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) #39, 7 CCR 1103-1 (2024), as proposed September 29, 2023; 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 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. (2023), 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 13.5 including C.R.S. §§ 8-1-101, 103, 107, 108, 111, 130; 8-4-111; 8-6-101.5; 102, 104, 105, 106, 108, 109, 111, 116, 117, 120; 8-12-115; 8-13.5-202, 203. Each of the preceding provisions is quoted in Appendix A to the COMPS Order, 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 as follows: **(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. Pursuant to C.R.S. § 24-4-103(6), the Director finds as follows.

A. Rule 1.8.3: Regular rates for employees with multiple jobs

Rule 1.8.3 is amended non-substantively to avoid any misunderstanding of the intent and scope of the text in question. The rule covers how to calculate regular rates for employees with "two or more non-exempt *jobs*," but the title refers to employees with "multiple ... *rates*." To avoid any possible confusion about how the rule covers employees with multiple rates due to multiple *jobs*, the title is deleted.

B. Rule 1.9.1: Time worked

Rule 1.9.1 is amended non-substantively to avoid any misunderstanding of the intent and scope of the text in question. In replacing the Minimum Wage Order with COMPS Order #36 in 2020, the Division noted that the "time worked" rule was being amended for the express purpose of making clear that Colorado law covers as "time worked" various tasks and requirements that had been excluded from federal wage law coverage by the Portal-to-Portal Act.[1] Accordingly, it listed various tasks and requirements that had been excluded from federal wage law coverage, stating they were included as "time worked" under Colorado wage law, as long as they took over one minute.[2] Since this rule took effect, some have asked whether the over-one-minute minimum applies to *all* time worked, including even core work tasks. The Division believes it has been clear that the addition of the "over one minute" language in COMPS Order #36

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[1] "Rule 1.9, which defines what time qualifies as "time worked" that must be compensated, is revised to clarify that Colorado has not followed, and will not follow in the COMPS Order #36, the federal Portal-to-Portal Act ("PTPA"), 29 U.S.C. § 251 et seq. That Act narrowed the rights the FLSA provides, but in the ensuing decades, no Colorado statute, nor any Colorado rule, has adopted the language of the PTPA, nor any similar language." Statement of Basis for COMPS Order #36, p.12 (Jan. 22, 2020).

[2] "Pre-/Post-Shift Time Worked

- Federal wage law ... 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 ....
- But: Colorado never adopted the federal statute excluding pre- and post-shift activities from time worked (the PTPA).
- 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 ...."

Interpretive Notice and Formal Opinion ("INFO") #20A (last updated Jan. 26, 2023) (emphases removed).

was not a *narrowing* of what counts as time worked. Rather, the Division had clearly stated that the COMPS Order #36 amendment of the rule served to clarify that Colorado was more *broadly* defining time worked than federal law, so it was listing tasks and requirements federal law had excluded, just with an over-one-minute minimum. Nevertheless, to avoid any confusion, the Division now amends the rule to make more explicit that the over-one-minute minimum has applied, and continues to apply, to only tasks and requirements included by the COMPS Order but excluded by federal wage law.

C. Rules 1.8.1 and 1.10: Tips

Rule 1.8.1 is amended to clarify that tips are not part of the "regular rate" that rises 50% for overtime hours. This has been the Division's interpretation — *e.g.*, a tipped minimum wage employee's overtime rate is at 1.5 times minimum wage, not 1.5 times the sum of minimum wage plus their tips. But it has come to the Division's attention that:

- federal law expressly excludes tips from regular rates, while Colorado law did not expressly name "tips" among the lengthy list of items excluded from regular rates;
- that this Division not only has received *inquiries* about whether tips are included in regular rates (from attorney and non-attorney inquirers alike), but also a number of *complaints filed* by employees arguing that employers should have paid higher overtime rates of 1.5 times the sum of their wages plus their tips — paralleling class action and other lawsuits filed against employers in other jurisdictions claiming the same.[3]

The Division therefore amends Rule 1.8.1 to avoid any such interpretation of Colorado law on overtime pay.

Rule 1.10 amends the "tipped employee" definition that has proven unsatisfyingly unclear, especially as tipping is expanding to more occupations that may or may not qualify under the too-nebulous current rule text. The import of Rule 1.10 is this: an employer can pay up to $3.02 less than minimum wage as a "tip credit" (Rule 6.2.3), but only for a "tipped employee" (Rule 1.10). An employee receiving tips *directly* from customers (waitstaff, hotel housekeepers, etc.) clearly can qualify as a "tipped employee." The question that proves thornier, and often is hotly disputed and litigated, is which other employees (restaurant bussers, hosts, etc.) can be part of a "tip pooling" arrangement to share tips left by customers, and can be paid less than full minimum wage as a "tip credit" based on those shared tips.[4] Rule 1.10 exists to answer that question: tip credits and tip pooling are lawful for a "tipped employee," which means an employee "in an occupation in which s/he customarily and regularly receives more than $30 per month in tips" directly or from a tip pool.

There always has been a circularity to this definition that, at its core, says it's lawful to pool tips among those who customarily and regularly pool tips. Various problems with circular definitions are well-known, and two are especially relevant here. First, they don't *adapt* well to change: for example, if an occupation is tipped now, but wasn't in the past, is it "customarily" tipped? Second, they're incomplete, because they commonly require departing the text for more helpful *unwritten* definitions — as here: the most common way courts and agencies analyze which not-directly-tipped employees are "customarily and regularly" tipped is look at their *duties*. As summarized by a recent article written by a national law firm that represents Colorado employers, and posted by the Colorado Restaurant Association:

> ... experience in DOL [U.S. Department of Labor] investigations[] shows that DOL evaluates whether and to what extent *an employee performs significant customer-service functions in contact with patrons* .... This typically involves analyzing whether the *nature, frequency, and quantity of an employee's direct customer service and interaction* support characterizing the worker as being among those who customarily and regularly receive tips. For instance, it is unlikely that an employee who engages in customer contact infrequently or only to a trivial extent would be classified that way.[5]

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[3] *E.g., Zepeda v. Ulta Salon, Cosmetics & Fragrance,* No. SA CV 17-2184-DOC(JDEx), 2018 WL 6981842 (C.D. Cal. June 1, 2018) (class action lawsuit, under California wage law, seeking higher overtime rates by claiming employees' tips count as part of their "regular rates" that rise 50% for all overtime hours); *Denson v. DC Rest. Holdings*, No. 19-CV-01609 (DLF), 2021 WL 4988994, at *2 (D.D.C. Oct. 27, 2021) (lawsuit arguing the same under D.C. (not federal) wage law); *Leleux v. Covelli Fam. Ltd. P'ship*, No. 617CV747ORL37TBS, 2017 WL 11036826, at *1 (M.D. Fla. Nov. 14, 2017) (lawsuit arguing the same under federal law).

[4] In this discussion, "tip pooling" includes tip-sharing arrangements by any name or structure (e.g., "tipping out" co-workers).

[5] "Can You Include Sushi Chefs and Other Unique Positions in Your Tip Pool?" (written by the law firm Fisher Phillips, LLP, and published on the website of Colorado Restaurant Ass'n) (dated May 5, 2023; last visited Sept. 27, 2023) (emphasis added).

This Division agrees that this definition not only is commonly applied, but also makes sense: if the question is, "who can fairly lay claim to a share of tips customers leave," then a fair answer is, "those who helped serve the customers leaving those tips." The problem is that this sensible answer appears nowhere in Rule 1.10, leaving it unhelpful as guidance to employers and employees — and leaving courts and agencies free to, at times, embrace different answers.

Applying *just the text* of Rule 1.10, without the unwritten definition focused on customer service contact: qualifying as a tipped employee depends on whether the requisite tips are not only regularly received, but also "customarily" received in the employee's "occupation" — two terms that troublingly blur the inquiry. Especially in jobs sometimes but not always tipped, or coming to be tipped more often as payment customs and technology change:

- How "*regularly*" tips are received is a knowable fact; how "*customarily*" tips are received is far murkier.
- The tips and duties of *an individual* are knowable facts; the tips and duties of *"an occupation"* are far murkier.

And this murkier look to occupational custom, not just to a specific employer/employee situation, can yield rulings that define "'customarily and regularly' ... in reference to *industry practice*, not a *specific business's* practice" in isolation.[6] And that definition can exclude from tip pools/credits an employee who is regularly treated as a "tipped employee" at a *specific employer*, but is in an *occupation* that isn't "customarily" tipped. Take cashiers: some courts have held that restaurant cashiers must be paid full minimum wage, without a tip credit, because they aren't customarily tipped in their occupation.[7] But other courts have held the opposite, based on the specific employer/employee situation — such as whether employees mix cashier duties with enough "customarily" tipped duties,[8] or whether cashiers are in a more specific occupation that customarily has tips left directly for them, rather than just shared in a tip pool.[9]

Fact-specific borderline cases are inevitable — but more frequent when a rule says the answer depends on the tips and duties of the "occupation" (not the specific employee), and on how "customary" (not just how "regular") tips are for that occupation. This lack of clarity has yielded frequent employee complaints that they don't qualify for tip pools/credits, so their employers owe them back wages — burdening this Division that by law must investigate and adjudicate all wage complaints it receives, burdening employers who (win or lose) are subjected to those investigations, and risking surprise to whichever party (employee or employer) loses the adjudication on this too-often unpredictable issue.

To redress these problems by improving the clarity of who is and isn't a tipped employee eligible for tip pools/credits, Rule 1.10 amends the "tipped employee" definition in two ways. First, whether an "*occupation*" is "*customarily*" tipped enough for tip-pooling/sharing is replaced by an expressly individualized look to the *duties* of the *particular employee*, as described in the article quoted above: whether "employees ... perform significant customer-service functions in contact with patrons." Based on years of prior experience amending wage rules to add clearer definitions, the Division believed that making the key focus (customer-service contact) an express rule, rather than an unwritten rule, will (A) decrease the volume of complaints and disputes, and (B) decrease the risk of occasional rulings that an employee receives enough regular tips yet isn't in an "occupation" that's "customarily" tipped.

Increasing the clarity that "tipped employees" eligible for tip pools/credits include a range of employees with customer-service contact, as well as employees in newly "tipped" occupations, comes with a need to modernize the *minimum amount of tips* to qualify — in order to avoid letting the new definition sweep in those whose tips are too trivial to fairly characterize them as "tipped employees." More broadly, Rule 1.10 exists to provide a definition of who is "tipped" enough to be fairly defined as a "tipped employee." This Division finds that $30 per month has proven an

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[6] *E.g., Shin & Koo, Inc. d/b/a White Tree Sushi & Asian Cuisine*, DLSS Direct Investig. #20-0019, p.2 (May 13, 2021) ("'customarily and regularly' is in reference to industry practice, not a specific business's practice" alone, in isolation from industry practice).

[7] *E.g., Marshall v. Krystal Co.*, 467 F. Supp. 9 (E.D. Tenn. 1978) (restaurant tip pool invalid for including employees in occupations not customarily and regularly receiving tips, including cashiers).

[8] *E.g., Townsend v. BG-Meridian, Inc.*, No. CIV-04-1162-F, 2005 WL 2978899 (W.D. Okla. 2005) (restaurant was compliant in paying (a) full minimum wage to those spending entire shifts on cash registers and phone orders, and (b) tipped minimum wage to those whose shifts include waitstaff duties as well as time on cash registers and phone orders).

[9] *E.g., Manning v. St. Petersburg Kennel Club*, No. 8:13-cv-3060-T-36MAP, 2015 WL 477364, at *2 (M.D. Fla. Feb. 5, 2015) (cashiers at gambling establishment were "tipped employees" because they received "direct 'personal' tips" in "tip boxes ... at each of the three cashier stations, ... labeled 'CASHIER AND BRUSH TIPS'").

inaccurate, arbitrary definition of who can be fairly characterized as a "tipped employee." Updating $30 per month from 1977[10] yields $1.55 per hour.[11] The Division finds $1.55 per hour in tips to be an apt definition of the minimum to qualify as a "tipped employee," and far more apt than the outdated existing $30 monthly minimum, for several reasons.

(1) *"Per month" is inapt.* In an economy that has come to include more part-time workers, a *monthly* total is inapt. Unlike the full-timer who would qualify with just one tip of *$2 per day* (see point (2) below), a low-hours part-timer (for example, one four-hour shift a week) would need multiple tips, almost *$2 per hour*, to qualify — an unjustifiable arbitrariness in how differently the "tipped employee" definition treats full- and part-time employees.

(2) *The $30 threshold is out of date.* If $30 per month was a fair description of what made for a "tipped employee" in 1977, then an inflation-adjusted equivalent is a fair description today. Or the opposite: the inaptness of the $30 threshold today is clear from what it actually means: in full-time work, *less than $1.50 daily* — or, one small tip per day. Nobody could fairly call someone working a full day, yet earning just one $1.50 or $2.00 tip, a "tipped employee."

(3) *$1.55 per hour is a sensible minimum to be fairly characterized as a regularly tipped employee.* $1.55 per hour is just over half the $3.02 maximum hourly tip credit — making it a reasonable threshold for tip credits to make sense. When an employer claims a tip credit, anyone with tips *below* $3.02 actually gains no earnings from those tips; the tips just let the employer pay a bit less of their minimum wage. Tip credits make the most sense for the vast majority of tipped employees (like restaurant waitstaff) whose tips regularly exceed (and commonly *far* exceed) $3.02. Tip credits also can make sense for those fluctuating above and below $3.02 — a reason to allow the credits when tips are somewhat below $3.02. But an employee *far below* $3.02 (*e.g.*, about half or less) is hard to call a "tipped employee" when such low tips provide the employee no additional earnings, instead just covering a small fraction of the employee's minimum wage. Finally, aside from the relationship of the $1.55 threshold to the $3.02 tip credit: $1.55 per hour amounts to *one small tip per hour* — which is a reasonable minimum for an employee to be fairly described as a regularly tipped employee. Or the opposite: anyone receiving *less* than one small tip per hour *cannot* be fairly described as a regularly tipped employee.

D. Rule 2.4.10: Airline overtime

Rule 2.4.10 is new, a narrow exemption allowing airlines with interstate routes to not pay time-and-a-half overtime rates for hours worked above 40 in a workweek "when such hours are voluntarily worked by the employee pursuant to a shift-trading practice under which the employee has the opportunity in the same or in other workweeks to reduce hours worked by voluntarily offering a shift for trade or reassignment." This amendment conforms the COMPS Order to the wage and hour law of other states with major airports, which already had this exemption (*e.g.*, California, Washington, New Jersey) that the COMPS Order now adds.

E Other amendments are non-substantive updates to, for example, updated years of statutes being cited (Rule 1.1), changed statutory citations (Rule 1.2), and updated verb tenses where now-past years are still referenced (Rule 2.5.1, and Rule 2.5.2(B)).

V. EFFECTIVE DATE. If adopted, these rules take effect January 1, 2024, or as soon after as rulemaking completes.

Scott Moss
Director
Division of Labor Standards and Statistics
Colorado Department of Labor and Employment

September 29, 2023
Date

[10] Inflation-adjusting $30 in 1977 to 2024, by the same CPI the Division must adjust the Colorado minimum wage by, yields an estimated $187.32 per month in 2024. Available data show commonly tipped food service workers average 29 hours per week, and applying an assumption of 10 days off work per year (holidays, vacation, sick/personal days, etc.) yields the average of $1.55 per hour.

[11] Any employer claiming tip credits of under $3.02 per hour is *already required to track average hourly tips* in each pay period — to know how much below full minimum wage they can pay, because the tips must make up the difference from full minimum wage.