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To: Michael Primo, Rule Coordinator, Office of Labor Market Information
From: Tyler Jaeckel, Director of Policy and Research, on behalf of the Bell Policy Center
Date: August 16, 2019
Re: CDLE Request for Information on the Colorado Minimum Wage Order Rule

The Bell Policy Center submits these comments in response to the Colorado Department of Labor and Employment's (CDLE) request for stakeholder feedback on the Colorado Minimum Wage Order (Wage Order) regulation, 7 CCR 1103-1.

The Bell Policy Center's mission is to ensure economic mobility for every Coloradan. We strive to ignite a conversation that inspires communities and their leaders to transform Colorado into a state where everyone thrives. Founded in 2000 to address the need for quality research and analysis that drives effective policy solutions to Colorado's challenges, we have provided research and recommendations that have led to new education programs, higher wages, advancements in human services, and better consumer protections. We address the intersecting forces affecting economic mobility in Colorado:

1. Growing economic inequality
2. Changing demographics
3. Technology's effects on how we work and learn
4. Lack of public investment

We are a leading provider of credible research and information on economic opportunity issues, a thought and change leader on fiscal issues, and a leader in practical policy changes that advance economic mobility.

Colorado has a tremendous opportunity to join the growing momentum around the country to update the state's Wage Order to better reflect the historic intent of a salary threshold for overtime eligibility and to change the Wage Order to reflect a presumption of coverage that will greatly benefit employees across Colorado and bring Colorado in line with a vast number of other states. By taking these steps, Colorado will ensure there are fair protections and benefits for employees across industries; provide employees with they pay they deserve for excessive time worked or ensure employees are able to possess one of the most important opportunities in life — personal time; and modernize the Wage Order to reflect the changes of the Colorado economy.

The time to take these steps is now, as the economy continues to change and the protections and benefits once afforded to employees continue to fall far behind. As outlined in our following comments, we are recommending the Colorado Department of Labor and Employment make two overall changes to the Colorado Minimum Wage Order (Wage Order) regulation, 7 CCR 1103-1:

1. **Update Colorado's overtime threshold to 2.5 times the state minimum wage** to better reflect the historic intent of the salary threshold of only exempting highly paid, bona fide executive, professional, and administrative employees; and,
2. Align Colorado's Wage Order with most states across the country **by having Colorado's Wage Order presumptively cover everyone** and ensure that all employees can benefit from a minimum wage, rest- and meal-breaks, and overtime.

I. Updating Colorado's Overtime Threshold to 2.5x State Minimum Wage

It's simple: Employees should get paid properly for the hours they work or be provided with the time off they need to raise their kids, support their families, engage in further education and training, enjoy the great outdoors, and give back to their communities.

However, many salaried employees in Colorado are not paid for the hours they work over the standard 40-hour work week. That's because many are classified as management employees who are exempted from overtime pay under federal and state law. But this exemption — referred to the "white collar" or EAP exemption — is intended to apply to "bona fide" executives, administrators, and professionals who set the rules and policies governing the workplace, not every employee who may have "manager" in their job title.

There are two ways to determine whether the exemption for overtime pay applies to employees. One is to review the employees' duties to determine if they perform executive, administrative, and professional functions that separate them from other salaried employees. Because it is difficult to distinguish between positions based solely on an analysis of the duties performed, a second test based on the employee's salary was added. It was based on the observation that bona fide executives, administrators, and professionals would clearly be paid more than the average employee.

The salary test created a threshold that indicates employees earning less than that amount are not likely to be performing the duties that would exempt them from overtime pay. In setting the federal salary threshold in 1958, the U.S. Department of Labor Administrator concluded, "employees that do not meet the salary test are generally also found not to meet the other requirements."¹

A. Current Salary Threshold for Overtime Pay

The federal salary threshold for overtime pay has not been fully adjusted to reflect the effects of inflation since 1975 and currently stands at \$455 per week or \$23,660 per year.² Clearly, an amount far below the salaries paid to bona fide executives, administrators, and professionals.

Furthermore, Colorado law exempts administrative, executive, and supervisory employees, plus professional and outside salespersons, other salespersons, parts persons and mechanics; commission salespersons; certain ski industry employees, and medical transportation employees.³

Colorado's salary threshold for exempting executive, administrative, and professional employees from overtime pay is set at the state's minimum wage for all hours worked in a week. The 2019 minimum wage is \$11.10 per hour or \$444 per 40-hour week. Because it is lower than the federal salary overtime threshold of \$455 per week, the federal threshold applies in Colorado for employees covered by the federal Fair Labor Standards Act (FLSA). When Colorado's minimum wage moves to \$12.00 per hour on January 1, 2020, the minimum wage will equal \$480 per 40-hour week and will become the new overtime salary threshold for Colorado salaried employees.

Based upon a review of wages, industries, and the history of FLSA's intent, a standard of the Colorado's minimum wage is an extremely inappropriate threshold for determining which employees are bona fide executives, administrators, and professionals who should be exempted from overtime pay. Based upon the Bell's analysis of low-wage employees in Colorado, Colorado employees in low-wage jobs have lower educational attainment levels than those in higher paying jobs and employees overall,⁴ are more likely to live in poverty than families of employees in higher wage jobs, and are more likely not to have health insurance.⁵ These are not common characteristics of high paying executive, administrative, nor professional occupations. Combined with the fact most low-wage jobs are entry-level positions, Colorado must develop a more appropriate standard that reflects the ever-changing economy.

B. Setting a New Salary Threshold for Colorado

In setting an updated threshold for determining exemptions from overtime, we recommend CDLE examine the overall wages of employees in Colorado and how the threshold can be tied to a common metric that adjusts with changes within the economy over time. Because the minimum wage will adjust over time, using a multiple of the state's minimum wage will be helpful measure moving forward and is consistent with the chosen paths of other states.

Colorado's Overall Wages & Proposed Threshold

Historically, the minimum wage has been set at half the median wage.⁶ This reflects the entry-level nature of most minimum wage jobs and the inexperience of the employees that generally hold these positions. In 2018, the median wage paid to all occupations was \$20.34 per hour or \$813.60 per 40-hour week.⁷ This represents the midpoint of the wage range for all jobs in Colorado or the average wage for the average job. Colorado's 2018 minimum wage of \$10.20 per hour equaled 50 percent of Colorado's 2018 median wage. Two times the minimum wage is equal to Colorado's median wage.

But bona fide executives, administrators, and professionals should be paid more than the "average wage" to reflect their additional duties, skills, and the added responsibilities they have in the workplace. In 2018, three times the minimum wage equaled \$30.60 per hour, \$1,224 per 40-hour work week, and \$63,648 per year. This amount equaled 150 percent of Colorado's 2018 median wage of \$20.34 per hour and is a much better reflection of the pay a bona fide executive, administrative, and professional would expect.

Additionally, three times the minimum wage is consistent with where the salary threshold was set historically.⁸ For example, when the threshold was first established in 1940, it was set at an amount equal to 2.73 times the minimum wage.⁹ In 1975, the last time the threshold was fully adjusted for inflation it was set at 3.1 times the minimum wage, an amount equal to 1.57 times the 1975 median wage.¹⁰

If we look ahead to 2020, Colorado's minimum wage will equal \$12.00 per hour. If the median wage increases at the average rate of wage growth over the past five years, 2.7 percent per year, it will total \$21.45 per hour. If it increases at the rate it did between 2017 and 2018, 3.5 percent per year, it will total \$21.77 per hour.

As the table below shows, based on these estimates, setting the salary threshold at 2.5 to three times the minimum wage would be equal to between 138 percent to 168 percent of Colorado's estimated median wage. This is an appropriate wage that reflects the salaries paid to bona fide executives, administrators, and professionals.

TABLE 1: APPROACHES TO SETTING A NEW OVERTIME SALARY THRESHOLD

	Median Wage (2.7% increase)		Median Wage (3.5 % increase)	
	Hourly	Salary Equivalent	Hourly	Salary Equivalent
3x Minimum Wage	\$36.00	\$74,880	\$36.00	\$74,880
Median Wage	\$21.45	\$44,616	\$21.77	\$45,282
Ratio of salary threshold to median wage	168%			165%
2.5x Minimum Wage	\$30.00	\$62,400	\$30.00	\$62,400
Median Wage	\$21.45	\$44,616	\$21.77	\$45,282
Ratio of salary threshold to median wage	140%			138%

The salary threshold is a bright line indicating the employees which should be exempt from overtime pay and which ones should not. It is easier to identify a bona fide executive, administrative and professional employee based on pay rather than through a detailed examination of their duties. When setting the threshold, it should be well above the median wage paid to the typical non-supervisory employee.

Average Salaries in Industries & Professions Support an Increased Threshold

Using Occupational Employment Wage Survey for Colorado 2018, the Bell Policy Center examined salary and wage information for salary levels of occupations that should likely be exempt from overtime based upon either their non-entry level roles as bona fide executives, administrators, and professionals. This analysis confirms a threshold of 2.5 to three times the minimum wage would be an appropriate, if even conservative, measure of bona fide executives, administrators, and professionals. Considering the intent of the FLSA overtime threshold was to only exempt a very select group of employees, it may also be interpreted that many of the following occupations should still be covered by an overtime threshold. The median and mean salaries for the following occupations were all over a proposed salary threshold of 2.5 times the minimum wage, or a \$62,400 salary in 2020.

TABLE 2: OCCUPATIONS MORE LIKELY TO BE BONA FIDE EXECUTIVES & ADMINISTRATORS

Occupation	Median	Mean	Experienced	75th %	90th %
Chief Executives	\$180,185	\$198,127	\$208,000+	N/A	N/A
Administrative Services Managers	\$113,315	\$119,650	\$143,132	\$145,803	\$181,772
Advertising and Promotions Managers	\$121,844	\$122,971	\$148,523	\$141,584	\$181,070
Computer and Information Systems Managers	\$153,783	\$164,216	\$193,676	\$191,156	N/A
Construction Managers	\$89,189	\$97,169	\$114,987	\$116,766	\$151,209
Financial Managers	\$145,997	\$163,741	\$197,502	\$194,903	N/A
Food Service Managers	Confidential	Confidential	Confidential	Confidential	Confidential
General and Operations Managers	\$107,130	\$131,920	\$170,585	\$169,966	N/A
Industrial Production Managers	\$117,194	\$128,377	\$155,688	\$155,937	\$203,101
Lodging Managers	\$74,815	\$82,504	\$98,141	\$98,003	\$131,607
Managers, All Other	\$127,747	\$138,491	\$165,128	\$161,508	\$207,399
Marketing Managers	\$161,875	\$169,630	\$203,690	\$199,691	N/A
Medical and Health Services Managers	\$108,653	\$118,543	\$142,401	\$138,033	\$181,792
Natural Sciences Managers	\$127,077	\$141,753	\$167,655	\$164,200	N/A
Public Relations and Fundraising Managers	\$128,326	\$136,990	\$163,881	\$163,209	\$204,601
Purchasing Managers	\$134,819	\$144,086	\$165,400	\$162,733	\$201,677
Sales Managers	\$145,526	\$160,318	\$193,559	\$192,835	N/A
Social and Community Service Managers	\$78,719	\$84,355	\$101,176	\$103,532	\$131,572
Training and Development Managers	\$113,532	\$122,310	\$144,413	\$144,944	\$179,947
Transportation, Storage, and Distribution Managers	\$108,720	\$118,575	\$139,457	\$136,892	\$174,872

Source: Occupational Employment Wage Survey for Colorado 2018, Colorado Department of Labor and Employment

TABLE 3: OCCUPATIONS MORE LIKELY TO BE BONA FIDE PROFESSIONALS

Occupation	Median	Mean	Experienced	75th %	90th %
Aerospace Engineers	\$115,528	\$124,068	\$149,645	\$156,344	\$196,583
Agricultural Engineers	\$81,878	\$82,565	\$96,104	\$95,384	\$113,964
Biomedical Engineers	\$95,834	\$96,879	\$111,393	\$116,735	\$133,091
Chemical Engineers	\$94,738	\$100,670	\$124,232	\$128,898	\$161,628
Electrical Engineers	\$97,399	\$100,554	\$119,123	\$123,467	\$152,394
Engineers, All Other	\$111,019	\$111,610	\$130,246	\$136,746	\$160,085
Environmental Engineers	\$92,272	\$98,352	\$115,388	\$120,189	\$151,179
Financial Analysts	\$90,062	\$109,124	\$136,314	\$127,115	\$201,629
Industrial Engineers	\$97,123	\$100,463	\$117,266	\$121,088	\$146,451
Management Analysts	\$86,560	\$94,095	\$112,830	\$112,569	\$148,757
Petroleum Engineers	\$136,582	\$153,635	\$187,577	\$187,145	N/A
Lawyers	\$127,068	\$147,559	\$184,403	\$181,825	N/A

Source: Occupational Employment Wage Survey for Colorado 2018, Colorado Department of Labor and Employment

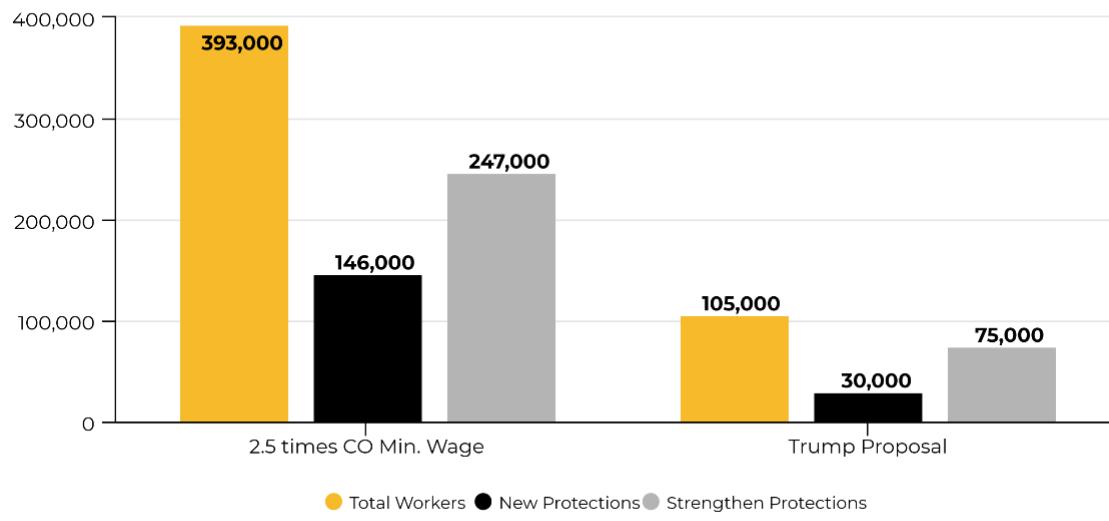
C. Close to 400,000 Coloradans Would Benefit From a 2.5x Minimum Wage Overtime Salary Threshold

Using data provided by the Economic Policy Institute (EPI), the Bell analyzed the different Colorado employees who would benefit from a proposed increased salary threshold of 2.5 times the state minimum wage. Because these estimates include FSLA exemptions to overtime rules for certain occupations and sectors which the current Colorado Wage Order does not incorporate, these are conservative estimates of the number of employees who would benefit from a proposed salary threshold increase.

Conservatively, an estimated 146,000 salaried employees would newly benefit from a threshold of 2.5 times minimum wage, or the salary equivalent of \$62,400. Another 247,00 salaried employees would have their protections “strengthened,” meaning they are likely currently eligible for overtime, but may be misclassified as exempt from overtime protections.

It is estimated this proposed threshold would benefit 288,000 more Coloradans than the current Trump administration’s proposal of \$35,308 for a full-year employee. As compared to the salaries provided in the previous section, it is clear that while the Trump administration’s proposal is an improvement from the current federal threshold, it is far short of being an adequate measure of bona fide executives, administrators, and professionals.

TABLE 4: BENEFITS OVER TRUMP PROPOSAL

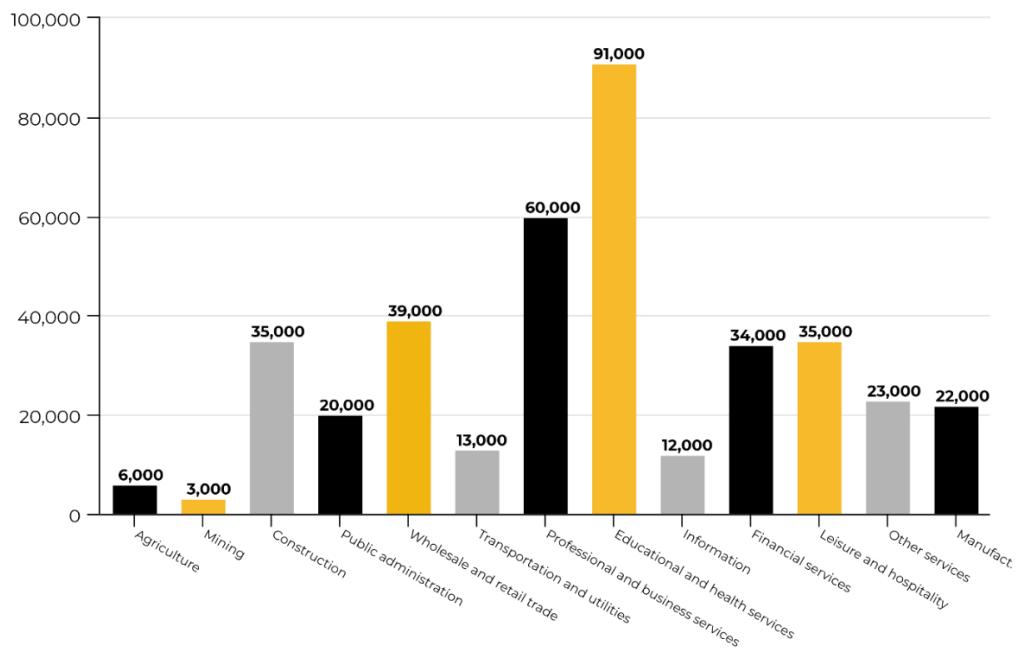


Source: Economic Policy Institute Analysis of Colorado using EPI Overtime Model

An increased salary threshold would benefit employees across industries in Colorado, with a particular benefit to employees within the education and health industries.¹¹ As the Bell has detailed in reports on the early childhood care workforce and the long-term care workforce, these are vital industries where overtime protections can ensure the time of employees is protected or employees are receiving adequate pay for the time they work.¹²

In time-demanding industries such as these, a week of sizable overtime hours for salaried employees making near the Trump proposal of \$35,308 a year could mean an employee's effective hourly wage rate is at or below the Colorado minimum wage.¹³ Without overtime protections, moving employees to salaried roles might allow employers to bypass minimum wage standards.

TABLE 5: BENEFITS BY INDUSTRY

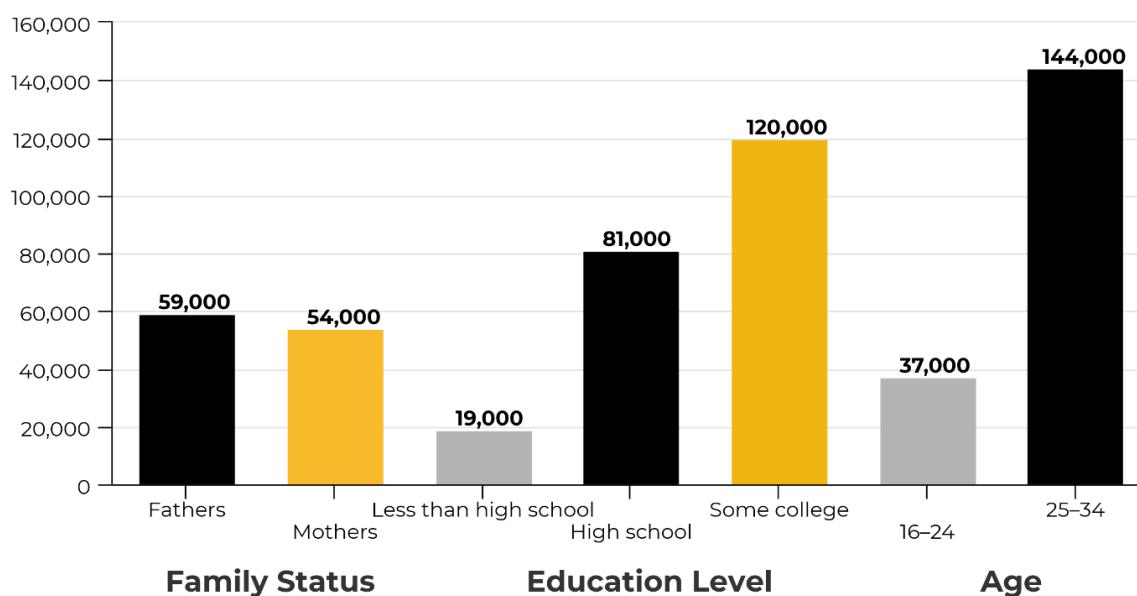


Source: Economic Policy Institute Analysis of Colorado using EPI Overtime Model

D. Strong Benefits to Coloradans & Colorado Economy by Raising Overtime Salary Threshold

In addition to the benefits to employee health, employee productivity, and overall consumer spending power, an increased salary threshold will have particular benefits to employees who are raising a family, pursuing further work advancement and education opportunities, and those who may be susceptible to pressures to work extreme hours.

TABLE 6: BENEFITS TO SPECIFIC GROUPS



Source: Economic Policy Institute Analysis of Colorado using EPI Overtime Model

Employees Raising Families

It's estimated more than 40 percent of the employees benefiting from the proposed threshold would be parents. About 60,000 fathers and 55,000 mothers would either receive new protections or gain strengthened protections. By either providing parents with more time to spend with their families or more pay to support their families based upon the hours they work, the proposed salary threshold will help to create a better work-family balance in the state. This change can have lasting benefits to physical health, decreased family conflict, and allow for greater family growth.¹⁴

Employees Pursuing Career Advancement & Education Opportunities

It's estimated more than 56 percent of the employees benefiting from the proposed salary threshold have less than a college degree. Around 100,000 of these individuals have a high school degree or less. Ensuring employees have time beyond a 40-hour work week to pursue skills development, secondary education, or other forms of education is vital to career advancement and ensuring that Coloradans are able to experience economic mobility. Based upon conversations with career advancement programs, many providers have stated their students are working in full-time positions.¹⁵ Colorado continues to be a leader in the development of workforce development programs, stackable credentials, and connections to higher education, and the proposed salary threshold rule will help to advance Colorado's larger higher education achievement and workforce development goals.¹⁶

Age Groups Susceptible to Pressures to Work Extreme Hours

The proposed threshold would benefit around 181,000 Coloradans aged 16-35. For younger employees entering

the workforce, there can be incredible pressure to work extreme hours to both prove themselves or gain access to additional opportunities. While these opportunities can be incredibly valuable to these employees and career development opportunities should be encouraged, they should not come at the cost of overtime protections or make these positions impossible for other employees with more limited work schedules, such as parents, to pursue. Setting an appropriate overtime standard for employers across industries can ensure a cultural norm is established that either employees should get the adequate pay for the excessive hours they work, or employees should be given back their time to pursue their own career advancement opportunities.¹⁷

II. Presumptive Wage Order Coverage for All Employees in Colorado

The Bell Policy Center has continued to work on voter-approved measures to expand and increase the minimum wage in Colorado. These expansions and increases have been integral to ensuring that employees across Colorado enjoy the benefits of the minimum wage. We believe it is also important employees across industries and regions of Colorado enjoy the additional benefits of rest and meal breaks and overtime.

Because Colorado's Wage Order doesn't presumptively cover all employees, it's confusing to determine which employees are covered and why other employees aren't.¹⁸ A standard that requires explicit justification for exemptions would increase fairness for Colorado employees, increase transparency regarding the reasoning for certain exemptions, and give all Coloradans greater clarity with regards to who is and who is not covered under the Wage Order.

Under the current Wage Order, many employees are not provided basic protections. These employees include those in the agricultural, construction, and manufacturing industries. Given the toiling nature of these occupations, coverage under the Wage Order is essential for ensuring working conditions are safe and humane for employees in these industries. Based upon a review of American Community Survey and Current Population Survey data, there are over 430,000 estimated employees within these three industries who are not likely covered.

TABLE 7: MAJOR INDUSTRIES

Industries Not Covered	
Agriculture, forestry, fishing, hunting	58,019
Construction	180,302
Manufacturing	191,809
Total Employees Not Covered	430,130

Based upon the continued intent of minimum wage protections and the need to cover areas of Colorado's economy where some of the arduous work occurs, the Bell recommends presumptively covering all employees so that all employee cans benefit from minimum wage, rest- and meal-breaks, and overtime.

III. Conclusion

CDLE has a valuable opportunity to make two major improvements to the Wage Order. It's time Colorado updates the salary threshold to reflect its historic intent. Colorado also needs to extend the Wage Order to cover industries and employees that are in critical need of the benefits provided through the Wage Order.

There have been many technological innovations that have changed the nature of work over the past two centuries of American history, but one tenant has remained consistent through all of this change: Workers deserve to be paid for the excessive hours they work or they should be provided with personal time, one of the most valuable resources available to employees.

Setting the overtime threshold at 2.5 times the minimum wage is a good start for Colorado and is consistent with other states around the country. It's also consistent with the salaries and wages within the Colorado economy.

Thank you for the opportunity to submit comments on the rule. Please do not hesitate to contact the Bell Policy Center if you have questions about our comment and analysis.

¹ Jared Bernstein & Ross Eisenbrey. "New inflation-adjusted salary test would bring needed clarity to FLSA overtime rules," ECONOMIC POLICY INSTITUTE, 13 March 2014, available at <https://www.epi.org/publication/inflation-adjusted-salary-test-bring-needed/>.

² Samantha Saccomanno & Rich Jones. "The Benefit of Modernizing Colorado's Overtime Rules." THE BELL POLICY CENTER, May 2018, available at <https://docs.google.com/viewer?url=http://www.bellpolicy.org/wp-content/uploads/2018/05/Modernizing-Overtime-Rules-in-Colorado-FINAL.pdf>

³ Colorado Minimum Wage Order 35. 7 CCR 1103-1.

⁴ For example, 10 percent of employees in low-wage jobs have less than a high school diploma, compared to 3 percent of employees in high-wage jobs and 6 percent of employees overall. While 3 out of 10 employees in low-wage jobs have a maximum of a high school diploma or its equivalent (GED, for example), one-third of employees with high-wage jobs have the maximum of a bachelor's degree. See Rich Jones. "Colorado Employees in Low Wage Jobs." March 2019, available at <http://www.bellpolicy.org/2019/03/25/low-wage-jobs/>

⁵ *Id.*

⁶ 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

⁷ Data from CDLE LMI Gateway website, available at www.colmigateway.com.

⁸ See Bernstein report.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Because the data from the EPI models has already excluded occupations that are exempt under the FSLA, the "education" category does not include teachers or other education employees exempt under the FSLA.

¹² "Colorado's Caring Workforce." THE BELL POLICY CENTER, available at www.bellpolicy.org/2019/05/31/colorado-caring-workforce/.

¹³ If a employee worked more than 57 hours in a give week, they would effectively be making less than Colorado's minimum wage. As Colorado's minimum wage increases, the number of overtime hours resulting in a sub-minimum wage effective hourly rate will likewise decrease.

¹⁴ See Comments from the National Employment Law Project.

¹⁵ A numeric analysis of full-time employees within workforce development and secondary education programs could not be established for this response. Working with the Department of Higher Education, it is believed that some of this information could be produced by CDLE.

¹⁶ For an overview of the landscape of worker training and post-secondary programs, see Amanda Valenta. "Colorado's Emerging Post-Secondary and Workforce System." THE BELL POLICY CENTER, available at <https://docs.google.com/viewer?url=http://www.bellpolicy.org/wp-content/uploads/2019/04/Workforce-Ecosystem.pdf>.

¹⁷ Noam Scheiber. "President Obama's Overtime Pay Plan Threatens the 'Prada' Economy." The New York Times. 30 May 2016, available at <https://www.nytimes.com/2016/05/31/business/for-harried-assistants-overtime-rule-may-have-its-downside.html?mwrsm=Email&r=0>.

¹⁸ In attempting to estimate the number of employees covered and not covered by the Wage Order in Colorado, we could not feel confident in setting a number given the existing format, language, and exemptions within the Wage Order.