

CML
COLORADO MUNICIPAL LEAGUE

**CML 96th Annual
Conference**

June 19-22, 2018

Vail

CML
COLORADO MUNICIPAL LEAGUE

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.


2018

**EMPLOYMENT LAW
UPDATE**

Range LLP
Law + Policy for the Mountain West •


CML
COLORADO MUNICIPAL LEAGUE

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



CML
COLORADO MUNICIPAL LEAGUE

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



SECRETARY ALEX ACOSTA

CML
COLORADO MUNICIPAL LEAGUE

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.

US DEPARTMENT OF LABOR
Wage & Hour Division

- **FEDERAL MINIMUM WAGE**
- and
- **FEDERAL OVERTIME**

CML
COLORADO MUNICIPAL LEAGUE

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.

**FEDERAL
OVERTIME**


CML
COLORADO MUNICIPAL LEAGUE

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.

OVERTIME EXEMPTION:

SALARY TESTS
+
JOB DUTIES TESTS

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.




THE SALARY TESTS

THE
SALARY BASIS
TEST:

WORK AN HOUR = WORK A WEEK

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



SALARY
LEVEL
TEST

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.




TODAY

\$455 / WEEK

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



There was talk:

\$913 / WEEK
OR
\$47,476 / YEAR

* Old Number: \$23,660 / year

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.




Federal Overtime Rule is
"Divorced From Reality."

U.S. CHAMBER OF COMMERCE


Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



Revised Salary Level Test:

Maybe \$33,000-ish
+
Automatic Annual Increase
+
2019 Q1-ish

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



EMPLOYEE

VS.

INDEPENDENT CONTRACTOR

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



**“~~CONTRACT~~
~~EMPLOYEE~~”**


Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



EMPLOYEE v. INDEPENDENT CONTRACTOR

You hire employees for a wage or salary to work for you for an indefinite period and you issue them a W-2.

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



EMPLOYEE v. INDEPENDENT CONTRACTOR

You retain independent contractors for a fee to perform a specific project within a specific time and you issue them a 1099.

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



Make ‘em employees,



unless you can prove they aren't.

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



IRS FORM SS-8

www.irs.gov

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



Independent Contractor Checklist

The more questions from the following list you answer "yes," the more likely you are to have a valid independent contractor relationship:

YES NO

- Is the contractor a business entity (such as an LLC, LLP, P.C., or Inc.), rather than an individual ("Fred Jones" or "Barbara Smith d/b/a All City Plumbing")?
- Is the scope of work clearly defined in terms of a particular project?
- Is the contractor paid a set amount, such as a flat fee in addition to reimbursable expenses, rather than being paid by the hour?

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



And Remember...

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



▶ THE "PUBLIC OFFICIAL" TEST

Bottom Line for IRS Payroll Tax Audits:

- Relatively Permanent Position
- Created by Statute, Charter, or Ordinance
- Authorized to Exercise City's Authority
- Answers to Council
- Takes an Oath

You're a **Public Official** and an **Employee**,
 and You **CAN'T** be an Independent Contractor... *

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



* SECTION 530

- ▶ UNCODIFIED STATUTE (1978)
- ▶ RELIEF FROM RECHARACTERIZATION
- ▶ REQUIRES ALL THREE THINGS:
 1. Consistent Treatment as Independent Contractor;
 2. Consistently Issued Form 1099; and
 3. Reasonable Basis for IC Characterization, e.g., "Industry Practice"

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



One More Wage & Hour Issue:

VOLUNTEER RESERVE OFFICERS


Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



FIRST RULE OF THUMB


**You Can't
Volunteer
To Do Your Job.**

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.




**But Can We Pay
Volunteer
Officers For
Special
Assignments?**

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



**Well, Kinda.
You Got Two Choices:**

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



**Pay Only A
NOMINAL
Fee**

*** ≤ 20 % of Officer Pay**


Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



**Pay Only For
"SPORADIC &
OCCASIONAL"
Assignments**


~ 10 HOURS PER QUARTER MAX

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



**Now Let's Talk
EEOC**

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.





PRESS RELEASE

University of Denver to Pay \$2.66 Million and Increase Salaries to Settle EEOC Equal Pay Lawsuit

Female Full Professors at the University's Sturm College of Law Were Paid Average of Nearly \$20,000 Less Than Their Male Counterparts, Federal Agency Charged

###

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.

EQUAL PAY ACT

FAQs

<https://www.eeoc.gov/policy/docs/ganda-compensation.html>

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.

ADA

AMERICANS with DISABILITIES ACT

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.

IS EXTENDED LEAVE A REASONABLE ACCOMMODATION?

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.

Yes, but. . .

Weld County / 01-2018 / Carman, Magistrate Judge (Aubrey v. Kopps)

- **Tied to ability to perform essential functions***
- **Indefinite leave is not reasonable.**

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.

FMLA


Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



PREGNANCY/ADOPTION

- Both Moms & Dads
- Intermittent Before
- If **Both** are EEs, Max of 12 weeks **combined**

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



*If you provide accommodations for some folks (e.g., light-duty positions), you better do the same for **pregnant women**, or have a really, really good reason that you don't.*

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



YOU CAN'T FORCE SOMEONE OUT ON LEAVE BEFORE SHE'S READY.

HB 16-1438: C.R.S. §24-34-402.3

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



So they go out on FMLA leave and come back with one bad 'tude.

Now what?

Gentle Hint: Call for Help.

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



ADEA

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.





The 27-year veteran with outstanding performance evaluations is 57;

And the supervisor who just canned her is 6 months out of grad school and 32.

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.

CML
COLORADO MUNICIPAL LEAGUE



JOB APPLICATION

HOW OLD ARE YOU?

(e.g., Birthdate: _____)

*** Are you at least 18 ?**

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.

CML
COLORADO MUNICIPAL LEAGUE

TITLE VII

Prohibits Job-Related Discrimination

Based Upon:

RACE

COLOR

NATIONAL ORIGIN

SEX

RELIGION



Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.

CML
COLORADO MUNICIPAL LEAGUE


TITLE VII
*Prohibits Job-Related Discrimination
 Based Upon:*

SEX

Empowered cities and towns, united for a strong Colorado.
 Contents of this presentation reflects the view of the presenter, not of CML.


Empowered cities and towns, united for a strong Colorado.
 Contents of this presentation reflects the view of the presenter, not of CML.



TITLE VII
SEX-BASED DISCRIMINATION

**WRITTEN
 ANTI-HARASSMENT
 POLICY**

Empowered cities and towns, united for a strong Colorado.
 Contents of this presentation reflects the view of the presenter, not of CML.



Anti-Harassment Policy

- * You *have* to tell.
- * You *have* to help.
- * We'll *investigate** 100% of the complaints we receive.
- * We'll do something if a complaint proves true.
- * And we won't retaliate against you, even if you're wrong.

Empowered cities and towns, united for a strong Colorado.
 Contents of this presentation reflects the view of the presenter, not of CML.



Anti-Harassment Policy

Pull It Out of Your Handbook.

■

Have Everyone Sign It.

■

Just Do It.

Empowered cities and towns, united for a strong Colorado.
 Contents of this presentation reflects the view of the presenter, not of CML.



**Anti-
 Harassment
 Training?**


Empowered cities and towns, united for a strong Colorado.
 Contents of this presentation reflects the view of the presenter, not of CML.



EEOC Select Task Force on the Study of Harassment in the Workplace

June 2016

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



- 1. No “One-Size-Fits-All.”**
- 2. It’s Not “One & Done.”**
- 3. Expand to Workplace Civility.**

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



EEOC SELECT TASK FORCE:

Start At The Top

Council Code of Conduct & Training

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



**INVESTIGATIONS
HAVE
CONSEQUENCES**

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



Records of Complaints & Investigations


Colorado Open Records Act

C.R.S. § 24-72-204

(3) (a) (X) (A) – (C)


“The custodian shall deny the right of inspection. . .”

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



**Sexual
Orientation
Discrimination**

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



Two Cert Petitions Pending Before the U.S. Supreme Court (*Zarda* and *Bostock*)

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



DOJ vs. EEOC

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



C.R.S. § 24-34-402 (a) (sexual orientation)

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



TITLE VII SEX-BASED DISCRIMINATION

Transgender Issues

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



Wittmer (S.D. Tex. 04/04/18)
(Title VII: Yep)
vs.
Sessions 10/17: “No Way”

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



C.R.S. §24-34-301 (7):
“Sexual orientation” means an
individual’s . . . transgender
status or another individual’s
perception thereof.”

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



“In Colorado, a person cannot be denied access to the restroom that conforms to their gender identity, and we encourage any victims of such discrimination to contact our office.”

**COLORADO DEPARTMENT OF REGULATORY AGENCIES
FEBRUARY 24, 2017**

Empowered cities and towns, united for a strong Colorado.

Contents of this presentation reflects the view of the presenter, not of CML.



Just give this some thought.

Empowered cities and towns, united for a strong Colorado.

Contents of this presentation reflects the view of the presenter, not of CML.



TITLE VII & CADA

Prohibit Job-Related
Discrimination Based Upon:

RELIGION

Empowered cities and towns, united for a strong Colorado.

Contents of this presentation reflects the view of the presenter, not of CML.



There is an Affirmative Duty to Accommodate Religious Beliefs and Practices.

*** Except in cases of “Undue Hardship”**

Empowered cities and towns, united for a strong Colorado.

Contents of this presentation reflects the view of the presenter, not of CML.



“The free exercise of one’s religion includes the right to *act or abstain from action* in accordance with one’s religious beliefs.”

Empowered cities and towns, united for a strong Colorado.

Contents of this presentation reflects the view of the presenter, not of CML.




Empowered cities and towns, united for a strong Colorado.

Contents of this presentation reflects the view of the presenter, not of CML.



Is There Still A Right To Be Free From Religion At Work?

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



...and what to do about

POLITICS?



Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.




WORKPLACE SAFETY TRAINING & DRILLS

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.




ACTIVE SHOOTER TRAINING

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.




- **Mass Casualty Event**
- **Domestic Violence**

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.




Should We Do It? Do We Know What We're Doing? Are We Ready For The Outcome?

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.




Parting is Such Sweet Sorrow




A FEW REMINDERS FOR THE END OF THE LINE

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.




Yeah, I know all about “At Will” employment . . .

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



But if you don't have a **documented, non-discriminatory** reason, we're gonna have a problem.


Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.




Okay, then. . .

We're Letting Him Go Because He's Just Not a Good **FIT.** So There.

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



IF YOU'RE GONNA LET 'EM GO...

- ▶ Check the **Performance Reviews** and and think about **Similar**s.
- ▶ Remember they'll immediately think about these **Three Things**:
 - The Mortgage?**
 - Health Insurance?**
 - Another Job?**
- ▶ Don't Engage in **Revisionist History**.

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



Separation Agreement, Waiver & Release of Claims

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



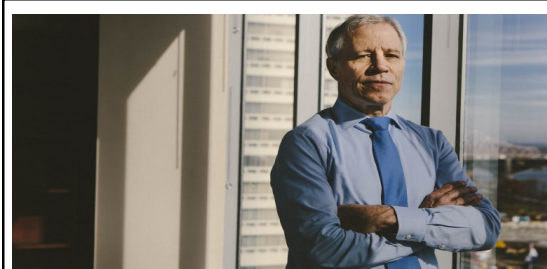
- ▶ **Get OWPA Right**
- ▶ **Careful About Non-Waivable Rights**
- ▶ **Payments Have Time Limits**
- ▶ **The Internet is NOT Your Friend.**

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



RETIREMENT PLAN LITIGATION

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



Jerome Schlichter
SCHLICHTER BOGARD & DENTON
ST. LOUIS, MO.

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



TWO ISSUES:
“Whatever You’re Paying, It’s Too Much.”

AND...

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.




“You’re Leaving Dogs In The Plan Too Long.”

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



No, You're
Not ERISA,
But...


Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



The Colorado
**UNIFORM
PRUDENT
INVESTOR ACT**


COLO. REV. STAT. TITLE 15, ARTICLE 1.1

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



- **Show Up**
- **Pay Attention**
- **Ask Questions**
- **Bring Your "A" Game**
 - **Ask For Help**
 - **Write It Down**

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.



**KEEP
CALM
AND
CARRY
ON**

Empowered cities and towns, united for a strong Colorado.
Contents of this presentation reflects the view of the presenter, not of CML.

