



## Interpretive Notice & Formal Opinion (“INFO”) # 1A:

### The Executive, Administrative, and Professional Exemptions from the Colorado Overtime and Minimum Pay Standards Order (“COMPS”)

#### Overview

This INFO explains the exemptions for **E**xecutives or supervisors, **A**dministrative employees, and **P**rofessional employees (“EAP”) from the core substantive provisions of the [Colorado Overtime and Minimum Pay Standards Order \(“COMPS”\)](#), under Rules 2.2.1–2.2.3. The EAP exemptions, like all COMPS exemptions, are narrowly construed, and an employer must “plainly and unmistakably” prove an employee is exempt. [COMPS, Rule 8.7\(A\)](#); *Chase v. Farmers Insurance Exchange*, 129 P.3d 1011, 1014–15 (Colo. App. 2004).

**Required Salary Threshold:** EAP employees are exempt from the core substantive portions of COMPS (except Rules 1, 2, and 8) if they **both** (A) are **paid a salary** of at least the minimum detailed in Rule 2.5.1, and (B) **perform exempt duties** as detailed in Rules 2.2.1, 2.2.2, and 2.2.3. An employee’s job **title** alone is not enough to establish exemption. Instead, their **salary and actual duties** determine whether or not they qualify for an exemption. To the extent that an employee’s duties fluctuate or change, the duties assessment is to be conducted on a weekly basis. While many of the COMPS EAP duties requirements are similar to those in federal law — the Fair Labor Standards Act (FLSA) — portions of the COMPS EAP exemptions do not precisely mirror, and are narrower than, those in federal law. Thus, federal law and interpretations of the EAP exemptions are informative mainly as to those aspects of the COMPS EAP exemptions that “identically or substantially” track the language of the federal exemptions, and that do not depend on different interpretation principles. One such Colorado-specific principle is the [COMPS, Rule 8.7\(A\)](#) requirement to “narrowly construe[]” COMPS exemptions, and the Colorado statutory provisions that Rule 8.7(A) cites on how to interpret Colorado wage-and-hour law.<sup>1</sup>

#### The Minimum Salary Basis to Qualify: Exception for Doctors, Lawyers, and Teachers

[COMPS, Rule 2.5](#) sets out the salary basis (the minimum salary required) for an employee to qualify for the EAP exemption. As of January 1, 2021, the minimum required salary basis is \$778.85 per week<sup>2</sup> (or \$40,500 per year).<sup>3</sup> Under COMPS, Rule 2.5.2(A), doctors, lawyers, and teachers who would qualify as exempt under Rule 2.2.3 need not be paid any particular salary or hourly compensation to be exempt.

#### Executives or Supervisors

Under [COMPS, Rule 2.2.2](#), to qualify for the EAP exemption, an executive or supervisor must:

##### **1) supervise the work of at least two full-time employees;**

“At least two full-time employees” means the supervisor or executive must supervise two employees that each work at least 40 hours per week, or their equivalent, meaning that an employee who supervises four employees each working 20 hours per week meets this requirement. If an employer has multiple supervisors,

<sup>1</sup> See *Brunson v. Colo. Cab Co., LLC*, 2018 COA 17, ¶¶ 21–24, 433 P.3d 93 (Colo. App. 2018) (this Division promulgates rules that are “independent of the FLSA”: it is “well settled that state laws may provide employees” rights “beyond those set out in the FLSA,” so while the FLSA “may be instructive” in interpreting Colorado law, “its helpfulness is limited to those instances where the state and federal statute[] are identical or substantially so.”).

<sup>2</sup> Beginning January 1, 2022, the weekly salary basis will be \$865.38. As of January 1, 2023, it will be \$961.54 per week, and as of January 1, 2024, it will be \$1,057.69 per week. As of January 1, 2025, it will be indexed by the same Consumer Price Index as the Colorado minimum wage. [COMPS, Rule 2.5.1](#).

<sup>3</sup> As under the FLSA, annual salary equivalents are based on 2080 hours worked over the course of 52 weeks (assuming 40 weekly hours), and are rounded to the nearest dollar.

there must be two non-exempt employees for each supervisor. Thus, for two supervisors to qualify for exemption, they must supervise at least four non-exempt employees. See [DOL Fact Sheet #17B](#).

**2) have the authority to hire and fire other employees, or to effectively recommend their hiring and firing; and**

“To effectively recommend” hiring and firing of employees does not mean the employer must *always follow* the executive/supervisor’s recommendation, but it nonetheless must give “substantial weight” to the recommendation. Generally, an executive’s or supervisor’s recommendations must be about employees whom the executive or supervisor “customarily and regularly” directs. See [DOL Fact Sheet #17B](#).

**3) spend a minimum of 50% of the workweek in duties directly related to supervision.**

“A minimum of 50% of the workweek” means that executive/supervisory employees spend at least half their work time performing qualifying duties directly related to supervision, *or* perform such duties at the same time they perform their own labor (*e.g.*, supervising while they also cook). These exempt duties include:

- creating or updating work schedules;
- training employees;
- conducting performance reviews;
- hiring, interviewing, and firing activities;
- answering subordinates’ questions;
- setting wage rates;
- handling employee complaints or grievances;
- disciplining employees; or
- directing the work of employees, overseeing operations, or determining work techniques.

**Example:** A restaurant “head chef” qualifies as an exempt supervisor when they, in addition to cooking, also assure good kitchen operations, monitor food quality, and supervise two or more other full-time kitchen employees. However, if the chef’s duties varied, and in some weeks they just cooked, with little interaction with subordinate employees doing their own cooking, then the head chef would not qualify as an exempt supervisor in those weeks. Each week’s status would depend on how much time was spent on supervision of other exempt duties. If during one week the chef trained new employees for the first hour of each shift and created the work schedule during the last hour of each shift, but spent the remaining 6 hours of each shift cooking on the grill without interacting with other employees, the chef would not be exempt that week. See [Tonys Taps LLC, DLSS Case #1737-18 \(Hearing Officer Decis. No. 19-039, May 3, 2019\)](#); [PalAmerican Security, DLSS Case #0324-19 \(Hearing Officer Decis. No. 19-089, Dec. 20, 2019\)](#).

## **Administrative Employees**

Under [COMPS, Rule 2.2.1](#), an administrative employee must:

**1) directly serve an executive;**

An administrative employee’s work must be “directly related to the management or business operations of the employer’s business.” Duties of consulting with the employer’s *customers or clients*, as to *their own* management or business operations, are not exempt administrative duties, unlike in the federal EAP exemption, 29 CFR § 541.201(c). Also, while Rule 2.2.2 defines “executive” for exemption purposes to include low- to mid-level managers supervising two or more employees—including in manual or low-level work—such lower-level managers are not the sorts of higher-level executives that the Rule 2.2.1 “administrative” exemption envisions. Consequently, an administrative employee who “directly serves” lower-level managers would not qualify for exemption. On the other hand, “the executive” is not so narrowly defined so that it applies only to the single most senior or top-ranking executive of an employer.

**2) regularly perform duties important to the decision-making process of the executive;**

“Regularly performing” duties that are “important to the decision-making process” means the employee performs such duties more than occasionally, but not necessarily constantly. In determining whether an employee “regularly performs” exempt duties, the Division considers the work the employee performs every week, but not one-time or occasional tasks. See [DOL Fact Sheet #17C](#). “Duties important to the decision-making process” include gathering information to help the executive choose clients or vendors, and to

participate in the employer's hiring/firing decisions. *Id.*; see [CPA Solutions LLC, DLSS Case #4961-18 \(Hearing Officer Decis. No. 20-001, Jan. 9, 2020\)](#).

**3) regularly exercise independent judgment and discretion in matters of significance; and**

The exercise of "independent judgment and discretion" means the employee can compare and evaluate options for the employer, and is free to make decisions after considering the different options without additional or further guidance or direction from the executive.

"Matters of significance" refers to the importance of the decision and the gravity of the potential impact on the employer. However, employees do not exercise independent judgment and discretion in matters of significance merely because their employer will experience financial losses if they perform their jobs poorly or (for example) cause the employer serious loss by failing to use equipment properly. See [DOL Fact Sheet #17C](#).

When determining whether an employee was exercising independent judgment and discretion in matters of significance, factors include, but are not limited to, whether the employee:

- has authority to formulate, affect, interpret, or implement management policies or operating practices;
- carries out major assignments in conducting the operations of the business;
- performs work that affects business operations to a substantial degree;
- has authority to commit the employer in matters that have significant financial impact; and
- has authority to waive or deviate from established policies and procedures without prior approval.

That an employee's decisions are changed or reversed by higher or more senior employees does not mean the employee is not exercising discretion and independent judgment. However, the exercise of discretion and independent judgment must involve more than mere use of skill in applying well-established techniques, procedures, or specific standards as described in manuals or other sources. And an employee's exercise of judgment as to inconsequential aspects of the business (for example, such decisions as furniture arrangement, office decorations, or cleaning) does not meet the requirements of this exemption. See [CPA Solutions LLC, DLSS Case #4961-18 \(Hearing Officer Decis. No. 20-001, Jan. 9, 2020\)](#); [DOL Fact Sheet #17C](#).

**4) have a primary duty that is both non-manual in nature and directly related to management policies or general business operations.**

"Primary duty" means the employee's main, major, or most important duty, and all of the employee's job duties as a whole. "Directly related to management policies or general business operations" means that the employee performs work assisting with management or the general operations of the business (as distinguished, for example, from work on a manufacturing production line or work selling a product in a retail or service establishment), and considers whether the employee "primary" duties are in functional areas, such as:

- quality control, or health and safety;
- purchasing or procurement;
- advertising or marketing;
- research;
- legal or regulatory compliance;
- public relations or government relations;
- computer network, internet, or database administration;
- taxes, audits, accounting, budgets, finance, or insurance;
- human resources or employee benefits; or
- personnel management or labor relations.

An employee who regularly performs clerical or secretarial duties—such as data entry, answering phones, taking messages, ordering office supplies, scanning documents, word processing, and/or taking notes—does not meet the requirements of this exemption. See [CPA Solutions LLC, DLSS Case #4961-18 \(Hearing Officer Decis. No. 20-001, Jan. 9, 2020\)](#); [DOL Fact Sheet #17C](#).

## **Professional Employees**

Under [COMPS, Rule 2.2.3](#), the professional employee exemption covers both “learned” and “creative” professionals.<sup>4</sup> To be exempt, professional employees must:

- 1) be employed in a field where their primary duty is work that requires the consistent exercise of discretion and judgment, as distinguished from routine work that is mental, manual, mechanical or physical;**

“Consistent exercise of discretion and judgment” means the employee is free to make decisions after considering different options, without the need of further direction, or direct control. The employee’s consistent exercise of discretion and judgment should be predominantly intellectual and varied in character, as opposed to being exercised in the context of work that is routine, or work that can be standardized.

- 2) be employed in the field in which they were trained; and**

If employees work in a field that is only *similar* to the field in which they were trained, the employees do not meet the second requirement of the exemption.

**Example:** If an employee takes courses to qualify as a director of a child care center for children ages 4-12, but is employed as a caretaker of children ages 1-3 in a daycare center, they do not qualify for exemption. Even if the work they were trained for (serving as a director of education for older children) would qualify, their actual duties are not in that exempt work for which they were trained, and the work they actually perform has insufficient duties that qualify for the professional exemption. [A Child’s Touch, DLSS Case #2121-18 \(Hearing Officer Decis. No. 19-046, Jun. 5, 2019\)](#).

- 3) either be a qualifying “learned professional” or “creative professional.”**

A “**learned professional**” has knowledge of an advanced type, in a field of science or learning, that is customarily acquired by a prolonged course of specialized intellectual instruction and study.

“Knowledge of an advanced type” means knowledge that enables the employee to analyze, interpret, and make deductions from different facts and circumstances. “A field of science or learning” includes law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, or other occupations with a recognized professional status, and is distinguishable from the mechanical arts or skilled trades, where an employee could have knowledge of an advanced type, but not in the same sort of “field of science or learning.”

“Customarily acquired by a prolonged course of specialized instruction and study” means the knowledge necessary for the profession is usually acquired through specialized academic training, such as obtaining a specific college major that is necessary for the work or earning an advanced degree in graduate school. The best evidence that an employee meets this requirement is that the employee has the appropriate advanced and specialized academic degree. However, the word “customarily” means the exemption may be available to employees working in professions who have substantially the same knowledge level and perform substantially the same work as degreed employees, but who obtained advanced knowledge through work experience and/or intellectual instruction. But the exemption does not apply to occupations in which most employees acquire their skill through work experience rather than advanced specialized intellectual instruction. Additionally, if an employee can qualify for the job with education consisting of a bachelor’s degree with any major of the employee’s choosing, without more, the employee would not meet this requirement. See [DOL Fact Sheet #17D](#); [A Child’s Touch, DLSS Case #2121-18 \(Hearing Officer Decis. No. 19-046, Jun. 5, 2019\)](#).

Doctors, lawyers, and teachers, as long as their duties qualify, are exempt learned professionals *without* the requirement of being paid an exempt minimum salary like other professionals. [COMPS, Rule 2.5.2\(A\)](#); [DOL](#)

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<sup>4</sup> These exemptions are similar to the federal rules. *Compare* 29 C.F.R. § 541.301-302 to COMPS, R. 2.2.3.

[Fact Sheet #17D](#). Teachers are exempt if their primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this primary duty as a teacher in an educational establishment. Exempt teachers may include regular academic teachers, kindergarten or nursery school teachers, teachers of gifted or disabled children, teachers of skilled and semi-skilled trades and occupations, aircraft flight instructors, home economics teachers, and vocal or instrument music teachers. [DOL Fact Sheet #17D](#). Commercial driving school instructors do not qualify as “teachers.” [Mountain States Driver’s Education Inc., DLSS Case #2406-20, \(Hearing Officer Decis. No. 21-038, Apr. 5, 2021\)](#).

A “**creative professional**” uses invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (as opposed to performing routine mental, manual, mechanical, or physical work, or work that primarily depends on intelligence, diligence, and accuracy).<sup>5</sup>

“Invention, imagination, originality or talent” is what separates a “creative professional” from an employee merely using intelligence, diligence, or accuracy in a creative field, or performing work that can be done by someone with general manual or intellectual ability and training. For example, *artistic* creative professionals must “choose their own subjects,” or “at most are given the subject matter” or “merely told the title or underlying concept” for their artistic work (see COMPS, Rule 2.2.3; 29 C.F.R. § 541.302(c)). Similarly, *white-collar* creative professionals must be in “more responsible writing positions,” and *journalism* creative professionals must exercise discretion and judgment. (29 C.F.R. § 541.302(c),(d).) Employees in mass media would not be exempt “creative professionals” if they only collect, organize, and record information that is routine or already public, merely rewrite press releases, or write standard recounts of public information. But they would be exempt if they use creative skills such as performing on air, conducting investigative interviews, analyzing or interpreting public events, writing editorials or opinion commentaries, or acting as a narrator or commentator. A “recognized field of artistic endeavor” includes music, writing, acting, and graphic arts.

### **Additional Information**

Visit the Division’s [website](#), call 303-318-8441, or email [cdle\\_labor\\_standards@state.co.us](mailto:cdle_labor_standards@state.co.us).

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<sup>5</sup> The “creative professional” exemption under COMPS uses the same wording as the federal “creative professional” exemption, 29 C.F.R. § 541.302. See COMPS, Rule 2.2.3.