

§ 8-4-109. Termination of employment - payments required - civil penalties - payments to surviving spouse or heir

(1)

(a) When an interruption in the employer-employee relationship by volition of the employer occurs, the wages or compensation for labor or service earned, vested, determinable, and unpaid at the time of such discharge is due and payable immediately. If at such time the employer's accounting unit, responsible for the drawing of payroll checks, is not regularly scheduled to be operational, then the wages due the separated employee shall be made available to the employee no later than six hours after the start of such employer's accounting unit's next regular workday; except that, if the accounting unit is located off the work site, the employer shall deliver the check for wages due the separated employee no later than twenty-four hours after the start of such employer's accounting unit's next regular workday to one of the following locations selected by the employer:

(I) The work site;

(II) The employer's local office; or

(III) The employee's last-known mailing address.

(b) When an employee quits or resigns such employee's employment, the wages or compensation shall become due and payable upon the next regular payday. When a separation of employment occurs, the employer shall make the separated employee's check for wages due available at one of the following locations selected by the employer:

(I) The work site;

(II) The employer's local office; or

(III) The employee's last-known mailing address.

(c) If an employer has made the employee's wages or compensation available at the work site or at the employer's local office under paragraph (a) or (b) of this subsection (1), and the employee has not received the wages or compensation within sixty days after the wages or compensation were due, the employer shall mail the employee's check for wages or compensation due to the employee's last-known mailing address.

(2) Nothing in subsection (1) of this section shall limit the right of an employer to set off any deductions pursuant to section 8-4-105 owing by the employee to the employer or require the payment at the time employment is

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severed of compensation not yet fully earned under the compensation agreement between the employee and employer, whether written or oral.

(3)

(a) If an employer refuses to pay wages or compensation in accordance with subsection (1) of this section, the employee, his or her designated agent, or the division may send a written demand for the payment.

(a.5) If the employer disputes the amount of wages or compensation claimed by an employee under this article and if, within fourteen days after the written demand is sent, the employer makes a legal tender of the amount that the employer in good faith believes is due, the employer shall not be liable for any penalty unless, in a legal proceeding, including a civil action or an administrative procedure under sections 8-4-111 and 8-4-111.5, the employee recovers a greater sum than the amount so tendered.

(b) If an employee's earned, vested, and determinable wages or compensation is not paid within fourteen days after the written demand is sent in the manner set forth in paragraph (d) of this subsection (3), the employer shall be liable to the employee for the wages or compensation, and a penalty of the sum of the following amounts of wages or compensation due or, if greater, the employee's average daily earnings for each day, not to exceed ten days, until such payment or other settlement satisfactory to the employee is made:

(I) One hundred twenty-five percent of that amount of such wages or compensation up to and including seven thousand five hundred dollars; and

(II) Fifty percent of that amount of such wages or compensation that exceed seven thousand five hundred dollars.

(c) If the employee can show that the employer's failure to pay is willful, the penalty required under paragraph (b) of this subsection (3) shall increase by fifty percent. Evidence that a judgment has, within the previous five years, been entered against the employer for failure to pay wages or compensation is admissible as evidence of willful conduct.

(d)

(I) The employer shall send or deliver payment, by check, draft, or voucher in the employee's name, to the employee at the address contained in the written demand; or make the payment by direct deposit authorized under section 8-4-102(2) if the employee has not revoked the authorization. The employer may, but is not required to, make the payment by direct deposit to an account specified by the employee in the demand, even if the employee

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has not previously authorized direct deposit of the employee's compensation, or make the payment by another method requested by the employee in the demand, if applicable. If the employee has not previously authorized direct deposit of compensation and the demand does not state an address to which the payment should be mailed, the employer shall make the payment as follows:

(A) To the employee's last-known address according to the records of the employer; or

(B) If applicable and if the employer so elects, as otherwise requested by the employee in the demand.

(II) The employee or his or her designated agent may commence a civil action to recover the penalty set forth in this subsection (3). For an action filed in a small claims court, established pursuant to part 4 of article 6 of title 13, C.R.S., if the employer has not received a written demand at least fourteen days before the employer is served with the complaint or other document commencing the action, service of the complaint or other document serves as the written demand under this subsection (3). 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.

(4) If, at the time of the death of any employee, an employer is indebted to the employee for wages or compensation, and no personal representative of the employee's estate has been appointed, such employer shall pay the amount earned, vested, and determinable to the deceased employee's surviving spouse. If there is no surviving spouse, the employer shall pay the amount due to the deceased employee's next legal heir upon the request of such heir. If a personal representative for the employee has been appointed and is known to the employer prior to payment of the amount due to the spouse or other legal heir, the employer shall pay the amount due to such personal representative upon the request of such representative. The employer shall require proof of a claimant's relationship to the deceased employee by affidavit and require such claimant to acknowledge the receipt of any payment in writing. Any payments made by the employer pursuant to the provisions of this section shall operate as a full and complete discharge of the employer's indebtedness to the extent of the payment, and no employer shall thereafter be liable to the deceased employee's estate or to the deceased employee's personal representative. Any amounts received by a surviving spouse or legal heir shall be considered in diminution of the allowance to the spouse or legal heir pursuant to the "Colorado Probate Code", articles 10 to 17 of title 15, C.R.S. Nothing in this section shall create a

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substantive right that does not exist in any agreement between the employer and the employee.

(Amended by 2014 Ch. 276, §4, eff. 1/1/2015. L. 2003: Entire article amended with relocations, p. 1856, § 1, effective August 6. L. 2007: (3) amended, p. 1677, § 2, effective May 31. L. 2014: (1)(c) added and (3) amended, (SB 14-005), ch. 276, p. 1112, § 4, effective January 1, 2015.)

This section is similar to former §8-4-104 as it existed prior to 2003, and the former § 8-4-109 was relocated to §8-4-113.

ANNOTATION

Law reviews. For article, "Employee's Right to Compensation Accruing After Termination", see 13 Colo. Law. 1643 (1984). For article, "Rights of Terminated Employees: Expanding Remedies", see 21 Colo. Law. 1639 (1992).

Annotator's note. Since § 8-4-109 is similar to §8-4-104 as it existed prior to the 2003 amendment to article 4, which resulted in the relocation of provisions, relevant cases construing that provision have been included in the annotations to this section.

The purpose of the Colorado Wage Claim Act is to ensure that wages are paid in a timely manner and to provide adequate judicial relief in the event wages are not paid. An employer is liable under the act if the employer does not pay an employee wages he or she earned at the time of discharge. *Fang v. Showa Entetsu Co.*, 91 P.3d 419 (Colo. App. 2003).

Vacation pay is within the definition of "wages or compensation". *Hartman v. Freedman*, 197 Colo. 275, 591 P.2d 1318 (1979).

An employment agreement that states that accrued but unused vacation pay is not payable if the employee is fired or fails to give two weeks notice does not violate the CWCA. *Nieto v. Clark's Market*, 2019 COA 98, ___ P.3d ___.

Employee entitled to additional wages based on a company "comp time" program. *Remote Switch Sys. v. Delangis*, 126 P.3d 269 (Colo. App. 2005).

Stock options may be within the definition of "wages or compensation". Therefore, district court improperly dismissed claim for stock option. *Montemayor v. Jacor Commc'ns, Inc.*, 64 P.3d 916 (Colo. App. 2002).

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Share of a legal fee was not "wages or compensation". Coffee v. Inman, 728 P.2d 376 (Colo. App. 1986).

Uncollected commissions are wages earned and due at discharge. Where salesmen were terminated prior to the closing and the collection of the commissions by the broker, wages were earned or due at the time of their discharge. Hofer v. Polly Little Realtors, Inc., 37 Colo. App. 86, 543 P.2d 114 (1975).

Or at time fully earned. At the time the employment relationship is severed, an employer need not pay, immediately, compensation not yet fully earned under a compensation agreement. But the implication is clear that such wages become immediately due at the time they are fully earned. Hofer v. Polly Little Realtors, Inc., 37 Colo. App. 86, 543 P.2d 114 (1975).

This section fails to offer any relief to employees whose wages are withheld while they are still employed. Consequently, plaintiff had no choice but to wait until he left the company to pursue his claim, because the claim accrued when the employment relationship ended, not when the wages were withheld. Farris v. ITT Cannon, a Div. of ITT Corp., 834 F. Supp. 1260 (D. Colo. 1993).

This section and §8-4-105 are mutually exclusive. Hofer v. Polly Little Realtors, Inc., 37 Colo. App. 86, 543 P.2d 114 (1975).

And distinguishable. This section creates a right in an employee under one set of circumstances together with a cause of action for a penalty, while §8-4-105 creates a right in an employee under a different set of circumstances and does not provide for a penalty. Hofer v. Polly Little Realtors, Inc., 37 Colo. App. 86, 543 P.2d 114 (1975).

Salesmen employed on a commission basis cannot be terminated with impunity prior to a closing and thus be deprived of large commissions obtained for their employers as a result of their efforts. Hofer v. Polly Little Realtors, Inc., 37 Colo. App. 86, 543 P.2d 114 (1975).

Determination of good faith under subsection (3) is matter for trial court. Cortez v. Brokaw, 632 P.2d 635 (Colo. App. 1981); Kennedy v. Leo Payne Broad., 648 P.2d 673 (Colo. App. 1982); Jet Courier Serv., Inc. v. Mulei, 771 P.2d 486 (Colo. 1989); Porter v. Castle Rock Ford Lincoln, 895 P.2d 1146 (Colo. App. 1995).

Trial court properly awarded the statutory penalty pursuant to subsection (3). "Without good faith legal justification" means willfully withheld without good cause; however, willful withholding does not require

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a showing of malice or similar motivation, rather, there need only be a demonstration that compensation is willfully withheld without good cause. Porter v. Castle Rock Ford Lincoln, 895 P.2d 1146 (Colo. App. 1995).

Jury must make factual determinations regarding whether to assess penalty under this section but is not responsible for determining amount of penalty. Graham v. Zurich Am. Ins. Co., 2012 COA 188, 296 P.3d 347.

A plaintiff granted a money judgment under this section is a winning party entitled to reasonable attorney fees, and a defendant does not become the "winning party" simply because the plaintiff does not prevail on each of its asserted claims. Porter v. Castle Rock Ford Lincoln, 895 P.2d 1146 (Colo. App. 1995).

Entitlement to attorney fees. If plaintiff was required to bring a claim for both wages and penalties under this section and §8-4-105 in order to be entitled to attorney fees, the reference to §8-4-105 in §8-4-114 would be meaningless, contrary to the other language of the statute, and inconsistent with the rules of statutory construction which require that the "entire statute is intended to be effective" and that every word must be given effect, if possible. Hofer v. Polly Little Realtors, Inc., 37 Colo. App. 86, 543 P.2d 114 (1975).

Employee commenced an action within the meaning of the Wage Claim Act seeking additional wages owed to him or her. Because employee prevailed in that action, as the "winning party" under that claim, he or she was entitled to an award of attorney fees relating to the prosecution of that claim. Remote Switch Sys. v. Delangis, 126 P.3d 269 (Colo. App. 2005) (decided under former §8-4-114).

Failure to specify in complaint the precise statute on which claim is based does not prevent plaintiff from seeking attorney fees. Fang v. Showa Entetsu Co., 91 P.3d 419 (Colo. App. 2003) (decided under former §8-4-114).

Section 8-4-114 applies to recovery under either. Even though it is not clear from the judgment, based on the jury verdict, whether the employee's recovery was under this section or §8-4-105, §8-4-114 applies to either. Keeton v. Rike, 38 Colo. App. 505, 559 P.2d 262 (1977).

Attorney fees to be taxed as a cost of suit cannot be construed as an additional penalty, i.e., recoverable only if the judgment in favor of the employee contains a penalty. Such a construction would discourage employees from instituting suit, since the judgment intended to make them

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whole would be substantially reduced by outlays for attorney fees. The consequence of this latter construction would be to defeat the fundamental purpose of the statute. One cannot assume that an unjust or oppressive result was contemplated by the general assembly. *Hofer v. Polly Little Realtors, Inc.*, 37 Colo. App. 86, 543 P.2d 114 (1975).

Penalty assessable under subsection (3) is for wages undisputed but unpaid. *Hartman v. Freedman*, 197 Colo. 275, 591 P.2d 1318 (1979).

An employer who fails to pay an employee the wages earned by the employee at the time of the employee's discharge is liable under section, even if the employer had the absolute right to discharge the employee. *Lee v. Great Empire Broad., Inc.*, 794 P.2d 1032 (Colo. App. 1989).

Conversely, even though an employee's discharge may constitute a violation of contract or other legal wrong by the employer, this section is not applicable to the circumstance if the employer pays all wages earned by the employee at the time of the employee's discharge. *Lee v. Great Empire Broad., Inc.*, 794 P.2d 1032 (Colo. App. 1989).

This section has been held to apply to payments becoming due after the date of the discharge, provided those future payments have been "earned," i.e., they are "vested and determinable," at the time of employee's termination. In such circumstances, the future payment must be made immediately upon becoming due or the employer becomes liable for the statutory penalty under the provisions of subsection (3). *Lee v. Great Empire Broad., Inc.*, 794 P.2d 1032 (Colo. App. 1989).

A terminated employee may seek any wages or compensation that was unpaid at the time of termination. However, the right to seek such wages or compensation is subject to the statute of limitations found in §8-4-122. *Hernandez v. Ray Domenico Farms, Inc.*, 2018 CO 15, 414 P.3d 700.

Liability of corporate officers for wages and attorney fees. Proof of good faith legal justification for refusal to pay wages by an employer is not required for the recovery of wages and attorney fees by an employee. *Cusimano v. Metro Auto, Inc.*, 860 P.2d 532 (Colo. App. 1992).

An employer's claim of breach of fiduciary duty is not a good faith legal justification for not timely paying an employee's final wages pursuant to this article. *Hartman v. Cmty. Responsibility Ctr., Inc.*, 87 P.3d 202 (Colo. App. 2003).

The officers and agents of a corporation are not jointly and severally liable for payment of employee wages and other compensation the corporation owes to its employees under the employment contract and the Colorado Wage Claim Act. Leonard v. McMorris, 320 F.3d 1116 (10th Cir. 2003).

A general manager whose duties included scheduling of overtime work but who had been given no authority or responsibility over wage payment policies was not subject to personal liability under the Wage Claim Act. Major v. Chons Bros., Inc., 53 P.3d 781 (Colo. App. 2002).

Federal Bankruptcy Code does not preempt claims against corporate officers under the Wage Claim Act. Claims under the Wage Claim Act would be preempted if brought against the corporation because the corporation filed a bankruptcy petition. The Bankruptcy Code does not, however, extend its protections to individuals or entities that have not filed a bankruptcy petition. In the absence of such a statutory provision, no direct conflict exists between the Bankruptcy Code and the Wage Claim Act. Leonard v. McMorris, 106 F. Supp. 2d 1098 (D. Colo. 2000), rev'd on other grounds, 320 F.3d 1116 (10th Cir. 2003).

Evidence held sufficient to support finding that defendant employer owed plaintiff wages and commissions. Brogan v. Bill Eger Motors, Inc., 39 Colo. App. 104, 561 P.2d 377 (1977).

"Without a good-faith legal justification" construed. In order to impose a penalty under this section, a trial court must find from the evidence that the employer willfully withheld compensation due and owing the employee. Beasley v. Mincomp Corp., 683 P.2d 370 (Colo. App. 1984).

Statutory penalty will not be assessed where there was bona fide dispute as to bonus due and payable. Rohr v. Ted Neiters Motor Co., 758 P.2d 186 (Colo. 1988).

Applied in Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981); Paulu v. Lower Ark. Valley Council of Gov'ts, 655 P.2d 1391 (Colo. App. 1982).

(1) For the legislative declaration contained in the 2007 act amending subsection (3), see section 1 of chapter 381, Session Laws of Colorado 2007.

(2) For the short title ("Wage Protection Act of 2014") in SB 14-005, see section 1 of chapter 276, Session Laws of Colorado 2014.