

# The Benefit of Modernizing Colorado's Overtime Rules

SAMANTHA SACCOMANNO, RICH JONES  
THE BELL POLICY CENTER • MAY 2018

## Introduction

It's simple: Workers should be paid for the hours they work. However, many salaried workers who work overtime miss out on valuable compensation when those hours are unpaid. Changing current rules to ensure these workers are accurately paid for the hours they work over 40 a week would boost their earnings, address the financial squeeze Coloradans face today, and help create a better work-life balance for many workers.

The 1938 federal Fair Labor Standards Act (FLSA) established two important rights for American workers: They must be paid at least a minimum wage (Colorado's is currently \$10.20 per hour); and if they work more than 40 hours per week, most must be paid overtime at time and a half. This law ensures workers can expect to work a reasonable schedule or be paid more for the additional hours they work. This is important because when employers acknowledge and value their employee's time, job satisfaction improves, turnover declines, and overall work performance increases.<sup>i</sup>

Originally passed in the depths of the Great Depression, FLSA and the regulations implementing it have undergone many changes over the years, resulting in fewer American workers being automatically eligible for overtime pay. Almost all hourly workers receive overtime pay, but salaried workers' eligibility depends on compensation and duties performed.

The most pressing problem with overtime regulations today is the salary level that determines whether salaried workers automatically qualify for overtime pay hasn't been fully adjusted for inflation in over 40 years. This puts roughly 92 percent of Colorado's salaried workers at risk of not receiving compensation for extra hours worked.

With average weekly wages in Colorado only up \$33 since 2000 after adjusting for inflation, the need to address stagnant wages is paramount.<sup>ii</sup> Adjusting the overtime salary level for inflation and guaranteeing Colorado's salaried workers collect overtime pay is one way to do this. Colorado policymakers have the power to boost wages and ensure overtime rights for workers by modernizing overtime pay rules and adjusting them to better reflect inflation. Governors can set a new salary threshold through rule, or the legislature could pass legislation setting a new salary threshold.

## History & Background

FLSA was enacted, in part, to encourage employers to hire more workers rather than require longer hours of those already employed. However, Congress determined minimum wage and overtime rules should not apply to "bona fide" executive, administrative, and professional (EAP) employees, and directed the Department of Labor to create rules to implement this exemption.

To determine which salaried workers should be exempt (i.e., ineligible for overtime pay) and nonexempt (i.e., eligible for overtime), a series of regulations were created to establish two tests based on work duties and salaries. The salary and duties tests were put in place to ensure average workers who were paid a salary received overtime pay, and only those who were truly executives, administrators, or professionals were exempted.

Extending overtime protections to many salaried workers is important, as most of these workers have limited bargaining power over their duties and schedules, and often work longer hours to avoid losing their jobs.

The EAP, or "white collar," exemption excludes "any employee employed in a bona fide executive, administrative, or professional capacity from receiving overtime pay." The reasoning behind the exemption is these employees don't need workplace protections since executives, managers, and administrators are the ones to set rules and policies governing the workplace.<sup>iii</sup>

Therefore, workers are excluded from receiving overtime pay if they meet each of the three tests:

- Be paid a salary
- Perform executive, administrative, or professional duties
- Earn more than the salary threshold, currently set at \$455 per week, or \$23,660 annually

The duties test was created to identify functions that executives, administrators, and professionals perform that separate them from other salaried workers. Because it's difficult to distinguish between different positions based solely on an analysis of the duties performed, it was determined "bona fide" executives, administrators, and professionals would clearly be paid more than the average worker.

The salary test created a threshold signifying all employees earning below that amount aren't likely to perform the duties that would make them exempt. In setting the salary threshold in 1958, the Department of Labor Administrator wrote, "Employees who do not meet the salary test are generally also found not to meet the other requirements..."<sup>iv</sup>

In 1938, the salary threshold started at \$30 a week. Since the FLSA's enactment, there have been periodic updates, but in recent decades, it hasn't fully reflected inflation.

In 1975, the Ford administration updated the salary threshold for inflation and set it at \$250 a week for those workers who met a general test of duties — the short test — indicating they met the EAP exemption. It was set at \$155 per week for those who met a more detailed test of duties — the long test — showing they were executives or administrators, and \$170 per week for professional employees. This was the last time an update to the salary threshold accurately reflected inflation. When adjusted for 2017 dollars, these amounts equal \$1,036, \$642, and \$704, respectively.

In 1980, the Carter administration issued a rule to raise the salary threshold yet again, but that rule was never implemented, and was later withdrawn by the Regan administration.<sup>v</sup>

In 2004 during George W. Bush's time in office, his administration consolidated the two duties tests into one and increased the salary threshold, but only to \$455 a week (or \$23,660 annually). The result made it easier to exclude more workers from receiving overtime pay under the EAP exemption. While the Bush administration updated the salary threshold, it did not fully account for inflation. For example, the 1975 short test threshold of \$250 per week equaled \$798 per week in 2004 dollars, and the long test threshold of \$155 per week equaled \$495 in 2004 dollars. Both amounts are far higher than where the threshold was set.

Because the salary threshold was set so low, it was difficult for many workers to qualify for overtime pay and excluded many of those for whom the overtime rules aimed to help. Additionally, the 2004 threshold was not indexed for inflation, and has remained at \$455 a week for the past 14 years. Had it been indexed for inflation, the \$455 a week threshold would be \$592 in 2017.

In 2016, the Obama administration issued a rule to raise the salary threshold to \$913 per week, or \$47,476 a year, partially restoring it to the 1975 level when adjusted for inflation. A federal district court in Texas prevented its implementation and ruled it invalid.

Had this rule been implemented, 250,000 more Colorado salaried workers would automatically qualify for overtime pay today. This would put more than \$517,000 per week in the pockets of mostly middle class workers, boosting Colorado's economy.

Updating the salary threshold is vitally important as only 7.7 percent of Coloradans currently automatically qualify for overtime pay, compared to the 62 percent nationally who automatically qualified in 1975.<sup>vi</sup> The Trump administration abandoned Obama's rule, but signaled they would introduce a new rule with a much lower threshold; however, they have not yet acted to revise the rule.

### What Other States Are Doing

States, however, have the power to issue their own rules if they exceed the federal minimum standards, and some have begun to act. Pennsylvania's Governor recently directed the Pennsylvania Department of Labor and Industry to modernize the state's overtime rules, gradually phasing them in over four years. Pennsylvania's salary threshold will gradually increase from \$455 per week, or \$23,660 annually, in 2018 to \$921 per week, or \$47,892 annually, by 2022. The salary threshold will then be updated automatically every three years based on inflation.<sup>vii</sup>

Several states, including Alaska, California, Maine, New York, and Oregon, peg their overtime salary threshold to their minimum wage. As the states' minimum wages increase, so do their salary thresholds for overtime pay. As a result, Alaska's overtime salary threshold increased in 2018 to \$40,934 per year. California's overtime salary threshold is slowly increasing from \$45,760 in 2018 to \$62,400 in 2022 as its minimum wage is set to increase. Maine's went from \$27,000 to \$30,000 in 2018, New York's (outside of New York City and its suburbs) went from \$40,560 to \$43,264 in 2018.

Maryland, Rhode Island, and Vermont introduced bills in their legislatures that would also raise the overtime salary threshold. Due to the lack of action on the federal level, more states are expected to act themselves. Colorado could take a similar leadership role on this issue.

## What Colorado Can Do

Colorado sets its overtime policy through rules issued by the Division of Labor Standards and Statistics within the Colorado Department of Labor and Employment (CDLE) (C.R.S. 8-6-111(4)) The governor can direct CDLE to set a new salary threshold through rule. The legislature could also pass legislation to establish a new salary threshold or direct CDLE to set one.

Minimum Wage Order 34, currently in effect, requires that covered non-exempt employees be paid time and one-half of the regular rate of pay for any work in excess of:

1. 40 hours per workweek;
2. 12 hours per workday; or
3. 12 consecutive hours without regard to the start and end time of the workday.

The employee is entitled to be paid “whichever calculation results in the greater payment of wages.”

The order defines and exempts the following employees from overtime provisions: administrative employee, executive, or supervisor; professional and outside salespersons; certain salespersons, parts-persons, and mechanics; commission sales persons; certain ski industry employees; and medical transportation workers.<sup>viii</sup>

To be exempt from overtime pay in Colorado, executive, administrative, and professional employees must be paid at least the minimum wage for all hours worked in a workweek. Colorado’s minimum wage is currently set at \$10.20 per hour, or \$408 for a forty-hour workweek. For a forty-hour week, this is less than the federal wage level, so that threshold of \$455 per week would apply to Colorado employees covered by FLSA.

The Director of the Division of Labor Standards and Statistics can set the wage threshold for salaried workers under the EAP exemption at a rate that best meets Colorado’s needs. When our minimum wage reaches \$12.00 per hour in 2020, the wage threshold will equal \$480 for a forty-hour work week and exceed the current federal level. However, it’s a *minimum* wage and, by definition, most workers earn more than this amount. Clearly, this isn’t a good measure to determine which workers are “bona fide” executives, administrators, or professionals.

## Workers Would Benefit from Overtime Threshold Increase

Increasing the overtime salary threshold in Colorado would greatly benefit middle class workers and help others enter the middle class. We recommend Colorado increase the salary threshold to the 1975 “short test” threshold, adjusted for inflation to 2017, and phase it in over four years. This would bring the standard to \$1,036 per week, or \$53,872 annually, in 2017 dollars.

This standard most accurately provides a clear delineation between Colorado salaried workers who should receive overtime pay and those who meet the EAP exemption. Making this change would ensure 327,739 Colorado salaried workers are automatically eligible for overtime pay.

### Which Workers Would Be Affected?

Using data provided by the Economic Policy Institute (EPI), we analyzed different types of workers who would benefit from the proposed salary threshold increase. The data present different demographic information on Colorado workers, including gender, race and ethnicity, parent status, age, education, occupation, and industry.

Within each group, affected workers are classified as “new protections,” or “strengthened protections.” Workers grouped under “new protections” are salaried workers who are not currently eligible for overtime pay because they pass both the duties test (i.e., they perform executive duties) and salary test (i.e., they earn above the current salary threshold of \$455 per week) but earn less than the proposed threshold of \$1,036 per week.

Workers grouped under “strengthened protections,” are salaried workers who do not pass the duties test (i.e., they do not perform executive duties) do pass the salary test (i.e., they earn more than the current threshold) but earn less than the proposed threshold. This means they are legally entitled to receive overtime pay under the current threshold, but because their salaries are above that limit, they are susceptible to being misclassified as exempt employees.

We conducted two analyses to determine how many and what type of workers would benefit from an increased salary threshold. First, we computed the total number of workers in each demographic group who would benefit from the new and strengthened protections on overtime pay.

Second, because Colorado’s salaried workers are not equally represented among all demographic categories, we looked at the percentage of affected workers compared to the proportion they comprise of all salaried workers in Colorado. We did this analysis for each demographic category. Read on for our findings.

## Findings

We found workers in every demographic category benefit from a salary threshold increase to \$1,036 per week. Data show the following categories of workers have the largest number affected: men; fathers; white workers; workers age 30-39; workers with some college; workers within management, business, and financial occupations; and workers in the retail trade industry.

However, when looking at the data proportionately, we found the following categories of workers have the highest percentage of affected workers compared to the proportion they comprise of all salaried workers in Colorado: women; workers age 16-29; non-white workers; workers with a high school diploma or some college; workers within office and administrative support occupations; and workers within the manufacturing industry. The tables below present more details on this analysis.

### DEMOGRAPHIC CATEGORIES WITH GREATEST NUMBER OF WORKERS AFFECTED

Demographic Category	Number Affected
Males	173,686
White Workers	242,455
Fathers	51,713
Some College Education	101,589
Workers Age 30-39	99,735
Management, Business, and Financial Occupations	69,247
Retail Trade Industry	67,557

### DEMOGRAPHIC CATEGORIES WITH GREATEST PROPORTION OF WORKERS AFFECTED

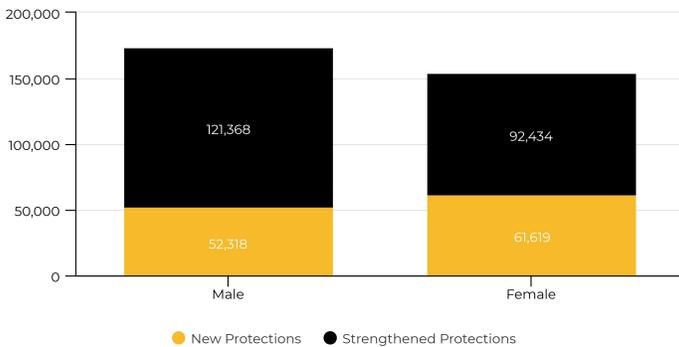
Demographic Category	Proportion Over Share of Salaried Workforce
Females	+5.8%
Hispanic Workers	+3.7%
Mothers	+1.5%
Some College Education	+8%
Workers Age 16-29	+7.2%
Office and Administrative Support Occupations	+6.15%
Manufacturing	+5.85%

## Gender

Data show more Colorado males would benefit from an increased overtime salary threshold, with a total of 173,686, compared to females at 154,053. A greater number of women would profit under new protections, while a greater number of men benefit under strengthened protections.

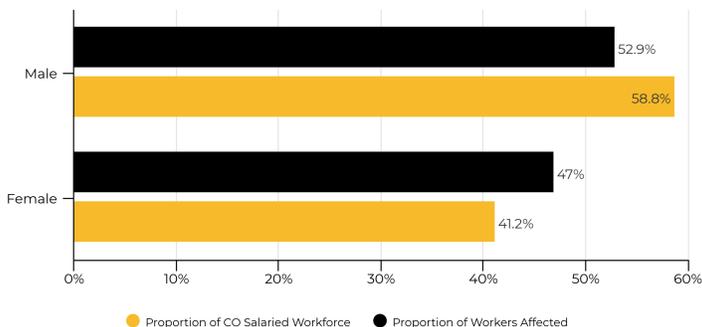
This means more female salaried workers already pass the duties and salary test, but would qualify for overtime pay because their weekly salaries are currently between \$455 and \$1,036. Additionally, more male salaried workers already make above the current salary threshold of \$455 per week, but because of their job duties, they could be misclassified and currently ineligible for overtime pay.

SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY GENDER



Proportionately, however, more female workers would benefit from the increase. As shown in the figure on the right below, females comprise 41.2 percent of the Colorado salaried workforce, but 47 percent of the workers who would benefit from this change. Comparatively, males comprise 58.8 percent of the Colorado salaried workforce, but only 52.9 percent of the workers that would benefit. This shows that female workers benefit disproportionately from the increase in the salary threshold.

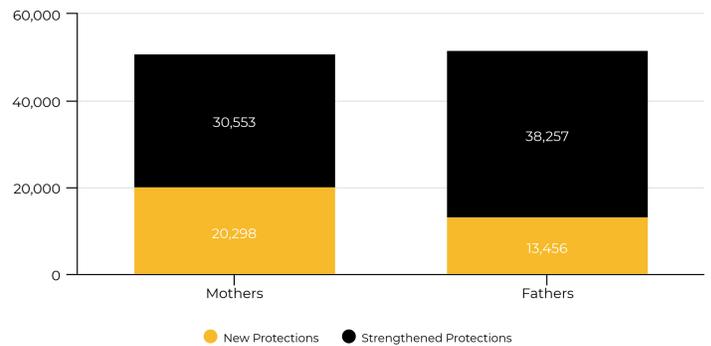
PROPORTION OF SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY GENDER



## Parent Status

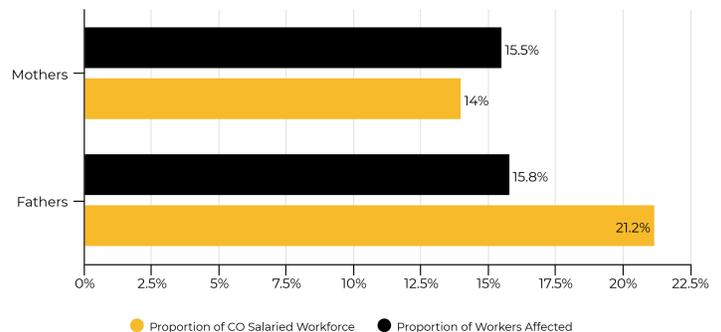
If Colorado raised the salary threshold to \$1,036 per week, over 100,000 parents would become automatically eligible for overtime pay: 50,851 mothers and 51,713 fathers. For mothers, 20,298 would benefit under new protections, while 30,553 would benefit under strengthened protections. For fathers, 13,456 would benefit under new protections, and 38,257 would benefit under strengthened protections. This data shows there is a significant number of Colorado working parents who could already receive overtime pay, but are currently vulnerable to being misclassified as exempt.

SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY PARENT STATUS



Proportionately, data shows the increase in the salary threshold would benefit Colorado's working mothers slightly more. Raising the wages paid to Colorado's working parents is an important two-generation policy that helps the entire family. Research shows children's outcomes vary based on their parents' income, and is vitally important as the parents' financial success greatly impacts their children's success, which in return benefits our state as whole.<sup>ix</sup>

PROPORTION OF SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY PARENT STATUS

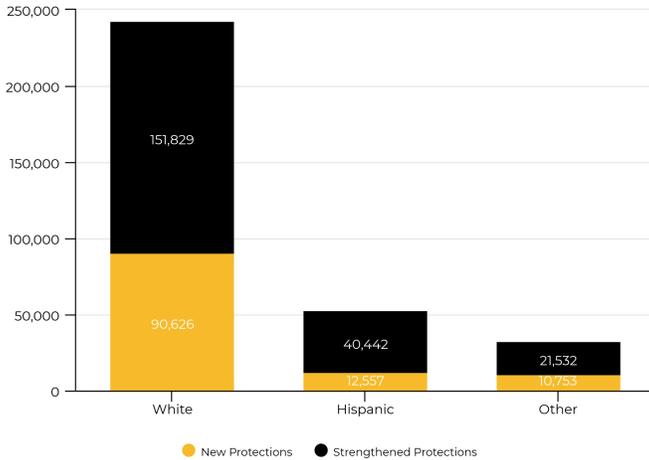


## Race

We grouped data for race and ethnicity into white, Hispanic, and other. "Other" was used because the small number of salaried workers who comprise specific racial and ethnic categories beyond white and Hispanic resulted in sample sizes too small to be representative.

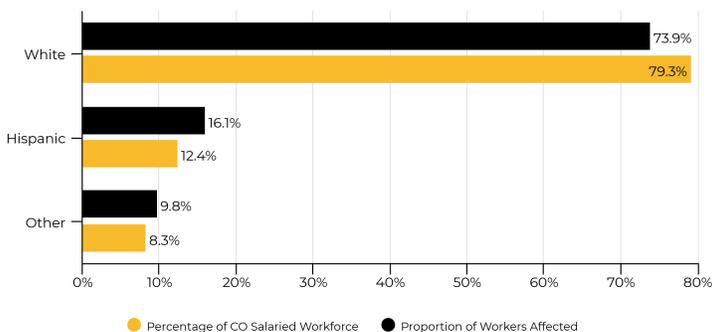
While all would benefit from an overtime salary threshold increase, data show a significantly larger number of white workers would be affected. This is because white workers comprise 79.3 percent of Colorado's salaried workforce.

SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY RACE



As shown in the figure below, most workers benefit under strengthened protections. While the largest number of workers who would benefit are white, proportionately, Hispanics and workers of other races benefit the most. Hispanics comprise 12.4 percent of Colorado's salaried workforce, but they make up 16.1 percent of the workers who benefit from the increase. Workers of other racial categories comprise 8.3 percent of Colorado's salaried workforce, but 9.8 percent of the workers who would benefit.

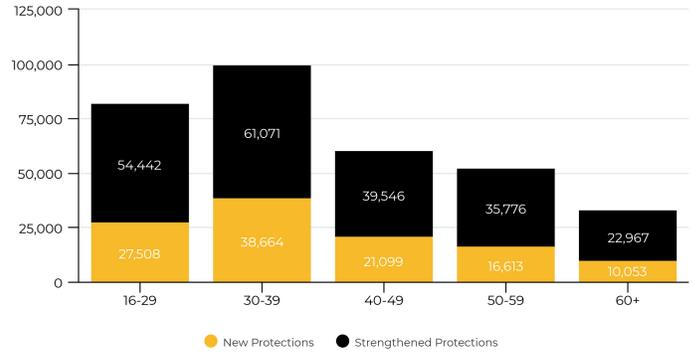
PROPORTION OF SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY RACE



## Age

Overall, data show Colorado workers aged 30-39 will benefit the most, with a total of 99,735 becoming automatically eligible for overtime pay. Workers aged 16-29 total 81,950, followed by those aged 40-49, 50-59, and 60+.

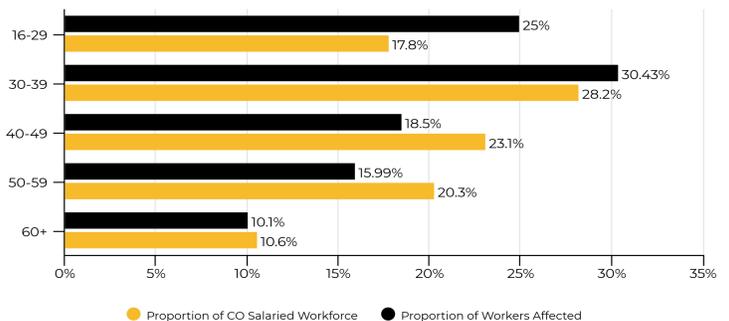
SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY AGE



As we have seen from other categories, all age groups benefit the most under strengthened protections, demonstrating that a majority of workers across all age ranges could be currently eligible for overtime pay, but are susceptible to misclassification.

Proportionately, workers in the youngest age group, 16-29, benefit the most, followed by workers aged 30-39. As the figure on the right below shows, workers age 16-29 comprise 17.8 percent of the Colorado salaried workforce, but 25 percent of those who would benefit. It is important to ensure Colorado's younger workers are paid for hours worked so they can save and invest in their futures.

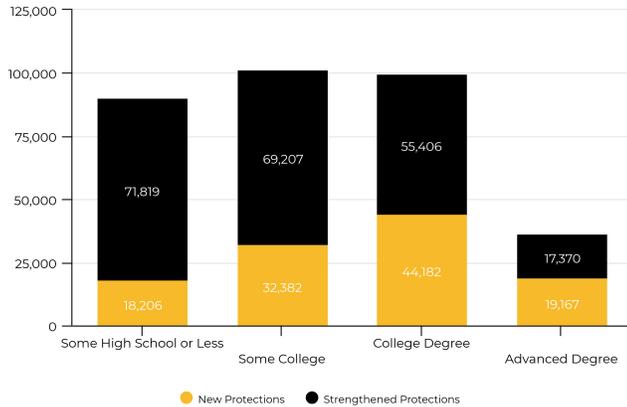
PROPORTION OF SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY AGE



## Educational Attainment

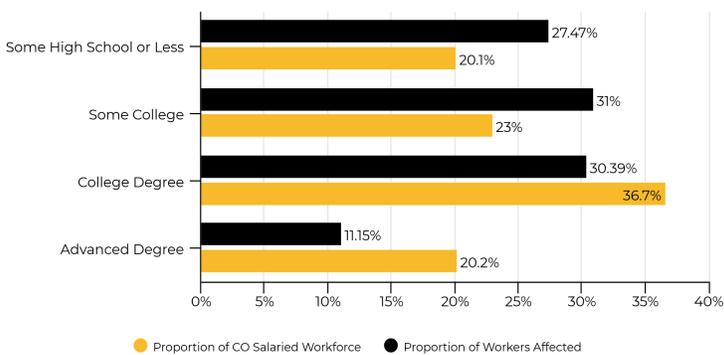
Data show Coloradans with some college would benefit the most from the increase in the overtime salary threshold, with a total of 101,589. Closely following are workers with a college degree at 99,587, and workers with a high school diploma or less at 90,025.

SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY EDUCATIONAL ATTAINMENT



All workers benefit most under strengthened protections except for workers with an advanced degree, meaning they already pass the duties and salary test, but will automatically be eligible for overtime pay because their salaries are currently between \$455 and \$1,036.

PROPORTION OF SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY EDUCATIONAL ATTAINMENT

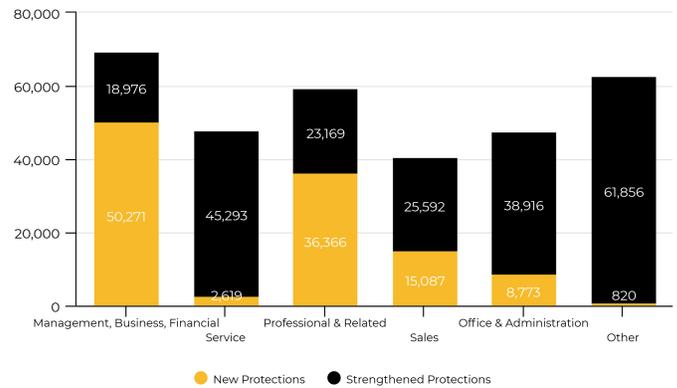


Proportionately, workers with a high school diploma or less and with some college benefit the most. Workers with some college comprise 23 percent of Colorado's salaried workforce, but 31 percent of the workers who would benefit. Workers with a high school diploma or less comprise the smallest percent of Colorado's salaried workforce, but have the second greatest percentage of workers who would benefit. As research released in our Guide to Economic Mobility<sup>x</sup> shows, by 2020, 74 percent of Colorado jobs will require some postsecondary education. It's important to ensure workers without higher education get paid for their hours worked, especially if they already earn lower salaries.

## Occupation

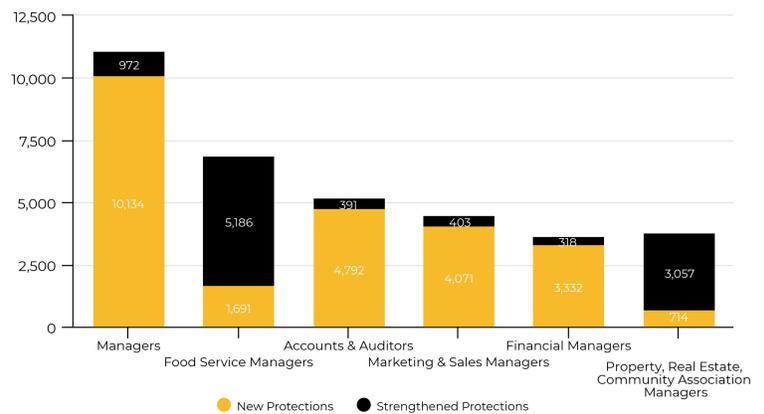
Data by occupation show the largest number of salaried workers benefiting by an overtime salary threshold increase would be employed in management, business, and financial occupations, at 69,247. As shown in the figure below, workers in these service roles would be assisted most by new protections, while workers in all other occupational categories benefit more from strengthened protections, with the exception of professional and related occupations.

SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY OCCUPATION



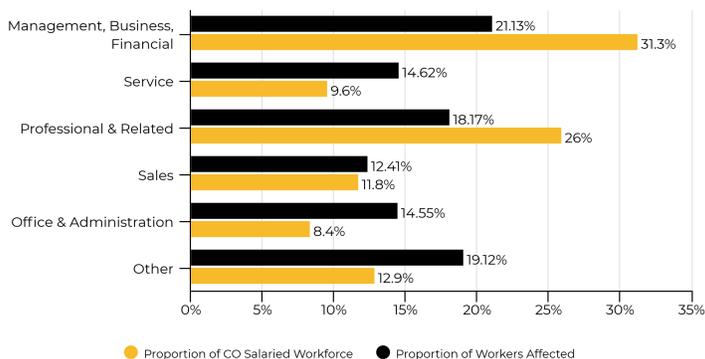
A further breakdown within the management category shows specific occupations that would be affected the most are: managers, food service managers, and accountants and auditors. Within the general category of "managers," specific job titles include: construction managers; medical and health services managers; human resource workers; management analysts; credit analysts; and loan counselors and officers.<sup>xi</sup>

SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY OCCUPATION WITHIN "MANAGEMENT, BUSINESS, & FINANCIAL"



Proportionately, as show in the figure below, workers in the service and office and administrative support occupations would be the most affected. Workers in these jobs comprise 8.4 percent of Colorado’s salaried workforce, but 14.5 percent of those affected by the increase in the overtime salary threshold.

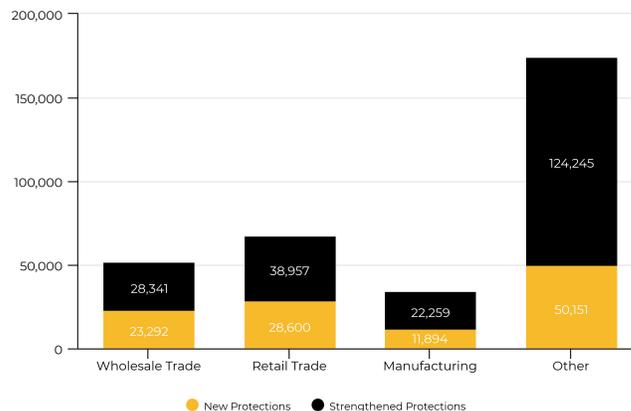
PROPORTION OF SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY OCCUPATION



### Industry

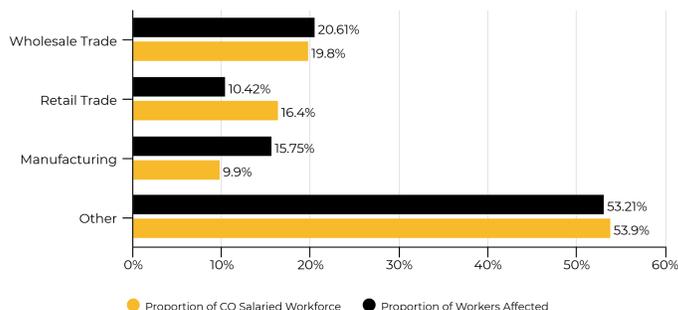
Retail trade is the individual industry category with the most workers who would be affected by the overtime salary threshold increase, followed by wholesale trade. However, most affected workers fall in “other” industries, which is comprised of several industries, totaling 174,396.

SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY INDUSTRY



Most workers would benefit from the strengthened protections. Proportionately, workers in the manufacturing industry would benefit the most, as they comprise 9.9 percent of Colorado’s workforce, but 15.7 percent of the workers affected.

PROPORTION OF SALARIED WORKERS IMPACTED BY THRESHOLD CHANGE, BY INDUSTRY



### Conclusion

The salary threshold that helps determine if salaried workers qualify for overtime pay hasn’t been fully adjusted for inflation since 1975. As a result, the number of workers who automatically qualify has dwindled, leaving many not paid for extra hours worked. This not only contradicts the purpose of FLSA, but it squeezes family budgets and limits Colorado’s overall economic growth.

Colorado state policymakers have the power to set the overtime threshold at a rate that makes sense for our state. We recommend they adjust the 1975 short test threshold for inflation and phase it in over four years. This will raise the threshold to \$1,036 per week by 2022 (in 2017 dollars), ensuring 327,739 salaried workers will automatically qualify for overtime pay, putting more money into the pockets of hardworking Coloradans.

## Endnotes

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<sup>i</sup> Concerning Overtime Protection. Colorado Center on Law and Policy.

<sup>ii</sup> [Guide to Economic Mobility](#). The Bell Policy Center. Jan 2018.

<sup>iii</sup> Bernstein, Jared and Eisenbrey, Ross. [New inflation-adjusted salary test would bring needed clarity to FLSA overtime rules](#). Economic Policy Institute. March 2014.

<sup>iv</sup> Whittaker, William. [The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13\(a\)\(1\)](#). Cornell University ILR School. May 2005.

<sup>v</sup> Bernstein and Eisenbrey. [New inflation-adjusted salary test would bring needed clarity to FLSA overtime rules](#). March 2014.

<sup>vi</sup> Shierholz, Heidi. [It's time to update overtime pay rules](#). Economic Policy Institute. July 2014.

<sup>vii</sup> [Governor Wolf to Modernize Outdated Overtime Rules to Strengthen the Middle Class and Provide Fairness for Workers](#). Pennsylvania Government. January 2018.

<sup>viii</sup> [Colorado Minimum Wage Order Number 34](#). Colorado Department of Labor and Employment.

<sup>ix</sup> King, Christopher, Coffey, Rheagan, Smith, Tara. [Promoting Two-Generation Strategies: A Getting Started Guide for State and Local Policy Makers](#). University of Texas at Austin. November 2013.

<sup>x</sup> [Guide to Economic Mobility](#). The Bell Policy Center. January 2018.

<sup>xi</sup> [Appendix B: Occupation Classification](#). U.S. Consensus Bureau.