



Wage & Hour Law – What’s New for 2021?

Presented by:

The Honorable Scott T. Varholak

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Panel

The Honorable Scott T. Varholak

United States Magistrate Judge
U.S. District Court for the
District of Colorado

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Topics



Perspectives from the Bench

- Filing trends
- Conditional certification & notice
- Discovery disputes
- Hybrids – FLSA and state law claims
- Settlement conferences

2021 Updates

- Updated state & federal regulations
- Federal vs. CO wage and hour law
- Biden U.S. DOL priority predictions
- Case law developments

Perspectives

Filing Trends

- 2020 in D. Colo: 83 wage cases filed; 52 still open
- 2021 in D. Colo: 13 wage cases filed; 1 closed
- From Judge Hegarty's 2019 Statistics Memo:
 - in 2019:
 - 3,733 civil cases were filed
 - 31 cases were tried before a jury
 - 6 cases were tried before a judge (including one Equal Pay Act claim, in which the employer prevailed)
 - no FLSA cases were tried in 2019.
 - in the last 18 years:
 - six FLSA cases have been tried to a jury; plaintiff prevailed 83% of the time

Perspectives

Conditional Certification in FLSA Collective Actions

- Running of time for opt-ins
- Burden at conditional certification phase
- Discovery – must employer provide?
- Notice issues

Perspectives

Discovery Disputes

- Discovery dispute resolution process
- Discovery disputes in wage class and collective action litigation

Perspectives

Hybrids – FLSA and Rule 23 State Law Claims

- Motions to dismiss – *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017) jurisdiction issues
- Case trajectory

Perspectives

Settlement Conferences

- Current settlement referral process
- Current settlement practices during COVID

Practice Pointers to Counsel from the Bench

2021 – first quarter developments and what’s to come?

- Updated state & federal regulations
- Federal vs. CO wage and hour laws
- Case law developments
- Biden U.S. DOL priority predictions

2021 – first quarter developments and what’s to come?

Updated Federal statutes/regulations/guidance

- Independent Contractor regulation (86 Fed. Reg. 8326) is now delayed until May 7, 2021.
- Tipped worker regulation is now delayed until April 30, 2021.
- Opinion Letters – WHD pulled already:
 - FLSA 2021-4, 8, 9 (issued before rules became effective and addressed tip pools/tip credit and IC status as to food distributors and owner/operator truckers)
 - FLSA 2019-10 (compensability of trucker sleep berth time *and* reinstated letters from the '60s-70s on related issues)
 - FLSA 2019-6 (finding worker providing services for virtual marketplace company [*i.e.*, an Uber/Lyft-type platform] is not an employee) (Feb. 19, 2021)
 - See: <https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA>

2021 – first quarter developments and what’s to come?

Updated Colorado wage-related statutes/regulations/guidance

- COMPS Order #37 (wages)
- Equal Pay for Equal Work Act (equal pay)
- Healthy Families & Workplaces Act (paid leave)
- Busy state agency
- Litigation around some of these issues – see, e.g.:
 - *Rocky Mtn. Assn. of Recruiters v. Moss*, 1:20-CV-03819-WJM-STV (filed Dec. 29, 2020) (challenging aspects of Equal Pay Act and Rules)
 - *Nieto v. Clark’s Market, Inc.*, 2019 COA 98 (parties’ agreement to not pay vacation pay on termination is enforceable)

2021 – first quarter developments and what’s to come?

Authority – new(er) Colorado wage-related statutes/regulations/guidance:

- COMPS Order #37 (wages)

- <https://cdle.colorado.gov/sites/cdle/files/7%20CCR%201103-1%20COMPS%20Order%20%2337.pdf>
- https://cdle.colorado.gov/sites/cdle/files/INFO%20%231_%20COMPS%20Order%20%2337%20%282021%29.pdf (INFO #1)
- https://cdle.colorado.gov/sites/cdle/files/INFO%20%233_%20Tips%20%26%20Tipped%20Employees%20%282021%29.pdf (INFO #3)
- https://cdle.colorado.gov/sites/cdle/files/INFO%20%234_%20Meal%20and%20Rest%20Periods%20%282021%29.pdf (INFO #4)
- https://cdle.colorado.gov/sites/cdle/files/INFO%20%237_%20Payment%20of%20Wages%20%26%20Required%20Record-Keeping%20%282021%29.pdf (INFO #7)
- <https://cdle.colorado.gov/sites/cdle/files/COMPS%20Order%20%2337%20%282021%29%20Poster%20OCLEAN.pdf> (Poster in English; available in many other languages as well)

2021 – first quarter developments and what’s to come?

Authority – new(er) Colorado wage-related statutes/regulations/guidance:

- Equal Pay for Equal Work Act (equal pay)

- https://leg.colorado.gov/sites/default/files/2019a_085_signed.pdf (the Act)
- https://cdle.colorado.gov/sites/cdle/files/7%20CCR%201103-13%20Equal%20Pay%20Transparency%20Rules_0.pdf (Equal Pay Transparency Rules)
- https://cdle.colorado.gov/sites/cdle/files/INFO%20%239_%20Equal%20Pay%20Transparency%20Rules%20%282021%29.pdf (INFO #9)

2021 – first quarter developments and what’s to come?

Authority – new(er) Colorado wage-related statutes/regulations/guidance:

- Healthy Families & Workplaces Act (paid leave)

- <https://leg.colorado.gov/bills/sb20-205> (the Act)
- <https://cdle.colorado.gov/sites/cdle/files/Wage%20Protection%20Rules%207%20CCR%201103-7%20Temp%20%28Clean%29.pdf> (Wage Protection Rules)
- <https://cdle.colorado.gov/sites/cdle/files/7%20CCR%201103-11%20Colorado%20WARNING%20Rules%20Proposed%20Rules.pdf> (Warning Rules)
- https://cdle.colorado.gov/sites/cdle/files/INFO%20%236B%20%2812-1-20%29%202021%20Paid%20Leave%20under%20HFWA_0_3.pdf (INFO #6B)
- <https://cdle.colorado.gov/sites/cdle/files/INFO%20%236C%20%2812-23-20%29%20C%20How%20HFWA%20Differs%20by%20Year%20%26%20From%20Other%20Laws.pdf> (INFO #6C)
- <https://cdle.colorado.gov/sites/cdle/files/Poster%20C%20Paid%20Leave%20%26%20Whistleblower%20-%202021%20poster.pdf> (Poster in English – also available in a number of other languages)

2021 – first quarter developments and what’s to come?

Key differences for practitioners between CO and federal wage laws

- Coverage – COMPS #37
- Exemptions – COMPS #37
- Contractors – C.R.S. § 8-4-101(5); see *also* 7 COLO. CODE REGS. § 1103-1:1
- Meal & Rest periods – COMPS #37 Rule 5
- Off-the-Clock work – COMPS #37 Rule 1.9
- Tipped workers – COMPS #37 Rule 6
- Minimum Wage & OT - FLSA MW - \$7.25/hour – still. Effective 1/1/21 - CO statewide minimum wage to increase to \$12.32/hour (from \$12); Denver minimum wage to increase to \$14.71/hour (from \$12.85).
- Don't forget – Paid Leave, Posters, Deductions, Nursing Accommodations – all slightly different

2021 – first quarter developments and what’s to come?

Case law developments

Jordan v. Maxim Healthcare Servs., Inc., 950 F.3d 724, 733 (10th Cir. 2020) (companionship exemption under CO Wage Order)

Scalia v. Paragon Contractors Corp., 957 F.3d 1156, 1159 (10th Cir. 2020) (use of 12- and 13-year religious community children to harvest pecans outside of school hours is not entitled to exemption from FLSA compensation requirements)

Nitzkowski v. Columbine Emergency Med. Servs. Inc., 445 F. Supp. 3d 1181, 1191 (D. Colo. 2020), appeal dismissed sub nom. Nitzkowski v. Columbine Emergency Medical Servs., Inc., No. 20-1149, 2020 WL 6053265 (10th Cir. May 1, 2020) (SJ granted for employer finding 3 hours of “down time” per 24-hour shift not compensable working time under FLSA)

Fedor v. United Healthcare, Inc., 976 F.3d 1100, 1100 (10th Cir. 2020) (FLSA action, concluding “the issue of whether an arbitration agreement is formed in the first instance must be determined by the court, even where there has been a failure to specifically challenge provisions within the agreement delegating certain decisions to an arbitrator.”)

2021 – first quarter developments and what’s to come?

Predictions regarding the Biden U.S. DOL wage priorities

- Anticipated Deputy Labor Secretary - Julie Su from CA, if confirmed
- Federal equal pay
- Federal paid leave
- \$15 minimum wage
- Stringent guidance around independent contractors, joint employers, tipped workers, and arbitration provisions

Questions?



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