



The Colorado Wage Claim Act: Timing and Penalties - 2018 Reboot

By Mary Jo Lowrey

The June/July 2009 edition of *Trial Talk* included an article titled “Understanding Provisions of The Colorado Wage Claim Act When Representing Terminated Employees: Timing and Penalties” written by Bob Truhlar and his new associate attorney at the time, Mary Jo Lowrey. Nine years later significant portions of that 2009 article are no longer accurate due to changes made to the Colorado Wage Claim Act itself and developments in case law interpreting that act. This article is intended to update the 2009 article and provide current information and guidelines for practitioners to use when representing clients.

In 2014, the Colorado General Assembly passed the “Wage Protection Act of 2014” which amended provisions of the Colorado Wage Claim Act (“CWCA”)¹ related to written notice of wage claims and provided an avenue for administrative processing of wage claims under \$7,500.² The new provisions went into effect on January 1, 2015. On March 5, 2018, the Colorado Supreme Court issued its long awaited ruling in *Hernandez v. Ray Domenico Farms, Inc.*, resolving the question of whether an employee can recover unpaid wages dating back to the beginning of the employer’s failure to pay wages or only back to the time period covered by the statute of limitations provision in the CWCA.³ As a result of these two events, representing clients in CWCA claims has changed.

Statute of Limitations

Practice Pointer: An employee must file her civil action for unpaid wages under the CWCA within two years (three years if willful) from the date those wages first became due and payable.

Prior to the *Hernandez* case, plaintiff side wage and hour practitioners routinely argued that the cause of action under the CWCA accrued from the date of the employee’s separation from employment. Therefore, the CWCA allowed a

victim of wage theft to pursue all unpaid wages owed to her from an employer dating back to the beginning of her employment provided she filed her civil action within the statute of limitations set forth in the CWCA.⁴ For example, if an employer had not been paying an employee overtime wages for the past ten years, as long as the employee filed her complaint within two years of her separation from employment she could claim unpaid overtime dating back the full ten years of her employment. Unfortunately, on March 5, 2018, the Colorado Supreme Court held that the statute of limitations period for a terminated employee’s claim for unpaid wages begins to run on the date that the wages first become due and payable, not on the date of separation.⁵ In practice, this means that every day that passes from the day a potential client contacts you that employee may be losing her ability to recover unpaid wages if you don’t file her lawsuit.

Practice Pointer: Filing a “wage complaint” with the CDLE as defined in the CWCA does not toll the statute of limitation to file a civil action.⁶

The Demand for Payment of Wages

The CWCA still requires an employee to send a demand for payment of wages to the employer in order to preserve penalties under the CWCA.⁷ After receipt of a wage demand the employer then has fourteen days to tender the amount of wages “that the employer in good faith believes is due.”⁸ If the owed wages are not paid within fourteen days the employer is liable for penalties in addition to the wages and compensation.⁹

Prior to the 2014 amendments to the CWCA the statute only allowed a “terminated” employee to make a demand for payment of wages and such demand had to be made within sixty days of the date of separation from employment.¹⁰ Fortunately, after the 2014 amendments to the CWCA current employees can pursue wages under the statute and the

sixty-day deadline has been eliminated. Employees no longer have to wait until termination to seek relief under the CWCA. And, after the *Hernandez* decision it is clear that they shouldn't wait since the statute of limitations is running from the day the owed wages weren't paid.

The 2014 amendments to the CWCA in small claims court to have the civil complaint be considered the wage demand.¹¹ Therefore, in this circumstance, and only in this circumstance, if the employer tenders payment within fourteen days of the filing of a civil action in small claims court penalties shall not be assessed against such employer and employee shall dismiss the action.¹² Since this amendment went into effect in 2015 some defense attorneys have represented that the statement,

“If an employer makes a legal tender of the full amount claimed in the action within fourteen days after service of the complaint or other document commencing the action, the employee shall dismiss the action” applies to actions filed in district court. This is a misreading of the statute. It is clear that this provision only applies to actions filed in small claims court.

Practice Pointer: Unless filing in small claims court, a wage demand should be sent no later than fourteen days prior to filing a civil action in order to allow the employer the statutory period to tender payment before incurring the cost of a filing fee.

Conclusion

Although the statutory changes to the CWCA and the *Hernandez* decision

may seem minor as described here, they significantly impact litigating claims under the CWCA. It is very important for practitioners to understand these changes and to alter their practice in how they approach CWCA claims and how they advise clients.

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Endnotes:

- ¹ Colo. Rev. Stat. § 8-4-101 *et seq.*
- ² See S.B. 14-005, 69th Sess. (Colo. 2014). “An Act Concerning Alternative Administrative Remedies For The Processing Of Certain Wage Claims, And, In Connection Therewith, Amending The Provisions For Written Notices Of A Wage Claim, And In Connection Therewith, Making And Reducing Appropriations.”
- ³ *Hernandez v. Ray Domenico Farms, Inc.* 414 P.3d 700 (Colo. 2018)
- ⁴ Colo. Rev. Stat. § 8-4-122. All actions brought pursuant to this article shall be commenced within two years after the cause of action accrues and not after that time; except that all actions brought for a willful violation of this article shall be commenced within three years after the cause of action accrues and not after that time.
- ⁵ *Hernandez* at 705.
- ⁶ Colo. Rev. Stat. § 8-4-101(13).
- ⁷ Colo. Rev. Stat. § 8-4-109(3)(a).
- ⁸ *Id.* at (3)(a.5).
- ⁹ *Id.* at (3)(b).
- ¹⁰ Colo. Rev. Stat. § 8-4-109(3)(a) (2003) (amended 2014).
- ¹¹ Colo. Rev. Stat. § 8-4-109(3)(d)(II).
- ¹² *Id.*



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