

*Information for Human Resources and Business Risk Professionals in the Colorado State Personnel System*

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## **Winter Driving Preparedness**

Recently, a group of friends was traveling back from Vail after a day of skiing. A heavy snow storm moved in and the high winds created a whiteout condition. Cars ahead began to slide and eventually traffic came to a stop. All at once, they were stuck and stranded on Vail Pass for most of the night. Luckily they were somewhat prepared for the weather. They were in their skiing gear, had just eaten dinner, and had a reliable vehicle with a full tank of gas.

If you were stranded, would you be prepared to survive? You should always be prepared for a breakdown or becoming stranded on or along a roadway. Every time you plan for a trip to the mountains for skiing, travel or the commute to work, make sure your vehicle has been maintained and equipped for the length of the trip and potential weather and road conditions.

Now that the snow is upon us and it feels like winter, it is important to be reminded of the hazards that snow and ice can create for the driver. As with any driving, know your limitations and do not exceed them. If the road becomes too treacherous or you're too tired, pull off in a safe area and relax.

Here are a few other winter driving safety tips to remember.

- Plan for the forecasted and "potential" weather. Check the forecast for the area you will be traveling, and get a current map for unfamiliar territory. If you expect it to be cold, prepare your car and yourself for cold weather. Don't ignore it.
- Clear ALL windows, mirrors, lights, and front grill of snow and ice. Make sure you have plenty of windshield washer fluid.
- Fill up the gas tank before you leave. If you get stranded in inclement weather or at high altitudes, you will need the engine as a heat source.
- Keep a "survival kit" in your vehicle at all times. These vary but generally speaking, a kit should include:
  - A first-aid kit
  - High-calorie snacks like energy bars and multi-grain bars
  - Water (allow room in container for the water to freeze)
  - Warm blankets
  - Cell phone car charger
  - Whistle
  - Paper towels
  - Booster cables
  - Ziploc and trash bags
  - A Swiss-Army knife or multi-tool
  - Several butane lighters
  - Pencil and paper

- Safety pins
  - Kitty litter
  - Small shovel
  - Road flare or safety triangle
- Wear sunglasses to avoid excessive eye fatigue and glare from the sun.
  - Keep your distance. Oftentimes, winter weather results in slippery roadways and low visibility from fog, wind, or snow. Increase your following distance by two full seconds to allow enough room between you and the vehicle in front of you.
  - Use proper braking. Whenever possible, downshift to a lower gear to use the braking power of your car's engine. If your vehicle skids, take your foot off the brake. When you start to skid, don't panic. Ease up on the accelerator and/or brake and steer in the direction the rear of your car is skidding. When you regain control of the car, apply your brakes lightly.

### **Announcing 4-Hour Defensive Driving Certificate Available to YOU!!!**

Did you know? According to GMAC Insurance, the top five driver errors resulting in a vehicle collision include:

1. Distracted Driving
2. Following Too Closely
3. Failure to Yield on a Left-Hand Turn
4. Incorrect Merging
5. Backing Up

The State of Colorado experiences \$500,000 on average in fleet vehicle collision (liability) costs every year; we are working to significantly decrease this cost and exposure. The State Office of Risk Management (SORM) knows you can drive; but we also know that there are a ton of distractions, weather hazards, human factors, and pressures from home and work that may lead to one of these top five reasons for collisions. If you were involved in a crash, who would be affected by your absence – fellow employees, family, friends, all of the above? What if it were serious or even fatal?

To address one of the most hazardous things we do each day, SORM is offering a classroom-based, 4-Hour Defensive Driving class to all state employees each month beginning in March 2011. The class is taught by the SORM team. It is accredited by the National Safety Council and provided at no charge to all state employees. Every month a class will be offered in a different region of the State.

This four-hour program presents driving techniques in an interactive format. It offers practical strategies to reduce collision-related injuries, fatalities, and costs. It also addresses the importance of attitude in preventing accidents, and shows students the consequences of the choices they make behind the wheel.

Defensive Driving is part of the State Office of Risk Management's Traveling Training beginning in March 2011. This year, the Traveling Training will take place over a day and a half. On the first day, we are offering safety compliance and injury prevention training. There will be two trainings conducted simultaneously to offer more options and better suitability for your agency/division.

Participants attending the second day can choose between a property liability and Corrective Actions training or a 4-hour Defensive Driving training.

Sign up for one or many trainings offered, including Defensive Driving, through the SurveyMonkey link. The link to the survey is <http://www.surveymonkey.com/s/coloradotravelingtraining2011>. You

will need to enter your Employee ID number or Colorado Driver’s License number. Be sure to locate it before registering for classes. Make sure you sign up on SurveyMonkey through the link provided, as classes are available on a *first-come, first-served* basis and have a maximum capacity of 35 participants. Once a class is full, the class will be removed from the registration form (survey). If you want to be added to a waiting list, please forward your information, the class you wish to take, and location of the class to [sunny.bradford@state.co.us](mailto:sunny.bradford@state.co.us). If you have to cancel, please ensure that you cancel your registration by sending an e-mail to [sunny.bradford@state.co.us](mailto:sunny.bradford@state.co.us). Classes are filling quickly, so be sure to sign up soon!

Classes will be held according to the following schedule:

Dates	Locations	State Region
March 10-11	Lowry Campus, Aurora	Metro
April 21-22	PCC, Pueblo	Southeast
May 12-13 <sup>1</sup>	UNC, Greeley	Northeast
May 17-18	CDOT, Montrose	West
June 16-17	Eagle County Building, Eagle	Mountains
July 7-8	TBD, Colorado Springs	South Metro
July 28-29	Adams State College, Alamosa	South Central

<sup>1</sup> Expected Training Date

If you have any questions or have a large group that needs training, please contact Sunny Bradford with SORM at 303.866.3609.

**Initial Facts for FY 2011-12 Open Enrollment & Supplement Program**

As mentioned in the [February issue of HealthLine](#) (page 4), open enrollment will be here soon, and new this year, the medical insurance supplement program will coincide with open enrollment. Employee Benefits is providing information now, so you can begin to prepare your employees. Additional details will be provided as decisions are made.

*Open Enrollment* exact dates for the FY 2011-12 must still be finalized, but there are a few things we do know that will help you and your employees prepare.

- Open enrollment must be at least 30 days this year. Because of federal healthcare reform, we will allow employees to cover dependent children up to age 26 in the new plan year (currently the State allows coverage up to age 25). Healthcare reform says that the enrollment period for this change must be 30 days.
- Open Enrollment will not start until after April 18, tax day. This will allow employees to have 2010 tax information should they need to document a dependent’s eligibility. This will also accommodate a change in the process for the Medical Insurance Supplement Program.

New this year, the application period for the *Medical Insurance Supplement Program* will run at the same time as open enrollment in an effort to be more efficient. This is a change from previous years, when the application period was in the summer. The supplement program offers qualified applicants (low-income with dependent children) a supplement to their premiums for State medical insurance.

- This will allow employees to address open enrollment *and* the supplement program at the same time, as many supplement applicants enroll in medical insurance during open enrollment.



- There will still be a special enrollment for supplement applicants who do not wish to enroll for medical insurance during open enrollment. This special enrollment will likely be in July.
- Having the application period during open enrollment will result in qualified applicants receiving their supplement for medical insurance premiums sooner than in past years. This should also mean less premium money out of the qualified applicants' pockets, while reducing the dollar amounts of refunds that have to be provided to those receiving supplements.
- For qualified applicants who enroll in medical insurance in the special enrollment for the program, this will allow coverage for them and their children to begin sooner, helping to fulfill the intent of the legislation.
- Applicants will be required to electronically attach the required documentation (2010 1040 tax forms, marriage licenses / certificates, birth, adoption, legal parental allocation documents) to their online application.
  - *Employee Benefits asks benefit administrators to help employees with scanning and storing their documentation when necessary.*
- Employee Benefits will contact last year's applicants (including those who did not receive a supplement) regarding these changes, but we ask you to get the word out to employees as well.

If you have any questions, please contact the Employee Benefits Unit at 303.866.3434 or 1.800.719.3434, or [benefits@state.co.us](mailto:benefits@state.co.us).

## Employee or Independent Contractor

### *Misclassification of Workers*

The recent message from federal and state government regulators has been very clear; **ALL** employers should expect increased scrutiny and enforcement from federal and state labor and tax authorities over what's believed to be the rising tide of misclassification of workers as independent contractors. The current federal administration has allocated \$25 million for a US Department of Labor (US DOL) "Misclassification Initiative" to support the enforcement of the Taxpayer Responsibility, Accountability, and Consistency Act of 2009, which is intended to increase penalties for filing incorrect employment tax information on tax returns. Colorado state government is not excluded from this increased scrutiny and enforcement.

Employee misclassification is where employers wrongfully treat workers as "independent contractors," rather than employees. The misclassification of workers and subsequent treatment of contractors as employees, within Colorado state government, could create various liabilities to the State. Misclassification of workers as independent contractors is a serious issue and extends beyond unemployment compensation to payroll taxes, PERA contributions, benefits, and possible fines from federal and state regulators.

Nationally, lawsuits involving alleged improper independent contractor classification under the Fair Labor Standards Act (FLSA), Title VII of the Civil Rights Act of 1964, and state wage and hour laws are also on the rise. To complicate matters, the analysis for determining whether a worker should be classified as an employee or an independent contractor can vary depending on which of its obligations the State is considering. For example, state regulators in the Department of Labor and Employment examining whether a worker is entitled to unemployment compensation may determine that a worker is an independent contractor under state law, while federal Internal Revenue Service investigators may determine the same worker is an employee entitled to participate in the State's retirement plan (PERA). Independent contractors are not employees of the State of Colorado, and are not eligible for employee benefits such as medical insurance and PERA.

### *Retirees*

One of the questions most frequently received by DHR relating to independent contractors is whether a retired state employee (retiree) that comes back as a worker after retirement is really an independent contractor. The answer depends on a variety of factors, but if the retiree is planning on returning to state employment to perform the same or similar duties the retiree carried out prior to retirement, the answer is generally no, which means he or she is an employee, not an independent contractor. If a retiree needs to be brought back to state employment, there are options to bring him or her back in accordance with law. One option is in a state temporary position for up to six months, or bring him or her back in a permanent part-time position. Another option is using a substitute position (Personnel Rule 4-34 allows for training purposes) for six months before he or she retires. Lastly, do not forget about state ethics statutes (C.R.S. § 24-18-201) that prohibit any state employee from contracting with the State for six months after he or she terminates state employment regarding matters they were directly involved in during their employment.

### *New Independent Contractor Exhibit*

Over the past few years, a number of independent contractors working with the State have filed for unemployment benefits and have been awarded those benefits at unemployment insurance hearings. In response to this and other potential issues surrounding misclassification of workers, a new bilateral purchase order or independent contractor exhibit was created for use in all personal services agreements with a sole proprietor where a State contract is not used. The exhibit is designed to give the State a “rebuttable presumption” that the individual is an independent contractor. This means that if the State uses the exhibit **and** follows the terms of the exhibit, the contractor is “presumed” to be an independent contractor. However, the use of the exhibit alone does not guarantee proper classification of the worker. If the State uses the exhibit, but does not follow all nine points, there is likely no rebuttable presumption. This exhibit is available on the Office of the State Controller and DHR websites at:

<http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251667395705&ssbinary=true>.

### *Revised Form*

The newly revised *Certification for Personal Services Agreement* (PSA) form is designed to assist state human resources staff with determining whether a vendor is a true independent contractor. New questions were added to assist in evaluating the degree of control over the vendor by the State, but none of the single questions are intended to be a standalone determination. Through the process of answering the questions on the form, it may be determined that the nature of the services provided, length of time, current vendor status, etc., indicate the service would be better obtained through a human resource action (filling a temporary or permanent position) instead of a procurement action (leased or contract worker). Determining worker classification must be done on a case-by-case basis in collaboration with human resources, procurement, and contracting professionals. The revised PSA form is available on the DHR website at <http://www.colorado.gov/cs/Satellite/DPA-DHR/DHR/1213129336426>.

### *New Process*

Currently, the Office of the State Controller (OSC) is cross referencing the payroll system (CPPS) and the employee social security number to the COFRS vendor code. If there is a match, it is immediately put on hold and the COFRS payment cannot be issued. There are various legal issues that must be addressed when a department or institution of higher education (department) is contracting with a current state employee. Under federal labor laws the State of Colorado is considered one employer. It is a challenge to defend that a vendor is an independent contractor, when that vendor also happens to be a current state employee. Careful consideration must be taken prior to determining whether a current state employee can also contract with the State. Personnel Rule 1-14 (A) allows a state

employee to be retained on a personal services contract if the employee is performing different functions from his or her normal job duties and is in a different department, e.g., full-time employee for one state department as a social worker and contracts with an institution of higher education to develop a Web site for a research department. If these factors are not met, then a dual employment agreement (Personnel Rule 3-33) must be issued instead of entering into a procurement agreement/contract. DHR is working in conjunction with the OSC to gain resolution to these situations. If you are contacted by DHR or the OSC regarding a payment hold, please provide all requested information and if appropriate, the hold will be released by the OSC as soon as possible.

It is important that each department regularly evaluate its personal services contracting practices and identify any possible worker classification issues. We also recommend that departments develop policies regarding treatment of independent contractors and how it differs from treatment of employees. If you have any questions regarding independent contractor issues, please contact Kirsten Jahn Elfton at 303-866-4231 or [kirsten.jahn@state.co.us](mailto:kirsten.jahn@state.co.us).

## **Fair Labor Standards Act (FLSA) Reminders**

### *Overtime and Dual Employment*

The FLSA provides regulations for calculating overtime regarding state employees who are performing more than one job, with more than one state department or within the same state department. Because the State is deemed to be one employer under federal law, departments must take careful steps to ensure that overtime is calculated correctly for these individuals and agreements are established that determine the overtime compensation and identify the employee's primary duties. The US DOL defines primary duty as the principal, main, major, or most important duty that the employee performs. Determining the employee's primary duty, for two distinct jobs with potentially different exemption status, is based on all the facts and the character of each job.

Factors to consider when determining employees' primary job include the relative importance of the exempt duties compared with the non-exempt duties and the employee's freedom from direct supervision. The amount of time spent performing exempt work may also be considered. The general rule is that employees who spend 50% of their time performing exempt duties could satisfy the primary duty test to be exempt for both jobs. However, departments should take note that time is not the sole determining factor and these factors are not all inclusive.

Normally, an employee cannot be both exempt and non-exempt from FLSA overtime regulations. When a non-exempt employee performs two distinct jobs for the same employer, the hours in both jobs must be combined for purposes of calculating overtime. It becomes more complex when one job is typically considered exempt and the other non-exempt. For example, if an employee works for the Department of Corrections, as a Correctional Officer I (position is non-exempt under FLSA) and subsequently retains employment with the Department of Public Safety as a General Professional V (position is Administrative exempt under FLSA), the two departments must establish an agreement that identifies the employee's primary duty. If the employee's primary duty is the exempt administrative work, then this employee could be deemed exempt for FLSA purposes – for both jobs. However, if the primary duty of the employee is correctional work that is non-exempt, then the employee is considered non-exempt for overtime purposes and the hours for both jobs must be combined to determine the overtime obligations. If the jobs have two different rates of pay the overtime pay would be based on a weighted average of the two different pay rates. Using the same example from above, if the rate of pay for the General Professional V assignment is \$37.63 per hour and 15 hours are worked, and the rate of pay for the Correctional Officer I assignment is \$19.00 per hour and 40 hours are worked, this would be a total of 55 hours worked in that work week. The following chart demonstrates how to calculate the weighted average overtime hourly rate.

<u>Job Class</u>	<u>Hourly Rate</u>	<u>Hours Worked</u>	<u>Total Pay</u>
General Professional V	\$37.63	15	\$564.45
Correctional Officer I	\$19.00	40	\$760.00
<b>Total straight pay</b>			<b>\$1,324.45</b>
<i>Weighted Hourly OT Rate</i>			\$24.08 (564.45 + 760/55)
<i>*Overtime pay</i>			\$180.60 (24.08 x 0.5 x 15)
<i>Total Pay</i>			<b>\$1505.05</b>

\*At this step, overtime pay is calculated at 0.5 times the regular rate, not 1.5, because all hours worked (55) have already been included in the straight pay calculation. What has not been included is the additional .5 for the 15 hours of overtime compensation.

If an employee takes a second job with a different department where the schedule is sporadic or occasional in nature, the two jobs would not have to be combined for overtime purposes. Sporadic or occasional is defined by the US DOL as infrequent, irregular, or occurring in scattered instances. For example, a state employee works regularly during the day as an administrative assistant and one night in December, January and March, providing a one-hour lecture at a community college as an introduction to basic Web page design. Under the FLSA, this second employment (community college lectures) could be deemed sporadic or occasional and, for overtime purposes, the hours would not need to be combined.

*Exempt or Non-Exempt*

Whether a position is exempt or non-exempt under the FLSA depends largely on an employee’s actual job duties and not the job class. In order to meet any exemption, a position must meet the salary threshold, e.g., \$455 and any other requirements of a particular exemption. For example, to meet the Executive exemption, the position must have the primary duty of management and supervise two or more FTE.

It is imperative that each individual position is reviewed by HR staff who may have to ask clarifying questions of an appointing authority to ensure that each position is designated appropriately under federal law. Designating an entire job class as exempt under the FLSA poses potential risk and legal liabilities to the State because it is a position’s actual assignment that determines status. Some of the State’s job classes are fairly broad in concept so it is possible that positions in the same class will be designated differently under the FLSA. For example, a unit with four General Professional III’s may have two positions that meet an exemption under the FLSA but the other two positions do not. HR staff is solely responsible for designating individual positions appropriately, regardless of an appointing authority’s desires.

It is also important to remind employees that the State is obligated to follow federal law and that designation under the FLSA has nothing to do with the employee’s “status” within the state personnel system. The State is obligated to ensure that employees are designated and paid appropriately under the FLSA.

Departments are strongly encouraged to conduct periodic audits or reviews of individual positions to ensure positions continue to be designated appropriately under the FLSA. A good time for these reviews is during annual performance reviews/evaluations, and a review must be done if job duties have significantly changed.

*Legal Implications*

The US Department of Labor (US DOL) has pledged to increase its enforcement under the FLSA. In fiscal year 2009, US DOL collected approximately \$173 million in back wages for 220,000 workers. US DOL has made protecting the rights of employees its top priority. The expectation is that every employer will be in compliance with the requirements of Federal law.



Combating improper designation of FLSA-covered employees is a key goal in US DOL's strategic plan for fiscal years 2011-2016. US DOL has it in their plan for 2011 to develop proposed regulations that would strengthen FLSA recordkeeping requirements mandating employers to notify workers of their rights under the Act. This includes those workers that are deemed to be "independent contractors". DHR will track any new regulations proposed and adopted by US DOL and will keep HR informed through e-mail updates and *Advisor*, as appropriate.

It is more imperative than ever that all departments and institutions of higher education (departments) ensure compliance with the FLSA. Governmental entities are experiencing more scrutiny by US DOL. Maricopa County, Arizona, was required to pay more than \$2 million in back wages to 1,690 detention officers working for the county sheriff's office. US DOL recovered \$104,159.86 in overtime back wages in Louisville, Kentucky, for 24 employees of Trevicos-Soletanche JV who were working on a public repair project funded by the American Recovery and Reinvestment Act. After conducting employee interviews and reviewing all relevant time and payroll records, US DOL determined that 24 administrative and technical support workers were incorrectly identified as exempt from the FLSA and deprived of overtime compensation. A single officer in the Los Angeles Police Department (LAPD) was awarded \$4 million by a jury for retaliatory actions taken by the police department. The police officer was removed from his position for testifying on behalf of a coworker who claimed the LAPD had violated the FLSA.

In this budget climate, the State can ill afford to ignore or neglect any requirements under federal law. Departments are encouraged to educate their appointing authorities on the requirements of the FLSA. DHR will continue to provide education to supervisors through the Nuts and Bolts of State Supervision training offered through the Professional Development Center (PDC) and is in the process of developing a training tool that will be available online.

DHR staff is available to provide any training materials or assistance with reviewing individual positions for the proper designation under the FLSA. For dual employment or other issues related to the FLSA please contact Joi Simpson at 303-866-5496 or [joi.simpson@state.co.us](mailto:joi.simpson@state.co.us).

### Now More Than Ever Working Together Needs Your Help

Help *Working Together* make a difference for state employees in crisis. Please let your employees know about the number of convenient methods to make **tax-deductible** donations to Working Together: direct payroll deduction, Colorado Combined Campaign (#1300), automatic debit from the employee's account at any financial institution, electronic fund transfer for Credit Union of Colorado members, and direct donation by check.