



## Interpretive Notice & Formal Opinion (“INFO”) #20: Summary: “Time Worked” That Must Be Paid under Colorado Law

Employees must be paid for any time that counts as “time worked,” also called “compensable time” or “paid time.” This INFO #20 is a summary of the details in INFO #20A (what does and doesn’t count as time worked under Colorado law), #20B (how time worked applies to different types of pay) and #20C (travel time and sleep time).

**General Rule:** Time worked is **all time** performing **labor or services** for employer **benefit**. That includes:

- ▶ **Performing work.** Time an employer **benefitted** from and **permitted**, even if it didn’t **require** the time.
  - **Benefit** to an employer doesn’t require an employer to actually **control** the employee activities.
  - **Permission** includes work the employer **didn’t expressly authorize** — **if** the employer **knew**, or had **reason to believe**, employees worked for its benefit, including:
    - Work an employer **knew** or had **reason to believe** was done **outside scheduled shifts**; and
    - **Off-site** work, if the employer permitted it — such as allowing **remote or home-based** work.
- ▶ **On-premises time** in **some** cases, depending on **why** employees are on premises, **may be** time worked.
  - **Required** presence at any location **is time worked**, even if no productive work is done.
  - **Choosing** to be on-site, **if completely relieved** of duty (coming early or staying late to socialize with co-workers, or to eat in a break room) **is not time worked**.
- ▶ **The continuous workday.** Even if time is duty-free, it **is** time worked if it’s **after the start** and **before the end** of other time worked — except for long enough **breaks** when **fully relieved** from duty.

**Common Pre-/Post-Shift Tasks that Count as “Time Worked,”** if they take over one minute:

- ▶ **Required clothing or gear** pickup, dropoff, and putting on and off — except clothes worn outside work too;
- ▶ **Checking in or out** — whether for clocking, security, safety, or other purposes;
- ▶ **Meetings** or other information sharing or receiving before, after, or otherwise **outside scheduled shifts**;
- ▶ **Post-shift clean-up**, or similar off-the-clock duty before or after shifts; and
- ▶ **Waiting** for any of the above, whether **in line** or in a specific spot.<sup>1</sup>

**Waiting:** ● **Required waiting** on-site, for work assignments or for other kinds of time worked, **is** time worked.

- **On-call time off-site**, and **sleep time on-site**, may or may not be time worked — depending on how **restricted** or unrestricted, and how **interrupted** or uninterrupted, the employee’s time is.

**Travel:** ● **Regular commuting** is **not** time worked, **unless** it includes other time worked (such as work calls while driving) or follows other time worked (under the “**continuous workday** rule,” above).

- Other travel for employer **benefit is** time worked — driving between appointments, etc.

**Pay:** ● Except for workers exempt from these wage and hour laws:

- All time worked must be **tracked** and **paid**, whether by hour, salary, piece rate, commission, etc.
- Time past 40 hours a week or 12 a day requires **time-and-a-half overtime pay**.<sup>2</sup>
- Pay can be **any agreed** rate, as long as **minimum** wage or more is paid “**for all hours worked**,” not just **on average** over a week or pay period.<sup>3</sup>

<sup>1</sup> In contrast, *federal* law excludes various of these pre-/post-shift activities that *Colorado* law covers; see INFO #20A.

<sup>2</sup> For more on who is covered or exempt from overtime, or from other wage and hour requirements, see INFO #1.

<sup>3</sup> In contrast, some *federal* courts view *federal* law as requiring minimum wage only on average by week; see INFO #20B.



## Interpretive Notice & Formal Opinion (“INFO”) #20A: What Is and Isn’t “Time Worked” That Must Be Paid under Colorado Law

### Overview

Employees must be paid for any time that counts as “time worked,” also called “compensable time” or “paid time.” This INFO #20A explains what does and doesn’t count as time worked under Colorado law, in particular the time worked definition in [Colorado Overtime and Minimum Pay Standards Order \(“COMPS”\) Order Rule 1.9](#). INFO #20B explains how time worked applies to different pay types; #20C explains travel time and sleep time.

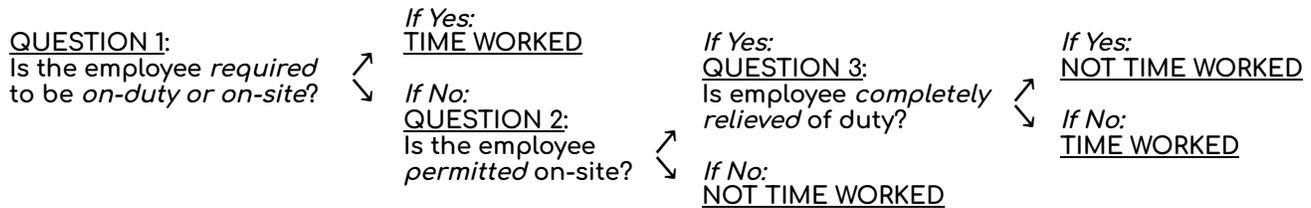
**General Rule:** Time worked is **all time** performing **labor or services** for employer **benefit**. That includes:

- **Performing work.** Time an employer **benefitted** from and **permitted**, even if it didn’t **require** the time.
  - **Benefit** to an employer doesn’t require an employer to actually **control** the employee activities, under Rule 1.9 and the statute defining an employee “performing labor or services.”<sup>1</sup>
  - **Permission** includes work the employer **didn’t expressly authorize** — **if** the employer **knew**, or had **reason to believe**, employees worked for its benefit,<sup>2</sup> including:
    - work an employer **knew** or had **reason to believe** was done **outside scheduled shifts**; and
    - **off-site** work, if the employer permitted it, such as allowing **remote or home-based** work.<sup>3</sup>

**Example 1:** An employee works overtime without authorization. The employer forbids overtime, but doesn’t monitor time worked. It must pay for the unauthorized overtime worked.<sup>4</sup>

- **On-premises time** depends on why the employee is on premises. Time an employee is:
  - **Required** to be “**on ... premises, on duty or at a prescribed workplace**”<sup>5</sup> **is time worked**, whether or not any productive work is done; “there need be no exertion at all.”<sup>6</sup>
  - **Choosing** to be on-site, **if completely relieved of duty, is not time worked** — for example, arriving early or staying late to socialize with co-workers, eat, or watch TV in a break room.

FIGURE 1: Is it “time worked,” based on 3 questions



<sup>1</sup> C.R.S. § 8-4-101(5) (performing labor or services for “benefit” of employer who “may” exercise control defines “employee”).

<sup>2</sup> [Blue Ribbon Distributing](#), DLSS Case #0758-18 (Hearing Decis. #19-017, Feb. 19, 2019) (employer “suffered or permitted” off-clock work; evidence undercut its denial of knowing of the work); [Todd M. Roby DDS](#), DLSS Case #2629-16 (Hearing Decis. #18-008, Feb. 27, 2018), at 6-7; [Bender Medical Group](#), DLSS Case #2997-16 (Hearing Decis. #17-084, Oct. 18, 2017), at 5-6. [Accord 29 C.F.R. §§ 785.11](#) (work compensable if not requested, but suffered or permitted), 785.12 (“must count” offsite work employer “knows or has reason to believe”), 785.13 (noting “duty of the management to exercise its control and see that the work is not performed if it does not want it”; “It cannot sit back and accept the benefits without compensating”).

<sup>3</sup> [Bull v. U.S.](#), 68 Fed. Cl. 212, 251-252 (2005) (employer knew “or had reason to know ... employees were constructing training aids at home because [it] did not provide ... an adequate tool room” or enough time during scheduled shifts).

<sup>4</sup> [Rocky Mountain Business Advocate Group](#), DLSS Case #0513-18 (Hearing Decis. #19-026, Mar. 21, 2019); [Trimble True Value Hardware & Garden Center](#), DLSS Case #4585-17 (Hearing Decis. #18-071, Oct. 18, 2018).

<sup>5</sup> [COMPS Rule 1.9; Statement of Basis, Purpose, Specific Statutory Authority, and Findings for COMPS #36 \(2020\) \(“2020 COMPS SBP”\)](#), at 11-16. (Both quoting and citing [Anderson v. Mt. Clemens Pottery Co.](#), 328 U.S. 680, 690-91 (1946)).

<sup>6</sup> “[A]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve.... Readiness to serve may be hired, quite as much as service itself....” [Armour & Co. v. Wantock](#), 323 U.S. 126, 133 (1944) (quoted in 29 C.F.R. § 785.7).

## Pre-/Post-Shift Time Worked

- *Federal* wage law (the Fair Labor Standards Act, "FLSA") originally counted pre-/post-shift tasks (screenings, gear time, etc.) as time worked — until a later federal statute (the Portal-to-Portal Act, "PTPA") excluded some "preliminary and postliminary" activity that isn't "integral and indispensable."<sup>7</sup>
- But: **Colorado never adopted the federal statute excluding pre- and post-shift activities from time worked** (the PTPA).<sup>8</sup>
- **Pre-/post-shift tasks** like these may take just seconds, but **count as time worked if over one minute**:
  - ✓ putting on or removing required **clothes or gear**, but **not** uniforms also worn **outside work**;
  - ✓ pre- or post-shift meetings, or other sharing or receiving of **work-related information**;
  - ✓ **clock** or **check in/out**, or security/safety **screening**;
  - ✓ staying at work **waiting** for **assignments**;
  - ✓ **set-up, clean-up**, or other "**off the clock**" duties; or
  - ✓ **waiting** for activities like those listed here.

**Example 2:** An employer requires gear pick-up and a security screening. Each of the two activities (with time spent waiting in line for each) takes 45 seconds.

- Both activities count as time worked *if* the employee spends over one minute on them.
- If the gear pick-up and security screening are *consecutive*, they are time worked. Though they are different tasks, the employer is requiring 1.5 continuous minutes of pre-shift activity.
- If the gear pick-up is in the morning right before the shift starts, but the security screening is in the afternoon right after the shift ends, then the employer is requiring 45 seconds of pre-shift activity, and 45 seconds of post-shift activity — so neither counts as time worked.

**Example 3:** An arriving employee's day starts with: (1) 45 seconds in security screening at the entrance; (2) 5 minutes walking to the work area, often spent in personal conversation with co-workers, or on phone calls; then (3) arriving at the work area typically 10 minutes before the shift — voluntarily, with no employer or workload pressure to be early — often spent socializing with coworkers in a break room or listening to music, with no required tasks or assigned location.

- None of the three activities are time worked; only starting their shift starts their time worked.<sup>9</sup> (1) The 45-second screening is too short. (2) The 5-minute walk remains completely relieved of duty. (3) The pre-shift 10 minutes on premises also remains completely relieved of duty. If the employer required arriving 10 minutes before their shift (to wait for assignments, etc.), *then* it would be time worked. But early arrival is optional, so it's not the sort required of on-premises time that, even without productive work, still counts as time worked.

<sup>7</sup> 29 U.S.C. § 251 et seq.; e.g., [Integrity Staffing Solutions, Inc. v. Busk](#), 574 U.S. 27, 33 (2014).

<sup>8</sup> Having never adopted or applied the PTPA, Colorado law parallels the broader time worked definition of the *pre-PTPA* FLSA, as the Division explained in the 2019 proposed version, and 2020 final version, of the [2020 COMPS SBP](#), at 11-16. E.g., [Universal Protection Service](#), DLSS Case #1839-20 (Hearing Decis. #21-073, July 2, 2021), at 13-17 ("Colorado has not adopted PTPA-like exemptions. ... Thus, to the extent federal precedent is helpful in interpreting ... COMPS on what counts as time worked, that guidance is to be found in the pre-PTPA/pre-§ 203(o) cases."); [Busk v. Integrity Staffing Solutions, Inc.](#), 905 F.3d 387, 405 (6th Cir. 2018) (finding "nothing to suggest" state law follows PTPA and "refus[ing] to read-in such a significant statute by inference or implication" when Nevada and Arizona never adopted PTPA provisions).

<sup>9</sup> [Cookies with Altitude](#), DLSS Case #2890-16 (Hearing Officer Decis. #18-015, Mar. 28, 2018).

- The **one-minute threshold** applies to **only pre- and post-shift activities, not other time worked.**<sup>10</sup>

**Example 4:** Before her main duties, an employee (1) skims her work text messages (45 seconds), (2) skims the subject lines of unread emails (30 seconds), then (3) checks voicemail (2 minutes).

→ All three activities are time worked. Though tasks like these are commonly done when a shift starts, they aren't *pre- or post-shift* activity like those Rule 1.9 covers only if over one minute.

- **Other pre-/post-shift activity not listed in Rule 1.9:** The list in Rule 1.9 gives just **examples** of pre- or post-shift activity. For activities not in that list, apply the general rule: whether time is for employer benefit.

**Example 5:** Before restaurant servers clock in for a shift, the manager holds a pre-shift meeting. In the meeting, the manager talks about the day's menu, table assignments, and other information needed for the workday. Servers are not required to show up early to attend the meeting.

→ The pre-shift meeting is time worked for all who attend, even if others don't. The employer is permitting anyone attending to perform work for the employer's benefit.

**Example 6:** Before remote call center staff start work, they start up and sign into their computers, which can take 5-15 minutes, because it includes multiple sign-ins (to the employer intranet, then to its timekeeping software), and sometimes waiting for software or database updates.

→ Computer sign-in, whether or not delayed by updating, is essentially clock-in time, so it counts as time worked for employer benefit, as long as it takes over one minute.<sup>11</sup>

### **"Continuous Workdays" Include All Time Not Fully on Break, Until the Last Time Worked Activity**

- Even if time isn't otherwise time worked, it counts as part of a **"continuous workday"** of time worked if it's **after** other time worked **starts**, and **before** other time worked **ends** — excluding long enough breaks.<sup>12</sup>

✗ Periods of **20 minutes** or longer when **"completely relieved from duty"** (e.g., meal breaks, or time between separate shifts) are **not** time worked.

✓ **Shorter** breaks, even if completely relieved from duty (e.g., coffee breaks or time for snacks of under 20 minutes) are considered paid rest time that **"must be counted** as hours worked."<sup>13</sup>

**Example 7:** An arriving employee spends 45 seconds in security screening, then 30 seconds clocking in, then 5 minutes walking to her desk. On the walk, she makes personal calls or listens to music.

→ The 5-minute walk alone wouldn't count as time worked — but it does because it (a) follows 75 seconds of time worked (screening and clock-in), and (b) can't qualify as an unpaid break.

<sup>10</sup> The one-minute threshold recognizes that seconds-long pre-/post-shift tasks shouldn't need tracking since they don't add meaningful work time. Some federal courts reject *federal* claims to *several minutes* of pre-/post-shift work as *de minimis*, e.g., [Peterson v. Nelnet Diversified Solutions](#), 15 F.4th 1033 (10th Cir. 2021). Colorado law has no such exclusion: "There is no minimum size of a wage claim, ... no claim too minimal ('de minimis') for recovery, because Article 4 requires paying '[a]ll wages or compensation', and authorizes ... actions 'to recover any amount of wages or compensation' and ... complaints 'for any violation'." [COMPS Rule 8.1\(B\)](#); see also [2020 COMPS SBP](#) at 52-55; [Universal Protection Service](#) (above) at 20.

<sup>11</sup> [Peterson v. Nelnet Diversified Solutions](#), 15 F.4th 1033, 1035 (10th Cir. 2021) ("booting up ... computers and launching certain software before ... clock in" is time worked); [Cadena v. Customer Connexx LLC](#), 51 F.4th 831, 839 (9th Cir. 2022) ("principal duties require ... a functional computer, so turning on or waking up their computers at the beginning of ... shifts is integral and indispensable .... Because clocking in to the timekeeping program occurs after booting up ... —the first principal activity of the day—it is compensable.").

<sup>12</sup> [29 C.F.R. § 790.6](#) ("time between the commencement of the employee's first" activity that counts as time worked, "and the completion of [their] last" activity that counts as time worked, "must be included in the computation of hours worked").

<sup>13</sup> [29 C.F.R. §§ 785.18-19](#) (rest and meal periods).

## Specific Types of Activity

### (A) Clothing and Gear

- Time worked includes **putting on** (“**donning**”) and **removing** (“**doffing**”), as well as **picking up, loading, and dropping off**, required work clothes or gear (other than uniforms also worn outside work).<sup>14</sup>

**Example 8:** An employer gives security guards mandatory uniforms and gear: shirts, pants, ballistic vests, badges, and duty belts holding firearms and tools. It also specifies what shoes the guards must wear, has uniform condition and appearance rules, and notes how uniforms are key to guards’ work deterring crime. The employer lets guards put on uniforms and gear at home or work, but forbids wearing them other than on duty or commuting in employee vehicles.

- Time putting on and taking off all parts of the uniform, whether at home or at work, is time worked. The uniform is for employer benefit, and can’t be worn in public.<sup>15</sup>

**Example 9:** Poultry plant employees start with 2-3 minutes to pick up and put on required smocks, boots, gloves, and sleeves (all worn in addition to their regular clothes). As the day ends, it takes 3-5 minutes to remove, rinse, and sanitize that gear, then wash their hands. Federal safety rules require the sanitizing to avoid contaminating other workers or the public. Showering and changing into new clothes, to remove any poultry residue, is allowed but not required.

- All gear time — picking up, putting on and off, cleaning, and waiting for those tasks — is time worked. It’s for required work gear or to prevent hazards from work for employer benefit.<sup>16</sup>
- All cleaning and sanitizing time — cleaning and sanitizing the gear, washing hands, and the optional showering and clothes-changing time — is time worked. The time is for health measures to protect against hazards from work that’s for employer benefit.<sup>17</sup>

**Example 10:** Dancers at an adult entertainment club are required to wear performance clothes they select and supply themselves, but that must meet the employer’s specific guidelines. The clothes are revealing, so dancers typically don’t wear them to or from work; they change at the club.

- Time changing into required performance clothing not worn outside work is time worked.<sup>18</sup>

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<sup>14</sup> As with PTPA, *Colorado* never adopted 29 U.S.C. 203(o), another *federal* statute that excludes certain time employees spend on work-related clothing and hygiene. [2020 COMPS SBP](#) at 13-15; [Universal Protection Service](#) (above) at 14 (Universal Protection Service, DLSS Case #1839-20 (Hearing Decis. #21-073, July 2, 2021), at 13-17 (“to the extent federal precedent is helpful in interpreting ... COMPS on what counts as time worked, that guidance is to be found in the pre-PTPA/pre-§ 203(o) cases.”).

<sup>15</sup> Compare [Universal Protection Service](#) (above) at 11-20 (under Rule 1.9, guards putting on uniforms and gear is “labor or services for the employer’s benefit, ... not because s/he chose to do it, but because the employer required it for its own ends ... , e.g., having its employees create a crime-deterring effect and avoiding penalties or fines” employer might otherwise face) with [Bamonte v. Mesa](#), 598 F.3d 1217 (9th Cir. 2010) (putting on police uniform or gear isn’t time worked if doable at home).

<sup>16</sup> Time worked under Colorado law thus includes various *gear time* federal law excludes. E.g., [Castaneda v. JBS USA, LLC](#), 819 F.3d 1237, 1250 (10th Cir. 2016) (PTPA excludes time donning, doffing, and washing meatpacking equipment); [Salazar v. Butterball LLC](#), 644 F.3d 1130, 1133 (10th Cir. 2011) (same, employee time donning, doffing, and sanitizing turkey processing “frocks, aprons, gloves, boots, hard hats, safety glasses, knife holders, and arm guards”); [Gorman v. Consol. Edison Corp.](#), 488 F.3d 586, 594 (2d Cir. 2007) (same, donning helmets, safety glasses and steel-toed boots).

<sup>17</sup> Time worked under Colorado law thus includes various *health or sanitation time* federal law excludes. E.g., [Reich v. IBP](#), 38 F.3d 1123, 1126 (10th Cir. 1994) (PTPA excludes “donning, removing, picking up, and depositing for laundering sanitary outer garments” that, “although required and of some value to the employer, ... are primarily for the benefit of the employee”).

<sup>18</sup> Time worked under Colorado law thus includes various *clothing time* excluded by a federal statutory exemption, 29 U.S.C. § 203(o), that permits collective bargaining agreements to exclude certain clothing time.

- But time worked **doesn't** include **basic tasks** commuting employees do to **prepare for a day** — as long as those tasks don't materially **add** to the time it takes to prepare for a day of work outside home. Examples:
  - X dressing in appropriate clothes;
  - X packing a light bag or briefcase (with food, papers, or basic light supplies or gear); and
  - X unloading or unpacking that bag or case, or undressing, at the end of the day.

**Example 11:** Before leaving home, a hospital employee packs a stethoscope, pad, and multi-colored pen (to mark different points on patient charts) in a briefcase they bring to and from work.

- Packing a briefcase or backpack with light items doesn't materially add to the time it takes to prepare for a day of work outside home, so it isn't time worked.

**Example 12:** Medical clinic staff must load medical equipment into their cars before leaving home, then unload it after work; the employer prohibits leaving it in cars. The several items total 100 pounds, so loading and unloading takes 15 minutes of walking between the car and home.

- The loading and unloading materially add to the time it takes to prepare for (or return from) a day of work, and they are for employer benefit, so they count as time worked.<sup>19</sup>

## (B) Screening

- Time worked includes time in, or waiting for, a **screening or search** required to work for the employer —
  - including for **health, safety, or security**, and
  - whether **discretionary** with the employer or **legally required**.

**Example 13:** Federal rules require radiation screening for nuclear plant guards entering or exiting work.

- The screening is for hazards from work for employer benefit, so it is time worked.<sup>20</sup>

**Example 14:** For security screening to prevent theft, exiting warehouse employees must spend 10-15 minutes to wait in line, remove belts, empty pockets, and walk through metal detectors.

- The screening is for employer benefit, so it is time worked.

- One specific form of screening or search, **drug testing**:
  - **is** time worked when required of **employees**, but
  - **is not** time worked when required of **applicants** as a **condition** of, and **before starting**, the job.

**Example 15:** An employee's first day on the job includes a number of required activities, one of which is drug testing. The employer also requires annual drug testing for all employees.

- The drug testing is time worked: the employer requires it; it's for employer benefit (whether for efficiency, safety, or legal compliance); and it's subject to employer control (whether the employer has the drug testing done in-house or by a third party).<sup>21</sup>

**Example 16:** An employer requires new employees to take, and pass, a drug test before starting the job.

- The drug testing is not time worked. It is part of the hiring process, like an interview or a written test, because passing it is a condition of starting the job.

<sup>19</sup> [Wilson v. PrimeSource Health Care](#), No. 16-cv-1298 (N.D. Ohio July 5, 2017); see [Stevens v. Brink's Home Security](#), 169 P.3d 473, 476 (Wash. 2007) (commute in company truck was time worked; it was strictly controlled, including a mandate to be available to aid other sites); [Dooley v. Liberty Mutual Insur.](#), 307 F. Supp. 2d 234 (D. Mass. 2004) (real estate appraisers' calls and emails before driving from home to first job are time worked). INFO #20C covers pre-/post-commute work.

<sup>20</sup> Time worked under Colorado law thus includes various *health or safety screening time* that federal law excludes. [Olive v. TVA](#), No. 5:15-cv-00350 (N.D. Ala. Aug. 7, 2015) (PTPA excludes legally required radiation scans because the nuclear plant employees "are employed to provide security, not to wait in line and undergo radiation scanning").

<sup>21</sup> [Safway Services, LLC](#), DLSS Case #2272-17 (Hearing Officer Decis. No. 18-050, Aug. 10, 2018) at 5-6 (ordering wages for employee "subject to Safway's control ... because the company required [them] to participate in the first day's orientation/training and drug test activities"; rejecting employer argument "that these activities were 'pre-employment' (and thus, non-compensable)"); [Bonds v. GMS Mine Repair & Maintenance, Inc.](#), No. 2:13-cv-1217 at \*14 (W.D. Pa. Jan. 8, 2014) (mandated safety meetings and drug/alcohol testing must be compensated).

**(C) Waiting and "On-Call" Time**

- **Waiting:** Time worked includes waiting, at the worksite or another prescribed location, for instructions or assignments, even if employees are ultimately sent home without getting any work or instructions.<sup>22</sup>

**Example 17:** For safety and sanitation, meatpacking employees must wear specialized gear that they wait in line for several minutes to pick up at the start, and drop off at the end, of their shifts.

→ Time waiting to get or return required gear is time worked, like time donning and doffing it.<sup>23</sup>

**Example 18:** In downtime between appointments, a hairstylist stays at the salon for walk-in customers.

→ The hairstylist must be compensated for time spent waiting for work.<sup>24</sup>

- **On-Call:** Time worked includes being "on call" (required to report when called) *if* work rules (response time, location, etc.) or realities (call length, frequency, etc.) prevent routine personal activity while on call.

**Example 19:** Firefighters on 24-hour on-call shifts must arrive by 20 minutes after a call, preventing activity taking more time, or further away, than 20 minutes. Those with children need child care available. Shifts average 3-5 calls, taking on average 1 hour each, but can have up to 13 calls.

→ The on-call time is time worked; it precludes routine personal activity, for employer benefit.<sup>25</sup>

**(D) Travel Time & Sleep Time** — INFO #20C gives the details, and examples, of these basic rules.

- **Travel** for employer benefit is time worked, except not commute time, and not most travel within employer property to go to and from the employee's assigned workstation — with exceptions noted in INFO #20C.
- **Sleep** time within shifts can be excluded from time worked under certain conditions — mainly whether the employee has a real opportunity for a lengthy period of sleep without interruption, as INFO #20C details.

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

<sup>22</sup> [Donovan v. 75 Truck Stop, Inc.](#), No. 80-9-Civ-Oc (M.D. Fla. July 20, 1981) (wait was time worked: though free to "go across the street to go swimming at the Days Inn ... [employees] were expected to be available to commence work immediately" if customers arrived); [Armour & Co. v. Wantock](#), 323 U.S. 126, 133 (1944) ("[A]n employer, if he chooses, may hire [employees] ... to do nothing but wait for something to happen .... Readiness to serve may be hired, quite as much as service itself").

<sup>23</sup> [IBP, Inc. v. Alvarez](#), 546 U.S. 21, 40 (2005) (compensable under PTPA: *donning* protective gear, but not *waiting* to don).

<sup>24</sup> [HHCP LLC](#), DLSS Case #0291-18 (Hearing Decis. #19-018, Feb. 20, 2019); [Lassen v. Hoyt Livery, Inc.](#), 120 F. Supp. 3d 165, 177 (D. Conn. 2015) ("Time spent . . . waiting for passengers, even those who cancel, is compensable time").

<sup>25</sup> [Renfro v. Emporia](#), 948 F.2d 1529 (10th Cir. 1991); [29 C.F.R. §§ 785.17](#) ("An employee ... required to remain on call on the employer's premises or so close ... that he cannot use the time effectively for his own purposes is working while 'on call'") and [553.221\(c\)-\(d\)](#) ("Time ... away from the employer's premises under conditions ... so circumscribed that they restrict ... effectively using the time for personal pursuits also constitutes compensable hours .... Time ... at home on call may or may not be compensable depending on whether the restrictions ... preclude using the time for personal pursuits.")



## Interpretive Notice & Formal Opinion (“INFO”) #20B:

### What’s Owed for “Time Worked” for Different Types of Pay, Hourly and Non-Hourly

#### Overview

This INFO #20B explains how the pay owed for time worked can vary for hourly, salary, commission, and piece rate pay. INFO #20A covers what counts as time worked requiring pay under [Colorado Overtime and Minimum Pay Standards Order \(“COMPS”\) Order](#) Rule 1.9. INFO #20C covers travel and sleep time ([Rules 1.9.2-1.9.3](#)).

#### Pay of at Least Minimum Wage is Required for All Time Worked, Not Just on Average by Week

- All time worked must be tracked and compensated, regardless of the type of pay rate — hourly rates, salaries, piece rates, commissions, etc. — unless the worker is exempt from those wage and hour laws.
- Colorado law requires paying employees’ **agreed pay rates** for time worked, but pay also must be at least:
  - **Minimum wage** for all time worked, not just on **average** by week or pay period.<sup>1</sup> Language requiring minimum wage “**per hour**” and “**for all hours worked**” (as in Colorado law<sup>2</sup>), courts explain, “prohibits **borrowing** compensation ... owed for **one** set of hours ... to rectify compensation below the minimum ... for a **second** set ..., **regardless** of whether the **average** of paid and unpaid ... time exceeds the minimum.”<sup>3</sup>
  - **Overtime** pay of **1.5 times** an employee’s regular rate for overtime hours (see INFO #1 on overtime rules).

<sup>1</sup> *E.g., Sobolewski v. Boselli & Sons, LLC*, 342 F. Supp.3d 1178, 1184 (D. Colo. 2018) (Colorado minimum wage violated by paying above minimum wage for most hours, but paying nothing for some compensable time: “even though ... compensation is more than the minimum” on average, pay was “less than the legal minimum wage ... *for all hours worked*”) (emphasis added); *Pilmenstein v. Devereux Cleo Wallace*, 2021 COA 59, ¶ 35, 492 P.3d 1059, 1066 (Colo. App. Oct. 18, 2021) (rejecting defense that employee’s total pay was at least minimum wage for all hours worked; “if an employee works but is not paid for her time, she has received less than the legal minimum wage for the hours worked”).

<sup>2</sup> Colo. Const., Art. XVIII § 15 (minimum wage required “per hour”); [COMPS Rule 3.1](#) (“Under the minimum wage requirements ... of the Colorado Constitution,” employees, “whether employed on an hourly, piecework, commission, time, task, or other basis, shall be paid not less than the Colorado minimum ... *for all hours worked*”) (emphasis added).

<sup>3</sup> *Oman v. Delta Air Lines*, 466 P.3d 325, 336 (Cal. 2020). The federal Fair Labor Standards Act (FLSA) requires only (1) *minimum wage*, not higher agreed-to *regular* rates (as in Colorado law), and (2) in some courts’ view, minimum wage *on average by week* (*U.S. v. Klinghoffer Brothers Realty Corp.*, 285 F.2d 487 (2d Cir. 1960)), not for *all time* worked, as in states like Colorado with law requiring the minimum “per hour” and “for all hours worked” rather than by “week” like the FLSA:

- *Oman*, at 336 (state law “prohibits borrowing compensation contractually owed for one set of hours or tasks to rectify compensation below the minimum ... for a second set ..., regardless of whether the average of paid and unpaid ... time exceeds ... minimum wage. Even if that ... might be thought ... to pay ... minimum wage for each hour ..., it does so only [by] renegeing on ... contractual commitments” to agreed rates) (citing *Armenta v. Osmose*, 35 Cal.App.4th 314 (2005) (FLSA requires minimum only on average by “work week,” but (a) “the averaging method ... effectively reduces [a] contractual hourly rate,” which “contravenes” state law requiring, without withholding from, “agreed rates,” and (b) state law requires “minimum wage “for all hours worked in the payroll period .... This language expresses the intent to ensure ... minimum wage for each hour worked. The averaging method ... [of] federal minimum wage law does not apply.”);
- *Abarca v. Werner Enterprises, Inc.*, No. 8:14cv319 (D. Neb. July 27, 2022) (following *Oman*, Nebraska minimum wage is “on an hour-by-hour basis”: “Although there is no specific statutory analog to California’s piece rate statute in Nebraska, two statutes taken together achieve the same effect”: one requiring “minimum wage for all hours worked, calculated on an hour-by-hour basis,” one protecting wages “promised ... under a contract”) (citations omitted);
- *Busk v. Integrity Staffing Solutions*, 905 F.3d 387, 406 (6th Cir. 2018) (“... no basis for the conclusion that Nevada has adopted” the federal “workweek” averaging approach; state law “provides that an employee must be paid ‘wages of each hour the employee works,’” allowing workweek averaging for only certain non-hourly employees).

Even if the text of Colorado law left any ambiguity, the FLSA interpretation (minimum wage only as a weekly average, allowing unpaid time) is narrower than Colorado law, and must be rejected under Colorado’s express mandates (which FLSA lacks) to “liberally construe[]” wage rights. C.R.S. § 8-6-102 (minimum wage “shall be liberally construed”); [COMPS Rule 8.7\(A\)](#) (same; rules “shall be liberally construed, with exceptions and exemptions accordingly narrowly construed”).

**Example 1:** Each week, an employer pays a cashier \$20 per hour for four nine-hour shifts (36 paid hours), but doesn't pay for two hours of pre-/post-shift cleanup daily (8 unpaid hours).

- The first four of the eight unpaid hours are hours 37-40, and must be paid the \$20 regular rate. The remaining four unpaid hours are hours 41-44, requiring \$30 per hour overtime (1.5 times the regular rate). So the employer owes \$200 per week: \$20 per hour for the first four of the eight unpaid hours; and \$30 per hour for the remaining four of the eight unpaid hours.

## Hourly Pay

- ✓ Time worked must be paid at **whatever rate the parties agreed to** — so pay can be at **different rates** for different kinds of time worked (Examples 4 & 5 below).
- ✗ **But an agreement can't eliminate the duty to pay for all time worked** — so pay can't be **zero or below minimum wage** for any time worked (Examples 2, 3, 5 below).

**Example 2:** Weekly, an employer pays for 35 hours at \$18.50 per hour, but not for 2½ hours of donning and doffing uniforms wearable only at work. Average weekly pay is above minimum wage.

- "Putting on or removing required work clothes or gear" is time worked. The \$647.50 weekly pay (\$18.50 x 35 hours) provides \$17.27 per hour: the average of \$18.50 for the 35 paid hours, and \$0 for the 2½ unpaid hours. Paying \$0 for any time worked is unlawful; employers must pay at least minimum wage not just on average by week, but for all time worked. Since \$18.50 is the sole rate agreed to, the employer owes that rate for the 2½ unpaid hours.<sup>4</sup>

**Example 3:** A gymnastics school pays \$18.00 per hour. It pays for all time with students, but not for some required meetings and trainings. Average weekly pay remains above minimum wage.

- The employer must pay for the unpaid time worked — and not at minimum wage, but at the \$18.00 regular rate, since that was the only rate agreed to.<sup>5</sup>

**Example 4:** Same as Example 3, but the pay is \$20.00 for time with children, minimum wage otherwise.

- This is lawful; all time worked is paid at a lawful rate.

**Example 5:** Same as Example 3, but pay is \$20.00 for class time and \$10.00 for other time worked.

- The \$10.00 rate is unlawfully below minimum wage. But it's lawful to have a lower rate for one kind of time worked than for another; the error was just setting the lower rate below minimum wage. So the employer must raise the pay for non-class time to minimum wage.

## Non-Hourly Pay: (1) Salaries; (2) Commissions; (3) Piece Rates

Most non-hourly pay — salaries, commissions, or piece rates — doesn't depend on how much time is worked. The time worked rule **still applies to non-hourly pay**, but **doesn't require pay to be hourly** or time-based.

- ✓ *Generally:* **Non-hourly pay can serve as the pay for all time worked.** The duty is just to pay for time worked at **whatever rate, hourly or non-hourly, is agreed to** be the employee's pay for their time worked.
- ✗ *Except:* **Non-hourly pay doesn't cover all time worked**, so extra pay is required, if the non-hourly pay is —
  - (A) **Below Minimum Wage** (only some non-hourly employees are exempt — see [INFOs #1 and #1A](#)),
  - (B) **Limited to Certain Time Worked** (relevant more often to piece rates than to salaries), or
  - (C) **Actually an Hourly Rate** (relevant more often to salaries).

The sections below, on key types of non-hourly pay — salaries, commissions, and piece rates — explain:

- ⚠ How to **spot these three situations**, for each type of non-hourly pay; and
- ✓ How non-hourly pay situations can be **fixed**, to assure lawful pay for all time worked.

<sup>4</sup> *Universal Protection Service*, DLSS Claim #1839-20 ([Hearing Decis. #21-073, July 2, 2021](#)) & #4570-20 ([Hearing Decis. #22-004, Jan. 18, 2022](#)) (numbers simplified here).

<sup>5</sup> *FRW, LLC, d/b/a Momentum Athletic Center*, DLSS Claim #5559-18 (Hearing Decis. #20-004, Jan. 24, 2020).

**(1) Salaries**

Salaries — defined as “predetermined” pay “on a weekly or less frequent” basis, “not subject to reduction” if “quantity ... of work” changes<sup>6</sup> — **can pay for all time worked**, except in **3 situations**:

**(A) If the Pay Is Below Minimum Wage.** A salary can't be less than **minimum wage multiplied by hours worked**.<sup>7</sup> This means that pay — **whether a salary or not** — must be **at least** these example amounts:

Weekly Time Worked	The 2023 Minimum Wage for:	Minimum Weekly Pay, Hourly or Non-Hourly
40 hours	• the first 40 hours weekly — \$13.65; • overtime hours past 40 weekly — \$20.48 <i>(if no higher local minimum wage applies)</i>	40 x \$13.65 = <b>\$546.00</b>
45 hours		40 x \$13.65 + 5 x \$20.48 = <b>\$648.40</b>
50 hours		40 x \$13.65 + 10 x \$20.48 = <b>\$750.80</b>
55 hours		40 x \$13.65 + 15 x \$20.48 = <b>\$853.20</b>

**(B) If the Pay Is Limited to Certain Time Worked.** If a salary pays for **only certain time worked** — by agreement or by the nature of what it compensates — then it doesn't cover **other** time worked.

**Example 6:** A store pays a \$720 weekly salary to cashiers. Its handbook says the salary pays for cashier shifts of 36 hours per week. One cashier is then assigned 4 extra hours, per week, of errands to pick up and drop off supplies for the store.

→ Because the store had agreed that the \$720 salary is for the 36 cashier hours, it hasn't paid for the 4 extra hours for errands. So the employer owes \$20 per hour (the only agreed pay rate, \$720 for 36 hours) for the 4 extra hours, or \$80 per week. **Note** — this is the same outcome as Examples 1-2: if an employer pays an agreed rate for only on-shift time, then it owes extra pay at that rate for any extra time worked.

**Example 7:** Same as Example 6, but the store pays an extra \$60 for the errands.

→ The \$720 paid for the 36 cashier hours (\$20 per hour), and the \$60 paid for the 4 errand hours (\$15 per hour), both are above minimum wage, so this is lawful. **Note** — this is the same outcome as Example 4: agreements to different rates for different kinds of time worked are lawful, as long as each rate is at least minimum wage.

**Example 8:** Same as Example 6, but the handbook doesn't say the salary is for only cashier shifts.

→ The \$720 per week can be the agreed pay for all time worked, whether cashier shifts or errands. It's high enough that the employee with 4 extra hours of errands is still paid at least minimum wage: \$720 for 40 hours is \$18 per hour.

**(C) If the Pay is Actually an Hourly Rate.** If pay is called a “salary” but changes if hours worked change, then it's **really hourly pay, not a salary** (see the definition above), so extra time worked requires extra pay.

**Example 9:** A store pays a \$720 weekly salary to cashiers working 36 hours per week — but it lowers, or “docks,” that pay in any when cashiers work fewer hours for any reason. Since \$720 for 36 hours is equal to \$20 per hour, the store lowers pay by \$20 for each hour as follows:

Time Off	Time Worked	Pay Decrease	Wages: Weekly	Wages: Hourly
None	36 Hours	None	\$720	\$20
1 Hour	35 Hours	\$20	\$700	\$20
2 Hours	34 Hours	\$40	\$680	\$20

This store is actually paying hourly wages, not salaries. Weekly pay isn't fixed; it rises or falls when hours rise or fall, which is how an hourly wage, not a salary, works (as noted above). That's lawful, but the store must pay an extra \$20 per hour if cashiers work *over* 36 hours.

<sup>6</sup> Colorado and federal law define salary versus hourly pay identically, including that a salary may be reduced “when an exempt employee is absent from work for one or more *full days* .... Dock[ing] the pay ... for *partial-day* personal absences, ... would lose the exemption.” [29 C.F.R. §§ 541.602-603](#) (emphasis added); [COMPS Rule 2.5](#) (adopting federal rules).

<sup>7</sup> Various exemptions have other requirements, including of salaries *well above* minimum wage; see [INFOs #1 and 1A](#).

**(2) Commissions**

Commissions — defined as “compensation paid upon results achieved,” including pay that depends on sales or other revenue, rather than on time<sup>8</sup> — can pay for all time worked, **except**:

**(A) If the Pay Is Below Minimum Wage.** Colorado minimum wage exempts *some* “outside salespersons.”<sup>9</sup> Others with “commission sales” aren’t exempt, or are exempt from only overtime, not minimum wage.<sup>10</sup> If commission employees aren’t exempt, **each pay period must average at least minimum wage.**

**Example 10:** A salesperson in a retail appliance store is paid 10% of their sales that the employer was paid for that month. In June 2023, they worked 160 hours, and earned \$2,000 in commissions from \$20,000 in sales.

→ For 160 hours, \$2,000 is \$12.50 per hour — below minimum wage. The \$13.65 Colorado minimum wage for 160 hours is \$2,184, so the employer owes \$184.

**Tip:** To avoid minimum wage violations, options for employers paying **commissions or piece rates** include adopting policies such as one of the following:

- **raise the rate** of the commissions or piece rates high enough to assure each week’s pay averages at least minimum wage — though that may not fully protect against violations if any weeks generate *no* (or very low) commission sales or piece rate production; or
- **add extra pay** if commissions or piece rates fall below minimum wage, which requires tracking time worked to know when pay is below the minimum wage multiplied by hours worked.

**(B) If the Pay Is Limited to Certain Time Worked.** A commission can serve as the pay for **all time worked that produces the commission-generating sale**, not just for time on the specific task of making the sale. But other time worked that doesn’t generate a sale, even if necessary for the job, requires extra pay.

**Example 11:** An HVAC maintenance employee visits homes for service appointments: seasonal servicing (cleaning, replacing filters, etc.); repairs; and sales and installation of upgraded equipment. Customers are charged per service or sale, regardless of how long any work takes. Employee pay is 25% of all charges (other than the cost of parts) from their visits. They also spend time: (A) driving to each appointment; (B) communicating with customers (phone, text, etc.) before visits; and (C) in weekly staff meetings the employer requires.

- All of (A), (B), and (C) are time worked that must be compensated.
- (A) and (B) are activities necessary to produce commission-generating sales. Commissions serve as the pay for all work to produce a sale, so they **can** serve as the pay for this time.
- (C) is activity for the employer’s benefit that, even if necessary to work as a commission-paid service employee, doesn’t go toward producing any commissions. So the commissions **can’t** serve as pay for this time, and the employer must pay extra for that time — at whatever regular hourly rate the commissions come to, or at any other agreed hourly rate.<sup>11</sup>

**Tip:** To avoid unpaid time violations, one option for employers paying **commissions or piece rates** is to **specify an hourly rate** (anything minimum wage or higher) it will pay for any time worked the commissions or piece rates don’t cover.

<sup>8</sup> [Div. of Employment & Training v. Moen](#), 767 P.2d 1230, 1233 (Colo. App. 1988).

<sup>9</sup> COMPS Rule 2.2.4 (exemption if salesperson spends 80% of time directly related to outside sales away from worksite).

<sup>10</sup> COMPS Rule 2.4.2 (overtime-only exemption: limited to “sales” employees, and only those (A) whose pay is at least 50% commissions *and* 1.5 times minimum wage, (B) at employers with revenue over 75% from retail or service sales).

<sup>11</sup> COMPS Rule 1.8 explains how to determine an hourly “regular rate of pay” for non-hourly-paid employees.

**(3) Piece Rate, or Piece Work, Pay**

Piece rates — defined as pay **per item or task finished** (e.g., per sheet of drywall hung, or per call taken), **regardless of the time worked**<sup>12</sup> — can pay for all time worked, **except**:

**(A) If the Pay Is Below Minimum Wage.** Unless an employee is exempt,<sup>13</sup> employers must track employee hours to assure their pay is at least minimum wage for all time worked — for example, making sure the piece rate is high enough, or adding pay if the piece rates total less than minimum wage.

**Example 12:** A chicken slaughterhouse employee works 40 hours of time worked each week, for a \$4.00 per chicken piece rate. In one week in 2023, they finish 120 chickens, for pay of \$480.00 (\$4.00 x 120); the next week, 150 chickens, for pay of \$600.00 (\$4.00 x 150).

- The employee's regular hourly pay rate — pay divided by time worked — is \$12.00 the first week, and \$15.00 the second week. The first week's pay is unlawfully below the 2023 Colorado minimum wage, \$13.65. The second week's pay is lawfully above minimum wage.
- For the first week, the employer owes an extra \$66.00, to raise the pay from \$12.00 per hour (\$480.00 for a 40-hour week) to the \$13.65 Colorado minimum wage (\$546.00 for a 40-hour week). Or the employer can raise the piece rate high enough to assure that pay is at least minimum wage on average for the workweek. See the "Tip" options in Part (2)(B) above.

**(B) If the Pay Is Limited to Certain Time Worked.** If a piece rate pays for **only certain time worked** — by agreement and by the nature of what it compensates — then it doesn't cover **other** time worked.

- This situation (B) — pay limited to certain time worked — may **apply more often to piece rates** than non-task-specific pay (salary, hourly rate, etc.), because of the "piece rate" definition: Pay for **producing defined pieces** of work, but **not other** time insufficiently related to piece production.<sup>14</sup>
- For this reason, **piece rates** typically are offered as, and serve as, the pay for:
  - ✓ work that **produces the pieces**; *and*
  - ✓ work **directly related** to piece production — see the table and explanations on the next page — **if** the parties **agreed and understood** that the piece rate serves as the pay for that work; *but*
  - ✗ **not other, more general time worked** (for example, bathroom cleaning time for tailors paid a piece rate per shirt, which would require extra pay) — **regardless** of what was **agreed and understood**, because a pay rate "per piece" can't serve as the pay for time that doesn't produce pieces.

**Example 13:** IntervU4U, a startup business, sells mock job interview sessions online: a 40-minute mock interview by, then 20 minutes of feedback from, an IntervU4U employee. IntervU4U explains in writing to employees that pay is "\$25 for each one-hour session." But IntervU4U employees also need to spend 5-10 minutes of prep time, before each session, to review the personal information the customer had submitted in advance of the interview.

- The piece rate *can't* serve as the pay for prep time: the parties agreed that the \$25.00 piece rate is for only the hour of in-session time: "\$25 for each *one-hour session*." So the employer owes extra pay for the prep time — at \$25 per hour, the only pay rate the parties agreed to.

<sup>12</sup> See, e.g., [Monroe v. FTS](#), 860 F.3d 389, 415 (6th Cir. 2017) ("the amount ... paid in a piece rate system *remains the same regardless of the number of hours* required to complete" pieces); [Amponsah v. DIRECTV, LLC](#), 278 F. Supp. 3d 1352, 1365 (N.D. Ga. 2017) (describing pay as "piece-rate basis—that is, a *fixed amount ... for the action* performed *regardless of the amount of time*"); [Roeder v. DIRECTV, Inc.](#), No. C14-4091, 2017 WL 151401, at \*19 (N.D. Ia. Jan. 13, 2017) (describing pay as "piece-rate, meaning ... a *specified amount for a job* regardless of *how long* it took"); [29 C.F.R. § 541.605](#) (noting "fee basis" and "piecework" both are "an agreed sum for a single job *regardless of the time* required for its completion"); IRS Letter Ruling PLR 5411123110A, 1954 WL 10083 (Nov. 12, 1954) (pay "on a job basis, *i.e.*, certain work to be completed at a *definite charge, regardless of time taken*, is no different from a regular *piece-rate* job basis") (Emphases added in all.)

<sup>13</sup> E.g., see the "Commissions" section: the "outside salesperson" exemption *could* apply if pay is a fixed sum per sale.

<sup>14</sup> See the above note on how a piece rate is a fixed amount for an "action performed" or "certain work" (*i.e.*, each "piece").

**Example 14:** A slaughterhouse pays employees a \$5.00 per chicken piece rate. The pay always averages more than minimum wage. Employees must spend time on a wide range of activities other than actually producing processed chicken: clean and maintain equipment; put on and take off work gear; check in and out; wait for orders or repairs; meetings; and taking turns cleaning restrooms.

- All of these activities **count as "time worked"**; the question is **whether the piece rate can serve as the pay** for not only actual chicken production, but all other kinds of time worked.
- Since the piece rate is for producing each piece, it **can serve as the pay** for activity **directly related to producing each piece**, such as (*listing items by their letters in the table below*):
  - (A) cleaning your own work gear (e.g., your knife) or work area during each shift; or
  - (C) donning and doffing gear necessary to the chicken work.

But the piece rate **can't serve as the pay** for activity that, although it benefits the employer (which is why it's time worked), is **not directly related to producing each piece** — such as:

- (B) periodic equipment maintenance (knife-sharpening, machine-cleaning, etc.);
  - (D) checking or clocking in or out (if it becomes time worked by taking over a minute);
  - (G) meetings or trainings the employer requires; or
  - (H) other work not directly related to the piece work (cleaning bathrooms, etc.).
- Piece rate pay always depends on how rapidly the business provides pieces to produce (rate of assembly line, of customer orders, etc.) — so it also **can serve as the pay** for time on:
    - (E) routine waits for work or orders (e.g., for calls placing orders, or cars arriving at a mechanic's work station), or getting to the work station where the piece work is done.

But that assumes, during the waiting time, piece work can start when orders arrive. If, due to broken equipment, lack of supplies, etc., it's temporarily impossible for piece work to start when orders arrive, then the employee must be present with no possibility of pay-generating piece work for that time. So the piece rate **can't serve as the pay** for time:

- (F) during equipment or supply delays that temporarily prevent performing piece work.
- Overall, piece rate employees are **not owed extra pay** for (A), (C), or (E), but **are owed extra pay** for (B), (D), (F), (G), or (H) — at whatever **regular hourly rate** their **piece rate pay equals**.<sup>15</sup>
  - This table summarizes **whether piece rates can serve as the pay** for various activities that **count as time worked** (the specific activities are based on this food manufacturing example):

Activities of Piece Rate Employees: <i>Examples</i>	Cleaning/Maintenance:		Shift Start/End Tasks:		Waiting for Work:		Other Work:	
	[A] Ongoing cleaning of work area or gear <i>(wipe gear, conveyor, etc.)</i>	[B] Periodic maintenance <i>(maintaining tools, deep cleaning, etc.)</i>	[C] Put on / take off ("don/doff") needed gear <i>(bib, goggles, gloves, etc.)</i>	[D] Check or clock in/out <i>(time clock, security/safety screen, etc.)</i>	[E] For orders or time to get to a work station	[F] For repair or supply needed for piece work to be done	[G] Meeting / training <i>(instruction, assignment, safety, etc.)</i>	[H] Not directly related to piece production <i>(clean rest room, etc.)</i>
Typical Frequency of the Activity:	Each shift (once or more)	Periodic (whether daily or less often)	At the start or end of each shift (or each meal break)		Any (frequency is not relevant)		Any (frequency is not relevant)	
Can Piece Rates Serve as the Pay for the Activity?	Yes	No	Yes	No	Yes	No	No	

<sup>15</sup> [COMPS Rule 1.8](#) explains how to determine an hourly "regular rate" for non-hourly-paid employees.

**Tip:** To avoid unpaid time violations, **options** for employers include:

- (a) **Make clear that the piece rate includes time directly related** to piece production

**Example 15:** Same as Example 13 (IntervU4U pre-session prep time), except IntervU4U's handbook changes the description of the piece rate pay from "for each one-hour session" to, instead, "for all work for the client who purchased the session."

→ The new wording makes clear that the piece rate serves as the pay for not just the one hour of in-session time, but also the 5-10 minutes of pre-session prep time. Since the prep time is directly related to producing the session, the piece rate can serve as the pay for that time, so the employer now owes nothing extra.

**Example 16:** Same as Example 14 (slaughterhouse employees with varied tasks), except the employer handbook states that the \$5.00 per chicken piece rate serves as employees' sole pay for *all* time worked, including *weekly meetings* and one shift per week each employee spends *cleaning bathrooms*.

→ Even if the parties "agreed to" and "understood" that statement: **Agreement and understanding is necessary, but not sufficient, for piece rates to serve as the pay for non-piece-producing time worked;**<sup>16</sup> the time worked *also* must be directly related to piece production. A piece rate for each chicken produced can't serve as the pay for time not directly related to producing chickens, so the employer owes additional pay for non-directly-related time worked.

- (b) **Specify an hourly rate** — anything minimum wage or higher — it will pay for any time worked that the piece rates don't cover (as noted in Part (2)(B) of the Commissions section above).

- (c) **Add a fixed payment** of enough wages to compensate, at least at minimum wage, any regular non-piece-generating tasks.

**Example 17:** Same as Example 14 (slaughterhouse employees with varied tasks), except that after a detailed study, the employer determines that each day, employees spend *at most* 10 minutes going through safety screening and clocking in and out, and *at most* 2 hours per week on periodic equipment maintenance.

→ If, under an agreement with employees, the employer adds to each paycheck 10 minutes per day and 2 hours per week, at the applicable minimum wage or higher, employees are paid enough for that time worked. If any employee ever spends *more* time on these tasks, though — for example, 4 hours per week on equipment maintenance — then more pay is owed for that extra time.

**For More Information:** Visit the Division [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>16</sup> In this way, Colorado law differs somewhat from the federal rule allowing some agreements for piece rates to cover "nonproductive" work ([29 C.F.R. § 778.318\(c\)](#)), because: (1) that federal rule is premised at least in part on the workweek-averaging interpretation of the minimum wage that Colorado law does not apply (*id.*); (2) Colorado law limits permission for agreements to limit the right to pay for any activities that qualify as time worked, e.g., C.R.S. § 8-4-121 ("Nonwaiver of employee rights. Any agreement, written or oral, by any employee purporting to waive or to modify such employee's rights in violation of this article shall be void."); and (3) Colorado law requires liberal construction of the right to be guaranteed pay of at least minimum wage for all activities that qualify as time worked, e.g., C.R.S. § 8-6-102 (minimum wage "shall be liberally construed"); COMPS Rule 8.7(A) (same; rules "shall be liberally construed, with exceptions and exemptions accordingly narrowly construed").



## Interpretive Notice & Formal Opinion (“INFO”) #20C:

### What Travel Time and Sleep Time Is and Isn’t “Time Worked” That Must Be Paid

#### Overview

This INFO #20C covers how time worked applies to travel time ([Rule 1.9.2](#)) and sleep time ([Rule 1.9.3](#)). INFO #20A covers what counts as time worked that must be paid (also called paid or compensable time) under [Colorado Overtime and Minimum Pay Standards Order \(“COMPS”\) Order](#) Rule 1.9; INFO #20B covers how what’s owed for time worked can vary by the type of pay — hourly, salaried, piece rates, commissions, etc.

#### Sleep Time in an Assigned Location

- Sleep time of **5-8 continuous hours**<sup>1</sup> in an **assigned location** is **not** time worked under these conditions:
  - In shifts **under 24 hours**: If the employer doesn’t interrupt, *or* reserve a **right to interrupt**, the 5-8 hours.
  - In shifts of **24 hours or longer**: If —
    - (A) an **express agreement** excludes this sleep time from time worked that must be paid,<sup>2</sup>
    - (B) the employer provides **adequate facilities** for uninterrupted sleep, *and*
    - (C) the employee **is actually allowed** to sleep at least **5 hours uninterrupted** — even if the employer reserves the **right to interrupt** the time for work.
  - Even if sleep time can be excluded from time worked:
    - time worked includes any sleep time that’s **interrupted** for work;
    - **8 hours** is the most that can be excluded, even if the sleep time is over 8 hours; and
    - for any **overtime eligibility** based on shift length,<sup>3</sup> **all sleep time is included** in shift length.

**Example 1:** An office security employee has a 36-hour shift, 6 a.m. Monday to 6 p.m. Tuesday. A written agreement says up to 8 hours of sleep time will not be paid. Though the employee has 5 hours of uninterrupted sleep time Monday night, and is allowed to try to sleep, the only place to sleep is the office chair at the security desk.

→ No time when the employee actually sleeps, or is permitted to try to sleep, may be excluded from time worked, because there is no adequate sleeping facility.<sup>4</sup>

**Example 2:** A hospital requires paramedics to stay in the building for 24-hour shifts, but provides a room for each paramedic to sleep, with a bed and curtains. A written agreement says 8 hours of sleep time may be excluded from time worked. When they are woken up to respond to calls, the employee is paid for their time responding to calls.

→ The employer can exclude sleep time of 5-8 hours from time worked.

<sup>1</sup> Federal law has been interpreted as similarly requiring that at least 5 hours be continuous. *E.g.*, [Bagoue v. Developmental Pathways, Inc.](#), No. 16-cv-01804-PAB-NRN, 2019 U.S. Dist. Lexis 162007, at \*34 (D. Colo. Sep. 23, 2019) (holding, and citing “Department of Labor ... guidance,” that “the five hours must be continuous”) (citing [29 C.F.R. § 785.22](#)).

<sup>2</sup> This differs from the federal rules that also allow “implied” agreements, [29 C.F.R. § 785.22\(a\)](#).

<sup>3</sup> *E.g.*, [COMPS Rules 2.4.7](#) (certain direct care “companions”), 2.4.4 (medical transport employees).

<sup>4</sup> *Bagoue*, (above), at \*34 (noting the general “require[ment] that the sleeping facility be ‘private’”).

**Travel Time That Is "Time Worked"**

- Time **traveling for the employer's benefit** is time worked that must be paid.
- All time within a **continuous workday** — including all travel between the **first** and the **last** time worked in a workday — **is** time worked.<sup>5</sup> That means:
  - ✓ "travel **from job site to job site** during the workday[] must be counted as hours worked,"<sup>6</sup> and so must
  - ✓ travel **from the employer's site to a job site** where the employee is assigned to work:

"Where an employee is **required to report** at a meeting place to receive **instructions** or to perform **other work** there, or to pick up and to carry **tools**, the **travel** from the designated place to the work place is part of the day's work, and must be **counted as hours worked** regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., **all of the time** is working time. However, if the employee goes **home instead of returning** to his employer's premises, the travel after 8 p.m. is home-to-work travel and is **not** hours worked."<sup>7</sup>

**Example 3:** Insulation installation employees report to the shop to clock in, wait for assignments, and load equipment before heading to worksites.

→ Since clock-in, waiting, and loading are time worked (see INFO #20A), the travel time also is.<sup>8</sup> But the time commuting to the shop before clocking in is not time worked.

**Example 4:** A home health employee's day is a series of appointments at client residences. Once per pay period, they must go to the employer office to sign their timesheet — which they do during a workday that's otherwise filled with client residence appointments.

- The trip to the office is just one of several work appointments at different sites, so:
- (A) travel from home to the first appointment (whether a client residence or the office) is ordinary commuting, not time worked;
  - (B) travel between appointments is time worked; and
  - (C) travel from the last appointment to home is ordinary commuting, not time worked.

**X** The **exception** to all time within continuous workdays being time worked — **breaks** of over **20 minutes** when **completely relieved** of duty (see INFO #20A) — includes **travel** on such breaks.

**Example 5:** In addition to a 30-minute meal break, an employee has another 20-minute break, when completely relieved of duty, in their eight-hour shift. They use the break for personal activity like walking to a place to eat another meal, or driving to run errands.

→ The walking and driving are not time worked. For shifts of five hours or more, Colorado law requires a 30-minute meal break that can be unpaid if the employee is completely relieved of duty — but a *second* break can be unpaid if 20 minutes or longer and completely relieved of duty.

<sup>5</sup> [29 C.F.R. § 785.38](#).

<sup>6</sup> 29 C.F.R. § 785.38 (emphasis added); [Excel in Driving](#), DLSS Case #2891-17 (Hearing Officer Decis. #18-046, Jul. 27, 2018), at 11 (time worked included travel between driving lessons; workday began when employee picked up employer car).

<sup>7</sup> 29 C.F.R. § 785.38 (emphasis added).

<sup>8</sup> [Chao v. Akron Insulation & Supply](#), No. 5:04-CV-0443 (N.D. Ohio May 5, 2005) (workday began with "shop time" — getting assignments, gathering in crews, and packing equipment — so later travel time was time worked).

**Travel Time That Is Not "Time Worked"**

(1) **Normal home to work commuting** — traveling **to and from work**, at the **start or end** of a workday, is **not time worked**<sup>9</sup> — with the exceptions listed below:

**Example 6:** An oil drill crew rides together from a meetup point to the site in one car, due to (1) employer pressure for crews to arrive at the same time, (2) roads requiring four-wheel drive, and (3) limited parking. Workers use the drive time as they wish.

→ Despite work reasons to drive together, this is ordinary commuting, not time worked.<sup>10</sup>

**Example 7:** A car dealership employee works five days a week of regular day shifts, but sometimes is called to return at night to unlock a car.

→ Time worked excludes regular commutes as "normal home to work travel." But *extra* home to work travel, like these special trips to and from work, in a day that already had a home to work commute, is time worked, not "normal" home to work travel.

✓ **Exceptions:** Commutes are **time worked** in **some circumstances** making them more like work time:

(A) If, **during the commute**, employees engage in **other time worked**.

**Example 8:** A manager holds morning safety meetings by phone while employees commute.

→ Receiving information is time worked, so the workday starts with the call, making the rest of the commute also time worked.<sup>11</sup>

**Example 9:** An inventory auditor rides in a company van to individual stores to take inventory. During the ride, the auditor sometimes completes paperwork and verifies that the stores have provided the necessary inventory information.

→ Completing paperwork and verifying information is time worked. On days the auditor performs time worked in the van, the workday starts when they start that work.<sup>12</sup>

(B) If **work** is required **immediately before** commuting to work, or **immediately after** commuting home, that gives the commute **increased (a) length, (b) risk, or (c) restrictions on activity**.

**Example 10:** Medical clinic employees have 15 minutes of time worked immediately before their morning commute, and another 15 immediately after their evening commute: the clinic prohibits leaving certain medical equipment at work or in cars, so employees must load it into their cars right before driving to work, must unload it right after driving home, and can't make stops for personal errands or appointments during their commutes since that would leave the equipment unattended in a car.

→ The requirement to commute with equipment comes with *restrictions on employee activity*, so it doesn't stop the time worked that starts with morning loading, and continues through evening unloading.<sup>13</sup>

<sup>9</sup> [KadyLuxe, LLC](#), DLSS Case # 0049-19 (Hearing Officer Decis. No. 20-016, March 13, 2020) (travel time between tasks during the workday was time worked but employee's commute from home to first task and from last task home was not).

<sup>10</sup> [Smith v. Aztec Well Servicing Co.](#), 462 F.3d 1274 (10th Cir. 2006) (also noting that tasks like repairing flat tires, because they are inherent to any commuting or driving, didn't start the paid workday).

<sup>11</sup> [Smith v. Aztec Well Servicing Co.](#), 462 F.3d 1274 (10th Cir. 2006) (ordinarily non-compensable commuting became time worked when drives included safety meetings, so for those drives only, the paid workday began when the meeting began).

<sup>12</sup> [Johnson v. RGIS Inventory Specialists](#), 554 F. Supp. 2d 693, 708-09 (E.D. Tex. 2007).

<sup>13</sup> [Wilson v. PrimeSource Health Care](#), No. 16-cv-1298 (N.D. Ohio July 5, 2017); see [Stevens v. Brink's Home Security](#), 169 P.3d 473, 476 (Wash. 2007) (commute time of technicians allowed to drive company-branded trucks between home and worksites, but forbidden from personal activity, is time worked); [Dooley v. Liberty Mutual Insurance](#), 307 F. Supp. 2d 234 (D. Mass. 2004) (checking email and returning calls before driving from home to the first job were compensable for appraisers).

**Example 11:** An inspector drives directly to client sites. Before leaving home, they get directions to each client for the day, call each client they will visit that day, and prepare some paperwork. After returning home, the inspector must finish and upload their reports.

Time worked includes the work both before leaving home and after returning, but not the *commute*, because the employee: (1) is *fully relieved* of duty while commuting, free to do personal activity (errands, etc.); and (2) need not do these tasks *immediately before or after* the workday.<sup>14</sup>

**Example 12:** A car racetrack employee, while commuting to the track each day, must hitch and tow a racecar behind their own car. The commute is fully relieved of duty, but due to towing another car, they drive more slowly, making the commute 5 minutes longer.

→ The commute is time worked; its length is increased by work immediately before.

(C) If employees are **required** to take **employer-provided transportation** that, compared to other commuting, causes **either (A) or (B)** below.

(i) If the required employer transportation **makes the commute longer**.

**Example 13:** To save parking for guests, a ski resort requires employees to park at a local school to wait for a shuttle to the resort. To be safe, most employees arrive 5 minutes before the scheduled shuttle arrival. The shuttle at times is up to 10 minutes late. The school to resort drive is 20 minutes by shuttle, but 15 minutes in employees' own cars. For some employees, driving to the school is longer than driving to the resort.

→ Rule 1.9.1 time worked includes time in, and time over one minute awaiting, a shuttle.

→ Extra driving from home to school, rather than right to the resort, is *not* time worked; it's normal home-to-work travel, just to a different site the employer chose, the school.

(ii) If the required employer transportation **increases safety risk**.

**Example 14:** Miners travel from the mining property entrance to, underground, their mining work stations. Part of the travel is in employer-provided open-top rail cars. Part is a lengthy walk (i.e., not just a short walk to and from a rail car). Both in the rail cars and on the walk, miners face physical "exertion as well as hazards ... even if safety rules are followed": "hazards of falling rocks"; "ventilation poor" air; and "footing uncertain" due to "steep grades," "low ceilings," and various "obstacles."<sup>15</sup>

→ The entrance-to-workstation walk imposes physical hazards and exertion, well beyond that of normal walks or commutes, so it counts as "labor," and therefore as "time worked," when it's required, on employer property, and for employer benefit.<sup>16</sup>

<sup>14</sup> [Butler v. DirectSAT USA, LLC](#), 55 F. Supp. 3d 793, 814-16 (D. Md. 2014).

<sup>15</sup> These facts and quotes are from [Tennessee Coal Co. v. Muscoda Local](#), 321 U.S. 590, 595-596 (1944).

<sup>16</sup> [Tennessee Coal Co. v. Muscoda Local](#), 321 U.S. 590, 598, 603 (1944) (miners' entrance-to-workstation "compulsory travel" under employer control and on employer property — both the walking and in employer transport — "involves ... exertion as well as hazards," making it compensable "work or employment ... as those words are commonly used — ... exertion ... controlled or required by ... and primarily for the benefit of the employer," so the pre-Portal-to-Portal Act ("PTPA") version of the Fair Labor Standards Act ("FLSA") "leave[s] no uncertainty as to its character as work ... [and] requires that ... compensation be paid for such work") (emphases added); [Carter v. Panama Canal Co.](#), 463 F.2d 1289, 1304 (D.C. Cir. 1972) (holding that, even where the PTPA's exclusion of ordinary entrance-to-workstation travel applies, walking to a locomotive engine within the employer's site *would* be compensable if it were an "arduous" task, but that this walking was not arduous, so it was not compensable).

**Tip:** If an employer wants to **minimize the risk of commute time becoming time worked** due to job activities immediately before or after (or during) the commute being "time worked," options include:

- **minimizing employee transport of equipment** while commuting, and employee **loading or unloading** of equipment immediately before or after commuting — or at least limiting any such transport, loading, or unloading to light items that don't meaningfully add to employee time; and
- ensuring employees are **fully relieved from duty while commuting** by not restricting their activity while commuting (forbidding personal errands, requiring pickup/dropoff stops, or requiring employees transporting property to stay in their vehicles to guard the property).

(2) Travel between a site **entrance** and **workstation**, at the **start** or **end** of a shift, generally **is not** time worked — like ordinary **commuting**, with similar **exceptions**. That is, entrance-workstation travel **is** time worked:

✓ If it's **not solely travel**, because it includes **other activity** that's "**time worked**," such as —

- meetings or instructions,
- picking up or returning required gear or clothes,
- screening or check-in, or
- waiting in line for these or other kinds of time worked.<sup>17</sup>

✓ If it's **after other time worked starts**, and **before it ends**, making it part of a **continuous workday**.

**Example 15:** An arriving employee spends 3 minutes waiting in line at the building entrance before punching the timeclock, then 3 minutes walking to their workstation.

→ The entrance-to-workstation walk is time worked. Waiting for and punching the timeclock took more than one minute, so it counted as time worked (see INFO #20A), and therefore started the employee's time worked for the day.

**Example 16:** Same as example #15, except it takes one minute or less to wait for and punch the timeclock — which are the only activities before the entrance-to-workstation walk.

→ The entrance-to-workstation walk is not time worked. Waiting for and punching the timeclock didn't take more than one minute, so it didn't count as time worked (see INFO #20A), and therefore didn't start the employee's time worked for the day.

✓ If it imposes **physical hazard or exertion** beyond normal travel of that type (walking, driving, etc.).

**Example 17:** Same as Example 14, but with the entire mine entrance to mining work station travel being on foot, without the portion in the employer-provided open-air rail cars.

→ This travel time is time worked, for the same reasons covered in Example 14.<sup>18</sup>

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

<sup>17</sup> For what non-travel activities do and don't count as time worked, including the sorts of pre-/post-shift activities that may occur during entrance-workstation travel, see INFO #20A.

<sup>18</sup> *Tennessee Coal Co. v. Muscoda Local*, 321 U.S. 590, 595-96, 598, 603 (1944) (miners' entrance-to-workstation time, including the walking time, compensable under FLSA as it existed before the PTPA excluded such time).