

THE EMPLOYER'S ADVISORY

A PERIODICAL HIGHLIGHTING
CURRENT EMPLOYMENT-LAW ISSUES

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12 DAYS OF RESOLUTIONS FOR 2025

It's that time of year again. Time for winter driving, sunsets before 5:00 p.m., the countdown to Spring Training, and, of course, New Year's resolutions. So, to join in this long-standing tradition, The Employer's Advisory created the following resolutions, in no particular order:

#1. *Follow proposed legislative bills and get involved before it becomes law.* To borrow an oft-repeated expression, "If you don't get involved in legislation before it's passed (e.g., write emails to your representatives/senators; participate in local SHRM committees), you lose the right to complain about it after it's passed." The 2025 Colorado legislative session is certain to be a very active one regarding employment laws (e.g., efforts are already underway to nix Colorado's Labor Peace Act governing workplace unionization). So, now is the time to get involved in shaping how those employment/HR laws will look.

#2. *Make sure you're complying with Colorado's new wage requirements.* With the federal efforts to modify wage requirements on pause, Colorado employers can turn their attention to Colorado's wage requirements as they have now become official. Those are:

- Minimum wage:
\$14.81 per hour

- Minimum salary amount to be exempt:
\$56,485.00 per year
- Highly compensated threshold:
\$141,212.50 per year

#3. *Don't forget the highly compensated exemption.* To classify an employee as exempt under Colorado law (i.e., not required to keep track of the employee's time or to ensure the employee receives overtime pay), the organization must show that the employee (a) receives, at least, the minimum salary basis amount (see bullet #2 above) and (b) meets one of the duty-basis tests (e.g., administrative, executive/supervisor or professional).

In addition to those exemptions, Colorado also has a highly compensated exemption that an employer can use to classify an employee as exempt. To establish that an employee meets the highly compensated exemption, the employer must show that the employee:

- performs office or non-manual work as their primary duty (for example, a managerial electrician);
- customarily and regularly performs one or more exempt duties of an executive, administrative, or professional employee; and
- receives at least \$141,212.50 per year.

This doesn't mean that to classify an employee as exempt the employer must pay the employee \$141,212.50 per year because that amount only applies to the highly compensated exemption. To meet the administrative, executive, or professional exemptions -- an employer only needs to meet one to classify the employee as exempt -- the employee need only receive \$56,485.00 per year.

In essence, the salary requirement is higher for the highly compensated exemption because it's easier to meet the duty basis tests of that exemption, whereas the salary is lower with the other exemptions because the duty tests for those exemptions are more difficult to meet.

#4. Provide non-exempt employees with the new COMPS poster. Don't overlook that pesky provision in COMPS that requires employers to provide a copy of COMPS with the Employee Handbook and have the employee sign the COMPS Order:

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**.

COMPS Order, Rule 7.4.2.

#5. Don't think Amazon is just for shopping (a.k.a. don't forget that overtime is based on an employee's regular rate, not just the employee's hourly rate). The Colorado Supreme Court's recent *Amazon* decision, which principally discussed holiday premium pay, highlighted how many payments to employees make up an employee's "regular rate."

That is, as you'll recall, COMPS requires that when paying an employee for overtime hours worked, the employer must pay the employee 1 ½ times the employee's "regular rate" (i.e., not just 1 ½ the employee's "hourly rate"). So, what makes up an employee's regular rate, you may ask. In short, there's a lot of stuff that COMPS identifies as being included in an employee's 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.

COMPS Order, Rule 1.8

Additionally, the Supreme Court noted that COMPS only identified a few items that were specifically not included in an employee's regular rate (a.k.a. "the excluded list"). Those items were:

Business expenses, bona fide gifts, discretionary bonuses, tips, employer investment contributions, vacation pay, holiday pay, sick leave, jury duty, or other pay for non-work hours.

And while the Order does mention "holiday pay" as being on the excluded list, the Supreme Court in *Amazon* noted that such pay was only excluded from regular rate under COMPS if the pay was for holidays not worked, as opposed to those situations where the employee receives a premium for working on the holiday because when the employer pays a premium for working on the holiday that premium must be included in the employee's regular rate.

In short, if your payment to an employee is not specifically identified in the excluded list, you should consider including that amount in the calculation of an employee's regular rate.

#6. Make sure job descriptions accurately describe the duties you want the employee to

perform. Job descriptions not only convey to employees what they should be accomplishing, but they are invaluable to identify in unemployment claims, EEOC charges, litigations, etc. what the employer considers to be the essential functions of the position. It is best practice to review job descriptions periodically to ensure they capture the realities of the positions they cover. Additionally, these job descriptions are absolutely essential in defending a claim under the Equal Pay Act. So, don't overlook these critical documents.

#7. Tell every non-exempt employee every single day that they are "authorized and permitted" to take a 10-minute rest break every four hours or major fractions thereof. Okay. Not once-a-day, every day. Twice a day is better. That is, we all know that the COMPS Order has a provision regarding employees taking a certain number of rest breaks each shift. But many read that provision to say the employee must "take" the rest break when that's actually not in the Order. Instead, the Order requires employers to "authorize and permit a required 10-minute rest period." So, how does an employer "authorize and permit" a rest break. Well, here are a few ideas:

- Have language in the Handbook that stresses every non-exempt employee is "authorized and permitted" to take the identified rest breaks.
- Put the language in the Handbook sign-off sheet and have the employee initial it and sign the sign-off sheet that non-exempt employees are authorized and permitted to take the required rest breaks.
- Have all non-exempt employees sign the COMPS Order.
- Have supervisors end employee meetings by saying, "don't forget you are authorized and permitted to take a 10-minute rest break every four hours. If you don't think you're authorized and permitted to take one, come see me."

- Get company coffee mugs that say, "All non-exempt employees are authorized and permitted to take a 10-minute rest period every four hours."
- Put the authorized-and-permitted language in the company newsletter.
- Hire a group of holiday carolers to go around singing, "on the first day of Christmas my true love authorized and permitted me to receive a 10-minute rest break every four hours."

Of course, the key is not only in the form, but also the substance. So, in addition to these steps, make sure that employees are truly authorized and permitted to take rest breaks and that employees aren't feeling pressured to skip a rest break or two. To this end, it's also helpful to communicate to employees what they can do if they feel like they cannot take a break.

#8. Make sure supervisors receive training regarding the organization's policies and procedures. Do your supervisors understand the finer points of the ADA when their subordinates talk to them about a recent medical issue or explain why the employee shouldn't receive a reprimand because of a certain medical condition? Do they understand that unlawful harassment and discrimination claims are not limited to sex, but can include religion, age, race, ethnicity, genetic information, gender identity, gender expression, disability, marital status, etc.? Do they understand how harassment under Colorado's POWR differs from harassment under the federal Title VII? These are just a few examples of training that supervisors should receive from organizations.

#9. Ensure that your organization's harassment and discrimination policies contain effective and lawful complaint procedures and that the organization has a complaint repository and keeps track of certain documents for 5 years. One of the best defenses to a harassment claim is that an employer has a well-documented anti-harassment policy and complaint procedures that is conveyed to every employee and is followed when a complaint is received.

Additionally, Colorado POWR requires that all Colorado employers have a complaint repository that contains “**ALL** written or oral complaints of discriminatory, harassing, retaliatory, or unfair employment practices that includes, but is not limited to: (a) the date of the complaint; (b) the identity of the complaining party, if the complaint was not made anonymously; (c) the identity of the alleged perpetrator; and (d) the substance of the complaint.”

POWR also requires that organizations keep the following categories of records for five (5) years: (a) requests for accommodation; (b) written and oral employee complaints of discrimination, harassment, or unfair employment practices; (c) submitted job applications; (d) records related to hiring, promotion, demotion, transfer, layoff, termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; and (e) records of training provided to or facilitated for employees.

#10. *Si sus trabajadores hablan varios idiomas, las políticas de la compañía deben estar en varios idiomas.* If you didn't understand that, perhaps you shouldn't expect employees who predominantly speak Spanish to understand the organization's English-only policies. In short, consider having your key employment policies translated into Spanish for workers who predominantly speak Spanish.

#11. *Treat every e-mail and text as though it could be “Jury Exhibit #1.”* Many people look at e-mails and texts as more “casual” than documents, letters, etc. But they aren't. Further, hitting that “delete” button doesn't erase the e-mail or text from the system; it can be discovered years later. All employees within your organization should be advised to read and write e-mails and texts from this perspective.

12. *Make sure all your employment posters are up to date.* In the last few years, there have been a lot of new posters that Colorado employers must post. These posters include, but are not limited to workers compensation notices, COMPS, HFWA,

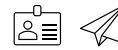
FAMLI, etc. So, make sure that your posters are updated to reflect current laws. Free current versions of most posters can be found at <https://cdle.colorado.gov/posters>.

So, with these resolutions now prepared, we can look forward to the coming year!!! And we here at The Employer's Advisory wish everyone “Happy Holidays” and a wonderful start to the new year.

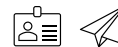
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