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Colorado Wage Order Recognized by the Colorado Court of Appeals as Providing Overtime Protections Beyond Those of the Fair Labor Standards Act

The right of Colorado employees to receive overtime pay is governed by federal law (the Fair Labor Standards Act, or FLSA), state law (the Colorado Minimum Wage Act), and state regulations (the Colorado Minimum Wage Order, or Wage Order). But is the Wage Order intended to extend overtime protections to certain classes of employees who are not protected by the FLSA? According to a recent decision by the Colorado Court of Appeals, that is indeed the intent of the Wage Order, as interpreted by the Colorado Department of Labor.

The Court of Appeals announced its conclusion regarding the policy intent of the Wage Order in analyzing an issue of first impression in Colorado in *Brunson v. Colo. Cab Co., LLC*, 2018 COA 17 – "whether shuttle van drivers who transport passengers to and from Denver International Airport (DIA), but do not drive outside of the state, are considered to be 'interstate drivers,' and thus are exempt, under the Colorado Minimum Wage Order, from receiving overtime pay." *Id.* at 1. The district court had found that the shuttle van drivers were exempt from the Wage Order based on the broad, federal court interpretation of the FLSA term "interstate drivers" as those drivers whose jobs have any effect on interstate commerce, even if their driving occurred entirely within the state. *Id.* at 8-14.

In reversing the district court's grant of summary judgment in favor of Colorado Cab Company and concluding that the shuttle van drivers are not exempt from the Wage Order, the Court stated that "[b]ecause Colorado provides more employee protection than does federal law, and the Department has published clear persuasive evidence of its intent to provide greater protections than those provided under the [FLSA], we conclude that federal case law's interpretation of 'interstate drivers' does not apply to Brunson's state claims." *Id.* at 3-4.

To support this interpretation of the Wage Order, the Court cited to the Advisory Bulletins and Resource Guide issued by the Colorado Department of Labor on March 31, 2012 (the Advisory Bulletin), available online at https://perma.cc/7PLAZTRD. *Id.* at 14. The Court gave deference to the Advisory Bulletin's definition of "intrastate" drivers as those who drive solely within Colorado, as opposed to "interstate" drivers, who drive across state lines. *Id.* at 17. Importantly, the Court also recognized and cited the following statement from the Advisory Bulletin with regard to the policy intent of the Colorado Wage Order:

> [e]mployers and employees in Colorado may be covered by either federal wage law, state wage law, both state and federal law, or

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> neither, depending upon the particular circumstances. Whenever employers are subject to both federal and Colorado law, **the law providing greater protection for the employee or setting the higher standard shall apply.**

Id. at 16-17 (quotation marks omitted) (emphasis added).

Prior to the decision in *Brunson*, Colorado appellate courts had never before recognized the Advisory Bulletin as worthy of such significant deference, nor had they affirmed the intent of the Wage Order as providing the broadest possible protection to Colorado employees, even where the FLSA does not extend such protection.

Conclusion

The Colorado Court of Appeals' recognition of the policy intent behind the Colorado Minimum Wage Order as providing broader protections to employees than those extended by the FLSA is significant for any future interpretations of ambiguous terminology in the Wage Order. The decision reinforces Colorado's commitment to protecting its employees, and it provides precedent for affording deference to the statutory and regulatory interpretations of the Colorado Department of Labor.