
JEFFERSON COUNTY MEDIATION SERVICES

VOLUNTEER COLLOQUIUM MINUTES

May 16, 2017

Volunteers Present: Jaydee Bachman, Jim Carr, Larry Cerrillo, Yasmine Chapman, Hazel E. Hanley, Sheila Kelly, Matt Jarvinen, Linda Lautigar, Anthony Matthews, and Mikkilynn Olmsted

Others Present: Maggie Carr, Mike Ely

Staff Present: Julie Carter, Helena Jo Goldstein, Rachel Johnson, Beth Merritts

I. Welcome and Introductions

Helena welcomed everyone, introduced herself and staff members present. She invited mediators present to introduce themselves. Alexander Hood, Towards Justice, Director and Founder introduced himself.

II. Wage and Hour Law for Mediators.

Presenter: Alexander Hood, Towards Justice, Director and Founder.

Mr. Hood welcomed the group. Mr. Hood's presentation provided a primer on Colorado state wage and hour statutes and regulations, including sleep time, breaks, travel time, and illegal kick-backs, as well as how to identify those issues and ensure that pro se parties to mediation do not unwittingly waive their rights.

Mr. Hood provided background information about Towards Justice and the services it provides. Towards Justice is a non-profit that began in 2014 to fight wage theft. Towards Justice frequently works with low-wage workers and immigrant populations regarding claims of unpaid wages, wage disputes and wage theft. Towards Justice offers intakes and works to investigate claims of wage theft. In addition to individual cases, Towards Justice is involved with impact litigation and files class action lawsuits on behalf of low-wage workers, detainees and vulnerable immigrant populations.

Mr. Hood defined wage theft as a denial of wages or benefits. Wage theft can occur in a variety of ways, including:

- Illegal deductions, such as for tools, uniforms, and training.
- Non-payment of wages.
- Underpayment of wages: paying less than state or federal minimum wage, denying payment for overtime, or paying fewer hours than worked. Mr. Hood expressed that employees cannot waive their access to minimum wage or overtime.
- Misclassification of employees (such as independent contractors, managers/non-managers)
- Tipped wage workers (management cannot skim tips).

Mr. Hood encouraged mediators to become familiar with:

- The Colorado Minimum Wage Order 33, establishing minimum wage at \$9.30 per hour
- Colorado Wage Claim Act - C.R.S. §8-4-101-109.
- Fair Labor Standards Act
- Department of Labor Memo on Misclassification

Mr. Hood pointed out that mediators may run into wage dispute cases in small claims and civil court. Occasionally, cases may come directly to JCMS, seeking resolution for unpaid wages. When questions of employment classification arise, Mr. Hood encouraged mediators to ask about the reality of the relationship, such as where, when, and how long was the party was employed. Mediators were asked to explore the employees job duties to determine whether the job was a management position or the employee was performing non-manager duties. Another issue to explore is whether a worker was an independent contractor, as employers often assert in wage theft cases, or actually an employee entitled to certain benefits.

Mr. Hood thanked everyone for their time and for attending his presentation. Towards Justice can be reached by phone or email: 720-441-2236, info@towardsjustice.org

**III. Next Colloquium: Tuesday, September, 19, 2017,
6:00 – 8:00 p.m. in the Open Space Hearing Room (Ponderosa Room).
The topic will be announced closer to the date. Suggestions are always welcome!**

Submitted by: *Beth Merritts*

Beth D. Merritts, Case Manager

Approved by: *Helena Jo Goldstein*

Helena Jo Goldstein, Program Director



An Introduction to Wage and Hour Laws in Colorado

Alexander Hood

Towards Justice Founder and Director of Litigation

“Wage Theft”

- ▶ **Wage theft is** the denial of wages or employee benefits that are rightfully owed to an employee.
- ▶ **Wage Theft’s Many Faces**
 - ▶ Unpaid contract wages
 - ▶ Unpaid overtime
 - ▶ Unpaid minimum wage
 - ▶ Misclassification (independent contractor vs. employee)
 - ▶ Illegal deductions

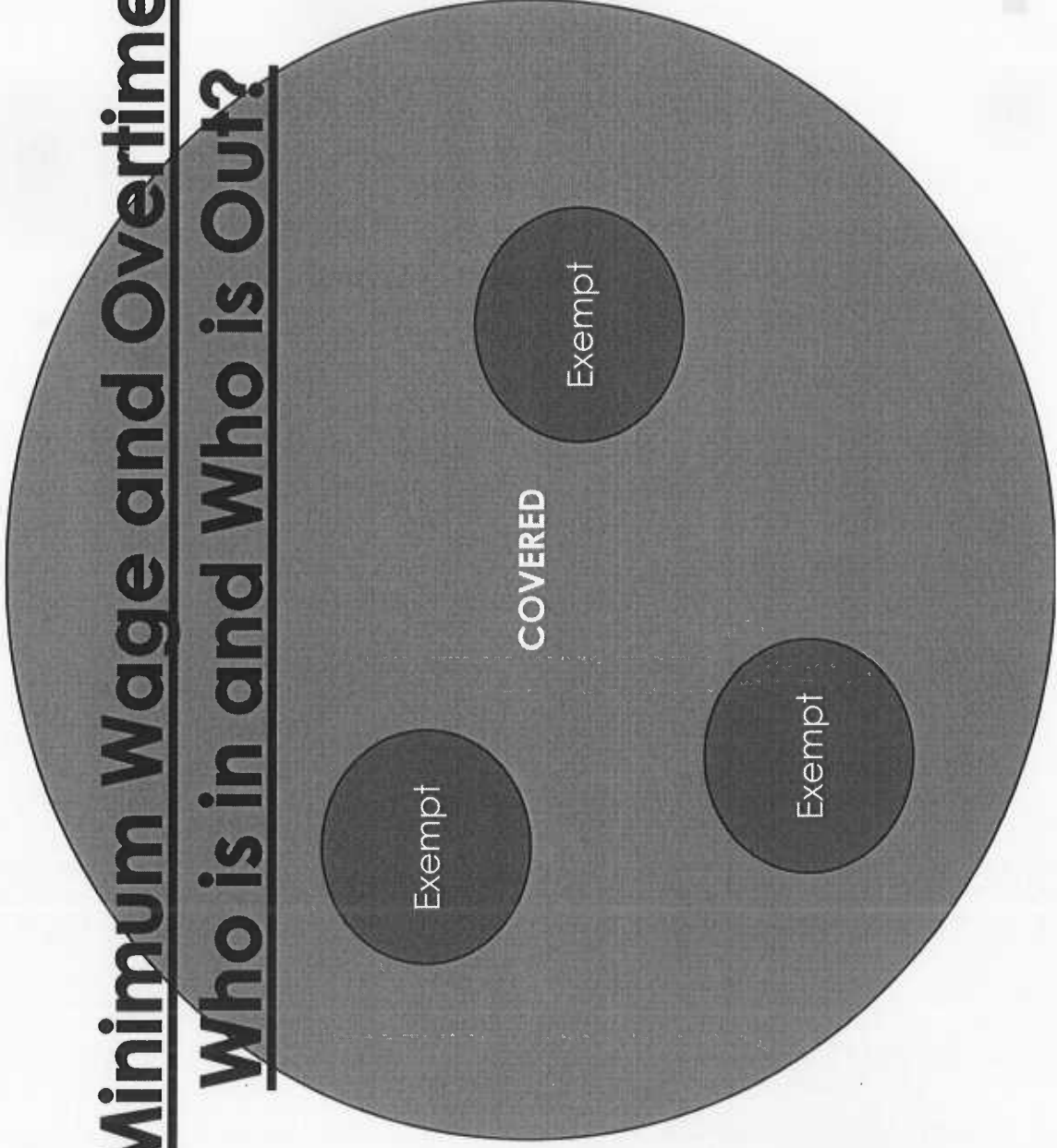
Why Employment Contracts Are Different

- ▶ Have to pay even if person does a bad job
 - ▶ No set off unless deduction is legal
 - ▶ Remedy is firing the person
- ▶ Cannot waive min wage and OT
 - ▶ Can't agree not to receive min wage and OT
- ▶ Cannot contract away status as an employee
 - ▶ Independent contractor agreements
- ▶ Liability is statutory and contract

Laws We're Talking About

- ▶ **Minimum Wage and Overtime**
- ▶ **Fair Labor Standards Act**
 - ▶ 29 U.S.C. § 201 *et seq.*
 - ▶ Minimum wage (Fixed at \$7.25/hr)
 - ▶ OT for hours in excess of 40 in a week
- ▶ **CO State Law**
 - ▶ CO Const., Art. XVIII, § 15; C.R.S. § 8-6-101 *et seq.*; Wage Order, 7 C.C.R. § 1103-1
 - ▶ Minimum Wage (Increases yearly – Currently \$9.30/hr)
 - ▶ OT for hours in excess of 40 in a week AND 12 hours in a day
- ▶ **Payment When Due**
 - ▶ Colorado Wage Claim Act
 - ▶ C.R.S. § 8-4-101 *et seq.*
 - ▶ Actual Wages Owed
- ▶ **Contract**

Minimum Wage and Overtime Who is in and Who is Out?



The FLSA: Who is Covered?

- ▶ Enterprise (looks at employer)
 - ▶ Employer has at least \$500k in revenue;
 - ▶ More than 1 employee; and
 - ▶ An employee that touches things that move in interstate commerce.
- ▶ Individual (looks at employee – workweek by workweek)
 - ▶ Engaged in interstate commerce or in the production of goods for interstate commerce
- ▶ Always Covered
 - ▶ hospitals, residential medical or nursing care, schools, preschools, government agencies

The FLSA: SOL and Individual Liability

- ▶ Individual liability as “joint employer”
 - ▶ **USDOL Joint Employment Guidance:**
https://www.dol.gov/whd/flsa/Joint_Employment_AI.htm
 - ▶ **Usually see courts applying factors from *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983):**
 - ▶ Power to hire and fire
 - ▶ Control
 - ▶ Determine rate and method of pay
 - ▶ Maintain employment records
 - ▶ **Nascent control can be enough (e.g., CEO liability).** *Irizarry v. Catsimatidis*, 722 F.3d 99 (2d Cir. 2013)

- ▶ SOL is 2 years (3 if willful). 29 U.S.C. § 255.
 - ▶ **Willfully blind doesn't count.** 5 CFR § 551.104 (defining willful)

CO Min Wage and OT: Who is Covered?

- ▶ **Anyone covered by the FLSA (min wage only), CO Const, Arti XVIII, § 15**
 - ▶ “Effective January 1, 2017, Colorado’s minimum wage is increased to \$ 9.30 per hour and is increased annually by \$ 0.90 each January 1 until it reaches \$ 12 per hour effective January 2020, and thereafter is adjusted annually for cost of living increases, as measured by the Consumer Price Index used for Colorado. **This minimum wage shall be paid to employees who receive the state or federal minimum wage.**”

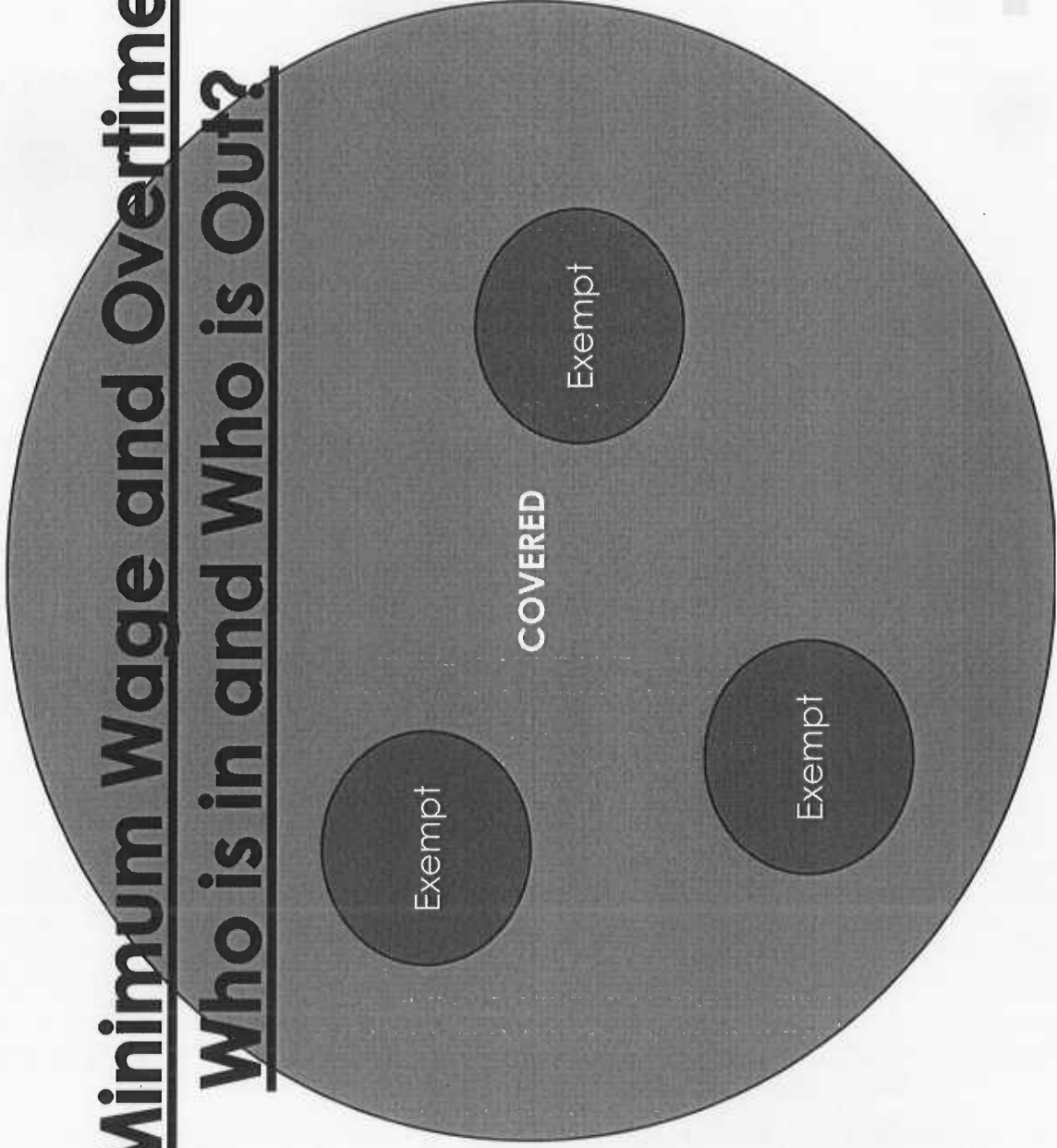
- ▶ **The Wage Order Categories (min wage and OT), 7 C.C.R. § 1103-1**
 - ▶ **(A) Retail and Service**
 - ▶ **(B) Commercial Support Service**
 - ▶ **(C) Food and Beverage**
 - ▶ **(D) Health and Medical**



CO Min Wage & OT: **Individual Liability & SOL**

- ▶ **No individual liability.** *Leonard v. McMorris*, 63 P.3d 323 (Colo. 2003).
- ▶ **But joint employment between entities.** *Solis v. The Circle Group*, 16-cv-01329-RBJ (D. Colo. Apr. 5, 2017).
- ▶ **SOL?**

Minimum Wage and Overtime Who is in and Who is Out?





Exemptions

FLSA and State Law

- ▶ **Exempt from Min Wage AND OT (Not exhaustive)**
 - ▶ Executive, Administrative, and Professional
 - ▶ Outside Sales
- ▶ **Exempt from OT (Not exhaustive)**
 - ▶ Employees Paid Commissions in Retail Establishments
 - ▶ Agriculture (just FLSA)
 - ▶ Downhill Ski Industry (Just CO)
 - ▶ Car Dealer Salespersons, Parts-Persons, and Mechanics



Independent Contractors FLSA and State Law

- ▶ Can't Contract Around
- ▶ Your burden
- ▶ "Economic Realities Test"
- ▶ DOL 2015 Memo:
http://www.dol.gov/whd/workers/misclassification/ai-2015_1.htm



Independent Contractors

FLSA Economic Realities Test

1. **Work An Integral Part Of The Employer's Business?**
2. **Worker's Managerial Skill Affect The Worker's Opportunity For Profit Or Loss?**
3. **Does The Worker's Relative Investment Compare To The Employer's Investment?**
4. **Work Performed Require Special Skill And Initiative?**
5. **Relationship Between The Worker And The Employer Permanent Or Indefinite?**
6. **Nature And Degree Of The Employer's Control?**



Independent Contractors FLSA and CO Pretty Much the Same

1. **FLSA:** According to USDOL, “[i]n sum, most workers are employees [rather than independent contractors] under the FLSA’s broad definitions.”
2. **CO:** “‘Employee’ means any person ... performing labor or services for the benefit of an employer **in which the employer may command when, where, and how much labor or services shall be performed.**” C.R.S § 8-4-101.

What Hours Count Towards Min Wage and OT?

Or, What is Work?

1. Wait Time?
2. Sleep Time?
3. Travel Time?
4. Training Time?

THE KEY: Is the thing you are doing primarily for the benefit of the employer?

- ▶ **SCOTUS on whether wait time is work:** “We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time.... **Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged.**” *Skidmore v. Swift & Co.*, 323 US 134, 136-37 (1944).

Payment When Due **CO Wage Claim Act**

- ▶ C.R.S. §§ 8-4-101 *et seq.*
- ▶ C.R.S. § 8-4-103 (current employees)
- ▶ C.R.S. § 8-4-105 (deductions)
- ▶ C.R.S. § 8-4-109 (former employees)
- ▶ C.R.S. § 8-4-110 (penalties and demand letter)

Payment When Due

CO Wage Claim Act: Unpaid Wages

- ▶ **Always entitled to unpaid wages and fees.** *Giuffre v. Marys Lake Lodge, LLC*, 2013 U.S. Dist. LEXIS 25322, 2013 WL 673987 (D. Colo. Feb. 25, 2013)
- ▶ **14 day demand letter for penalties to attach.** C.R.S. § 8-4-110. Complaint as demand letter?
- ▶ **SOL is 2 yrs (3 if willful).** C.R.S. § 8-4-122.
- ▶ **When does it accrue?** See *Norwood v. WBS, Inc.*, 15-cv-00622-REB-STV (D. Colo., Nov. 14, 2016)
- ▶ **No individual liability.** *Leonard v. McMorris*, 63 P.3d 323 (Colo. 2003).
- ▶ **But joint employment between entities.** *Solis v. The Circle Group*, 16-cv-01329-RBJ (D. Colo. Apr. 5, 2017).