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The Colorado Division Of Labor issues guidance on Colorado's exemption test for supervisors, which could settle numerous questions regarding the exempt status of managers covered by Colorado's Wage Order 22.

## Rocky Mountain Edition

*A Littler Mendelson Colorado-specific Newsletter*

### Colorado Division Of Labor Issues Important Clarification Of Management Overtime Exemption Test

*By Darren Nadel*

Managers in the Retail and Service, Commercial Support Service, Food and Beverage, and Health and Medical industries must meet overtime exemption tests under both state and federal to be considered "exempt" in Colorado. There are significant differences between state and federal law. For example, while managers may be considered exempt under the federal "primary duty" test under federal law, the same is not necessarily true under Colorado state law. Instead, under Colorado Minimum Wage Order Number 22, managers "must spend a minimum of 50% of the workweek in duties directly related to supervision" in order to satisfy the "Executive or Supervisor" exemption in Colorado.

Until now, the phrase "directly related to supervision" has been undefined in Colorado. Wage Order 22 does not define it, and there is no case law interpreting the phrase. The Division of Labor, which wrote Wage Order 22 pursuant to an express grant of legislative authority, and which is charged with interpreting and enforcing Wage Order 22, has now clarified the meaning of that critical language in an "Advisory Bulletin." According to the Division of Labor, an employee is engaged in a duty "directly related to supervision" anytime the employee is performing a management function and any time the employee is engaged in the primary duty of managing the employee's store, facility, restaurant or office. Therefore, although the exemption is not satisfied by meeting the federal primary duty test alone, any

time spent in the primary duty of management counts toward the 50% test.

The Advisory Bulletin provides a host of examples of management time including many routine management tasks such as hiring and training subordinates, evaluating employees, setting work schedules, disciplining employees, delegating work, and planning and controlling budgets. Importantly, the Advisory Bulletin also makes clear that an employee is engaged in a duty directly related to supervision any time the employee is leading other employees by example. This could be very important to employers who have their managers perform tasks that are similar to the tasks of the subordinates the managers are directing.

Another item of great importance is the Advisory Bulletin's discussion of "concurrent duties." Employees often perform "hybrid" duties that have both managerial and non-managerial aspects to them. Thus, showing an employee how to stock shelves involves both the managerial function of training and the non-managerial task of stocking shelves. According to the Advisory Bulletin, time spent engaged in otherwise non-exempt tasks like stocking shelves is generally considered management time if the decision regarding when to perform the task rests with the employee doing the task. Stocking shelves at the direction of a higher-level employee is non-exempt time. The Bulletin provides the following useful

examples: “An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can simultaneously direct the work of other employees and stock shelves.”

Under the Division of Labor’s “tacking” analysis, time spent performing other exempt tasks such as “administrative” or “professional” duties counts toward the “duties directly related to supervision” test. Specific examples set out in the Advisory Bulletin include time spent “exercising discretion, performing audits, and formulating or implementing policies.”

Lastly, the Advisory Bulletin makes clear that the exemption analysis requires a careful look at each employee’s job. According to the Bulletin, “[j]ob descriptions and company policies will rarely materially aid this inquiry, because job descriptions and policies are often imperfect predictors of how employees spend their actual work time.” This is both an important warning and an important potential victory for employers. It is a warning because the exemption analysis cannot be satisfied merely by drafting a job description that appears exempt. A carefully drafted job description is important, but it is by no means the end of the analysis. Instead, an employer must ensure that each individual in a management position is performing his or her job consistent with the requirements for exemption. The Advisory Bulletin is also a potential victory for employers because it supports the argument that class actions involving manager misclassifications should generally not be certified in Colorado. Because (as the Advisory Bulletin recognizes) the way employees spend their actual work time may differ greatly from one employee to the next, class treatment is seemingly inappropriate in managerial exemption cases.

The Division of Labor’s Advisory Bulletin is entitled to deference by the Courts so long as it is consistent with the Wage Order it is interpreting. The Advisory Bulletin appears consistent with Wage Order 22, but it should be noted that it has not yet been subjected to judicial scrutiny.

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