

**COMMENTS FROM TOWARDS  
JUSTICE REGARDING  
MODERNIZATION OF COLORADO'S  
MINIMUM WAGE ORDER**

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## **I. Introduction**

Towards Justice is a non-profit law firm that litigates workplace rights issues on behalf of low-wage workers, many of whom live and work in Colorado. The following comments are submitted to the Colorado Department of Labor by Towards Justice in response to the CDLE's solicitation of public comment. They are informed by Towards Justice's experience litigating on behalf of workers and hearing from them and their advocates about the ways in which state wage-and-hour laws could, consistent with the CDLE's mandate, be improved to protect the health and wellbeing of workers. Among other recommendations, Towards Justice urges the CDLE to:

Wage Order Coverage Categories: Towards Justice urges the CDLE to eliminate the Wage Order's coverage categories and create a default rule that all employers and employees in Colorado are covered by the protections of the Wage Order absent a determination by the Agency that an industry or occupation should be excluded from some or all Wage Order coverage. Eliminating the Wage Order coverage categories will modernize Colorado wage-and-hour law and bring it into conformity with the wage-and-hour schemes of every state Towards Justice has surveyed. Additionally, this change would reduce litigation costs and uncertainty for workers and employers.

Removing the coverage categories and presumptively covering all workers would also be consistent with the Agency's statutory mandate to protect workers. It would specifically benefit construction and agricultural workers who are too frequently denied minimum wages, overtime, and rest and meal breaks. Finally, the Agency should specifically ensure minimum protections, including minimum wages for herders who are currently among the lowest paid employees in the state.

Minimum Salary for Exempt EAP Employees: We also ask the CDLE to set a minimum salary of 2.5 times the minimum wage for workers exempted by the Wage Order as "Executive, Administrative, and Professional" (EAP) employees under Section 5. In 2020, when the minimum wage is \$12.00, this minimum salary would be \$62,400 per year. Employees not paid that amount would be entitled to overtime when working more than 40 hours per week or 12 hours per day.

Overtime is one of the bedrock protections of our wage and hour laws, but for far too many Coloradans, it has become a false promise. Too many salaried white collar workers work extraordinary hours for meager pay. They do not have enough time with their families or their communities, enough time to travel or pursue workforce and professional development opportunities. Colorado should extend overtime protections to these workers, unless they are paid a salary that exceeds the median wage rate. Overtime should be the norm, not the exception.

## **II. The CDLE's Statutory Mandate to Protect Colorado's Workers**

Colorado statute charges the Director of the CDLE's Division of Labor Standards

and Statistics (CDLE) with the duty to protect workers by regulating the conditions of labor, work hours, and living wages of all workers in Colorado. The Director's authority is broad, and his or her rulemaking responsibilities pursuant to this authority are mandatory. Under Title 8, "The director *shall* determine [ . . . ] the standards of conditions of labor and hours of employment not detrimental to health or morals for workers; and what are unreasonably long hours." C.R.S. § 8-6-106. The Director also has the duty to "inquire into the wages paid to employees and into the conditions of labor surrounding said employees in any occupation in Colorado" if the Director "has reason to believe that said conditions of labor are detrimental to the health or morals of said employees or that the wages paid to a substantial number of employees are inadequate to supply the necessary cost of living and to maintain such employees in health." C.R.S. § 8-6-105. Title 8 also makes it illegal to employ workers in occupation working in Colorado (a) under conditions of labor detrimental to their health or morals or (b) for wages which are inadequate to supply the necessary cost of living and to maintain the health of the workers. C.R.S. § 8-6-104.

That statutory scheme works in concert with the Colorado Constitution, which dictates a floor for minimum wages for workers in Colorado. Pursuant to Article XVII, § 15 of the Colorado Constitution, the minimum wage increased to \$9.30 per hour "and will increase 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." That provision ensures a critical baseline protection for Colorado workers, but it provides only a small fraction of the substance of Colorado wage-and-hour law, and it does not discharge the Agency of the broad duties spelled out in Title 8.

Pursuant to the Constitution, the millions of Colorado workers covered by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.*, are guaranteed the constitutionally mandated minimum wage, but the Constitution says nothing about those workers' entitlement to overtime premiums or meal- and rest-breaks necessary for their health and safety. And for all of the workers who are not covered by the FLSA, either because they are exempted from coverage or because their employer is too small to be covered, the Constitution does not on its own set even a minimum wage unless those workers are covered by the Colorado minimum wage, which under the current scheme, occurs the CDLE provides by rule that those workers are covered.

All of these questions that are left unanswered by the Colorado Constitution are resolved by what has become known as the "Colorado Minimum Wage Order" ("Wage Order" or "MWO"). The Wage Order governs, among other things, who is entitled to Colorado minimum wage, required rest- and meal-breaks, and overtime. It also provides exemptions from coverage for certain employees who would otherwise fall within the Wage Order's protections.

### **III. The History of the Wage Order**

The Wage Order was first promulgated in 1938. It set basic protections for women

and minors employed in laundry occupations and provided, in part, for minimum wage, rest and lunch breaks, and a basic 40-hour work week.<sup>1</sup>

Between 1938 and 1997, the Wage Order changed periodically. For example, the agency implemented required overtime premiums in 1940 with Wage Order 4, requiring that employers pay a premium of 1.5 times the regular rate of pay for hours worked in excess of 48 in a week. Daily overtime was added to Wage Order 6 in 1951, requiring time-and-a-half compensation for hours worked in excess of 8 in a day. Finally, in 1996, the agency created the four coverage categories of today's Wage Order in 1996.<sup>2</sup>

In 1998, however, the Wage Order froze, and it has remained ossified in essentially this state for the past twenty years, even while Agency has had to promulgate an entirely new Wage Order in each of those years pursuant to constitutionally mandated updates to the minimum wage.

During this period, it is not clear that the Agency has ever substantively engaged with its statutory duties to protect workers. Since its founding in 2014, Towards Justice has commented every year on proposed Wage Orders. In particular, Towards Justice has focused its comments on some of the issues the CDLE has suggested it will reexamine for the forthcoming Wage Order--the scope of the coverage categories in Section 1 and a minimum salary for the EAP exemptions in Section 5. And yet, during this period, the CDLE has not made any substantive changes aside from annual updates to the minimum wage.

Even while the Agency declined to alter the Wage Order in any way in response to comments from workers during the notice-and-comment rulemaking process, it was too often solicitous of behind the scenes lobbying from industry. Between 1997 and 2015, while the agency declined to alter the MWO through an open, formal rulemaking process, the CDLE issued a series of opinion letters that purported to modify the scope of the MWO. These letters were largely solicited by employers or their attorneys through non-public communications with the agency, and they were not subject to any formal rulemaking process that engaged stakeholders beyond the entity soliciting the opinion.<sup>3</sup> Additionally, in 2012 the Agency issued an Advisory Bulletin, promulgated without any formal notice-and-comment rulemaking that largely compiled Agency opinions expressed through these letters. The Agency last issued an opinion letter of this kind in March 2014,

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<sup>1</sup> "ORDER NO. 1 GOVERNING WOMEN AND MINORS IN LAUNDRY OCCUPATIONS IN THE LAUNDRY TRADE", Industrial Commission of Colorado, Minimum Wage Division (May 20, 1938).

<sup>2</sup> In 1996, today's "Commercial Support Services" coverage category was titled "Service Industries." The category became "Commercial Support Service" in 1998 with Wage Order 22. "COLORADO MINIMUM WAGE ORDER NUMBER 22", COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR (effective August 1, 1998).

<sup>3</sup> Amicus Brief of Towards Justice, *Kennett v. Bayada Home Health Care, Inc.*, 14-cv-02005, 10th Cir., No. 19-1004 (filed May 9, 2019).

and the Division issued a statement in June 2019 stating that no prior opinion letter from the Agency is legally binding and the Agency will continue its current practice of not issuing opinion letters in the future.<sup>4</sup> As for the Advisory Bulletin, the Division said it “is no longer operative as reflecting Division opinions, interpretations, or rulings.” *Id.*

Towards Justice is encouraged by the Agency’s proposed rulemaking schedule for considering amendments to the MWO and its commitment to engaging in a transparent rulemaking process that permits employers, employees, and the public to provide feedback on proposed changes. That process is consistent with the principle that the broad authority granted to the Agency by the legislature is constitutionally required to be subject to “sufficient statutory standards and safeguards and administrative standards and safeguards, in combination, to protect against unnecessary and uncontrolled exercise of [the Agency’s] discretionary power.” *Cottrell v. City & Cty. of Denver*, 636 P.2d 703, 709 (Colo. 1981). We are optimistic that with this new version of the Wage Order, the Agency will comply with its clear statutory mandate in Title 8.

#### IV. Coverage

##### **A. The Agency should eliminate the Minimum Wage Order’s coverage categories and instead cover all employees unless specifically exempted by Agency rulemaking.**

The CDLE’s statutory mandate requires it to protect *all workers*. Title 8 provides that it is “unlawful to employ *workers in any occupation within the state of Colorado* for wages which are inadequate to supply the necessary cost of living and to maintain the health of the workers so employed” and that it is “unlawful to employ *workers in any occupation within this state* under conditions of labor detrimental to their health or morals,” C.R.S. § 8-6-102, -106 (emphasis added), where occupation is defined as “every vocation, trade, pursuit, and industry.”

The Colorado Department of Labor and Employment has ignored this mandate for years. Instead of protecting all workers in Colorado, the CDLE has maintained for 21 years that the coverage of Colorado’s Minimum Wage Order applies only to four categories of industries—(A) Retail and Service, (B) Commercial Support Service, (C) Food and Beverage, and (D) Health and Medical.<sup>5</sup>

To comply with Title 8, the Agency should replace its current rule requiring that an industry be named as a coverage category in order for the law to cover a worker in that industry with a rule that presumptively covers all Colorado workers except where there is a

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<sup>4</sup> Division of Labor Standards and Statistics, Colorado Department of Labor and Employment, “Notice Regarding Opinion/Exemption Letters” (June 24, 2019) available at <https://www.colorado.gov/pacific/sites/default/files/Opinion-Exemption%20Letters%20%281%29.pdf>.

<sup>5</sup> The Minimum Wage Order coverage categories have remained unchanged since Wage Order 22, effective August 1, 1998.

reason to exempt some category of workers via clear exemptions enacted through open notice-and-comment rulemaking. Under this rule, all workers would be covered unless exempted.

Removing the coverage categories in Section 1 of the Wage Order and presumptively covering all workers would be consistent with the practice around the country. Towards Justice has not identified a single state, aside from Colorado, that expressly spells out coverage categories to determine which workers are covered by its wage-and-hour laws. Instead, most states apply their wage and hour laws to all occupations, except for those expressly identified through specific exemptions to coverage. To name a few, minimum wage laws in Oregon,<sup>6</sup> California,<sup>7</sup> Massachusetts,<sup>8</sup> Arizona,<sup>9</sup> Washington,<sup>10</sup> and New Mexico<sup>11</sup> cover all workers except for those that are expressly excluded.

This makes sense. A default rule covering all workers except those excluded is much more easily administrable than a rule that spells out specific coverage categories, especially as the economy evolves and new categories of employment emerge. Under the current framework, the agency must continually evaluate new categories of employment to determine whether they fall within the existing coverage categories or whether the Agency should add additional categories to capture emerging businesses. When labor standards cover everyone except for those workers or industries who are expressly excluded, emerging categories of employment are presumptively covered unless and until the Agency sees a reason to carve them out.

A rule covering everyone except those excluded would also provide more clarity for workers and employers. As opposed to workers and employers having to evaluate for themselves whether any particular employer falls within the arcane and complex wage order coverage categories in Section 1, under the framework applied in most other states, those employers would presumptively be covered by Colorado's labor standards protections.

Instead, the current scheme has created confusion and spurred prolonged and costly litigation for both workers and employers. This litigation has highlighted the illogical nature of the coverage categories. For example, when does a business that makes food fall

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<sup>6</sup> O.R.S. Chapter 653 Sections 010-025, available at [https://www.oregonlegislature.gov/bills\\_laws/ors/ors653.html](https://www.oregonlegislature.gov/bills_laws/ors/ors653.html).

<sup>7</sup> SB 3, "An act to amend Sections 245.5, 246, and 1182.12 of the Labor Code, relating to labor" (Leno, Chapter 4, Statutes of 2016) (approved by Governor April 4, 2016) available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=20152016SB3](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=20152016SB3).

<sup>8</sup> Massachusetts General Laws Title XXI Chapter 151: Section 1.

<sup>9</sup> ARS 23.362-363.

<sup>10</sup> RCW 49.46.010, RCW 49.46.020.

<sup>11</sup> 50-4-21 NMSA 1978, 50-4-22 NMSA 1978.

within the “Food and Beverage” category? In *Salazar v. Butterball*, the court concluded that wholesale food manufacturers are not covered by the Minimum Wage Order because while these manufacturers “prepare[] and offer[] [food and beverages] for sale,” they do not “prepare or sell those items ‘for consumption either on or off the premises.’” The court noted that “Butterball's food products are prepared for eventual consumption (after all, they are food), but they are not *sold* for consumption. They are sold for resale.” *See Salazar v. Butterball, LLC*, 644 F.3d 1130, 1144 (10th Cir. 2011). This means that a worker who makes food and sells that is sold directly to consumers receives the protections of the Wage Order, but a worker who makes food for sale to businesses that sell to consumers does not. It is difficult to see how that illogical distinction is consistent with the Agency’s duty to protect the “health and welfare” of all workers in Colorado.

Consider also the question of when a business falls within the “Commercial Support Services” category. In *Blanco v. Xtreme Drilling & Coil Servs., Inc.*, the court concluded that an oil and gas rigging company that provided drilling services to clients did not fall within the “Commercial Support Services” coverage category in part because it performed specialized, as opposed to routine, tasks. While the coverage category definition makes no distinction between specialized and routine tasks, the court read this distinction into the regulation. The court rejected Plaintiff’s argument that because the definition of “Commercial Support Services” included “equipment operations,” and he operated drilling equipment for Defendant, he should be covered. The court cited to *Butterball*, discussed above, saying “courts look to whether the employer’s operations fit the industry definition, not whether any of the company’s employees perform services that may be supplied in a particular industry,” *Butterball*, 644 F.3d at 1143-44, and “Plaintiff’s reliance on the low-skilled nature of his work as a roughneck and his operation of equipment in that role is unavailing because the Wage Order applies based on industry, not the type of work an individual worker performs.”

The *Blanco* court ultimately agreed with Defendant’s ostensibly absurd and hair-splitting position that “its employees’ operations of the drilling equipment do not make them ‘equipment operators’ under the Wage Order.” *See Blanco v. Xtreme Drilling & Coil Servs., Inc.*, 16-CV-00249-PAB-CBS, 2017 WL 951150, at \*3 (D. Colo. Mar. 8, 2017), *reconsideration denied*, 16-CV-00249-PAB-CBS, 2018 WL 1138293 (D. Colo. Mar. 2, 2018). That decision alone should provide justification for eradicating the Wage Order’s arcane coverage categories.

The uncertainty and litigation costs created by the coverage categories are borne both by employers and by workers. As a non-profit law firm dedicated to protecting workers, Towards Justice is committed to litigating these coverage issues when doing so is in the best interests of our clients, but it would be much less costly for everyone if the CDLE set a default rule that all industries are covered unless subject to a specific exemption.

Finally, CDLE’s coverage-category-based rule of inclusion forces much of the debate about who should be covered by the Wage Order behind closed doors. As described above,

between 1997 and 2015, the Agency was subject to nearly constant behind-the-scenes pressure from industry urging the Agency to determine that some industry or businesses fall outside of the Wage Order categories. If the Agency adopts a rule covering all workers except those specifically excluded in its Wage Order, industry will still lobby the Agency for exemptions, but that lobbying will happen via the notice-and-comment rulemaking process through which the Agency will consider specific exemptions to coverage. This will allow the public an opportunity to respond and engage in public discourse surrounding who is exempted by the Wage Order.

**B. The exclusions from the MWO for construction and agriculture are particularly illogical and harmful to workers.**

Although the Agency’s regulation is called the “Minimum Wage Order,” it provides employees with many more protections than minimum wage, consistent with the agency’s mandate to implement “standards of conditions of labor and hours of employment not detrimental to health or morals for workers; and what are unreasonably long hours.” C.R.S. § 8-6-106.

Pursuant to the Wage Order, an employer covered by the Wage Order must provide its employees with minimum wage, overtime for hours worked in excess of 12 in a day and 40 hours in a week (unless the employee is otherwise exempted from overtime in the Wage Order), a 30-minute meal break per five consecutive hours of work, and a 10-minute rest break per 4-hour work period. Employees who are considered not covered by the Wage Order are thus not entitled to the Wage Order’s vital health and safety protections—meal breaks and rest breaks—at all.

To fulfill its statutory mandates under Title 8, the Agency should further strengthen the substantive protections of the Wage Order by, for example, requiring overtime premiums for work in excess of 10 hours per day (discussed *infra* at Section VI). However, the very least the Agency must do pursuant to Title 8 is to extend Minimum Wage Order coverage to categories of workers who are left out and whose health and welfare suffer because of their exclusion, including construction and agricultural workers.

**i. Construction workers were initially excluded from MWO coverage because of industry lobbying, but their vulnerability to misclassification, wage theft, long hours, and grueling work conditions make MWO coverage critical to worker health and morals.**

**1. The exclusion of the construction industry from Minimum Wage Order coverage was born of behind-the-scenes lobbying.**

Towards Justice recognizes and is grateful for the Agency’s current initiative to carefully consider these issues after engaging in a transparent process that involves the creation of full administrative record. Yet transparent rulemaking has not always been the



Agency's practice, and the history of the construction industry's exclusion from Wage Order coverage highlights that point.

The CDLE formed a position that the construction industry should not be covered by the Wage Order in 1998.<sup>12</sup> In 1997, the Wage Order covered construction workers, but pursuant to a March 1998 letter from the then-Director of the Division of Labor to the Director of Governmental Affairs of The Associated General Contractors of Colorado--a letter obtained by Towards Justice through a 2019 public records request--the Agency changed its position in response to lobbying from the construction industry. The letter read:

After reviewing the circumstances surrounding your industry and the information you supplied in our meeting, specifically, the information that '99.9%' of the construction industry is involved in interstate commerce and thus subject to the federal Fair Labor Standards Act, I have determined that it is not necessary to include this industry in the new Colorado Minimum Wage Order #22. I anticipate preliminary work for wage order #22 to begin within the next 30 days. [. . .] Thank you for taking the time to meet with and educate us regarding the unique circumstances in your industry. I trust that this letter will offer the resolution necessary to meet your needs.

This letter demonstrates that the choice to exclude construction workers was premised on Industry's representation that "'99.9%' of the construction industry is involved in interstate commerce and thus subject to the federal Fair Labor Standards Act." Yet, this unchecked representation spoke only to the availability of minimum wage to construction workers in Colorado by way of the FLSA. It did not speak to the rights of construction workers to any other substantive protections of the Wage Order.

Construction workers' exclusion from Wage Order coverage is a holdover from a time when the Colorado Department of Labor and Employment rewarded industry's back door lobbying efforts at the expense of millions of workers who never had a seat at the table. The exclusion should be eliminated.

**2. The construction industry is rife with wage-and-hour violations, and Wage Order coverage will ensure public and private enforcement of workplace rights.**

For construction workers, nonpayment of wages is a regular occurrence; employers commit payroll fraud; workers sometimes do not receive pay statements at all; retaliation against those who attempt to vindicate their rights is rampant; and employers far too often misclassify workers as independent contractors to evade their obligations to those workers under wage-and-hour laws. In recognition of the commonplace wage-and-hour violations in the construction industry and the need for increased compliance with wage and hour

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<sup>12</sup> See Minimum Wage Order Number 21, 7 CCR 1103-1 (effective October 1, 1997) at 1.

law in the industry, former Governor Hickenlooper signed an executive order in June 2018 creating the Joint Enforcement Task Force on Payroll Fraud and Employee Misclassification in the Construction Industry.<sup>13</sup>

Nonetheless, the Wage Order's failure to cover construction workers substantially impedes the Agency's ability to enforce misclassification and payroll fraud in the construction industry. Although the District of Colorado has held that workers can recover under Colorado law for overtime owed to an employee under the FLSA,<sup>14</sup> the Agency has historically not taken that position<sup>15</sup> and has not investigated unpaid overtime due under the FLSA. This has undermined wage and hour enforcement in an industry rife with abuses and has resulted in countless misclassified workers being turned away from the administrative wage complaint process.

The Agency can resolve the issue by extending Wage Order coverage to all workers in the construction industry. This would make clear to construction workers what their rights are and how to access justice to vindicate those rights, and it would clarify the Agency's authority to investigate and rectify wage and hour violations in the construction industry.

**3. The CDLE should protect the health and welfare of construction workers, who labor in grueling conditions, by extending Wage Order coverage to the construction industry.**

Finally, Wage Order coverage for construction workers is essential because of rights in the Wage Order beyond minimum wage and overtime. Construction workers often handle dangerous machinery in the blistering heat for hours on end without a rest or meal break. Breaks and the 12-hour workday<sup>16</sup> must be made available to the workers who perform those arduous jobs. Construction workers and their advocates alike have called the Agency's attention to how the conditions of labor in the construction industry are detrimental to the health of construction workers. It is the duty of the Agency to protect

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<sup>13</sup> See Press Release, Gov. John Hickenlooper, Gov. Hickenlooper signs executive order to improve payroll and worker classification in CO construction industry (June 6, 2018), available at <https://www.colorado.gov/governor/news/gov-hickenlooper-signs-executive-order-improve-payroll-and-worker-classification-co> ("Gov. Hickenlooper and CDLE Executive Director Walker determined that the unique nature of the commercial construction industry provides a good opportunity for improved compliance assurance and assistance.").

<sup>14</sup> See *Irigoyen-Morales v. Concreations of Colorado, Inc.*, 15-CV-02272-LTB-KLM, 2016 WL 9735757, at \*2 (D. Colo. June 30, 2016) ("I conclude that the CWCA supports a claim for overtime pay owed under the FLSA.").

<sup>15</sup> This conclusion is based on conversations between Towards Justice staff and Agency staff in 2017 and 2018, as well as reports from construction workers who have attempted to file claims within the administrative process but whose claims have been denied because of the absence of wage order coverage even though they were denied overtime premiums owed to them under the FLSA.

<sup>16</sup> The 12-hour workday is too long. As explained in Section VI below, Towards Justice joins construction workers in urging the Agency to adopt a 10-hour workday.

construction workers from these conditions. C.R.S. §§ 8-6-104, -105, -106.

**4. Some construction workers have shared their experiences and pleas for rest and meal breaks for the Agency’s consideration during this process.**

Over the past several months, Towards Justice has spoken directly to construction workers about their experiences in the workplace and the importance of extending coverage to them under the Wage Order. Many of those workers have submitted comments directly to the Agency, but Towards Justice also provides excerpts from some of those comments here:

Monica M., a part-time construction and part-time domestic worker from Jefferson County shared (translated from its original Spanish):

When I have worked in construction without breaks I feel exhausted instead when there are breaks one feels safer

Mark Thompson, a carpenter from Colorado Springs, commented on the need for breaks, public enforcement, and better standards in a deteriorating construction industry:

Breaks and lunch periods are not just a human right but even more s[o], this is a safety issue in a dangerous industry. Workers need the opportunity to sit down and rest as well as clear their head. this is their chance to reh[y]drate and get some nutrition. Overtime pay is an issue as well. Workers should be comp[en]sated for time away from their families.

Workers in my industry need to be able to access an agency that will [e]nforce the rules when they have been done wrong. Currently i[t] is to[o] difficult to protect oursel[ve]s and our co workers... I have dedicate[d] my life to building Colorado and I love my work. I am blessed that I have been able to a[c]quire many skills over my 32 year career but I am saddened by what my industry has become in our state and I want opportunity for workers that follow this same path. I am proud that my son has followed in my footstep and is now a journeyman carpenter but I am also concerned about if this industry will provide for him and his family the same way it has provided for me.

The Agency is mandated by Title 8 to provide construction workers with the vital health and safety protections of the Minimum Wage Order—rest and meal breaks.

**ii. The Agency should also ensure all agricultural workers are protected by the MWO.**

Section 1 of the Wage Order does not appear to cover most agricultural workers, and the Colorado Division of Labor has previously interpreted the Wage Order not to

cover the agricultural industry at all.<sup>17</sup> Title 8, however, requires that the Agency provide for the health and safety of agricultural workers who labor in grueling conditions. Pursuant to that mandate, the Agency must provide critical minimum protections to agricultural workers.

**1. MWO coverage should ensure all agricultural workers in Colorado receive Colorado minimum wage, regardless of FLSA coverage.**

Many agricultural workers are covered by the FLSA’s minimum wage protections. Through the Colorado constitution, those agricultural workers covered by FLSA are entitled to Colorado minimum wage, but many workers are excluded--such as those working on small farms and those “principally engaged in the range production of livestock,”<sup>18</sup> including shepherds. These workers are not even entitled to Colorado or federal minimum wage. This should change. There is no reason to exclude any agricultural worker from minimum wage protection, and for this reason Washington,<sup>19</sup> New York,<sup>20</sup> and California have all extended state minimum wage protections to agricultural workers. *See infra* page 15 for more on minimum wage coverage for range workers.

**2. The Agency should provide agricultural workers with at least the rest and meals breaks that Minimum Wage Order coverage would ensure.**

Even for agricultural workers who are entitled to state minimum wage, Colorado provides them with little else. No agricultural worker in Colorado is entitled to rest and meal breaks required for millions of other workers in Colorado, even though agriculture “ranks among the most hazardous industries.”<sup>21</sup> Every day in the United States, about 100

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<sup>17</sup> ADVISORY BULLETINS AND RESOURCE GUIDE, Colorado Division of Labor, March 31, 2012. Available at <https://www.colorado.gov/pacific/sites/default/files/Advisory%20Bulletins.pdf>.

<sup>18</sup> 29 U.S.C. § 213(a)(6)(E).

<sup>19</sup> All but a very small subsection of agricultural workers in Washington are entitled to state minimum wage. In order to be exempted from minimum wage, an agricultural worker must meet all of the following criteria: “An individual who is employed as a hand harvest pieceworker in the region of employment, and who commutes daily from his or her permanent residence to the farm upon which he or she is employed and who has been employed in agriculture less than thirteen weeks during the preceding calendar year.”

“Minimum Wage Act Applicability”, State of Washington Department of Labor and Industries Employment Standards, RCW Chapter 49.46 (revised July 15, 2014) available at <https://www.lni.wa.gov/WorkplaceRights/files/policies/esa1.pdf>.

<sup>20</sup> “Minimum Wage Order for Farm Workers Including Occupations in Agriculture Particularly Hazardous for the Employment of Children Below the Age of 16,” New York Department of Labor, 12 NYCRR 190, (effective December 31, 2016) available at <https://labor.ny.gov/formsdocs/wp/CR190.pdf> (entitling agricultural workers in New York to the same minimum wage rates as non-agricultural workers “if, during the preceding calendar year, the cash remuneration paid to all persons employed on the employer’s farms aggregated \$3,000 or more.”).

<sup>21</sup> “Agricultural Safety,” The National Institute for Occupational Safety and Health available at

agricultural workers suffer a lost-work-time injury, and 417 farmers and farm workers died from a work-related injury in 2016, resulting in a fatality rate of 21.4 deaths per 100,000 workers. *Id.*

Rest and meal breaks would provide critical relief to agricultural workers who often work 12-hour days without a break to eat, drink water, or use the restroom. Other states, including Oregon,<sup>22</sup> California,<sup>23</sup> and Washington,<sup>24</sup> extend rest and meal break protections to agricultural workers. Agricultural workers are entitled to a paid 10-minute rest break per four hours of work in all three states and a 30-minute meal break for work periods of five hours or more in Washington and California and for work periods of six hours or more in Oregon. Agricultural workers in Colorado should receive, at the very least, the rights to rest and meal breaks that Minimum Wage Order coverage provides to employees in other covered industries.

**3. Consistent with this same mandate, agricultural workers should be entitled to overtime premiums for hours exceeding 12 in a day and 40 in a week.**

Currently, most agricultural workers in Colorado are not entitled to overtime, even when they are covered by the FLSA because of an exemption from FLSA overtime requirements for agricultural workers. *See* 29 U.S.C. § 213(b)(12). The historical exclusion of agricultural workers from overtime protection in the FLSA is rooted in historical racism and misconceptions about the industry. Historians have identified compelling historical evidence that white, southern congressmen, who maintained the most powerful seats in Congress in the 1930s, excluded agricultural workers from the protections of New Deal legislation to continue subjugating black workers in the South and preserve the plantation system.<sup>25</sup>

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<https://www.cdc.gov/niosh/topics/aginjury/default.html>.

<sup>22</sup> “Agriculture: Rest and Meal Periods,” Technical Assistance for Employers, Oregon.gov (November 2012) available at [https://www.oregon.gov/boli/TA/pages/t\\_faq\\_taagricrestmeals.aspx](https://www.oregon.gov/boli/TA/pages/t_faq_taagricrestmeals.aspx).

<sup>23</sup> “Protect Your Business—Prevent Penalties: Agriculture,” California Department of Industrial Relations Labor Enforcement Task Force (2019) at 3, available at [https://www.dir.ca.gov/letf/Agriculture\\_Employer\\_Brochure.pdf](https://www.dir.ca.gov/letf/Agriculture_Employer_Brochure.pdf)

<sup>24</sup> “Meal and Rest Break Requirements for Agriculture,” Washington State Dairy Federation (October 10, 2017) available at <http://wastatedairy.com/meal-and-rest-break-requirements-for-agriculture/>.

<sup>25</sup> Southern agriculture, the most developed agricultural industry at the time, depended on black labor. In 1930, 53 percent of all people engaged in agriculture worked in the South. And in 1940, more than 50 percent of farm workers in the 11 southern states were black. Throughout the thirties, Southerners retained the powerful seats in Congress. “President Roosevelt could be confident of the support of the Southern leaders of Congress only ‘[s]o long as the New Deal did not disturb southern agricultural, industrial, or racial patterns.’”

Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New*

States around the country, however, are beginning to challenge the foundations of this policy decision and extend overtime protections to agricultural workers. In 2016, California passed phase-in overtime compensation for agricultural workers, recognizing that “[a]gricultural employees engage in back-breaking work every day” and “few occupations in today’s America are as physically demanding and exhausting as agricultural work.”<sup>26</sup> As of January 1, 2019, agricultural workers in California must receive time-and-a-half overtime compensation for any hours worked in excess of 55 hours in a workweek or 9.5 hours in a workday. The statute lowers the overtime threshold by five hours every year through 2022, at which point agricultural workers will be entitled to time-and-a-half compensation for hours worked in excess of 40 in a week or 8 in a day.<sup>27</sup>

Minnesota and Hawaii also provide overtime compensation for farmworkers. Agricultural workers in Hawaii earn overtime premiums at 40 or 48 hours in a workweek, and overtime premiums for farm workers in Minnesota begin at 48 hours in a workweek.<sup>28</sup>

Colorado should follow these states’ lead. Extending overtime is critical to protecting the “health and morals” of Colorado’s agricultural worker.

One watermelon farmworker from Rocky Ford has urged the Agency to give agricultural workers rights to breaks and overtime. He said (translated from its original Spanish):

I believe that all work... has value and that all workers should be given breaks and overtime. The reality is that for a long time we have asked ourselves why the government doesn't value farm work... Not a day goes by where we don't eat a meal with a farm product. For this reason we need to have rest breaks. On a farm, work is really tiring under the sun when it can get up to more than 100°.

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Deal, 65 TEX. L. REV. 1335 (1987) (internal citation omitted), available at [http://nationalaglawcenter.org/wp-content/uploads/assets/bibarticles/linder\\_racial.pdf](http://nationalaglawcenter.org/wp-content/uploads/assets/bibarticles/linder_racial.pdf).

<sup>26</sup> Phase-In Overtime for Agricultural Workers Act of 2016, Cal.Labor Code D. 2, Pt. 2, Ch. 6, § 857 to 864. See also 2015 California Assembly Bill No. 1066, California 2015-2016 Regular Session.

<sup>27</sup> This schedule applies to employers with at least 26 employees. Employers with 25 or fewer employees are on a schedule delayed by three years. Agricultural workers of employers with 25 or fewer employees will receive time-and-a-half overtime compensation for any hours worked in excess of 55 hours in a workweek or 9.5 hours in a workday as of January 1, 2022.

<sup>28</sup> Employers of agricultural workers in Hawaii must pay overtime premiums at 40 hours in a week for all but 20 weeks of the year. Farm owners may select 20 weeks to pay overtime premiums for hours worked in excess of 48 in a week.

Samuel Gamer, “Farmworker Overtime Across the States”, Cornell Journal of Law & Public Policy (October 31, 2015), available at <http://jlpp.org/blogzine/farmworker-overtime-across-the-states/>.

#### 4. Herders, unprotected by the FLSA, endure abysmal pay and work conditions that should be regulated by the Minimum Wage Order.

The agency should also specifically ensure that shepherds are covered by the Colorado Wage Order. Herders in Colorado, the vast majority of whom are immigrants from Peru, Chile, and Mexico, are required to be on-call 24 hours per day, 7 days per week, living in small campers without electricity, running water, or a bathroom.<sup>29</sup> The working conditions for herders are brutal. In a two-year study of shepherds conducted by Colorado Legal Services, almost 73 percent of the herders reported having zero days off over the course of a year, more than 80 percent were not permitted to leave their ranch, and roughly 70 percent reported never having access to a functioning toilet.

In 2019, herders in Colorado work for the federal shepherd minimum wage of \$1,633.33 per month.<sup>30</sup> In the two-year study of Colorado herders by CLS, 62 percent of herders reported that they actively worked 81 or more hours per week, and 35 percent of those herders reported they actively worked 91 or more hours per week.<sup>31</sup> The majority of herders in Colorado are thus likely making between \$4.48 and \$5.04 per hour.

The federal herder wage was set using a formula the U.S. DOL established in 2015 that is based on the flawed premise that herders work an average of 48 hours a week. This estimate relied exclusively on the biased, self-serving estimate of herder hours worked submitted by *ranchers*, not herders.<sup>32</sup> The CDLE should not assume that the presence of a minimum wage floor established by the U.S. DOL discharges the CDLE of its own independent duty to investigate conditions of employment in the herding industry.

Herders should make state minimum wage, or at least a substantially higher wage, under the Minimum Wage Order. Both Oregon and California have created a higher minimum wage than federal law requires in recognition of conditions in the industry. In Oregon, at present, herders must be paid at least \$1,950 per month.<sup>33</sup> From July 1, 2020 to June 30, 2021, herders in Oregon must be paid at least \$2,080 per month. In California, at present, herders must be paid at least \$2,133.52 per month. Effective January 1, 2020,

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<sup>29</sup> Jennifer J. Lee & Kyle Endres, OVERWORKED AND UNDERPAID: H-2A HERDERS IN COLORADO, Colorado Legal Services (2010), available at <http://users.frii.com/cls/Overworked%20and%20Underpaid.pdf>.

<sup>30</sup> *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: Adverse Effect Wage Rate for Range Occupations in 2019*, 83 Fed. Reg. 66,307, 66307 (Dec. 26, 2018).

<sup>31</sup> Active work is differentiated from being on call. Herders are required to be on call 24/7. See Lee & Endres, *supra* note 17, at 18.

<sup>32</sup> Hispanic Affairs Project is litigating a challenge to that U.S. DOL rule in federal district court in Washington, D.C. *Hispanic Affairs Project v. Acosta*, 901 F.3d 378 (D.C. Cir. 2018). For more on this issue, see HAP's public comments to the CDLE (August 2019).

<sup>33</sup> Oregon calculates minimum wages for herders by multiplying the state minimum wage by 2,080 hours per year and dividing that figure by 12 months. ORS 653.025, ORS 653.010.

herders must be paid at least \$2,311.24 per month.<sup>34</sup> California law also provides that wages paid to herders cannot be offset by meals or lodging provided by the employer. Colorado should follow the lead of these states in protecting some of the State's lowest paid workers.

## V. Minimum Salary for Exempt Employees

### A. Overtime is a bedrock principle of U.S. wage and hour law that should be updated and expanded because of changing labor market conditions.

Any discussion of the appropriate minimum salary required to be paid to EAP exempt employees must begin with consideration of the importance of overtime protections. Franklin Delano Roosevelt and the New Deal Congress implemented overtime in the 1930s as one of the pillars of workplace rights in this country. The federal overtime requirement, and overtime compensation in general, is undergirded by two policy goals: (1) to reduce unemployment by encouraging employers to hire more workers instead of overworking those already employed, and (2) to reduce overwork and its detrimental effect on the health and wellbeing of workers and the economy.<sup>35</sup>

As for the first goal, when overtime hours come at an increased cost to employers, employers overwork their employees less and hire more workers. Research suggests that the “overtime pay premium for non-exempt workers is effective at limiting overtime worked—about 44% of ‘exempt’ workers (i.e., most executives and supervisors, certain administrative and professional employees, and outside salespeople) work longer than 40 hours per week,

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<sup>34</sup> This minimum wage applies to herders on a regularly scheduled 24-hour shift on a seven-day-a-week “on call” basis. California law draws a distinction based on the number of employees a given herder’s employer employs. For employers who employ 26 or more employees, the current monthly minimum wage is \$2,133.52 per month. Effective January 1, 2020, it will be \$2,311.24 per month. For employers who employ 25 or fewer employees, the current monthly minimum wage for herders is \$1,955.74 per month. Effective January 1, 2020, it will be \$2,133.52 per month.

<sup>35</sup> Federal Register / Vol. 80, No. 128 / Monday, July 6, 2015 / Proposed Rules 38519.

It is widely recognized that the general requirement that employers pay a premium rate of pay for all hours worked over 40 in a workweek is a cornerstone of the Act, grounded in two policy objectives. The first is to spread employment by incentivizing employers to hire more employees rather than requiring existing employees to work longer hours, thereby reducing involuntary unemployment. See, e.g., *Davis v. J.P. Morgan Chase*, 587 F.3d 529, 535 (2d Cir. 2009) (“The overtime requirements of the FLSA were meant to apply financial pressure to spread employment to avoid the extra wage and to assure workers additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act.”) (internal quotation marks omitted). The second policy objective is to reduce overwork and its detrimental effect on the health and well-being of workers. See, e.g., *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) (“The FLSA was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive a fair day’s pay for a fair day’s work and would be protected from the evil of overwork as well as underpay.”) (internal quotation marks and brackets omitted).



compared to only about 20% of non-exempt workers.”<sup>36</sup> The remaining work to be done is spread to new employees, leading to job creation.<sup>37</sup> That goal is especially important in times of economic recession, where some warning signs suggest that the global economy may be headed over the coming years.<sup>38</sup>

Overtime also protects the wellbeing of workers and employers alike by guarding against the injurious consequences of overwork. For workers, overwork can lead to stress, chronic fatigue, and serious health conditions like cardiovascular diseases.<sup>39</sup> For employers, overwork can cause harm in the short and long term. Overwork increases safety incidents, mistakes, and worker illness and burnout, while it decreases the quality of work, productivity, attention, and executive functions. *Id.* The Economic Policy Institute has explained:

“It is not surprising . . . that accident rates increase during overtime hours (Kogi 1991). For example, researchers have identified overtime as a factor contributing to safety incidents at nuclear power plants (Baker et al. 1994), confirming what researchers had previously found at manufacturing plants (Schuster 1985) and among anesthetists (Gander et al. 2000). Workers who work overtime face a greater risk of injury and illness (Aakerstedt 1994; Duchon et al. 1994; Rosa 1995; Smith 1996). For a typical example, a German study found that, after nine hours at work, the accident rate begins to rise; in the 12th hour the accident rate was twice as high as the rate for the first nine hours (Hanecke et al. 1998).

On the mental, physical, and financial effects of overwork, it summarized:

In the U.S., job stress is estimated to cost industry \$150 billion per year in absenteeism, health insurance premiums, diminished productivity, compensation claims, and direct medical costs (Donatelle and Hawkins 1989). Longer work hours can only contribute further to this drain. A study by Northwestern National Life (1991), which investigated employee burnout, found that seven out of 10 employees experiencing job stress said they frequently suffered health ailments. Frequent mandatory overtime was one of the leading five factors that caused increased stress. Employees who worked overtime on a regular basis were twice as likely (62% vs.

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<sup>36</sup> [https://www.epi.org/publication/briefingpapers\\_bp120/](https://www.epi.org/publication/briefingpapers_bp120/)

<sup>37</sup> For example, the National Retail Federation projected that the Obama DOL’s proposed salary basis would have created 117,000 new jobs. “The National Retail Federation Admits That The Overtime Rule Will Create Jobs,” CAP Action (May 26, 2016) available at <https://medium.com/@CAPAction/the-national-retail-federation-admits-that-the-overtime-rule-will-create-jobs-6a29b1b5b6ad>.

<sup>38</sup> Feergal O’Brien and Piotr Skolimowski, *Recession Warnings Pile Up for the Battered Global Economy*, Bloomberg, August 14, 2019, <https://www.bloomberg.com/news/articles/2019-08-14/recession-warnings-pile-up-for-the-battered-global-economy>.

<sup>39</sup> Helene Jorgensen and Lonnie Golden, *Time After Time: Mandatory Overtime in the U.S. Economy*, Economic Policy Institute (January 1, 2002), available at [https://www.epi.org/publication/briefingpapers\\_bp120/](https://www.epi.org/publication/briefingpapers_bp120/).

34%) to report that they found their jobs to be highly stressful.”<sup>40</sup>

There is substantial evidence, however, that overtime protections and their goals are being eroded as the federal government and states have failed to update those protections to keep up with changing labor market conditions. In the U.S., approximately 19 to 33 percent of overtime work is mandatory.<sup>41</sup> This means that more than a quarter of the workforce is compelled by their employers to work more than 40 hours in the week by threat of job loss, demotion, assignment to unattractive tasks or work shifts, or other reprisals. *Id.* In 2003, almost one-third of the national workforce worked more than 40 hours a week, and one fifth worked more than 50 hours a week.<sup>42</sup>

Workers and their families sharply feel the brunt of this increase in the work hours. Between 1989 and 1998, the average middle income, married couple family transitioned to working six more weeks a year.<sup>43</sup> And overtime work has only increased since then. That means six fewer weeks at home with family, six fewer weeks engaging with community or faith groups outside of work, and six fewer weeks of leisure.

There are also serious macro-level consequences of this increase in work hours. When workers have less time outside of work, they have less time for workforce and professional development<sup>44</sup> and less time to spend money in the economy. And all that extra work does very little for productivity. While productivity remains relatively constant through 49 hours of work per week, after that point there is a sharp drop off in productivity.<sup>45</sup>

Colorado’s workers are working too many hours for too little pay. It is time for the Agency to uphold the promises of the overtime protections enshrined in the New Deal by updating those protections for the modern labor market.

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<sup>40</sup> *Id.*

<sup>41</sup> A. E. Dembe et al., “The impact of overtime and long work hours on occupational injuries and illnesses: new evidence from the United States,” *BMJ Journals* Vol. 92 Issue 9, available at <https://oem.bmj.com/content/62/9/588#xref-ref-75-1>.

<sup>42</sup> Helene Jorgensen and Lonnie Golden, “Time After Time: Mandatory Overtime in the U.S. Economy,” Economic Policy Institute (January 1, 2002) available at [https://www.epi.org/publication/briefingpapers\\_bp120/](https://www.epi.org/publication/briefingpapers_bp120/).

<sup>43</sup> Helene Jorgensen and Lonnie Golden, “Time After Time: Mandatory Overtime in the U.S. Economy,” Economic Policy Institute (January 1, 2002) citing Mishel et al. 2001, available at [https://www.epi.org/publication/briefingpapers\\_bp120/](https://www.epi.org/publication/briefingpapers_bp120/).

<sup>44</sup> *See, e.g.*, <https://www.meetingstoday.com/blog/postid/329/3-professional-development-obstacles-and-ways-to-work-around-them>.

<sup>45</sup> Heather Boushey and Bridget Ansel, The Washington Center for Equitable Growth, *Overworked America: The economic causes and consequences of long work hours*, May 2016, <https://equitablegrowth.org/research-paper/overworked-america/>.

## **B. The EAP Exemption is a Narrow Exception to Overtime Requirements That Should Apply Only Where the Exempt Employee Is Paid a Sufficiently High Minimum Salary.**

The FLSA created narrow exemptions from overtime pay for executive, administrative, and professional employees who are paid a minimum salary basis. These exemptions exempt employees whose discretion, autonomy, and ability to negotiate for themselves make it appropriate to exempt them from overtime laws. Yet, these exemptions must be cabined to employees whose roles require the exercise of discretion and independent judgment.<sup>46</sup>

Since 1940, federal regulations have allowed workers to fall within the EAP exemption only where they are paid a minimum salary. Setting a minimum salary basis has long been recognized as “the best single test of exempt status” by the United States Department of Labor.<sup>47</sup> The salary basis test is intended to provide a “ready method of screening out the obviously nonexempt employees”—that is to say, to “help distinguish bona fide executive, administrative, and professional employees from those who were not intended by Congress to come within these exempt categories.”<sup>48</sup> But the salary basis test can only achieve this goal when it is kept up-to-date. Failure to modernize the federal salary threshold has left millions of low-paid salaried workers without basic overtime protections, and for this reason, the Department of Labor under President Obama embarked on an effort to update the minimum salary threshold to ensure its consistency with the purposes of the EAP exemption.<sup>49</sup> Unfortunately, those efforts did not go far enough for Colorado, and even their modest ambitions have been stifled by the Trump Department of Labor, which recently released a substantially less adequate proposal.<sup>50</sup>

The Colorado Department of Labor and Employment is far behind even the federal government on this issue. It mirrored in its Wage Order the FLSA’s statutory exemption for executive, administrative, and professional employees, but the Wage Order does not include a minimum salary threshold above which those employees must be paid to be exempted from the protections of the Wage Order. Section 5 of the Wage Order does provide that executive or supervisory employees must be paid “at least minimum wage for all hours

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<sup>46</sup> § 541.200.

<sup>47</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 FR 38516-01 (internal quotation marks omitted). See 80 Fed. Reg. 38516 *et seq.* (July 6, 2015), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf>; see also 29 C.F.R. §§ 541.100(a)(1) (executive), 541.200(a)(1)(administrative); 541.300(a)(1)(professional).

<sup>48</sup> “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule,” Department of Labor Wage and Hour Division, 29 CFR Part 541, Federal Register Vol. 80, No. 128 (July 6, 2015) at 38524 (citing 69 FR 22165).

<sup>49</sup> <http://www.whitehouse.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr>. 11. See <http://www.census.gov/hhes/www/poverty/data/threshld/index.html>.

<sup>50</sup> <https://www.epi.org/publication/trump-overtime-proposal-april-update/>.

worked in a workweek,” and Agency staff has informed Towards Justice that even though that same limitation does not exist elsewhere in Section 5, the Agency also applies it to the administrative employee exemption. But the absurd result of the current rule is that employers can easily label low-wage employees as administrative, executive, or professional staff, claim those employees are exempt from the protections of the Minimum Wage Order, and pay them a salary that is no more than minimum wage for all wages worked, without any overtime, and “professional” employees can apparently be paid *less* than minimum wage.

This entire scheme is inconsistent with the Agency’s mandate and the original purposes of the EAP exemption, which is intended to apply solely to employees who exercise the discretion and have the bargaining power consistent with their exempt status. Indeed, implementing a minimum salary threshold is even more consistent with the Colorado EAP exemption than it is with the FLSA EAP exemption. The FLSA’s EAP exemption is statutory, meaning that the regulatory minimum salary threshold is a gloss on the statutory exemption.<sup>51</sup> In Colorado, however, the EAP exemption is a creature of regulation, which means that the minimum salary threshold need not be tied in any way to Colorado’s duties test. Instead, in deciding what minimum salary to adopt, the Agency should be guided by Title 8’s statutory mandate to protect workers and by the compelling empirical evidence that supports expansion of overtime protections to hundreds of thousands of currently exempt Colorado workers.

**C. The CDLE should restore the rights to overtime that many Colorado workers formerly enjoyed under the FLSA by implementing a minimum salary basis of 2.5 times State minimum wage for exemption under Section 5 of the Wage Order.**

At the inception of the FLSA salary basis, the salary threshold for overtime exemption was set at a ratio of three times the minimum wage<sup>52</sup> and 62 percent of workers were automatically eligible for overtime pay nationwide. By contrast, in 2018, only 7.7 percent of Colorado workers were automatically eligible for overtime.<sup>53</sup> A salary threshold of 2.5 times the minimum wage would restore or improve the overtime rights of close to 400,000 Coloradans.<sup>54</sup>

Furthermore, in 1975, the FLSA salary basis was more than four times the poverty

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<sup>51</sup> See *Nevada v. United States Dep’t of Labor*, 275 F. Supp. 3d 795, 806 (E.D. Tex. 2017). While Towards Justice believes that *Nevada* was wrongly decided, that case is helpful for these purposes because it illustrate a potential limitation on federal regulatory authority to establish a minimum salary threshold that does not apply to the CDLE.

<sup>52</sup> *New Inflation-adjusted Salary Test Would Bring Needed Clarity to FLSA Overtime Rules*, Ross Eisenbrey and Jared Bernstein (2014).

<sup>53</sup> See Comments from Bell Policy Center.

<sup>54</sup> This is still only about one third of the salaried workforce in Colorado, which totals approximately 1,237,000 workers.

line for a family of four. In 2018, a salary threshold of four times the poverty line for a family of four would be \$133,532. A salary threshold of 2.5 times the minimum wage would be less protective of Coloradans than the FLSA salary basis was originally meant to be, but it would bring Coloradans much closer to the promise of the FLSA's earlier overtime protections.

Finally, updating the threshold to 2.5 times minimum wage would recognize the importance of overtime protections and ensure that the EAP exemption is available only where appropriate. Historically, the minimum wage has been set at half of median wages.<sup>55</sup> By setting the minimum salary threshold above twice the median wage, the CDLE would recognize that overtime is the norm, not the exception, and that everyone except workers paid *more than* median wages should be entitled to it.

Updating the minimum salary threshold to the levels initially set by the federal Department of Labor makes sense considering the U.S. DOL's original understanding that "[a] weakness of the salary test is that increases in wage rates and salary levels over time gradually diminish its effectiveness."<sup>56</sup> By setting a minimum salary threshold of 2.5 times Colorado minimum wage the Agency would both update the original FLSA salary threshold for increases in wage rates while also ensuring that the Colorado's threshold adjusts with increases in Colorado minimum wage as determined by inflation pursuant to the Colorado constitution.

**D. States around the country are protecting their workers by raising the salary threshold to levels close to a minimum salary basis of 2.5 times the minimum wage in Colorado.**

By pegging its minimum salary for EAP exempt employees at 2.5 times the minimum wage, Colorado would be one of several states to recognize the importance of expanding overtime protections by substantially increasing the minimum salary threshold to historical levels.

Recently, the Washington Department of Labor and Industries announced its intention to increase the required annual salary for EAP exempt employees to 2.5 times the state minimum wage, which would result in a minimum salary climbing to about \$80,000 by

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<sup>55</sup> Arindrajit Dube. "Proposal 13: Designing Thoughtful Minimum Wage Policy at the State and Local Levels." THE HAMILTON PROJECT, available

at [https://www.hamiltonproject.org/assets/legacy/files/downloads\\_and\\_links/state\\_local\\_minimum\\_wage\\_policy\\_dube.pdf](https://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/state_local_minimum_wage_policy_dube.pdf).

<sup>56</sup> Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor at 8 (June 30, 1949).

2026.<sup>57</sup> A bill in the Massachusetts legislature would set its overtime threshold at the 40th percentile of earnings of full-time salaried employees in its census region.<sup>58</sup> Massachusetts' phase-in overtime threshold would increase annually by about \$10,000 until the threshold reaches \$64,000 in 2024. In Maine, another bill would increase the salary threshold to \$55,224 in 2022.<sup>59</sup> Both bills incorporate automatic updating by which the overtime threshold will increase after the schedule elapses.

Finally, in New York City, the salary threshold for 2019 is \$58,500.<sup>60</sup>

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<sup>57</sup> See pre-draft rulemaking at <https://lni.us.engagementhq.com/1659/documents/2620>; see also “Washington State Set to Substantially Increase the Salary Required for Exempt Status and Make Other Changes to White Collar Exemptions,” *The National Law Review* (January 14, 2019) available at <https://www.natlawreview.com/article/washington-state-set-to-substantially-increase-salary-required-exempt-status-and>.

<sup>58</sup> Massachusetts S.B. No. 1092, (filed January 16, 2019), available at <https://malegislature.gov/Bills/191/S1092>.

Beginning January 1, 2021, the overtime threshold rate shall be no less than \$35,000; beginning January 1, 2022, the overtime threshold rate shall be no less than \$45,000; beginning January 1, 2023, the overtime threshold rate shall be no less than \$55,000; beginning January 1, 2024, the overtime threshold rate shall be no less than \$64,000. Beginning January 1, 2025, and each January 1 thereafter, the overtime threshold rate shall be no less than the higher of the following rates: the annual earnings of a full-time employee employed for 2080 hours per year at 2 times the minimum wage established under section 1 of this chapter, or the overtime threshold rate from the preceding year increased by the percentage annual increase, if any, in the second quartile of the usual weekly earnings for full-time wage and salary workers, or its successor index, as published by the United States Department of Labor, Bureau of Labor Statistics, or its successor agency, with the amount of the overtime threshold rate increase rounded to the nearest dollar.

<sup>59</sup> “An Act To Restore Overtime Protections for Maine Workers,” H.P.311, House of Representatives, January 29, 2019, Available at <http://legislature.maine.gov/legis/bills/getPDF.asp?paper=HP0311&item=1&snum=129>.

A salaried employee who works in a bona fide executive, administrative or professional capacity and whose regular compensation, when converted to an annual rate, meets or exceeds 3000 times the State's minimum hourly wage or the rate established in this paragraph or the annualized rate established by the United States Department of Labor under the federal Fair Labor Standards Act, whichever is higher. Beginning October 1, 2019, the rate is \$33,000; beginning January 1, 2020, the rate is \$40,408; beginning January 1, 2021, the rate is \$47,816; and beginning January 1, 2022, the rate is \$55,224. On January 1, 2023, and each year thereafter, the rate must be increased by the percentage annual increase, if any, in the 2nd quartile of usual weekly earnings for employed full-time wage and salary workers as published by the United States Department of Labor, Bureau of Labor Statistics, or its successor agency, with the amount of the rate increase rounded to the nearest dollar; and SUMMARY This bill annually raises the minimum salary that an employee who works in an executive, administrative or professional capacity must earn in order for that employee to be exempt from the laws governing the minimum wage and overtime pay until it is \$55,224 on January 1, 2022.”

<sup>60</sup> <https://www.labor.ny.gov/legal/counsel/pdf/administrative-employee-overtime-exemption->

**E. The insufficiency of alternative metrics for selecting a minimum salary basis reinforces why 2.5 times the minimum wage is appropriate.**

**i. Setting the salary threshold at two times the minimum wage is not enough.**

A minimum salary of two times the minimum wage would not be sufficient. First, as explained above, the minimum wage has historically been set at around half of median wages. By setting a salary threshold at two times the minimum wage, the CDLE would thus be permitting workers paid only median wages to be exempt from overtime. Exemption from overtime, however, should be the norm, not the exception. Only workers making substantially over median wages should fall within the EAP exemptions in Section 5.

Additionally, a salary threshold of twice the minimum wage would fall far behind the FLSA's original intent. About 65 percent of the salaried workforce in the U.S. was automatically eligible for overtime in 1975. In order to cover the same share of workers in Colorado today, the salary threshold would have to be \$1,327 a week, or \$63,696 annually,<sup>61</sup> which is greater than 2.5 times the minimum wage, and substantially greater than twice the minimum wage.

Finally, a salary threshold of 2 times the minimum wage would fall below the Obama Department of Labor's proposed rule. As explained below, under the Obama proposal, the minimum salary threshold for 2020 would be \$51,000. Twice the minimum wage in Colorado in 2020, however, would only amount to only about \$49,000.

**ii. The Obama administration's proposed salary basis would not be protective enough of Colorado workers.**

The Obama administration's Department of Labor proposed a salary threshold that would have started at \$47,476 in 2016 and increased every three years to \$51,000 in 2020, \$55,000 in 2023, and \$59,000 in 2026. If the CDLE chooses a salary basis of \$51,000 in 2020, to mirror the Obama salary threshold, that would not be protective enough of Colorado workers.

The Obama salary threshold was a conservative benchmark created to apply to all 50 states, including states with much lower costs of living than Colorado. The proposed salary threshold, initially \$47,476 in 2016, was tied to the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, the South.<sup>62</sup> Colorado's state salary

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[frequently-asked-questions.pdf](#).

<sup>61</sup> Heidi Shierholz, "It's time to update overtime pay rules," Economic Policy Institute (July 9, 2014) available at <https://www.epi.org/publication/ib381-update-overtime-pay-rules/>.

<sup>62</sup> U.S. Department of Labor, Wage and Hour Division, "Final Rule: Overtime."

threshold should be higher than the Obama DOL's one-size-fits-all minimum salary basis.

Indeed, a salary threshold in Colorado of 2.5 times the minimum wage would closely parallel the Obama DOL's methodology because the 40th percentile of earnings of full-time salaried workers in the West census region, to which Colorado belongs, is projected to be \$61,013 annually in 2020.<sup>63</sup>

**iii. Adopting the Trump administration's proposed salary basis would be even more inadequate and would fail to protect Colorado workers.**

The Trump administration's proposed salary basis is \$35,308 annually in 2019. This much lower salary basis tracks the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region in the country. Colorado adopting the 20th percentile of earnings from the lowest wage region in the U.S. as its salary basis, when Colorado's earnings are much higher, would make the state salary basis unacceptably low.

The CDLE must set a salary threshold that meaningfully distinguishes "bona fide" executive, administrative, and professional workers from workers entitled to overtime. The Economic Policy Institute projects that Trump DOL's proposed rule would entitle only an estimated 8 percent of the salaried workforce in Colorado to overtime; by comparison, the original FLSA salary basis automatically entitled 62 percent of workers nationwide to overtime. A salary threshold that protects only 8 percent of salaried workers in the state does not protect the rights of the majority of workers to overtime compensation for extra hours worked, as the overtime laws were intended. The Trump salary threshold does not achieve that goal, and the CDLE should decline to adopt it.

**iv. Adopting a salary basis of \$43,360 in 2020, calculated by multiplying the minimum wage by 60 hours in a work week (with 20 hours at time-and-a-half compensation) by 52 weeks in a year, is not a good solution.**

Another possibility would be to approximate the minimum salary owed to workers based on the minimum wage rate plus some approximation of overtime premiums owed in a workweek with substantially more than 40 hours. For example, in 2020, a minimum wage Colorado worker who works 60 hours in one week and is not exempt from overtime should be paid at least \$43,460, including minimum wages and overtime premiums. This minimum threshold would be inadequate.

Workers who are making minimum wage should not be exempted from overtime. That minimum hourly rate is not consistent with the degree of discretion, autonomy, and bargaining power of an EAP exempt worker. Plus, far too many salaried employees work more than 60 hours in a workweek. Setting the salary basis using this formula would leave

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<sup>63</sup> See EPI's public comments to the CDLE. David Cooper, Economic Policy Institute, "Updating Colorado's overtime salary threshold" (August 16, 2019).



thousands of workers with a salary of \$43,360 working 70 hours a week and receiving minimum wages for 60 of those hours, with absolutely no compensation for the rest of the hours they worked.

**F. Salaried employees reached out to the Agency directly to ask that the Agency start valuing their time and physical and mental health by restoring their rights to overtime.**

One assistant general manager at a restaurant on the Western Slope said:

We employ a team of salaried kitchen supervisors, food & beverage managers and hotel managers that all make salaried wages. Because of the lack of housing in our community, the workforce has shrunk over time forcing our salaried managers to put in longer hours. Because we are not required to pay them overtime, there are many weeks out of the year that they face grueling work schedules. We are in jeopardy of having them quit due to exhaustion, lack of morale and being underpaid.

One non-profit worker in Frisco said:

We need to stop normalizing the belief that the busier you are, the more important you are. If a job and tasks can't be completed during business hours, then the employer needs to rethink the way they do business. These changes would allow people to take better care of their personal health by giving them the time they need to de stress and exercise - which in the long run leads to better productivity and less time away from the job because of health issues.

One social worker and graduate student at the University of Denver said:

As a social worker, it can be easy to fall into the trap of working 60+ hours per week for no pay, because we as a profession are dedicated to the greater good. Making professional-level salaries at least 2.5x the minimum wage allows us to demand fair pay given the emotional labor and educational requirements of our field. It prevents us from getting burned out or providing sub-par service to those who may already have trouble accessing quality services.

## **VI. Other Proposed Changes to the Minimum Wage Order**

**A. The substantive protections of the Wage Order must be improved to fulfill the Agency's mandates under Title 8.**

Colorado's current break laws and overtime premiums predicated on the 12-hour workday are insufficient. The Wage Order used to provide for an 8-hour work day and overtime compensation for hours worked in excess of 8 a day. *See* Minimum Wage Order No. 6, 622-24 State Capitol Annex, Industrial Commission of Colorado Minimum Wage Division

(“Time worked in excess of eight (8) hours in a twenty-four (24) hour calendar day (permitted only in case of emergencies (or) conditions demanding immediate action) shall be paid for at the rate of time and one-half the employee’s regular hourly rate.”).

The Agency should return to this policy to protect workers, employers, and the economy and to further the policy goals of overtime. Colorado’s current daily overtime threshold is uniquely high. It cuts against worker health and morals, increases overwork and its deleterious effects, eviscerates the work/life balance, and does not provide the fair compensation that workers should receive. Additionally, the 12-hour overtime threshold undermines the second policy goal of overtime--reducing unemployment by encouraging employers to hire more workers instead of overworking those already employed--by allowing employers to prescribe 11.5 hour work days at no additional cost to the employer.

Colorado is the only state that provides for daily overtime compensation at a threshold higher than 8 hours. Every other state law that provides for daily overtime compensation is more protective of workers than Colorado’s Wage Order. California, Alaska, and Nevada all require overtime premiums to kick in at 8 hours of work in a day. In California, workers are entitled to 1.5 times their regular rate of pay at 8 hours in the day and two times their regular rate of pay at 12 hours in the day. Cal.Labor Code D. 2, Pt. 2, Ch. 1, § 510. See also California’s Phase-In Overtime for Agricultural Workers Act of 2016, *supra*, which provides for time-and-a-half compensation to agricultural workers for hours worked in excess of 8 as of 2022. The FLSA also entitles covered workers to overtime compensation at 8 hours in the day, and Colorado law should be more protective of workers than federal law requires.

The Agency should return to the 8-hour daily overtime threshold and adopt California’s overtime premium scale. However, at the very least, the agency must make the protections of overtime and breaks available to everyone, particularly agricultural workers and construction workers.

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