



## Comments on Proposed Rules

**Kirkpatrick, Josh**

Wed, May 20, 2020 at 4:21 PM

To: "michael.primo@state.co.us" <michael.primo@state.co.us>

Good afternoon. I submitted this comment on the Google Docs form, but it was not showing up on the list of comments submitted, so I am sending to you via email as well. Thank you.

I was asked by a client in the broadcasting industry to address a concerning gap in the exemptions for COMPS Order 36. While not specifically at issue for the current proposed set of rules, we nonetheless wanted to address the concern now in the hope that the Division will take action.

Federal law provides an exemption for “creative professionals.” See 29 CFR § 541.302. While this exemption does not cover everyone in the broadcasting industry, it does cover, inter alia, certain broadcasting talent who perform on-air and/or who write or contemporaneously create their own content (as well as artists, musicians, composers, and the like). COMPS Order 36 omitted this exemption from Rule 2.2. There has never been a corresponding exemption under Colorado law, but our client has never been part of a covered industry prior to COMPS Order 36.

With the expanded coverage of the COMPS Order, this issue has become apparent. Especially in light of the absence of a Highly Compensated Employee (“HCE”) Exemption in the COMPS Order (compare 29 CFR § 541.601), there are numerous workers in Colorado making significant annual income (some well in excess of the threshold for the HCE) who may now be overtime-eligible (assuming no other exemptions apply). Surely, it is not the intention of the Division that these creative employees track their hours worked and earn overtime compensation. This result would be especially troublesome because of the blurred lines between work time and non-work time. On-air talent—as public figures—often host and emcee functions and events to promote their own personal “brands” as well as the goodwill of their employers, travel for sporting and other events, and post on social media about breaking news and other current events. Additionally, overtime eligibility for these creative employees, whose rate of pay is often contractually-fixed, imposes additional cost on broadcasting operations, which are particularly impactful in smaller metro areas. The increased Salary Requirement under COMPS Order 36 will, as of January 1, 2021, provide an increased compensation floor above and beyond minimum federal requirements for exempt employees. Finally, omitting the creative professional exemption means that multi-state employers – who often have a choice on where to locate employees – may consider shifting certain creative work elsewhere.

According to the Colorado Broadcasters Association (CBA), which supports this comment, broadcasters are facing the unprecedented difficulty of providing their communities with 24/7 news and information on the ever-changing COVID-19 pandemic, while losing their only source of income, advertising. Non-essential businesses have been required to close or limit their operations statewide, causing them to cancel their marketing campaigns. Per the CBA, Colorado’s broadcasters are reporting a 60-70% loss of income in a single quarter. The amount of time until commerce nears its pre-pandemic levels is a complete unknown and advertising will assuredly lag behind that return, forcing broadcasters to make extremely difficult budget decisions, just to stay in businesses. The loss of the “creative professionals” exemption will likely make those budget cuts even deeper, leading to many more Coloradans finding themselves out of work.

**Josh Kirkpatrick**

Shareholder

-----  
This email may contain confidential and privileged material for the sole use of the intended recipient(s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient), please contact the sender by reply email and delete all copies of this message.

Little Mendelson, P.C. is part of the international legal practice Little Global, which operates worldwide through a number of separate legal entities. Please visit [www.littler.com](http://www.littler.com) for more information.