



STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY, AND FINDINGS

Colorado Overtime & Minimum Pay Standards Order (COMPS Order) #37, 7 CCR 1103-1 (2021), as adopted November 10, 2020.

I. BASIS: The Director (“Director”) of the Division of Labor Standards and Statistics (“Division”) has authority to adopt rules and regulations on minimum and overtime wages, and other wage-and-hour and workplace conditions, under the authority listed in Part II, which is incorporated into Part I as well.

II. SPECIFIC STATUTORY AUTHORITY: The Director is authorized to adopt and amend regulations and rules to enforce, execute, apply, and interpret Articles 1, 4, and 6 of Title 8, C.R.S. (2020), and all regulations, rules, investigations, and other proceedings of any kind pursued thereunder, by the Administrative Procedure Act, C.R.S. § 24-4-103, and provisions of Articles 1, 4, 6, 12, and 13.3 including C.R.S. §§ 8-1-101, -103, -107, -108, -111, -130; 8-4-111; 8-6-102, -104, -105, -106, -108, -109, -111, -116, -117; 8-12-115; 8-13.3-403, -407, -408, -409, -410. Each of the preceding provisions is quoted in Appendix A to COMPS Order #37, which is incorporated herein by reference.

III. FINDINGS, JUSTIFICATIONS, AND REASONS FOR ADOPTION: Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds: **(A)** demonstrated need exists for these rules, as detailed in the findings in Part IV, which are incorporated into this finding as well; **(B)** proper statutory authority exists for the rules, as detailed in the list of statutory authority in Part II, which is incorporated into this finding as well; **(C)** to the extent practicable, the rules are clearly stated so that their meaning will be understood by any party required to comply; **(D)** the rules do not conflict with other provisions of law; and **(E)** any duplicating or overlapping has been minimized and is explained by the Division.

IV. SPECIFIC FINDINGS FOR ADOPTION:

(A) Rules 1.1-1.2: Non-substantive clarifications

No substantive changes are made to “Authority and relation to prior orders” (Rule 1.1) or “Incorporation by reference” (Rule 1.2), which are amended only with clarifications to avoid possible misconceptions. First, Rule 1.1 has incorporated the current year’s versions of referenced statutes: 2021 in COMPS Order #37 (2021); 2020 in COMPS Order #36 (2020). But a claim filed in 2021 may be based on events in 2020 or 2019, and would apply whatever prior year’s law applied during those events. Thus, Rule 1.1 clarifies that while these Rules replace prior versions, “prior orders still govern as to events occurring while they were in effect,” and 1.2 clarifies that while the 2021 versions of laws are incorporated, “[e]arlier versions ... may apply to events that occurred in prior years.”

Second, Rule 1.2 deletes a reference to the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201 et seq., and clarifies that “[w]here these Rules have provisions different from or contrary to any incorporated or referenced material, the provisions of these Rules govern.” Prior versions included the FLSA in a list of citations incorporated, for two reasons: (A) because Colorado law covers failure to pay *any* wages, FLSA minimum or overtime wage non-payment also violate Colorado wage law (per COMPS R. 3.2), so such FLSA requirements should be deemed part of Colorado wage law; and (B) COMPS repeatedly references various FLSA and federal rule provisions, but for brevity does not quote them, so deeming the FLSA text incorporated was appropriate. However, that has yielded questions as to whether COMPS thereby adopted FLSA *interpretations* never explicitly mentioned in COMPS. The Division finds that reading such interpretations into COMPS is not what the Division intended, nor a plausible interpretation of the COMPS references to the FLSA references. Firstly, it is well-established that expressly incorporating only a *statute* does not incorporate even interpretations actually codified in *regulations*, so incorporating just FLSA *statutory* citations cannot be deemed to incorporate more than the cited statutory text.¹ Secondly, a Colorado wage statute mandates “liberal construction,” yet FLSA caselaw has departed from that

¹ See [Statement of Basis, Purpose, Specific Statutory Authority, & Findings, pp.3-4 \(May 25, 2020\)](#) (hereinafter, “Statement & Findings”)(findings as to COMPS Order #36 amendments, adopted May 25, 2020)(from paragraph that begins: “First, ...”).

principle,² precluding any presumption that FLSA interpretations apply to COMPS. Thirdly, a state does not need any wage law if it is content with the “floor” of limited federal protection, and some states do not raise that floor, but Colorado has: the purpose of essentially all Colorado wage law is to *depart* from the FLSA with *higher and additional* standards,³ including Title 8, Articles 4 (recovery of *full* unpaid wages, not just *minimum or overtime* as under the FLSA) and 6 (higher minimum wage than FLSA), and the majority of other COMPS provisions.⁴ Because these points emphasize how fundamentally COMPS has *not* presumptively adopted federal wage law, the Division finds it worthwhile to (A) prevent any risk of future misperceptions by deleting the FLSA reference in the incorporation rule, and (B) explain why in this Statement, in hopes of resolving any existing misconceptions.

While aiming to add clarity, all Rule 1.1-1.2 amendments are non-substantive, merely stating expressly what the Division finds were already the only valid or plausible interpretation of existing versions of these Rules.

(B) Rules 1.5-1.6: “Employee” and “Employer”

The Rules 1.5-1.6 “employee” and “employer” definitions are amended to conform to new legislative enactments defining those terms. The definitions in C.R.S. §§ 8-4-101(5)-(6) remain, except for claims as to paid sick leave under the Healthy Families and Workplaces Act (“HFWA”), C.R.S. §§ 8-13.3-401 et seq., which qualify as “wage” claims if paid sick leave is not provided as required by HFWA (*id.* § 402). For such claims, HFWA expressly adopts the C.R.S. § 8-4-101(5)-(6) “employee” and “employer” definitions, except HFWA: (A) excludes “employees” covered by federal railroad unemployment insurance (§ 8-13.3-402(4)); and (B) includes the state, local governments, school districts, and their agencies and entities (§ 8-13.3-402(5)).

No other changes are made to the “employee” or “employer” definitions, which warrants explanation, given recent flux in federal rules defining those terms in the FLSA. First, a federal rule changed one aspect of the employer definition, narrowing the definition of “joint employers” responsible for FLSA wages, but: (A) after the USDOL adopted its rule in January 2020, the Division detailed, in adopting COMPS Order #36 that month, findings that a 2019 Colorado statute requires Colorado law to continue using the pre-existing “joint employer” definition from which the USDOL rule departed; (B) after the USDOL rule went into effect in March 2020, the Division reiterated its position in findings published in May 2020; and (C) in September 2020, in a challenge to the USDOL rule filed by Colorado and 17 other states, a federal court struck the USDOL rule, describing it as “flawed in just about every respect,” and detailing numerous substantive and procedural shortcomings.⁵

² Compare COMPS Order R. 8.7(A) (“Liberal construction of COMPS, narrow construction of exceptions/exemptions”: “provisions of the COMPS Order shall be liberally construed, with exceptions and exemptions accordingly narrowly construed,” consistent with various statutory provisions, most notably the § 8-6-102 “liberally construed” requirement) with *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018) (holding that FLSA exemptions should be given a “fair (rather than narrow) interpretation,” *id.* at 1142, which departed from prior federal precedent, *id.* at 1147-48 (Ginsburg, J., dissenting)).

³ See *Brunson v. Colo. Cab Co.*, 2018 COA 17, ¶ 23, 433 P.3d 93, 97 (Colo. App. 2018) (noting that the Division promulgates minimum wage rules that are “independent of the FLSA,” and “it is well settled that states may provide employees with benefits beyond those set out in the FLSA”) (citing *Martinez v. Combs*, 231 P.3d 259, 280-81 (Cal. 2010) (“Courts must give ... wage orders independent effect ... to protect the [state labor] Commission’s delegated authority to enforce the state’s wage laws and .. provide greater protection to workers than federal law”)); *Idowu v. Nesbitt*, 2014 COA 97, ¶ 51 (emphasis added) (FLSA “establishes the *minimum* wage and hour requirements with which employers must comply. Nothing in the FLSA prevents states from providing employees with *additional benefits* in these areas”) (emphases added); *Redmond v. Chains, Inc.*, 996 P.2d 759 (Colo. Ct. App. 2000) (FLSA does not preempt Colorado minimum wage protections, because that state law provides relief not available under FLSA); *Bowe v. SMC Elec. Prod., Inc.*, 935 F. Supp. 1126, 1134 (D. Colo. 1996) (“FLSA’s relationship to the CWA is a protective floor — not a ceiling — for employee rights. States can ... through statutory verbiage (or no verbiage at all), use their police powers to add to worker protections above and beyond the federal right”).

⁴ E.g., COMPS Order R. 1.9 (broader compensable “time worked” definition), 2.5 (higher minimum salary for various exemptions); 3.1 (higher local minimum wages enforceable), 4.1 (daily, not just weekly, overtime), 5.1-5.2 (meal and rest periods), 6.1-6.2 (protection for all employee tips, and more limited tip credit), 7.1-7.4 (record-keeping and posting rules).

⁵ [New York v. Scalia, No. 1:20-cv-01689-GHW, 2020 WL 5370871 Sept. 8, 2020](#) (granting summary judgment to Colorado and other states, striking 2020 joint employer rule except for certain “non-substantive” changes to prior rule).

Given the flux in federal rules, the Division sees a need to clarify that its rules, interpretations, and findings on joint employers are not changing based on USDOL rule developments to date or possible follow-up developments (e.g., a later court ruling on, or USDOL replacement for, that rule). Rather than repeat past findings, the Division incorporates by reference all substantive points on the Colorado law “joint employer” definition, and the lack of impact of USDOL rules on the subject, in Part IV(A) of the Division findings of May 25, 2020.⁶

Second and similarly, USDOL proposed a rule in September 2020 narrowing the definition of “employee” under the FLSA. For the same reasons detailed above (including those detailed in the above-incorporated prior Division findings of May 25, 2020), the USDOL rule, in whatever form if any is adopted, will not change the “employee” definition under Colorado law. Rather than restate unchanged findings, the Division incorporates by reference all substantive points as to the “employee” definition under Colorado law in Part IV(B)(2) of the Division’s findings of January 22, 2020, as to the adoption of COMPS Order #36.⁷

(C) Rule 2.2.1: Administrative employees

Rule 2.2.1, defining exempt “Administrative employees,” is amended to redress confusion that has come to the Division’s attention as to the italicized portions: “[an] employee ... *who directly serves the executive*, and regularly performs duties important to the decision-making process of *the executive*. The employee must regularly exercise independent judgment and discretion in matters of significance, with a primary duty that is non-manual in nature and directly related to management policies or general business operations.” (Emphasis added.)

The Division has received a number of inquiries indicating a belief and/or concern that by exempting only an employee “*who directly serves the executive*,” Rule 2.2.1 might be interpreted as exempting (A) only those serving a CEO, owner, or other top-level official who is “the” executive of an employer, and (B) only those who serve that top-level executive “directly.” That rule language has been unchanged for decades, and evidence of the Division’s drafting intent is lacking, due to the absence of Division records from decades ago. Yet the Division has no evidence the provision was drafted with intent to limit it to those directly serving only the top executive of an employer, and the Division does not intend for the provision to be interpreted so narrowly now.

The Division amends Rule 2.2.1 to require exempt administrative employees to serve only “an” executive. However, Rule 2.2.2 defines “*executive* or supervisor” to include low- to mid-level managers who supervise two or more employees, including in manual or low-level work — not the sorts of “executives” an exempt “administrative employee” serves. In existing Rule 2.2.1, an administrative employee “must regularly exercise independent judgment and discretion in matters of significance, with a primary duty that is non-manual in nature and directly related to management policies or general business operations” — an equally apt description of the type of non-manual, higher-level work performed by an “executive” served by an exempt administrative employee. Rule 2.2.1 thus now allows exemption as long as “an” executive is no less engaged in higher-level, non-manual work than the “administrative employee” serving them: “The *executive and* employee must regularly exercise independent judgment and discretion in matters of significance, with a primary duty that is non-manual in nature and directly related to management policies or general business operations.” (Emphasis added.)

(D) Rule 2.2.3: Professional employees

Federal rules detailing the “professional” exemption to the FLSA cover two types of professionals: “Learned professionals ... [whose] primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction”; and “Creative professionals ... [whose] primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work.” (29 C.F.R. §§ 541.301-302.) The COMPS professional exemption, unchanged for decades, has covered only “learned,” not “creative,” professionals.

⁶ [Statement & Findings, Part IV\(A\) \(May 25, 2020\)](#) (findings as to COMPS Order #36 amendments, adopted May 25, 2020).

⁷ [Statement & Findings, Part IV\(B\)\(2\) \(Jan. 22, 2020\)](#) (findings as to COMPS Order #36, adopted Jan. 22, 2020).

Having received questions as to the basis for that difference, the Division finds that exempting high-level “creative professionals” would be appropriate, and thus now adds a second category of “professional employee”: those whose primary duty is work requiring “invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work, or work that primarily depends on intelligence, diligence and accuracy.” This definition uses the same wording as the federal “creative professional” exemption in 29 C.F.R. § 541.302, subparts (a) (“primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work”) and (c) (“exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training”).

The FLSA “learned professional” exemption requires a “primary duty” of work “which is predominantly intellectual in character and which *includes work requiring the consistent exercise of discretion and judgment*, as distinguished from performance of routine mental, manual, mechanical or physical work.” (29 C.F.R. § 541.301) (emphas added). Though lacking that exact phrase, the FLSA “creative professional” exemption requires the same: “an employee’s primary duty must be the performance of work *requiring invention, imagination, originality or talent* in a recognized field of artistic or creative endeavor *as opposed to routine mental, manual, mechanical or physical work*. The exemption *does not apply to work which can be produced by a person with general manual or intellectual ability and training*.” (29 C.F.R. § 541.302(a)) (emphases added). Also, “the requirement of ‘invention, imagination, originality or talent’ *distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy*. . . . exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee.” (*Id.* § 541.302(c) (emphasis added). Thus, *artistic* creative professionals must “choose their own subjects,” or “at most are given the subject matter” or “merely told the title or underlying concept” (*id.*); *white-collar* creative professionals must be (for example) “the more responsible writing positions in advertising agencies” (*id.*); and *journalism* creative professionals must exercise discretion and judgment as detailed in several respects in § 541.302(d) (emphases added):

Employees of newspapers, magazines, television and other media are not exempt creative professionals if they *only collect, organize and record information that is routine or already public*, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who *merely rewrite press releases* or who *write standard recounts* of public information by *gathering facts on routine* community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their *work product is subject to substantial control* by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is *performing* on the air in radio, television or other electronic media; conducting *investigative* interviews; *analyzing or interpreting* public events; *writing editorials, opinion columns or other commentary*; or acting as a *narrator or commentator*.

The COMPS “professional employee” exemption thus now includes an express element that the “primary duty is work that requires . . . the consistent exercise of discretion and judgment, as distinguished from routine mental, manual, mechanical or physical work.” Work requiring discretion and judgment already was required under existing law for the “learned professional” exemption,⁸ and the Division finds it an appropriate, reasonable description of who should be an exempt “creative professional” under the same broader “professional” exemption.

The Colorado Nonprofit Association expressed concern as to whether certain administrative employees at nonprofits who “perform non-manual duties important to programmatic decisionmaking and directly serve executives responsible for these programs” might remain outside the exemption because they “may not be

⁸ See *Reich v. Wyoming*, 993 F.2d 739, 743 (10th Cir. 1993) (under FLSA, framing question under the exemption as whether employees “consistently exercise the requisite discretion and independent judgment to a degree required of professionals”); *Pippins v. KPMG*, 759 F.3d 235, 238 (2d Cir. 2014) (under FLSA, “to determine whether a primary duty qualifies for the exemption: the work must . . . requir[e] the consistent exercise of discretion and judgment”). While many FLSA points do not apply to COMPS, this authority is on a particular exemption element on which FLSA and COMPS do not materially differ.

primarily responsible for management policies or general business operations.”⁹ The Division cannot pre-rule on whether particular employees would qualify as exempt, but can clarify that exemption does not require employees to be “primarily responsible” for the exempt administrative work. If employees meet the other exemption requirements, they need not be exclusive or final decisionmakers over the “management policies or general operations,” as explained in a rule defining work “directly related to management or general business operations”:

The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. *However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.* Thus, the term “discretion and independent judgment” *does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review.* The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee’s decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.¹⁰

(E) Rule 2.2.7(F): Compensation for exempt field staff of seasonal camps or seasonal outdoor education programs

From industry comments¹¹ and Division’s evaluation of Rule 2.2.7(F), the Division amends the computation of salary for this exemption, to simplify and better reflect the purpose of the exemption. The existing rule exempts field staff of seasonal seasonal camps or outdoor education programs who (in addition to performing the listed exempt duties) are provided various items (lodging, food, other services, etc.) without charge and paid the minimum wage for all hours worked or a salary equivalent to (a) 42 hours at the minimum wage, reduced by 10% for all employers, 25% for non-profits, and 15% for minors; (b) less a \$100 food and lodging credit.

Under the new rule, the credit for items of value provided to employees is increased from \$100 to \$200 per week, while the 10% reduction of the minimum wage for all employers is removed, and the 25% reduction for non-profit camps is reduced to one-sixth (16.67%). The resulting salary is roughly \$48 lower at for-profit camps, and \$5 per week lower at non-profit camps, than the existing rule would have set for 2021.¹²

The Division finds that the prior calculation method was more complex than necessary, and removing one of the calculation elements (the extra 10% reduction in the minimum wage) while increasing the credit from \$100 to \$200 simplifies the calculation, while lowering rather than raising the required pay for exemption. The Division finds that other elements of the salary — a fixed number of hours and credit for facilities provided — better reflect the reasons for this salary, namely that hours are hard to calculate and the jobs provide material benefits beyond compensation. The Division also credits industry representation that, while camps vary in their costs and what they provide employees, they typically pay well over the existing \$100 credit for not only food and lodging, but other facilities commonly provided, such as laundry, low-level medical care, internet for personal use, and transportation.¹³ While the cost of for-profit lodging is not used in wage law as a measure of a proper *deduction from wages* of employee housing,¹⁴ the Division finds that with food costing roughly \$84 per week (\$12 per day,

⁹ Comment by Colorado Nonprofit Association, Nov. 2, 2020.

¹⁰ 29 C.F.R. § 541.201(c) (emphases added). While many FLSA points do not apply to COMPS, this authority is on a particular exemption element on which FLSA and COMPS do not materially differ.

¹¹ See comment by Colorado Camps Network, Oct. 30, 2020 (received Nov. 2, 2020).

¹² For non-profits: \$231.20 rather than \$236.34, and \$153.58 rather than \$158.72 for minors. For for-profits: \$317.44 rather than \$365.70, and \$239.82 rather than \$288.08 for minors.

¹³ *Id.* at 1.

¹⁴ It is longstanding Division (see, e.g., COMPS Rule 6.2.1) and federal rule (see 29 CFR § 531.3(b)) that deductions for lodging should not include profit to the employer.

as the industry detailed), the addition of lodging and other facilities vary among camps but would make \$200 per week a reasonable estimate of total costs that are proper to deduct from employee wages. Some camps may pay more for such expenses, but wage law commonly caps deductions for higher-value items based on reasonable estimates with limits, rather than allow all total costs to be deducted, because that could drive wages to levels closer to zero than to the Colorado minimum wage. The Division also finds, based on feedback received from non- and for-profit camps, that there is less operational difference between these types of camps than previously believed,¹⁵ and thus reduces the minimum wage discount for non-profit camps from 25% to one-sixth (16.67%).

One additional change is to provide that exempt staff need not reside “on-premises” (the language of the existing rule) if they reside “in the field.” Some covered employers, especially because the rule includes “outdoor education programs,” do not have their own “premises,” so the new language exempting those who “are required to reside on-premises *or in the field*” reflects the Division’s intent in this exemption.

(F) Rule 2.4.6 and 2.2.6: Exemption for non-passenger drivers and driver’s helpers subject to the federal Motor Carrier Act.

COMPS Order #36 amended Rule 2.2.6 as to “interstate” transportation workers to conform to a judicial interpretation of the prior exemption for “interstate drivers, driver helpers, loaders or mechanics of motor carriers” in *Brunson v. Colo. Cab Co., LLC*, 2018 COA 17 ¶¶ 17–45. In requiring exempt employees to cross state lines in their work,¹⁶ *Brunson* departed from the “interstate” definition of the Federal Motor Carrier Act (“MCA”), which defines the FLSA overtime exemption for MCA-covered employees¹⁷ (the “Motor Carrier Exemption” or “MCE”), under which certain employees “who work entirely within a state are considered interstate drivers under the MCA exemption.”¹⁸ In addition, COMPS Rule 2.2.6 exempted from most sections of the COMPS Order, including the minimum wage, while the MCE exempts workers from overtime but not the minimum wage.¹⁹

After COMPS #36 took effect, the Division received transportation industry feedback²⁰ on having a state exemption requiring actually crossing state lines but a federal exemption covering certain wholly intrastate employees. The Division researched other states’ laws and found that many if not most apply the MCE in whole or substantial part,²¹ though a number not coextensively with the MCE: New York, Washington, and New Mexico require overtime for employees subject to the MCE,²² Massachusetts exempts only “driver[s] or helper[s]” on “trucks,” unlike the MCE exemption for loaders, mechanics, and some passenger vehicles. And even states

¹⁵ Comment by Colorado Camps Network, *supra*, at 2.

¹⁶ See [Statement of Basis, Purpose, Specific Statutory Authority, & Findings, pp.3-4 \(Jan. 22, 2020\)](#) (hereinafter, “Statement & Findings”)(findings as to COMPS Order #36 amendments, adopted May 25, 2020)(from paragraph that begins: “First, ...”).

¹⁷ 29 U.S.C. § 213(b)(1).

¹⁸ *Brunson*, ¶ 17.

¹⁹ See 29 U.S.C. § 213(b) (overtime exemption only, MCE at § 213(b)(1)) and 29 U.S.C. § 213(a) (minimum wage and overtime exemption, MCE not included).

²⁰ See comments by the Colorado Motor Carriers Association, Nov. 5, 2020; and the National Armored Car Association via Littler Mendelson, Oct. 30, 2020.

²¹ See laws from Oregon, OAR 839-020-0125(3)(a) (exempting from overtime an “employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours ... pursuant to the ... Motor Carrier Act”); New York, 12 N.Y.C.R.R. §142-2.2 (special overtime rule for “employees subject to the exemptions of [FLSA] section 13”); Washington, WAC 296-128-012 (special overtime rule for “truck or bus driver subject to the [MCA]”); Massachusetts, M.G.L. ch. 151, § 1A (exempting from overtime “driver or helper on a truck with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to ... the motor carrier act”).

²² See N.M. Stat. Ann. § 50-4-21 et seq. (no overtime exemption for MCE-exempt transportation employees); 12 N.Y.C.R.R. §142-2.2 (requires “overtime at a wage rate of one and one-half times the basic minimum hourly rate”; see also interpretation at *Hayward v. IBI Armored Servs.*, 954 F.3d 573, 576 (2d Cir. 2020)); WAC 296-128-012 (“The compensation system under which a truck or bus driver subject to the provisions of the Federal Motor Carrier Act is paid shall include overtime pay at least reasonably equivalent to that required by RCW 49.46.130 for working in excess of forty hours a week.”).

mirroring the MCE *overtime* exemption do not exempt workers from *minimum* wages as COMPS Order #36 did.

The Division finds it proper to broaden the existing *Brunson*/COMPS exemption to cover MCA-covered drivers and driver’s helpers without a requirement of crossing state lines. Hours of drivers and helpers are complex to supervise, especially since some do cross into states with different wage and hour rules, and the Division finds credible the industry point that when and whether in-vehicle employees cross state lines can be unpredictable. In contrast, the Division finds, loaders and mechanics should not be exempted: even if they work on or load vehicles in interstate commerce, they are not engaged in vehicular travel and instead generally work from a home base. In terms of justification for exemption from hours-tracking, loaders and mechanics are less like drivers and driver’s helpers, and more like similar mechanical workers and manual laborers in other industries — whose hours do have to be tracked for wage and hour purposes. The Division also finds it necessary to exclude from exemption those drivers and helpers (A) in smaller passenger vehicles not requiring a commercial driver’s license (“CDL), *e.g.* smaller shuttle drivers, and (B) non-CDL vehicles that simply carry workers to and from manual labor jobs. Those two categories of workers are typically lower-paid²³ than those who drive larger vehicles and/or have CDLs, yet sometimes are argued to be exempt under the MCE for work that is predominantly local and/or not the sort of commercial freight or passenger transport at the core of the MCA.²⁴

While the Division does not go as far as New Mexico, Massachusetts, or Washington have in requiring overtime pay for all hours worked, it finds that compensation for exempt drivers and driver’s helpers should be fair and adequate given the nature of the work. These employees often work long and grueling hours; the Bureau of Labor Statistics notes that “tractor-trailer drivers work far in excess of 40 hours per week”²⁵ and “often work nights, weekends, and holidays;”²⁶ the Division also has heard from transportation worker advocates that truck drivers often work 60 to 70 hours per week. Thus, to assure a basic minimum standard of compensation as a condition for exemption, the Division finds that exempt workers should not be exempt from the minimum wage (as they are not under federal law) and should be paid compensation equal to at least 50 hours at the Colorado minimum wage with overtime (\$677.60 per week in 2021). While that amount does not assure pay of what minimum wage workers receive with overtime for the long hours that may be worked in the industry, it at least assures that drivers and helpers, who are not exempt from minimum wage (including under federal law) are paid not like mere 40-hour minimum wage workers, given how commonly they do work overtime. The Division finds credible the reports from the industry that employees who are qualified to drive commercial vehicles typically are paid well above minimum wage, further making this exempt compensation requirement reasonable.

In sum, new Rule 2.4.6 replaces the relevant part of former Rule 2.2.6 to: (A) align the core exemption of drivers and driver’s helpers with the MCE and not require crossing state lines, while not exempting loaders or mechanics, nor drivers of smaller passenger or landscaping vehicles; (B) exempt from the rules requiring 40-hour weekly overtime, 12-hour daily overtime, meal periods, and rest periods, but not the state minimum wage; and (C) require, as a condition of exemption, weekly compensation equivalent to at least 50 hours at the Colorado minimum wage with overtime (\$677.60 per week in 2021).

(G) Rule 3.1, as well as Rules 2.2.7(F)(1), 2.5.2(B), and 6.2.3: Colorado Minimum Wage for 2021, and associated inflation adjustments to other figures in COMPS

Since 2007, the Colorado Constitution has mandated that the Colorado minimum wage must be “adjusted

²³ Compare Bureau of Labor Statistics (“BLS”) [Occupational Employment and Wages \(“OEW”\), May 2019, 53-3058 Passenger Vehicle Drivers, Except Bus Drivers, Transit and Intercity](#), which includes shuttle drivers (median annual compensation \$31,340) with OEW [53-3032 Heavy and Tractor-Trailer Truck Drivers](#) (median annual compensation \$43,030) and [53-3052 Bus Drivers, Transit and Intercity](#) (median annual compensation \$43,030).

²⁴ *Abel v. Southern Shuttle Servs.*, 631 F.3d 1210 (11th Cir. 2011) (airport shuttle van drivers).

²⁵ Stephen V. Burks and Kristen Monaco, [Is the U.S. labor market for truck drivers broken?](#), BLS Monthly Labor Review (Mar. 2019).

²⁶ BLS Occupational Outlook Handbook, [Heavy & Tractor-Trailer Truck Drivers, “Work Environment”](#) (last modified Sept. 16, 2020).

annually for cost of living increases, as measured by the Consumer Price Index [‘CPI’] used for Colorado.” (Article XVIII, § 15.) The past four years departed from CPI-adjusting because in 2016, a statewide vote enacted Amendment 70, which mandated specific increases for 2017 through 2020 to reach a \$12.00 minimum wage in 2020. For 2021 and future years, the Constitution mandates a return to annual CPI adjustment.

To effectuate that constitutional mandate to adjust the minimum wage annually “by the Consumer Price Index used for Colorado,” the Division reviews the sole CPI for Colorado calculated and published by the federal Bureau of Labor Statistics (“BLS”), the “Denver-Aurora-Lakewood” CPI. The Division has always measured CPI changes from mid-year to mid-year, because half-year CPI data is the most recent data available by September, the latest the Division can publish the proposed annual COMPS Order in time to take effect by January 1st, and in time to give employers and employees adequate notice of the coming year’s minimum wage. The change in CPI from the first half of 2019 to the first half of 2020 is +2.7%.²⁷ A 2.7% increase to the \$12.00 Colorado minimum wage for 2020 yields a 2021 minimum wage of \$12.32. For reference, and since prior years’ wages remain relevant to claims for past wages, below is a table of the Colorado minimum wage for the past 10 years and 2021.

Year	Minimum Wage	Basis for Setting Minimum Wage
2011	\$7.24	CPI-increased annually (2006 vote on Initiative 42, amending Colorado Constitution, Article XVIII § 15)
2012	\$7.36	
2013	\$7.64	
2014	\$7.78	
2015	\$8.23	
2016	\$8.31	
2017	\$9.30	Set at \$9.30 in 2017, then +90¢/year through 2020 (2016 vote on Amendment 70, amending Colorado Constitution, Article XVIII § 15)
2018	\$10.20	
2019	\$11.10	
2020	\$12.00	
2021	\$12.32	CPI-increased annually: +2.7% through mid-2020

V. **EFFECTIVE DATE.** These rules take effect on January 1, 2021.



Scott Moss
Director
Division of Labor Standards and Statistics
Colorado Department of Labor and Employment

November 10, 2020

Date

²⁷ See the [2019 and 2020 entries in the “HALF1” columns](#) in the linked BLS table: the CPI for the first half of 2020 (271.264) divided by the CPI for the first half of 2019 (264.147) is 1.027, indicating a 2.7% annual increase.