The Colorado Department of Labor and Employment (CDLE) has been busy this summer with the release of several Interpretive Notice & Formal Opinions (INFOs), providing guidance on the evolving landscape of Colorado employment law. Specifically, the CDLE recently released new guidance on (1) employee meal and rest periods (INFO #4); (2) paid sick leave for employees under Colorado’s Healthy Families and Workplaces Act (HFWA) (INFO #6B); and commissions and bonuses.
INFO #4: Meal and Rest Periods

INFO #4’s updated guidance retains much of its original language from older versions, but it includes additional information. Specifically, the INFO provides two noteworthy changes.

First, while the Colorado Overtime and Minimum Pay Standards (COMPS) Order #38 states that rest breaks are “time worked” for purposes of calculating minimum wage and overtime, INFO #4 adds that rest breaks are also “time worked” for purposes of recordkeeping and earnings statements. Therefore, under this new guidance, employers have an affirmative obligation under COMPS Order #38, Rules 7.1–7.3, to include rest breaks as part of time worked, which is included on earnings statements.

Second, INFO #4 clarifies an employer’s obligations with regard to determining whether a lunch break is impracticable. Under existing law, employees are entitled to thirty-minute uninterrupted and duty-free meal periods when their shifts exceed five consecutive hours unless the nature of the business or other circumstances makes a break “impractical.” INFO #4 provides that the determination regarding whether a meal period is impractical must be made on a case-by-case basis. INFO #4 explains that an employer should avoid a broad practice of declaring all meal periods for all or certain categories of employees impractical, even if the employer pays for the missed meal periods.

INFO #6B: Paid Sick Leave Under the HFWA

The CDLE’s newly released INFO #6B, which covers employers’ and employees’ rights and obligations under the HFWA, augments the previous version with updated information and new examples.

INFO #6B address the HFWA’s forty-eight hours of sick pay per year and rollover requirements. It clarifies that an employee is entitled only to up to forty-eight hours of sick leave. Therefore, once an employee has banked forty-eight hours of sick leave, whether that time was accrued that year or the previous year, the employee is not entitled to additional leave under the HFWA. An example from INFO #6B puts this into perspective:

An employee earns 48 hours of accrued leave in a benefit year, and uses 8 of those hours during the year. This means that (A) 40 hours of unused, accrued leave “carry forward” and the employee can use these 40 hours in the next benefit year, and (B) the employee will continue to earn accrued leave, up to an additional 8 hours (for 48 hours total), during the benefit year. Another employee earns 48 hours of accrued leave in a benefit year, and uses none of those hours; so, 48 hours “roll over” for use in the next benefit year, and the employee doesn’t earn any more accrued leave during that year, because they have already been provided with 48 hours for the benefit year.

Under this new interpretation, not only may employers limit use of sick time to forty-
eight hours annually, but they may also place a firm accrual cap on the amount of sick time that may be accrued to forty-eight hours, inclusive of hours carried forward.

The new guidance also provides clarity on a question related to public health emergency leave (PHEL). The HFWA requires that “on the date a public health emergency is declared,” an employer must supplement its employees’ accrued sick time to ensure full-time employees may take up to eighty hours of sick time (prorated for part-time employees). In guidance released by the CDLE at the end of 2021, the CDLE stated that employers may count accrued sick time toward the amount of PHEL-related supplemental leave it is required to provide. This raised a question: when does an employer count the amount of PHEL-related supplemental leave an employee is entitled to under the HFWA—at the time the need for leave arises or on the date a public health emergency is declared?

The CDLE’s new guidance now makes clear that an employer must supplement an employee’s accrued sick time with PHEL at the time the request for PHEL-related leave is made. In other words, an employer may credit the amount of accrued sick time in the employee’s bank at the time the leave request is made. For example, if an employee has forty-eight hours of accrued sick time on the date the employee requests PHEL-related leave, the employer must supplement the employee’s sick bank with thirty-two hours of PHEL to reach the eighty hour supplemental requirement. On the other hand, if an employee accrued and used forty-eight hours of sick time during the year for a non-PHEL qualifying reason before requesting PHEL leave, the employer must supplement the employee’s sick time with the full eighty-hour supplement.

INFO #17: Commissions and Bonuses

In INFO #17, the CDLE reinforces that so-called “present to win” clauses in compensation agreements are prohibited under Colorado law. Specifically, if an employee resigns or is discharged, “the employer must pay commissions or bonuses, so long as the employee did the required work, any agreed-upon and valid terms or conditions for payment are met, and the wages can be calculated.” Employers may not avoid payment of otherwise earned and determinable commissions or bonuses by relying on “present to win” clauses that require an employee be employed at the time of payment to receive a commission or bonus. The following example provided by the CDLE provides additional guidance:

An employer policy says an employee “must be an active Team Member at the time of payout” to receive bonuses. It fires an employee the day before it pays out bonuses, and it doesn’t pay them the bonus the employer confirmed they otherwise would have received.

According to INFO #17, this policy is not permitted under Colorado law. The employer may not refuse payment of already-earned commissions or bonuses because the employee is no longer with the company.

In addition, INFO #17 confirms that “[i]n the absence of an agreement on whether [the employee] was entitled to receive commissions on post-termination sales, the general rule is that ‘an agent is entitled to a commission when [their] efforts were
the procuring cause of sale.’’ Accordingly, under INFO #17, if an employee did the
work to make a sale, the employee is entitled to commissions, even if the sale was
not finalized until after the employee was no longer employed with the company.

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