COLORADO
Department of
Labor and Employment

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STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY, AND FINDINGS

Colorado Overtime & Minimum Pay Standards Order (COMPS Order) #37, 7 CCR 1103-1 (2021), as proposed September 30, 2020; to be followed and replaced by a final Statement at the conclusion of the rulemaking process.

I. 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 II, which is incorporated into Part I as well.

II. SPECIFIC STATUTORY AUTHORITY: The Director is authorized to adopt and amend regulations and rules to enforce, execute, apply, and interpret Articles 1, 4, and 6 of Title 8, C.R.S. (2020), and all regulations, rules, 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, 6, 12, and 13.3 including C.R.S. §§ 8-1-101, -103, -107, -108, -111, -130; 8-4-111; 8-6-102, -104, -105, -106, -108, -109, -111, -116, -117; 8-12-115; 8-13.3-403, -407, -408, -409, -410. Each of the preceding provisions is quoted in Appendix A to COMPS Order #37, which is incorporated herein by reference.

III. FINDINGS, JUSTIFICATIONS, AND REASONS FOR ADOPTION: Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds: **(A)** demonstrated need exists for these rules, as detailed in the findings in Part IV, which are incorporated into this finding as well; **(B)** proper statutory authority exists for the rules, as detailed in the list of statutory authority in Part II, which is 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; and **(E)** any duplicating or overlapping has been minimized and is explained by the Division.

IV. SPECIFIC FINDINGS FOR ADOPTION:

(A) Rules 1.1-1.2: Non-substantive clarifications

No substantive changes are made to "Authority and relation to prior orders" (Rule 1.1) or "Incorporation by reference" (Rule 1.2), which are amended only with clarifications to avoid possible misconceptions. First, Rule 1.1 has incorporated the current year's versions of referenced statutes: 2021 in COMPS Order #37 (2021); 2020 in COMPS Order #36 (2020). But a claim filed in 2021 may be based on events in 2020 or 2019, and would apply whatever prior year's law applied during those events. Thus, Rule 1.1 clarifies that while these Rules replace prior versions, "prior orders still govern as to events occurring while they were in effect," and 1.2 clarifies that while the 2021 versions of laws are incorporated, "[e]arlier versions … may apply to events that occurred in prior years."

Second, Rule 1.2 deletes a reference to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 et seq., and clarifies that "[w]here these Rules have provisions different from or contrary to any incorporated or referenced material, the provisions of these Rules govern." Prior versions included the FLSA in a list of citations incorporated, for two reasons: (A) because Colorado law covers failure to pay *any* wages, FLSA minimum or overtime wage non-payment also violate Colorado wage law (per COMPS R. 3.2), so such FLSA requirements should be deemed part of Colorado wage law; and (B) COMPS repeatedly references various FLSA and federal rule provisions, but for brevity does not quote them, so deeming the FLSA text incorporated was appropriate. However, that has yielded questions as to whether COMPS thereby adopted FLSA *interpretations* never explicitly mentioned in COMPS. The Division finds that reading such interpretations into COMPS is not what the Division intended, nor a plausible interpretation of the COMPS FLSA references. Firstly, it is well-established that expressly incorporating only a *statute* does not incorporate even interpretations actually codified in *regulations*, so incorporating just FLSA *statutory* citations cannot be deemed to incorporate more than the cited statutory text.[1]

[1] *See* Statement of Basis, Purpose, Specific Statutory Authority, & Findings, pp.3-4 (May 25, 2020) (hereinafter, "Statement & Findings") (findings as to COMPS Order #36 amendments, adopted May 25, 2020) (from paragraph that begins: "First, …").

Secondly, a Colorado wage statute mandates "liberal construction," yet FLSA caselaw has departed from that principle,[2] precluding any presumption that FLSA interpretations apply to COMPS. Thirdly, a state does not need *any* wage law if it is content with the "floor" of limited federal protections, and some states do not raise that floor, but Colorado has: the purpose of essentially all Colorado wage law is to *depart* from the FLSA with higher and additional standards, including Title 8, Articles 4 (recovery of *full* unpaid wages, not just *minimum or overtime* as under the FLSA) and 6 (higher minimum wages than the FLSA), and the majority of COMPS provisions.[3] Because these points emphasize how fundamentally COMPS has *not* presumptively adopted federal wage law, the Division finds it worthwhile to (A) prevent any risk of future misperceptions by deleting the FLSA reference in the incorporation rule, and (B) explain why in this Statement, in hopes of resolving any existing misconceptions.

While aiming to add clarity, all Rule 1.1-1.2 amendments are non-substantive, merely stating expressly what the Division finds were already the only valid or plausible interpretation of existing versions of these Rules.

(B) Rules 1.5-1.6: "Employee" and "Employer"

The Rules 1.5-1.6 "employee" and "employer" definitions are amended to conform to new legislative enactments defining those terms. The definitions in C.R.S. §§ 8-4-101(5)-(6) remain, except for claims as to paid sick leave under the Healthy Families and Workplaces Act ("HFWA"), C.R.S. §§ 8-13.3-401 et seq., which qualify as "wage" claims if paid sick leave is not provided as required by HFWA (*id*. § 402). For such claims, HFWA expressly adopts the C.R.S. § 8-4-101(5)-(6) "employee" and "employer" definitions, except HFWA: (A) excludes "employees" covered by federal railroad unemployment insurance (§ 8-13.3-402(4)); and (B) includes the state, local governments, school districts, and their agencies and entities (§ 8-13.3-402(5)).

No other changes are made to the "employee" or "employer" definitions, which warrants explanation, given recent and ongoing flux in federal rules defining those terms under the FLSA. First, a federal rule changed one aspect of the "employer" definition, narrowing the definition of a "joint employer" responsible for FLSA wages, but: (A) after the USDOL adopted its rule in January 2020, the Division detailed, in adopting COMPS Order #36 later that month, its findings that a 2019 Colorado statute requires Colorado law to continue applying the pre-existing "joint employer" definition from which the USDOL rule had departed; (B) after the USDOL rule went into effect in March 2020, the Division reiterated its position in findings published in May 2020; and (C) in September 2020, in a challenge to the USDOL rule filed by Colorado and 17 other states, a federal court struck that rule as "flawed in just about every respect," detailing numerous substantive and procedural shortcomings.[4]

Given the flux in federal rules, the Division sees a need to clarify that its rules, interpretations, and findings on joint employers are not changing based on USDOL rule developments to date or possible follow-up developments (*e.g.*, a later court ruling on, or USDOL replacement for, that rule). Rather than repeat past findings, the Division incorporates by reference all substantive points on the Colorado law "joint employer" definition, and the lack of impact of USDOL rules on the subject, in Part IV(A) of the Division findings of May 25, 2020.[5]

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[2] *Compare* COMPS Order R. 8.7(A) ("Liberal construction of COMPS, narrow construction of exceptions/exemptions": "provisions of the COMPS Order shall be liberally construed, with exceptions and exemptions accordingly narrowly construed," consistent with various statutory provisions, most notably the § 8-6-102 "liberally construed" requirement) *with Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018) (holding that FLSA exemptions should be given a "fair (rather than narrow) interpretation," *id*. at 1142, which departed from prior federal precedent, *id*. at 1147-48 (Ginsburg, J., dissenting)).

[3] *E.g.*, COMPS Order R. 1.9 (broader compensable "time worked" definition), 2.5 (higher minimum salary for various exemptions); 3.1 (higher local minimum wages enforceable), 4.1 (daily, not just weekly, overtime), 5.1-5.2 (meal and rest periods), 6.1-6.2 (protection for all employee tips, and more limited tip credit), 7.1-7.4 (record-keeping and posting rules).

[4] *New York v. Scalia*, No. 1:20-cv-01689-GHW, 2020 WL 5370871 Sept. 8, 2020) (granting summary judgment to Colorado and other states, striking 2020 joint employer rule except for certain "non-substantive" changes to prior rule).

[5] Statement & Findings, Part IV(A) (May 25, 2020) (findings as to COMPS Order #36 amendments, adopted May 25, 2020).

Second and similarly, USDOL proposed a rule in September 2020 narrowing the definition of "employee" under the FLSA. For the same reasons detailed above (including those detailed in the above-incorporated prior Division findings of May 25, 2020), the USDOL rule, in whatever form if any is adopted, will not change the "employee" definition under Colorado law. Rather than restate unchanged findings, the Division incorporates by reference all substantive points as to the "employee" definition under Colorado law in Part IV(B)(2) of the Division's findings of January 22, 2020, as to the adoption of COMPS Order #36.[6]

(C) Rule 2.2.1: Administrative employees

Rule 2.2.1, defining exempt "Administrative employees," is amended to redress confusion that has come to the Division's attention as to the italicized portions: "[an] employee … *who directly serves the executive*, and regularly performs duties important to the decision-making process of *the executive*. The employee must regularly exercise independent judgment and discretion in matters of significance, with a primary duty that is non-manual in nature and directly related to management policies or general business operations." (Emphasis added.)

The Division has received a number of inquiries indicating a belief and/or concern that by exempting only an employee "who *directly* serves *the* executive," Rule 2.2.1 might be interpreted as exempting (A) only those serving a CEO, owner, or other top-level official who is "the" executive of an employer, and (B) only those who serve that top-level executive "directly." That rule language has been unchanged for decades, and evidence of the Division's drafting intent is lacking, due to the absence of Division records from decades ago. Yet the Division has no evidence the provision was drafted with intent to limit it to those directly serving only the top executive of an employer, and the Division does not intend for the provision to be interpreted so narrowly now.

The Division now amends Rule 2.2.1 to require that an exempt administrative employee serve only "an" executive. However, COMPS Rule 2.2.2 defines "*executive* or supervisor" to include low- to mid-level managers supervising two or more employees, including in manual or low-level work — not the sorts of "executives" an exempt "administrative employee" serves. In existing Rule 2.2.1, an administrative employee "must regularly exercise independent judgment and discretion in matters of significance, with a primary duty that is non-manual in nature and directly related to management policies or general business operations" — an equally apt description of the type of non-manual, higher-level work performed by an "executive" served by an exempt administrative employee. Rule 2.2.1 thus allows exemption as long as "an" executive is no less engaged in higher-level, non-manual work than the "administrative employee" serving them: "The *executive and* employee must regularly exercise independent judgment and discretion in matters of significance, with a primary duty that is non-manual in nature and directly related to management policies or general business operations." (Emphasis added.)

(D) Rule 2.2.3: Professional employees

Federal rules detailing the "professional" exemption to the FLSA cover two types of professionals: "Learned professionals … [whose] primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction"; and "Creative professionals … [whose] primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work." (29 C.F.R. §§ 541.301-302.) The COMPS professional exemption, unchanged for decades, has covered only "learned," not "creative," professionals.

Having received questions as to the basis for that difference, the Division finds that exempting high-level "creative professionals" would be appropriate, and thus now adds a second category of "professional employee": those whose primary duty is work requiring "invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work, or work that primarily depends on intelligence, diligence and accuracy." This definition uses the same wording as the federal

[6] Statement & Findings, Part IV(B)(2) (Jan. 22, 2020) (findings as to COMPS Order #36, adopted Jan. 22, 2020).

"creative professional" exemption in 29 C.F.R. § 541.302, subparts (a) ("primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work") and (c) ("exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training").

The federal "learned professional" rule requires "work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work." (29 C.F.R. § 541.301.) While lacking that exact phrase, the federal "creative professional" rule requires the same: *artistic* creative professionals must "choose their own subjects," or "at most are given the subject matter" or "merely told the title or underlying concept" (§ 541.302(c)); *white-collar* creative professionals must be (for example) "the more responsible writing positions in advertising agencies" (*id*.); and *journalism* creative professionals must exercise discretion and judgment as detailed in several respects in § 541.302(d) (emphases added):

> Employees of newspapers, magazines, television and other media are not exempt creative professionals if they *only collect, organize and record information that is routine or already public*, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who *merely rewrite press releases* or who *write standard recounts* of public information by *gathering facts on routine* community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their *work product is subject to substantial control* by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is *performing* on the air in radio, television or other electronic media; conducting *investigative* interviews; *analyzing or interpreting* public events; *writing editorials, opinion columns or other commentary*; or acting as a *narrator or commentator*.

The COMPS "professional employee" exemption thus now includes the express element that the "primary duty is work that requires … the consistent exercise of discretion and judgment, as distinguished from routine mental, manual, mechanical or physical work" — the exact element already in the federal "learned professional" exemption, which the Division already viewed as applicable to "learned professionals" under the existing COMPS rule, and finds an appropriate description of who is, and also who should be, an exempt "creative professional."

(E) Rule 2.2.6(A): Exemption if transportation worker crosses state lines in course of work

Rule 2.26(A), the exemption for "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": The Division has no changes in proposed COMPS Order #37, but based on feedback received recently, the Division anticipates receiving comments on matters such as how to apply the requirement that the employee "crosses state lines in the course of his or her work." For example, the Division has viewed the requirement that an employee "crosses state lines in the course of his or her work" as requiring, consistent with analogous federal rules: that the employee crosses a state line, is offered the opportunity to travel across a state line, or is subject to being assigned an interstate trip with a reasonable expectation of such an assignment; and that if four consecutive months elapse without any of the preceding, or if the employee's duties change in a way that precludes interstate work, the employee may be viewed as an intrastate driver not subject to this interstate exemption for overtime pay. Publication of proposed COMPS Order #37, with this proposed Statement of Basis and Findings, opens the public comment period, mandated by the Administrative Procedure Act, for any interested stakeholders to weigh in on these and any other issues, so the Division aims to provide further clarity by the conclusion of the rulemaking process.

(F) Rule 2.5.1: Clarifying that federal salary rules are incorporated as to COMPS exemptions

A non-substantive amendment to Rule 2.5.1 clarifies that the incorporation of federal rules defining when an employee paid on a "salary basis" has always been intended to incorporate those salary rules as to COMPS exemptions, not to implicitly adopt any federal exemptions absent from COMPS.

(G) Rule 3.1, as well as Rules 2.2.7(F)(1), 2.5.2(B), and 6.2.3: Colorado Minimum Wage for 2021, and associated inflation adjustments to other figures in COMPS

Since 2007, the Colorado Constitution has mandated that the Colorado minimum wage must be "adjusted annually for cost of living increases, as measured by the Consumer Price Index ['CPI'] used for Colorado." (Article XVIII, § 15.) The past four years departed from CPI-adjusting because in 2016, a statewide vote enacted Amendment 70, which mandated specific increases for 2017 through 2020 to reach a $12.00 minimum wage in 2020. For 2021 and future years, the Constitution mandates a return to annual CPI adjustment.

To effectuate that constitutional mandate to adjust the minimum wage annually "by the Consumer Price Index used for Colorado," the Division reviews the sole CPI for Colorado calculated and published by the federal Bureau of Labor Statistics, the "Denver-Aurora-Lakewood" CPI. The Division has always measured CPI changes from mid-year to mid-year, because half-year CPI data is the most recent data available by September, the latest the Division can publish the proposed annual COMPS Order in time to take effect by January 1st, and in time to give employers and employees adequate notice of the coming year's minimum wage. The change in CPI from the first half of 2019 to the first half of 2020 is +2.7%.[7] A 2.7% increase to the $12.00 Colorado minimum wage for 2020 yields a 2021 minimum wage of $12.32. For reference, and since prior years' wages remain relevant to claims for past wages, below is a table of the Colorado minimum wage for the past 10 years and 2021.

Year	Minimum Wage	Basis for Setting Minimum Wage
2011	$7.24	CPI-increased annually, per Colorado Constitution Article XVIII § 15.
2012	$7.36	
2013	$7.64	
2014	$7.78	
2015	$8.23	
2016	$8.31	
2017	$9.30	Set at $9.30 in 2017, then +90¢/year through 2020, per Amendment 70 change to Colorado Constitution Article XVIII § 15.
2018	$10.20	
2019	$11.10	
2020	$12.00	
2021	$12.32	CPI-increased annually, per Colorado Constitution Article XVIII § 15.

V. EFFECTIVE DATE. These rules take effect on January 1, 2021.

Scott Moss
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Colorado Department of Labor and Employment

September 30, 2020
Date

[7] See the 2019 and 2020 entries in the "HALF1" columns in the linked BLS table: the CPI for the first half of 2020 (271.264) divided by the CPI for the first half of 2019 (264.147) is 1.027, indicating a 2.7% annual increase.