOL joint employment regulation — explained: "Joint employment is … provided for by amended C.R.S. § 8-4-101(6) because under FLSA law as it stood upon enactment of H.B. 19-1267, '[s]eparate persons or entities that share control … may be deemed joint employers under the FLSA.'" (January 2020 COMPS Findings, p. 9; citation omitted).

The Division will notice a proposed permanent joint employment rule within 30 days of this temporary or permanent rule, which will begin the formal notice and comment process on joint employment rulemaking. Until then, this temporary or emergency rule simply avoids confusion by assuring that USDOL's new rule will create no sudden change or uncertainty as to joint employment under Colorado wage and hour law.

(B) Daily overtime for "companions." The predecessor to COMPS Order #36, the annual Minimum Wage Order, had covered "health and medical" employees, and courts had ruled that Medicaid-funded "companions," even if not performing the same work as doctors and nurses, were still within the "health and medical" category, and that the Wage Order exempted only companions employed directly by the service recipient, not those employed by third-party providers.

- "Defendant contends that Ms. Kennett is barred from seeking overtime … [by] the 'companion' exemption. … The only sound interpretation of that exemption requires that the 'companion' employee is employed directly by the household or family." *Kennett v. Bayada Home Health Care*, 135 F. Supp. 3d 1232, 1234 (D. Colo. 2015).

- "The plain language of the [MWO] companion exemption dictates that it does not extend to third-party employers." *Jordan v. Maxim Healthcare Services*, No. 15-cv-01372-KMT, 2016 WL 1059540, *5 (March 17, 2016) (citing *Kennett*).

- "Plaintiffs are former home health aides … provid[ing] in-home care for Defendant's clients.… There is no genuine dispute … as to Defendant's liability under the … CMWO, and Plaintiffs are entitled to summary judgment." *Murphy v. AllStaff Homecare*, 2019 WL 4645440, at *1, *6 (D. Colo. Sept. 24, 2019).

Accordingly, when the Division conducted its research, drafting, hearings, and finalization of COMPS Order #36, from early 2019 to January 2020, the Division took the above state of the law as a given.

However, on February 19, 2020, the U.S. Court of Appeals for the Tenth Circuit abrogated all three of the above court decisions, with a holding that "the companionship exemption applies to all companions—including those employed by third-party employers." *Jordan v. Maxim Healthcare Services*, No. 18-1290, 2020 U.S. App. LEXIS 5061, at *12 (Feb. 19, 2020).

This decision changed the legal landscape abruptly, and confirmed that while any companion employers *not* paying daily 12-hour overtime had been acting contrary to years of court rulings, they ultimately prevailed in challenging those rulings. To the extent that such providers have not been required to pay such 12-hour overtime, it would be a change to the status quo to require it. COMPS Order #36 changes the status quo in a number of ways, and those employing companions may have to pay daily overtime or, if they choose, adjust their shifts to avoid days over 12 hours. But for *live-in* companions who intersperse work, on-call, and sleep time, changing shift structures is more difficult, as is obtaining more Medicaid funding, which cannot realistically be obtained in a year or less. Accordingly, the list of Rule 2.2.7 exemptions for "In-residence workers" now adds a subpart (G) that exempts, from 12-hour daily overtime, in-residence Medicaid-funded companions, defined as follows:

> "The Rule 4.1.1(B)-(C) daily (12-hour) overtime rule does not apply in COMPS #36 (2020) to companions designated as direct support professionals/direct care workers who are scheduled for, and work, shifts of at least 24 hours providing residential or respite services and who are employed by service providers and agencies that receive at least 75% of their total revenue from Medicaid or other governmental sources, and who provide services within Medicaid home- and community-based service waivers."

The Division in spring 2020 will convene a diverse task force — representing employees, employers, and relevant government entities — to study whether, when, and to what extent a daily overtime requirement should apply to such workers. Because that task force will take months, and COMPS Order #37 for 2021 needs to be proposed by September 2020, and thus needs to be drafted by summer 2020, the new Rule 2.2.7(G) exemption will continue unchanged in COMPS Order #37, with future changes, if any, coming only after the task force concludes, and only in a later COMPS Order.

(C) Rest period flexibility for certain providers of Medicaid services. COMPS Order #36 provided limited additional rest period flexibility for three categories: most agricultural employers (R. 2.3.1); employers with a collective bargaining agreement that may require different allocations of rest periods from those in the COMPS Order (R. 5.2.1(B)(i)); and Medicaid-funded residential in-home services (R. 5.2.1(B)(ii)). Following adoption of COMPS Order #36 on January 22, 2020, the Division learned that the employer definitions in the third category were inapt in three specifics.

First, 5.2.1(B)(ii) covered those employers funded 75% by "federal and/or state" funds. Some such providers, though, also have *local* government funds, driving their "federal and/or state" percentage under 75%. The Division did not intend to impose negative consequences (*i.e.*, losing this additional rest period flexibility) when localities choose to provide extra funding for Medicaid providers. Accordingly, the definition has been amended to require 75% funding "from Medicaid or other governmental funds."

Second, the 5.2.1(B)(ii) definition limited the range of employers to "residential" services, which excluded such services as day programs for persons with significant disabilities. The better restriction

than the term "residential" is the more technically apt definition — employers "within Medicaid home- and community-based services waivers," with the added clarifying limit that this extra rest period flexibility is for when "the services provided require continuous supervision of the service recipient, or providing a rest period would interfere with ensuring the service recipient's health, safety, and welfare." This assures that similar residential and non-residential services are treated equally, while assuring that this extra rest period flexibility applies only where truly needed for vulnerable service recipients.

Third, the Division has learned that the providers in 5.2.1(B)(ii) sometimes offer outings to service recipients, often persons with disabilities, whose needs require constant one-on-one supervision, including during outings outside their usual more controlled, safe settings. To avoid incentivizing the taking of rest periods when it would not be safe, and to avoid disincentivizing providers from offering service recipients such outings, the Division concluded that such time should be excluded from rest period requirements: "when (B)(ii) above applies[,] [w]hen direct support professionals or direct care workers serving individuals with disabilities spend time in community outings with those individuals with disabilities — as part of day programs, supported living services, or one-to-one respite or personal care — time in such outings does not require rest breaks or pay for rest breaks."

(D) Lessening unintended requirements for earnings statements. As adopted, Rule 7.1 requires employers to keep "Employee Records" with detailed information listed as items (A)-(E). Rule 7.2 then requires "Issuance of Earnings Statement[s]" by employers "each pay period." Rule 7.2, rather than repeat specific information that employers must provide, simply requires the information listed in Rule 7.1. The problem that has been called to the Division's attention is that some of what Rule 7.1 requires is information that makes no sense to require in each pay period's earnings statement — *e.g.*, date of hire (7.1(A)) and date of birth if under 18 years old (7.2(B)) — as well as information that may be administratively difficult to provide each pay period — *i.e.*, a "daily" record of hours worked.

The predecessor to COMPS Order #36, the annual Minimum Wage Order, had required such earnings statements for over two decades. Apparently many employers had not noticed, so the Division had not been pressed to loosen this requirement that, it agrees, asks more than is necessary of employers.

Further reform of the Rule 7 record and statement provisions may be warranted, and will be considered for COMPS Order #37. For this temporary or emergency rule, the Division wishes to change these rules only modestly. Accordingly, Rule 7.2 now requires each pay period's earnings statement to include only the items in 7.1(D)-(E) (i.e., "(D) record of credits claimed and of tips; and (E) regular rates of pay, gross wages earned, withholdings made, and net amounts paid each pay period"), "and the total hours worked in the pay period, with the employee's and the employer's names" — but not the items in 7.1(A), (B), and (C) (i.e., "(A) name, address, occupation, and date of hire of the employee; (B) date of birth, if the employee is under 18 years of age; (C) daily record of all hours worked").

Because this change eliminates the employer duty to provide pay statements with "daily … hours" and that state the employee's "occupation" (which can be important where pay depends on the nature of the employee's work, such as under certain collective bargaining agreements or prevailing wage rules), however, there is a need to make sure employees can obtain such information when needed. Accordingly, the Division is adding to Rule 7.3 ("Maintenance of Earnings Statement Information") to let employees receive the information that employers must maintain under Rules 7.1(A)-(C) — mainly daily hours and a statement of their occupation. Employers can choose any of the following three options: (A) provide this information with each pay period's earnings statements (which is what previously was mandatory, but now is an option); or (B) provide employees online access to the

information (if the employer knows the employee to have an email address); or (C) provide the information annually (by each January 31st, roughly contemporaneous with annual W-2 tax forms) as well as upon a request that an employee can make once per year (in addition to receiving the annual statement by January 31st).

(E) The need for temporary or emergency rulemaking. The above four developments all came to the Division's attention recently, after it finalized COMPS Order #36 in January 2020 and finalized the Wage Protection Act rules in late 2019. The Division finds, consistent with the standard for adopting temporary or emergency rules, that immediate adoption of these rules is imperatively necessary for the preservation of public health, safety, or welfare, and that compliance with permanent rulemaking provisions before adoption would be contrary to the public interest. These rules will prevent and redress the harms noted above, and the legislature has repeatedly issued findings that preventing and redressing unlawful wage non-payment prevents and redresses significant harms to public health, safety, and welfare. For example:

- The Wage Protection Act of 2014, which created the Division's authority and requirement to rule-make on, investigate, and issue determinations on all wage complaints it receives, included the following findings as to the importance of compliance with, and enforcement of violations of, state wage payment laws: "The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety." (Colorado S.B. 14-005, § 11, enacted May 29, 2014.)

- The 2019 statute adopting the current "employer" standard under Colorado law found that adopting a broader "employer" definition under Colorado law was necessary because "[e]xisting law … does not provide sufficient protections for workers and their families; and … to protect all workers, it is necessary to close loopholes that allow for the exploitation of human labor for profit." (Colorado H.B. 19-1267, § 1(3)(b)-(c), enacted May 16, 2019.)

- The 2019 Colorado Chance to Compete Act, which limited the screening of job applicants based on criminal history, included the following findings that are more broadly relevant to the problem of workers being under-paid: that when people "work at jobs that are below their potential" or otherwise suffer "underemployment," they "struggle to provide for their families," and "[c]hildren and families suffer." (Colorado H.B. 19-1025, § 1, enacted May 28, 2019.)

Consequently, a "temporary or emergency" rule is appropriate for the up to 120-day period permitted under the Administrative Procedure Act:

> A temporary or emergency rule may be adopted without compliance with the [ordinary rulemaking] procedures … and with less than the twenty days' notice prescribed … , or where circumstances imperatively require, without notice, only if the agency finds that immediate adoption of the rule is imperatively necessary to comply with a state or federal law or federal regulation or for the preservation of public health, safety, or welfare and compliance with the requirements of this section would be contrary to the public interest and makes such a finding on the record. Such findings and a statement of the reasons for the action shall be published with the rule. … A temporary or emergency rule shall

> become effective on adoption or on such later date as is stated in the rule, shall be published promptly, and shall have effect for not more than one hundred twenty days ….

(C.R.S. 24-4-103(6)(a).)

The above-detailed risks these temporary or emergency rules redress — of costly legal uncertainty, of weakened wage rights that would cost workers substantial lost wages, and of burdensome rules to employers — easily exceed various justifications that have been found sufficient for "temporary or emergency" rules:

- helping applicants get probationary driver's licenses, more quickly than regular rulemaking allows, was sufficient justification for a "temporary or emergency" rule in *Elizondo v. Motor Vehicle Division*, 570 P.2d 518, 523 (Colo. 1977); and

- a "budgetary emergency" was sufficient justification, even if the budget problem was known "long before," without strict need for "specific, objective data," as long as "the reasoning process that leads to the rule's adoption [was] defensible," in *Colorado Health Care Ass'n v. Dep't of Social Services*, 598 F. Supp. 1400 (D. Colo. 1984), *affirmed*, 842 F.2d 1158 (10th Cir. 1988).

(5) EFFECTIVE DATE. These rules are being adopted as temporary rules on March 16, 2020, effective immediately on March 16, 2020, pursuant to C.R.S. § 24-4-103(6), and remaining in effect for 120 days after adoption, through July 14, 2020.

March 16, 2020

Scott Moss
Director
Division of Labor Standards and Statistics
Colorado Department of Labor and Employment

Date