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WHAT'S NEW AT THE COURTHOUSE

Lately, the decisions from federal and state courts are coming fast and furiously. This article will discuss recent court decisions and the impact those decisions will have on Colorado employers.

Colorado Supreme Court Requires Holiday Pay Incentives to Be Included in the Regular-Rate Determination
Hamilton v. Amazon.com

Sometimes, a federal court requests a state court to address an issue that's come up in a federal case. That scenario took place in *Hamilton v. Amazon.com Services LLC*, 2024 WL 158760 (2024), wherein the 10th Circuit federal Court of Appeals requested that the Colorado Supreme Court answer a very specific question regarding how holiday incentive pay paid by an employer to an employee should be treated and whether the incentive needed to be included in the employee's base rate for overtime rate calculations.

This case was based on an employee suing Amazon.com in federal court claiming Amazon.com did not calculate the employee's overtime correctly because Amazon.com did not include a time and a half incentive provided to the employee for working on a holiday in that overtime calculation.

The federal court dismissed the claim because the court determined Colorado law did not require holiday pay incentives to be included in overtime calculations. The employee appealed the decision to the federal 10th Circuit Appeals Court. That Court decided that because this was an interpretation of Colorado law, it would ask the Colorado Supreme Court to provide an opinion.

In response, the Colorado Supreme Court held that holiday incentive pay must be included in an employee's regular rate of pay when determining the employee's pay for overtime calculations.

The Supreme Court based this decision on language in the Colorado Overtime and Minimum Pay Standards that identified that "[t]he regular rate includes all compensation paid to an employee, including set hourly rates, shift differentials, minimum wage tip credits, non-discretionary bonuses,

production bonuses, and commissions." In essence, the Supreme Court compared holiday incentive pay to a shift differential indicating that both payments are made to the employee to work undesirable shifts. Given this similarity, the Supreme Court held that holiday incentive pay should be included in the base pay compensation. This decision does not impact employers not covered by COMPS (e.g., governmental entities).

Example: Let's say ABC, Inc. has an employee it pays $15 an hour and $22.50 an hour when the employee works a holiday. Then, during a holiday week, the employee works 45 hours with 8 of those hours on a holiday. Under *Amazon.com*, the "holiday bump" needs to be included in the employee's regular rate, which will mean that the employee's overtime rate will be based on a higher number than the employee's normal hourly rate of $15 per hour. That new regular rate is calculated as follows:

Normal Pay	= 37 hours x $15/hour = $555
Holiday Pay	= 8 hours x $22.50/hour = $180
Subtotal	**= $735**
Overtime Base	= $735/45 hours = $16.33/hour
Overtime Rate	= $16.33/hour x .5 = $8.17
Overtime Pay	= $8.17/hour x 5 hours = $40.85
Total Pay	**= $775.85**

Remember that a similar calculation should generally be undertaken when an employer provides additional wages to an employee in Colorado, such as for nondiscretionary bonuses or shift deferential pay. Failure to properly account for all the pay in determining the overtime rate could result in wage demands and lawsuits.

The lawsuit against Amazon.com was a class action filed by one employee on behalf of all other employees. It demonstrates that what might seem like a simple math error or unsubstantial pay difference can balloon into significant legal exposure. In the wake of this case, it is a good time to review your payroll practices to ensure compliance with all state and federal wage laws.

U.S. Supreme Court Changes the Definition of "Adverse Employment Action." *Muldrow v. City of St. Louis*

In a discrimination, harassment, or retaliation lawsuit, the employee must prove that the employer subjected the employee to an "adverse employment actions." But what amounts to an adverse employment action? In the past, court opinions required an employee to prove that the employer subjected the employee to a "significant" change in working conditions that produced a "material employment disadvantage."

However, on April 17, 2024, the U.S. Supreme Court, in *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), lowered what an employee needed to prove to establish an adverse action. In *Muldrow*, a female police

officer filed a lawsuit against the city alleging sex discrimination because she was transferred to a less prestigious position in the force. This transfer was lateral and had the same pay as her previous position. Because there wasn't a significant change, the lower court dismissed the officer's lawsuit.

Ms. Muldrow appealed, and the Supreme Court held that an employee "need show only some injury respecting her employment terms or conditions" (i.e., not that the impact was "significant"). In short, the action must make an employee worse off, but the action does not have to make the employee "significantly" worse off.

Though it is clear that the Supreme Court intended to lower the standard for proving an adverse employment action in a discrimination case, the Supreme Court was not entirely clear on exactly where that new line will be to claim an adverse employment action. As a result, the courts who are deciding cases on this issue are now trying to figure out where the new line will be to prove an adverse action.

Examples of such cases include:

- *Beaver v. Amazon.com*, 2024 WL 3348628 (D.Colo. 2024); *Eguakun v. Gusto, Inc.,* 2024 WL 3416387 (D.Colo. 2024). In these cases, Colorado courts determined that being assigned to job duties that an employee disliked and failing to make a new position for the employee are not adverse employment actions.

- *Rios v. Centerra Group LLC,* 106 F.4th 101 (1st Cir. 2024). In this case, the court determined that admonitions by a supervisor without any formal consequences is not an adverse employment action.

- *Milczak v. General Motors, LLC,* 102 F.4th 772 (6th Cir. 2024). This court determined that an employer withholding of a discretionary raise or bonus could be an adverse employment action if the employee could prove they would otherwise be entitled to that raise or bonus.

- *Cole v. Group Health Plan,* 105 F.4th 1110 (8th Cir. 2024). Another court determined that scorn and ridicule of coworkers as a result of indicating the vaccination status of an employee on a badge was an adverse employment action.

Based on these decisions, employers are encouraged to train their employees and supervisors in anti-discrimination and anti-harassment policies and practices. Additionally, any allegation of discrimination, harassment, or retaliation based on a protected classification should be reported, put in the company's complaint repository, and investigated under Colorado's POWR Act.

Court Strikes Down FTC's Attempt to Ban Noncompete Agreements in the United States
Ryan, LLC v. FTC

Earlier this year, the Federal Trade Commission (FTC) issued an agency rule that invalidated most noncompete agreements in the United States. That rule was scheduled to become effective in early September 2024.

After the FTC passed this rule, the Supreme Court handed down the decision in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024). In this decision, the Supreme Court indicated that courts did not have to defer to agencies on their expertise in creating a new rule. This deference had been known for decades as "the Chevron Doctrine." Under the Chevron Doctrine, courts were expected to give deference to administrative agencies on matters covered by that agency. But in *Loper,* the Supreme Court stated that courts "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." So, in essence, the Supreme Court determined that courts would no longer be "required" to defer to administrative agencies; though the Court could defer if it wanted to.

With this in mind, the Northern District of Texas, Dallas Division, in *Ryan LLC v. Federal Trade Commission*, 2024 WL 3879954 (N.D.TX 2024), determined that the FTC exceeded its statutory authority in creating the rule banning noncompete agreements because the FTC's statutory authority does not allow them to make "substantive rulemaking." *Id*. The court went on to determine that the FTC's rule was unreasonably overbroad and without reasonable explanation.

Accordingly, the FTC rule was set aside by the court and the court indicated that the rule could not be enforced by the FTC. The FTC still has time to appeal this decision, and it will likely do so. But for now, go ye forth and enter into noncompete agreements. Just make sure that the agreement follows current Colorado law (i.e., C.R.S. §8-2-113).

Court Upholds DOL's Effort to Raise Salary-Basis Test for Exempt Employees
Mayfield v. United States DOL

Unlike the decision regarding the FTC's noncompete rule in *Ryan*, the 5th Circuit, in *Mayfield v. United States Department of Labor*, 2024 WL 4142760 (5th Cir. 2024), decided that the Department of Labor did have the statutory authority under the Fair Labor Standards Act to create a new rule on the salary basis for exempt employees.

As you'll recall, in the Spring 2024, the DOL issued a new rule increasing the salary basis amount for exempt employees from $35,568 annually to $43,888 annually starting July 1, 2024. This amount is to be increased again on January 1, 2025, to $58,656 and increase every three years thereafter to reflect current earnings data.

In *Mayfield*, the Court had to determine whether the DOL had the authority to create a new salary basis amount. The 5th Circuit determined that Congress intended to

delegate the authority to the DOL to determine the exemption status of employees when Congress passed the FLSA. Accordingly, the decision of the DOL to have a salary basis for an exempt employee would be aligned with this delegation.

For employers this means that for all exempt employees, you must first determine if that employee fits within one of the exempt categories, (e.g., executive, administrative, professional, etc.), and then you need to make sure that the employee is paid correctly under the salary basis test. Remember that federal and state laws have different salary basis tests. Colorado's current salary basis amount is set at $55,000. So, employers covered by COMPS must pay exempt employees at least this amount. Colorado's salary basis amount is also slated to increase in January 2025. But whether that new amount is going to be greater or less than the federal amount is still an undecided issue. Last year, the CDLE made its announcements on wage issues in late-September. So, a similar announcement could be issued any day now.

The *Mayfield* decision was issued on September 11, 2024, and many expect that it will be appealed to the U.S. Supreme Court. Like *Ryan* we will have to watch to see if an appeal happens and if those appeals change these decisions.

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