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Wage Protection Act Makes Significant Changes to Colorado Wage and Hour

By Josh Kirkpatrick and Jennifer Harpole

Significant changes to Colorado's wage and hour law are set to go into effect on January 1, 2015, with the implementation of the Wage Protection Act of 2014 (the Act or the amendments). The Act amends the Colorado Wage Claim Act by establishing a procedure for the Colorado Division of Labor to adjudicate complaints for unpaid wages or compensation of \$7,500 or less per employee, increases fines that can be imposed on employers, and provides for attorneys' fees for employees paid less than the applicable minimum wage.

Claims by Current Employees, and Relaxed Requirement for a Written Demand

Previously, individuals could only bring claims for unpaid wages and compensation after the termination of their employment, and they had to make a written demand for payment within 60 days of termination to be eligible for penalties if their employer failed to remit payment. Significantly, the amendments allow current employees to bring claims and eliminate the 60-day deadline. This means employers may be subject to penalties on any written demands for payment made within the two-year statute of limitations (or three years for a willful violation), if the employee recovers more than the amount tendered by the employer.

Under the amendments, either the employee or the Division can make a written demand for payment. Service of a small claims court complaint also satisfies the requirement to make a written demand for payment. Regardless of the form of the written demand, employers are still required to remit the full amount claimed within 14 days to avoid potential penalties.

Attorneys' Fees Available for Failure to Pay Minimum Wage

Under the Wage Claim Act, employees who receive less than the applicable minimum wage have a private right of action to recover the difference between their pay and the applicable minimum wage. The Wage Protection Act amends this section to state that an employee who prevails on a minimum wage claim also "is entitled to recover" reasonable attorneys' fees and court costs.

The amendments' attorneys' fees provision for minimum wage violations differs from the Wage Claim Act's general provision, which provides that a court "may" award the prevailing party on any wage claim—employer or employee—reasonable attorneys' fees and court costs.

The Division Will Investigate and Issue Citations

Although the Division already had a duty to inquire into violations of the Wage Claim Act and institute enforcement actions at its discretion, the amended law sets forth a detailed administrative procedure for claims of \$7,500 or less (exclusive of penalties and fines), including hearings similar to those conducted in unemployment matters. The administrative procedure is optional for employees, who may forego the procedure and file a wage complaint in court.

The new administrative procedure applies to wages and compensation earned on or after January 1, 2015. The Division sending a notice of complaint to the employer including the name of the employee, the nature of the complaint, and the amount for which the employer may be liable, including any potential fines or penalties. An employer must respond within 14 days after the complaint is sent. The Division is required to issue a determination within 90 days after the notice of complaint is sent, unless the Division provides advance written notice to the employee and the employer explaining that it has good cause for an extension of time.

If the Division finds the employer has failed to pay wages or compensation due, the Division will issue a citation and notice of assessment to the employer for the amount owed, including penalties and fines. If the employer pays the full amount of wages and compensation specified in the citation and notice of assessment within 15 days, the Division may waive or reduce fines and may reduce the penalties by up to 50 percent.

If the Division does not find a violation, the Division will issue a notice of dismissal to the employee and employer, which will explain the employee's right to any other relief under the Act.

Employees are not required to exhaust these administrative remedies before bringing suit. However, if an employer pays, and an employee accepts, all wages, compensation, and penalties in a citation and notice of assessment issued by the Division, an employee may not file a lawsuit based on the same claim. An employee also may choose to terminate the Division's administrative procedure by providing notice to the Division within 35 days of the Division's issuance of a dismissal or a citation and notice of assessment, in which case the employee may file a lawsuit based on the same claims.

Hearing Office Review and Appeals of Administrative Actions

Either the employee or the employer may request a hearing within 35 days after the Division issues its decision. If no request for a hearing is made within 35 days, the Division's decision is final.

Where a hearing is requested, the Division will appoint an officer to conduct a hearing. The hearing officer will have the authority to issue subpoenas to compel the attendance of witnesses and production of documents. The rules of evidence and requirements of proof generally apply, although the rules are somewhat relaxed. If two or more employees bring similar claims, the hearing officer will have the ability to consolidate them into one proceeding.

After conducting a hearing, the hearing officer will issue findings of fact, conclusions of law, and an order. The hearing officer's decision may be appealed to Colorado district court within 35 days of the mailing of the decision. Judicial review is limited to appeal briefs and the record designated on appeal.

Division and Hearing Officer May Impose Fines

Under the Wage Protection Act, the Division, through a citation and notice of assessment, or a hearing officer, after a hearing, may impose on an employer who without good faith legal justification fails to pay wages due a fine of up to \$50 per day per employee, commencing from the date the wages first become due and payable.

Moreover, the Division or hearing officer *shall* impose a fine of \$250 on an employer who fails to respond to a notice of complaint or any other notice from the Division to which a response is required. This fine may be waived or reduced only upon a finding of good cause for an extension of time for the employer to file the response.

In addition, the amendments provide that employers must retain records reflecting the information contained in an employee's itemized pay statement for at least three years after the wages or compensation were due. These records must be made available for inspection and copies provided to the Division on request. The director of the Division may fine an employer who violates this requirement up to \$250 per employee per month up to a maximum of \$7,500.

The fines will be paid into the state treasury, where they will be used to establish a wage theft enforcement fund for the costs of implementing the Wage Protection Act.

Clarification on Payment of Final Paycheck

Finally, the amendments clarify that if an employee fails to pick up his or her final paycheck within 60 days, the employer must mail the employee's check his or her last-known mailing address.

Recommendations for Employers

In order to comply with the amendments and best position the company in any Division-initiated investigation, employers should:

- Respond promptly and thoroughly to any notice of complaint received from the Division, and consider involving legal counsel prior to submitting a written response;
- Ensure record retention policies are in place to preserve information contained in itemized pay statements for three years; and
- Mail final paychecks to employees who fail to pick them up within 60 days.

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