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TO: **VIA EMAIL**
Scott Moss, Director, Division of Labor Standards and Statistics, Colorado Department of Labor & Employment

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RE: Pre-Rulemaking Comments on COMPS #38

In advance of the promulgation of Colorado Overtime and Minimum Pay Standards (COMPS) Order #38, we write to suggest that your agency clarify employee rights under Rule 5. Meal and Rest Periods. 7 Colo. Code Regs. §1103-5 (COMPS Order #37).

This rule should be modified in three ways: (1) clarify the showing an employer must make to demonstrate the impracticability of offering a 30-minute uninterrupted meal period; (2) require that, when a 30-minute meal period is impracticable, employers provide the best practicable meal period, and one that is narrowly tailored to address the reason that the 30-minute meal period became impracticable; and (3) clarify that the right to meal and rest breaks cannot be waived or alternatively that there is a presumption that employees who did not take rest breaks were denied those rest breaks by the employer and that the employer bears the burden of demonstrating that any individual employee specifically and voluntarily agreed to work without taking any specific rest period.

Rest and meal break standards are among the most important worker protections in the COMPS order. Unfortunately, their lack of clarity has created loopholes that employers have exploited and will continue to exploit if not addressed.

Clarifying Workers' Right to 30-Minute Meal Periods

Clarifying when a Duty-Free Meal Period is "Impractical": Rule 5 of COMPS Order #37 provides, in part, that "Employees shall be entitled to an uninterrupted and duty-free meal period of at least a 30-minute duration when the shift exceeds 5 consecutive hours," but allows employers to offer only an "on-duty meal while performing duties" when "circumstances make an uninterrupted meal period impractical." COMPS Order #37, R. 5.1. The Rule does not, however, define "impractical." In practice, some employers have taken the position that a duty-free meal period is impractical if it increases costs for the employer or disrupts production in any way. Based on their employer's unilateral decree, workers in these workplaces do not receive any of the benefits promised by the 30-minute meal period.

COMPS Order #38 should clarify the meaning of "impractical" by looking to other labor standards laws that seek to accommodate circumstances where an employer's strict compliance

with a labor standard would interfere with an integral feature of the employer's operations. The CDLE should clarity that it is the employer's burden to establish that a duty-free meal period is "impractical" by demonstrating that extending a duty-free meal period would prevent the employer from performing a vital function, *see, e.g*., *Conroy v. New York State Dep't of Corr. Servs*., 333 F.3d 88, 97 (2d Cir. 2003) (explaining that under the ADA, to demonstrate a business necessity, an employer must show more than . . . "mere expediency." An employer cannot simply demonstrate . . . convenien[ce] or benefi[ts] to its business. Instead, the employer must . . . show that the asserted 'business necessity' is vital to the business."), or where it would be exceptionally difficult, expensive, or harmful because of an unforeseen contingency.

An employer cannot set up their operations such that any off-duty 30-minute meal period is impractical. Instead, the employer must create work flows that assume each employee will enjoy a duty-free meal period of at least 30-minutes whenever she works 5 or more consecutive hours unless doing so would be inconsistent with a critical and integral feature of the workplace. For example, a sudden and unexpected staffing shortage could lead to impracticability, and it may be impractical to provide specific employees with a 30-minute duty free meal period while performing tasks that employee is uniquely suited to perform. Systematic understaffing that would regularly make duty-free meal periods impractical would not however satisfy the employer's obligation.

Clarifying that the Employer Must Provide the Best Meal Period Practicable: COMPS Order #38 should also clarify what kind of on-duty meal period an employer may offer when circumstances make an uninterrupted meal period impractical.

First, an on-duty meal period must be at least 30 minutes in duration, as nothing in the regulations allows a shorter meal period even where an employer can demonstrate that a fully off-duty meal period is impractical.

Second, the on-duty meal period should be narrowly tailored to address the unforeseen contingency or vital employer function that made the required off-duty meal period excessively difficult, expensive, or harmful. For example, if an unforeseen visit from an auditor requires the employee to be available to assist the auditor during her meal period, the employee could be on-call to attend to the auditor, but relieved of all other duties. Or where a 30-minute off-duty meal period is impractical, but a 15-minute off-duty period does not interfere with an unforeseen contingency or vital function, the employer must provide 15 minutes where an employer is completely relieved from all duties and 15 more minutes where the employee is relieved from as many duties as possible.

This is consistent with the rule announced by Washington courts in interpreting a near-identical meal period rule in that state. *Pellino v. Brink's,* 267 P.3d 383 (2011) ("[T]his 'on duty' responsibility is limited to being 'on call;' no active work can be performed, and the employees must be able to engage in personal activities and rest during these breaks. And, the full amount of required time (i.e., 10 minutes rest break for each 4 hours, and 30 minutes meal period for

each 5 hours) must be provided." (quotation omitted)). It is also consistent with how the law accommodates employers' business necessities and emergent needs in other contexts. *See, e.g.*, *Watson v. City of Miami Beach*, 177 F.3d 932, 936 (11th Cir. 1999). Allowing employers who can demonstrate some impracticability with providing a 30-minute uninterrupted meal break to ignore the meal period requirement entirely is inconsistent with the important purposes of the meal period protection and unnecessary to the protection of any legitimate employer interest.

Clarifying Workers' Right to 10-Minute Rest Breaks

Finally, COMPS #38 should clarify that there are only two options for employers with respect to 10-minute rest breaks: (1) ensure employees receive the required 10-minute compensated breaks while fully relieved of duties, or (2) compensate employees for 10 minutes of additional time for a missed break if it is not practicable for the employee to take a break.

Relying on INFO #4, many employers are currently taking the position that employees can "voluntarily" waive their right to take a 10-minute rest period. However, as the Colorado Court of Appeals recently made clear, claims for missed rest breaks are claims for unpaid minimum wage. *See Pilmenstein*, 2021 COA 59 ¶¶ 24-38. Allowing employees to waive their vested right to a 10-minute break would be like allowing employees to waive their right to minimum wage or to earned wages, which is plainly inconsistent with Colorado law. *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 4. To the extent COMPS or INFO #4 allows workers to waive their right to 10-minute rest periods, it runs afoul of Colorado wage law.

If the agency disagrees with this position, it should strive to make it more difficult for employers to avoid 10-minute rest break obligations by pointing to a general policy *allowing* workers to take breaks if they wish. Because of the inherent asymmetries of power in the employment relationship, there should be a presumption that workers who did not receive 10-minute rest breaks were denied those breaks by their employer. *Brinker Rest. Corp. v. Superior Ct.*, 273 P.3d 513, 545 (Cal. 2012) (Werdegar, *J.* concurring) ("An employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. Rather, as the Court of Appeal properly recognized, the assertion is an affirmative defense, and thus the burden is on the employer, as the party asserting waiver, to plead and prove it.").

To overcome this presumption, an employer must mount employee-specific evidence that an employee voluntarily and without coercion agreed to work through a specific rest period. Allowing employers to point to generalized evidence like employment handbooks that purport to encourage rest breaks allow employers to skirt effective enforcement of rest break protections.