



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

### **Colorado Overtime and Minimum Pay Standards Order (COMPS Order) #38, 7 CCR 1103-1 (2022), as adopted November 10, 2021.**

**I. BASIS:** The Director (“Director”) of the Division of Labor Standards and Statistics (“Division”) has authority to adopt rules and regulations on 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 rules and regulations to enforce, execute, apply, and interpret Articles 1, 4, 6, 12, and 13.5 of Title 8, C.R.S. (2021), and all rules, regulations, 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 13.5 of C.R.S Title 8, including but not limited to C.R.S. §§ 8-1-101, 103, 107, 108, 111, 130; 8-4-111; 8-6-101.5, 102, 104, 105, 106, 108, 109, 111, 116, 117, 120; 8-12-115; and 8-13.5-202, 203. Each of the preceding provisions relevant to COMPS Order #38 is quoted in Appendix A to COMPS Order #38, 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 as follows: **(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.** The Director’s findings for adoption (the “Findings”) are as follows.

#### **A. Non-Substantive or Organizational Changes, Including Moving Pay and Income Figures to the Publication And Yearly Calculation of Adjusted Labor Compensation (“PAY CALC”) Order, 7 CCR 1103-14 .**

In addition to certain non-substantive corrections and organizational improvements, the Colorado Overtime and Minimum Pay Standards Order (“COMPS Order,” or “COMPS”) #38 includes two other organizational matters. First, specific dollar values, including Colorado minimum wages and exemption income thresholds that adjust annually, are removed from the text of the COMPS Order, and replaced by references to the Publication And Yearly Calculation of Adjusted Labor Compensation Order (“PAY CALC Order,” or “PAY CALC”), 7 CCR 1103-14, a new set of rules also adopted on November 10, 2021, with an effective date of January 1, 2022, to be contemporaneous with this COMPS Order.<sup>1</sup> Publishing pay and income levels in PAY CALC rather than COMPS serves two key purposes. First, it alleviates the annual need to revise the COMPS Order, a wide-ranging set of labor rules of which pay and income levels are only a small part, in years when the sole purpose of a revision would be updating pay and income levels. Second, it improves accessibility of key information, such as each year’s minimum wage and exemption salaries, to publish this information in PAY CALC, an annual issuance that (A) is short (unlike COMPS, a necessarily long set of labor rules), and (B) has all relevant pay and income levels in a straightforward table on page one (unlike COMPS, which is organized by rule topic, leaving pay and income levels scattered throughout its various rules), which explains the nature of future increases, and refers the reader to the underlying rule text for further detail on each published value. Subsequent years’ minimum and exempt wage calculations will keep being published in each subsequent year’s annual PAY CALC Order.

Second, numerous specific citation numbers of other rules and statutes are eliminated, not to change any substance, but to avoid possible confusion. As provided in Rule 1.2, “incorporation excludes later amendments to or editions of the constitution, statutes, and rules; all cited laws are incorporated in the forms that are in effect as of the

<sup>1</sup> Changes related to PAY CALC include: incorporating PAY CALC by reference (Rule 1.2); adding that the “employee” and “employer” definitions also apply to PAY CALC (R. 1.5-1.6); adding references to PAY CALC, and removing specific wage rates where applicable, on the minimum wage, including for tipped and minor employees (R. 3.1, 3.3, 6.2.3); adding references to PAY CALC, and removing specific wage rates where applicable, in the general salary threshold provisions (R. 2.5.1) and salary basis for certain exemptions (administrative, executive, and professional employees; certain non-profit proprietors or owners; in-residence field staff of seasonal camps or outdoor education; drivers or driver’s helpers; and highly technical computer-related occupations) (R. 2.2, R. 2.4.6(C), and 2.5.2); and adding that required postings and notices must state the values in PAY CALC (R. 7.4.1).

effective date of this COMPS Order.” But future confusion could result if other laws cited by section numbers in COMPS are changed — for example, when federal regulations commonly have changes to their numbering when they are amended — which also could require amending COMPS only to address such changes. Accordingly, various such specific citations are removed, including as to driving-related exemptions in Rule 2.4.6, and as to range workers, now in Rule 2.4.9. However, because the cited laws in effect as of these rules are incorporated, relevant text from cited authorities is included in the Appendix below. References to the “Salary Requirement” rules of the FLSA in 29 C.F.R. Part 541 Subpart G, however, remain, to make clear that the Division continues to apply these regulations in its own calculations of salaries for exemptions requiring a salary (Rule 2.5.1), and because the entire subpart is unlikely to have citations changed.

## **B. Rule 1: Authority and Definitions.**

### **1. Rules 1.1 and 1.2: Authority and Relation to Prior Orders; Incorporation by Reference.**

These rule changes update the effective date of applicable authorities, and incorporate two additional rule sets: the PAY CALC Order (explained above), and the Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving (Colorado WARNING) Rules, 7 CCR 1103-11. The Colorado WARNING Rules are incorporated to identify that these procedures will be used in Division investigations of possible retaliation in contravention of the COMPS Order.

**2. Rules 1.5 and 1.6: Definitions of Employee and Employer.** Rules 1.5 and Rule 1.6 are amended with minor stylistic changes, to clarify that the “employer” and “employee” definitions apply to both the COMPS and PAY CALC Orders, and to assure consistency of wording with prior COMPS Orders. Definitions of “agricultural employee,” “agricultural worker,” and “agricultural employer” in the Agricultural Labor Rights and Responsibilities Act, SB21-87 (enacted and effective June 25, 2021), are also added. Agricultural employees are defined by their work falling within federal statutory definitions of agriculture in the Fair Labor Standards Act (“FLSA”) or Internal Revenue Code.<sup>2</sup> Agricultural employers are defined by their activities within the same definitions, and by “regularly engag[ing] the services of one or more employees or contract[ing] with any person who recruits, solicits, hires, employs, furnishes, or transports employees.” These are broad definitions required by the statutory provisions in which the legislature enacted them, consistent with broader legislative directives such as the SB21-87 mandates that the employer definition be “liberally construed for the protection of persons providing services to an employer,” and that agricultural employers are responsible for ensuring various forms of labor compliance if workers are directly employed by either that employer or a person with which they contract, such as various forms of labor contractors.<sup>3</sup>

**3. Rule 1.8.3: Regular Rate of Pay.** Rule 1.8.3 is added to incorporate and expand the explanation of how to calculate “regular rate of pay” when an employee works at two or more hourly rates. This information was previously contained in Rule 4.1.4, which stated that an employee’s regular rate of pay was the rate for the position “in which the overtime occurs, or [...] a weighted average of the rates for each position, as provided in the [FLSA].” Under the FLSA’s implementing regulations, the weighted average calculation is performed by taking the sum of an employee’s

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<sup>2</sup> SB21-87, at Section 8-13.5-201(3), C.R.S., defines an “agricultural worker” as “a worker engaged in any service or activity included in Section 203 (f) of the [FLSA], or Section 3121 (g) of the federal ‘Internal Revenue Code of 1986’ ....” In Section 8-6-101.5, C.R.S., which sets forth the minimum wage, overtime, and rest and meal period requirements for agricultural workers, both terms “agricultural worker” and “agricultural employee” are used. However, this section specifies that the same definition applies: “as used in this section, ‘agricultural worker’ has the meaning set forth in section 8-13.5-201(3)”. Because the term “employee” is otherwise used throughout the COMPS Order, the Division specifies here that either term (“agricultural worker” or “agricultural employee”) as used in the COMPS Order (or the PAY CALC Order) has the same meaning. *Not* incorporated is the separate definition for “agricultural employee” set forth in Section 8-2-206(3), C.R.S., which provides and specifies anti-retaliation rights in agricultural work: “as used in *this section* ...[:.] ‘agricultural employee’ means a person employed by an agricultural employer.” (emphasis added). While uses of each term throughout the bill could cause confusion, this definition of employee (based on the fact of employment by an agricultural employer) is limited to the anti-retaliation section, and the “agricultural worker” definition applicable to the wage, rest period, and meal period rights, is as provided in Section 8-13.5-201, C.R.S. (based on qualifying duties and work).

<sup>3</sup> The bill does not define when an employer “regularly engages the services” of an employee. The same term is used elsewhere in the Labor Peace Act, § 8-3-101 *et seq.*, which SB21-87 amends to add these definitions. *See* C.R.S. § 8-3-104(12) (“‘Employer’ means a person who regularly engages the services of eight or more employees.”). One Colorado case has addressed the meaning of this term in the Labor Peace Act context, noting it had not been defined, but agreeing with other jurisdictions that it “refers to the question as to whether the occurrence is or is not in an established mode or plan in the operation of the business, and has not reference to the constancy of the occurrence.” *United Mine Workers v. Sunlight Coal Co.*, 270 P.2d 776, 781 (Colo. 1954). This definition comports with the intent of SB21-87 to broadly cover agricultural employers in that it does not discount seasonality (covering employers who, for example, hire one employee to work during the peak season every year), and considers whether the underlying business structure is dependent on having at least one employee.

earnings during a workweek, and dividing it by the number of hours worked, to get the regular rate of pay upon which overtime is based.<sup>4</sup> However, under the FLSA rule, regular rate can be based on the rate in effect when the work is performed if the parties have an agreement that it will be calculated this way.<sup>5</sup> Rule 1.8.3 makes these requirements express, preventing confusion as to when to use weighted average and when to use the rate-in-effect, especially because these rules are codified in multiple different federal regulations. The Division also adopts a further requirement that the agreement between the employee and employer be in writing for the rate-in-effect method to apply. The Division finds this necessary to ensure that employees have a complete understanding (1) of the possibility of their overtime rate being based on their lower hourly rate(s) even though some of the work counting towards that threshold was paid at a higher rate for Rule 4 overtime purposes,<sup>6</sup> and (2) the meaning of “regular rate” as used in exemptions under Rule 2.4. The exemptions in Rules 2.4.2 (commission sales) and 2.4.5 (“8 and 80 rule” for hospital and nursing home staff) use the phrase “regular rate of pay” without explanation of how to determine the rate in such a case, as does Wage Protection Rule 3.5.2, 7 CCR 1103-7.<sup>7</sup> Moving the explanation to Rule 1.8, in a section with general definitions rather than as a subpart of overtime-specific Rule 4, clarifies that the “regular rate” method in Rule 1.8 applies outside the context of overtime, including to Rule 2.4 and the Wage Protection Rules. This change clarifies the broader applicability of the regular rate calculated pursuant to Rule 1.8.3, and the Division finds that the weighted average or rate-in-effect methodology is correct to determine the most appropriate rate (including honoring parties’ expectations if an agreement was reached).

### C. Rule 2.2: Exemptions.

1. **Rule 2.2.7(E): Range Workers.** Prior COMPS Orders exempted range workers, subject to certain requirements, mainly compliance with standards in federal regulations.<sup>8</sup> As explained below, to comply with new legislation mandating new agricultural wage and hour requirements, the prior range worker exemption in Rule 2.2 (exemptions from *substantially all* of COMPS) is replaced with a similarly worded exemption (Rule 2.4.9) in Rule 2.4 (exemptions from *overtime* rules), and with a partial minimum wage exemption (in Rule 2.3.1 and the PAY CALC Order).

*Overtime and minimum wages:* SB21-87 exempts range workers from the Colorado *hourly minimum wage*, requiring instead a weekly minimum *salary*: \$515.00 as of January 1, 2022, adjusted annually by at least the same inflation rate as the Colorado minimum hourly wage.<sup>9</sup> Because SB21-87 does not expressly exempt range workers from its mandate of overtime pay for agricultural workers, comments urged the Division to grant range workers overtime rights. Faced with that ambiguity, the Division believes the SB21-87 range worker exemption from *hourly minimum* wages can be read to imply exemption from *hourly overtime* wages; Rule 2.4.9 therefore exempts range workers from overtime rules.

*Rest and meal periods:* The proposed version of COMPS exempted range workers from rest and meal periods. Comments to the Division showed that SB21-87 requires rest and meal periods for range workers, however: (1) SB21-87 requires rest and meal periods for *all* agricultural workers, which under SB21-87 include range workers;<sup>10</sup> (2) the only range worker wage-and-hour exemption in SB21-87 is the *minimum hourly wage* exemption noted above; and (3) in the the same statutory section as the range worker minimum wage exemption, SB21-87 did expressly list certain workers (but not range workers) as exempt from rest and meal periods (certain truck, combine, and harvester operators).<sup>11</sup> It also is

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<sup>4</sup> 29 C.F.R. § 778.115.

<sup>5</sup> 29 C.F.R. § 778.419; *see id.* at § 778.400 (citing 29 U.S.C. § 701(g)(3): providing that overtime payment may be made “at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation ... [and] authorized by regulation by the Secretary of Labor as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time.”).

<sup>6</sup> For example, an employee performing work at a \$20.00 hourly rate for the first 40 hours of the workweek, and at a \$15.00 rate for hours 40 to 50, might not anticipate their overtime rate to be based on the \$15.00 hourly rate.

<sup>7</sup> Revised Wage Protection Rule 3.5.2 limits the method of calculating regular rates for HFWA leave for employees to the weighted average method (as explained in COMPS Rule 1.8.3(A)), and applies a 30-day calculation period rather than the workweek basis stated in Rule 1.8.3. *See* 7 CCR 1103-7, Rule 3.5.2(A).

<sup>8</sup> Previous COMPS Orders did not define “range workers in jobs related to herding or production of livestock on the range.” In implementing the range worker minimum wage in SB21-87, COMPS #38 amends the definition of, based on SB21-87 and the FLSA, of workers “principally engaged in the range production of livestock” to whom the exemption applies, without substantial change in meaning from previous COMPS Orders. C.R.S. § 8-6-101.5(1)(b) (incorporating 29 C.F.R. §§ 780.323–329).

<sup>9</sup> C.R.S. § 8-6-101.5(1)(b)(I),(II). The dollar figure of the exempt salary is set forth in the PAY CALC, not COMPS, Order.

<sup>10</sup> C.R.S. § 8-6-101.5(2)(a),(b).

<sup>11</sup> C.R.S. § 8-6-101.5(2)(c).

clear that exemption from *minimum or overtime wages* has never implied that those workers must be exempt from *rest or meal periods* too: there long have been many *overtime-only* exemptions that leave those workers, salaried or not, entitled to rest and meal periods, including (A) all the Rule 2.4 overtime-only exemptions, which leave those overtime-exempt workers still entitled to rest and meal periods, and (B) before SB21-87 abrogated it, the COMPS agriculture rule (prior Rule 2.3) that had exempted all of agriculture from *overtime*, and about half from *minimum wages*, yet still required *rest periods* for most agricultural workers. SB21-87 was written in substantial part to narrow or eliminate the COMPS agricultural exemptions, so when the legislature wrote and enacted SB21-87, it knew how COMPS showed that exemption from overtime or minimum wages does not imply exemption from rest and meal periods. Because the Division finds that SB21-87 did not exempt range workers from rest or meal periods, Rules 2.4.9 (new range worker overtime exemption), 2.3 (general agricultural labor rule), and 5.2 (general rest and meal periods rule) apply to range workers.<sup>12</sup>

**2. Rule 2.2.7(G), Rule 2.4.7: Direct Support Professionals.** The daily overtime exemption for certain direct support companions remains unchanged, but is moved into Rule 2.4 (overtime-only exemptions), as a new Rule 2.4.7, because Rule 2.4 is the appropriate location for rule provisions with overtime-specific exemptions.

**3. Rule 2.2.11: Highly Compensated Employees.** The annual COMPS Order and its predecessor the annual Colorado Minimum Wage Order long have included many exemptions paralleling those in the FLSA, yet not the FLSA “Highly Compensated Employee” (“HCE”) exemption. In the process that began in mid-2019 of replacing of the Minimum Wage Order with the COMPS Order, a wide range of Coloradans commented on how Colorado wage rules might be improved, but the idea of a HCE exemption for Colorado drew little attention before the COMPS Order took effect in early 2020. Since then, an HCE exemption has become an area of regular inquiry from employers and attorneys.

Under the FLSA, the HCE exemption covers white-collar workers paid a significantly higher annual salary than is required for other exemptions (such as the administrative, executive, and professional exemptions), but with duties that do not correspond to the more specific exempt duties required by those other exemptions. The logic of the exemption is that high pay for white-collar work is “a strong indicator of ... exempt status,” decreasing the need for a highly specific duties test.<sup>13</sup> The exemption can arise at employers of all types, but in particular, HCEs in small businesses may have duties too varied to fit the detailed duties tests of other exemptions. Based on inquiries from employers and their attorneys, and Division research into how the FLSA HCE exemption applies, the Division finds it appropriate to add an HCE exemption to the COMPS Order — with the safeguards in the FLSA HCE exemption, plus additional safeguards in the COMPS version, to assure that the exemption will not deny rights to non-white-collar workers, nor to workers insufficiently “highly compensated” in light of Colorado’s higher cost structures (wages, cost of living, etc.) than the national averages.

Accordingly, Rule 2.2.11 adds an exemption for “highly compensated employees” that largely tracks, with exceptions noted below, the FLSA HCE exemption in 29 C.F.R. § 541.601. The COMPS HCE exemption, like the FLSA HCE exemption, includes both a duties test and a salary test. As to duties, an exempt HCE is an employee who

(B) customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee (as described in Rules 2.2.1-2.2.3); and (C) whose primary duty is office or non-manual work — for example, nonmanagement production-line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section no matter how highly paid they might be.<sup>14</sup>

As under federal rules, “customarily and regularly” means “a frequency that must be greater than occasional but ... may be less than constant,” which “includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.” 29 C.F.R. § 541.701.

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<sup>12</sup> With the deletion of the Rule 2.2.7(E) range worker exemption, the otherwise unchanged exemption for field staff of seasonal camps or seasonal outdoor education programs is renumbered, from 2.2.7(F) to 2.2.7(E).

<sup>13</sup> 29 C.F.R. § 541.601(c), *see also* (a), (d); *Wilson v. Schlumberger Tech. Corp.*, 2019 U.S. Dist. LEXIS 74573, \*4, 2019 WL 1916200 (D. Colo. Apr. 24, 2019) (Order on Partial Motion for Summary Judgment) (describing the analysis of the highly compensated employee exemption as a “streamlined approach”).

<sup>14</sup> *Id.* at (a)(1).

As to salary: Rule 2.5.1 incorporates by reference the “Salary Requirement” rules of the FLSA in 29 C.F.R. Part 541 Subpart G, including the rules in that Subpart applying to highly compensated employees. As specified in Subpart G concerning weekly salary, Section 541.602(a)(3), C.F.R. — which allows for up to ten percent of the salary amount to be satisfied by payment of nondiscretionary bonuses or commissions — does not apply to highly compensated employees.<sup>15</sup> As to the required annual salary: (1) it may include commissions and other non-discretionary compensation earned during the year, but may not include board, lodging, or payments for insurance or other benefits; (2) if the threshold is not met by the final pay period of the year, the employer may make a final “catch up” payment during the final pay period or within one month after the year ends; (3) the exemption may be applied where an employee is employed less than a complete year if the salary meets the required level on a pro rata basis; and (4) an employer may use any 52-week period for calculating the salary, but if none is selected, the calendar year will be used.<sup>16</sup>

In sum, this COMPS HCE exemption substantially tracks the federal HCE exemption, but differs in two ways:

- (1) *Limitation of the HCE exemption to white-collar employees is stronger and clearer* than in federal law. Whereas the FLSA HCE exemption covers “employees whose primary duty *includes* performing office or non-manual work”<sup>17</sup> (emphasis added), Rule 2.2.11 covers only those “whose *primary duty is* office or non-manual work” (emphasis added).
- (2) *The minimum HCE exemption salary is higher* than the \$107,432 required by the FLSA HCE exemption.<sup>18</sup> Rule 2.2.11 requires a salary of 2.25 times the salary for various duties-specific exemptions (supervisors, etc.) in Rule 2.5, which is \$45,000 in 2022, \$50,000 in 2023, \$55,000 in 2024, then annually inflation-adjusted. That makes the HCE-exempt salary \$101,250 in 2022, \$112,500 in 2023, \$123,750 in 2024, then annually inflation-adjusted. This makes the Colorado exemption largely proportional to the federal threshold (which is approximately three times the federal salary basis, \$35,568), while tying it to Colorado’s higher salary basis, which in turn reflects Colorado’s higher cost structure (wages, cost of living, etc.) than the national averages.

**4. Rule 2.2.12: National Western Stock Show Employees.** This exemption is unchanged, but moved out of the agricultural exemption, and renumbered as a new Rule 2.2.12, to reflect that it has been an exemption from the COMPS Order that exists separately from the new requirements for agricultural labor under SB21-87.<sup>19</sup>

**D. Rule 2.3: Agriculture.** Rule 2.3 previously exempted many agricultural employees from requirements of the COMPS Order, defined “jobs in agriculture,” and described the exemption scope. The rule is largely re-written, now describing requirements and variances for minimum wages, overtime pay, and rest and meal periods in agricultural work.

**1. Rule 2.3.1: Minimum Wages.** SB21-87 requires that, as of January 1, 2022, agricultural employers pay all agricultural employees at least the Colorado minimum hourly wage, except that range workers must instead be paid the minimum weekly salary required by SB21-87 and implemented by the COMPS and PAY CALC Orders. Rule 2.3.1 is thus amended to remove the prior minimum wage exemption for FLSA-exempt agricultural work.

**2. Rule 2.3.2: Overtime and Maximum Hours Protections.** SB21-87 mandates for agricultural labor not any specific overtime requirements, but instead that the Division must set those requirements by rule:

[C.R.S. §] 8-6-120. Overtime wages for agricultural workers — legislative declaration. The director [of the Division] shall promulgate rules providing meaningful overtime and maximum hours protections .... In promulgating such rules, the director shall consider the inequity and racist origins of the exclusion of agricultural employees from overtime and maximum hours protections available to other employees, the fundamental right of all employees to overtime and maximum hours standards that protect the health and welfare of employees, and the unique difficulties agricultural employees have obtaining workplace conditions equal to those provided to other employees.

<sup>15</sup> *Id.* at (b)(1).

<sup>16</sup> *Id.* at (b)(1)–(4).

<sup>17</sup> *Id.* at (d).

<sup>18</sup> *Id.* at (a)(1).

<sup>19</sup> As were employers that “draw[] at least 50% of [their] annual dollar volume of business from sales to the consuming public (rather than for resale) of any services, commodities, articles, goods, wares, or merchandise[,]” who remain excluded from any agriculture-specific variance in these rules, *see* Rule 2.3.2(F).

Most states do not provide overtime pay rights in agriculture, and among those that do, two require overtime after 40 hours per week (California and Washington), one after 48 hours (Minnesota), one after 40 hours but 48 in peak season (Hawaii), and two after 60 hours (New York and Maryland). While Colorado has not previously provided for overtime pay in agriculture, it has provided a partial exemption for ski industry workers, where (based on a mix of Colorado and federal law), overtime pay is required after 56 hours per week and 12 hours per day. Thus, there is precedent for varying from the overtime pay thresholds of 40 hours per week and 12 per day that apply to the vast majority of industries, in particular for the highly seasonal work of the ski industry — and a substantial portion of agriculture is similarly seasonal.

Yet the Division finds that it cannot vary too heavily from existing overtime standards for other industries, because this is the SB21-87 mandate that the Division is legally required to execute: to redress agricultural workers' lack of "conditions equal to those provided to other employees" with "meaningful" protection of the "fundamental right" to overtime to that "protect the health and welfare of employees."<sup>20</sup> These parameters for the Division's overtime rules preclude setting materially lesser overtime requirements for agricultural employees than for other comparable employees.

However, SB21-87 does not preclude the Division from finding important, and accommodating, the reality that complying with new overtime requirements will be a major adjustment for Colorado agricultural employers — who, even when 100% compliant with all labor standards, have never had to pay extra for overtime hours. Accordingly, Rule 2.3.2 sets the following overtime requirements for agriculture.

Daily overtime pay. Agriculture is exempt from 12-hour daily overtime pay, as long as in days:

- (1) over 12 hours, the third paid rest period is 30 minutes (rather than 10 minutes or another applicable length), to allow adequate time for the extra rest, eating, and/or drinking that long agricultural days warrant; and
- (2) over 15 hours, employees receive an extra payment equal to at least one hour of the Colorado minimum wage.

The first requirement was in the proposed rules; the second was added based on (and the first was further supported by) comments and research on the ill effects of long hours, especially in arduous work,<sup>21</sup> such as the days over 12 or sometimes even 15 hours, in workweeks of 5-7 days, that can occur in agriculture<sup>22</sup> — an industry that, even with many employers engaged in best practices, is among the industries with the highest work fatality rates (per data from the federal Bureau of Labor Statistics),<sup>23</sup> and beyond fatalities "ranks among the most hazardous industries" (per data from the federal Centers for Disease Control, which also studies occupational health).<sup>24</sup>

Weekly overtime pay. Overtime pay requirements are phased in over several years, with the first requirements effective roughly one year after adoption (November 1, 2022), then nearly the full requirements effective after roughly two years (January 1, 2024), and the full requirements effective after roughly three years (January 1, 2025). The weekly overtime requirements vary by seasonality of the employer: overtime is after 48 hours weekly, but after 56 hours for the peak seasons of "highly seasonal" employers, as long as those employers give employees advance notice that they expect to have "peak seasons" of up to 22 weeks when hours may be longer without paying overtime until 56 hours.<sup>25</sup>

The proposed version of COMPS had applied a lesser overtime requirement to small employers, but comments and research militated in favor of not treating small employers differently from otherwise identical mid- or large-sized

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<sup>20</sup> C.R.S. § 8-6-120.

<sup>21</sup> As the federal Occupational Safety and Health Administration explains [in summarizing a range of studies](#):

Working 12 hours per day is associated with a 37% increased risk of injury.... [E]xtended shift[s] ... increased by 16.2% [the] monthly risk of a motor vehicle crash during their commute.... Decreased alertness from worker fatigue has been a contributing factor in industrial disasters ... [and] increased time off the job due to illness and increased workers' compensation costs[, a]n estimated annual cost of \$136.4 billion from fatigue-related, health-related lost productive work time.

<sup>22</sup> Agricultural workers are 2.26 times more likely than others to work over 50 hours per week (per BLS data), and comments to the Division confirm the existence of 6-7 day weeks of 12-13 hours, with some longer workdays, in Colorado.

<sup>23</sup> U.S. Bureau of Labor Statistics, *2019 Census of Fatal Occupational Injuries* (Census of Fatal Occupational Injuries Interactive Charts - Number and rate of fatal work injuries, by industry sector), <https://www.bls.gov/iif/oshcfoi1.htm#2019> (last modified Dec. 22, 2020).

<sup>24</sup> Centers for Disease Control and Prevention, The National Institute for Occupational Safety and Health (NIOSH), *Workplace Safety & Health Topics: Agricultural Safety*, <https://www.cdc.gov/niosh/topics/aginjury/default.html> (last reviewed Sept. 21, 2021).

<sup>25</sup> The rule defines "highly seasonal," "peak seasons," and what notice must be provided to employees.

employers, for several reasons. First, though rules can treat different parties differently, variation among those similarly situated should be minimized, so (a) workers doing the same work at different-sized employers should generally have the same rights, and (b) partially exempting small employers would not only un-level the playing field among employers, but potentially disincentivize employers from growing. Second, the Division’s core rulemaking duty is to faithfully implement what the legislature enacts, and SB21-87 lacks even a partial exemption for small employers (even as SB21-87 does detail various considerations for the Division’s overtime rulemaking). The Division cannot construe this as an omission of a consideration the legislature would value, because in the Division’s experience implementing new numerous labor laws, it finds that the legislature typically does *not* exempt small employers, instead usually including no employer size threshold in labor laws,<sup>26</sup> and sometimes giving small employers just an extra year before requirements phase in fully.<sup>27</sup> Third, another rule change aims to lessen overtime requirements for small family farms: many employers small enough for the “small employer” definition (under 4 employees and \$1 million in adjusted gross income) are family farms, and the adopted rules apply a broader definition of “family” than was proposed (certain part-owners and their close relatives) exempt from overtime. Fourth, the adopted rules do retain one accommodation for small employers: a moderately lesser overtime requirement in 2024, to delay the imposition of the final, full overtime requirements that take effect in 2025.

**Overtime exemptions:** In addition to existing COMPS Order exemptions (*e.g.*, for supervisors), new overtime exemptions cover (a) certain employees of agricultural employers who are part-owners or their close relatives, and (b) decision-making managers at livestock employers (discussed further below).

Summary Table: Weekly Overtime Requirements for Agricultural Employers			
Time Period	(a) Highly Seasonal Employers	(b) Non-Highly Seasonal Employers	(c) Small Employers (seasonal or not)
Until 11/1/22	[ No requirements ]		
11/1/22-12/31/23	60 hours		
2024	56 hours for up to 22 peak weeks;	54 hours	56 hours
2025 -	48 hours otherwise	48 hours	[No separate rule for small employers; apply (a) or (b)]

**3. Rules 2.3.1 and 2.3.3: Meal and Rest Periods.** Under SB21-87, agricultural workers are entitled to rest periods of at least 10 minutes per four hours worked, and meal periods of at least 30 minutes for shifts of five hours or more. The latter may be unpaid only for workers fully relieved from duty. To conform to that SB21-87 requirement, Rule 2.3.1 deletes text that had exempted agriculture fully from meal periods and had allowed limited rest period variations not in conformity with what SB21-87 requires.<sup>28</sup> SB21-87 provides for different rest and meal break treatment for two types of work: (a) exemption from meal and rest periods for “a truck driver whose sole and principal duty is to haul livestock or to a combine or harvester operator while harvesting”,<sup>29</sup> and (b) workers engaged in hand-weeding and hand-thinning must receive an additional five minutes of rest per four hours of work, making their total paid rest period time 15 minutes per four hours, in the middle of each such period to the extent practicable.<sup>30</sup>

<sup>26</sup> *E.g.*, C.R.S. § 8-4-101(5),(6) (no exemption or delay based on employer size for new Wage Protection Act requirements in either 2014 enactment or 2020 amendments expanding coverage); Equal Pay for Equal Work Act, S.B. 19-085, C.R.S. §§ 8-5-101 et seq. (no exemption or delay based on employer size for new requirements of posting jobs and promotions, and of wage record-keeping).

<sup>27</sup> *E.g.*, Healthy Families and Workplaces Act (“HFWA”), S.B. 20-205, C.R.S. §§ 8-13.3-401 et seq. (small employer exemption for just one year, and only a partial exemption from one of two types of required paid leave); Chance to Compete Act, H.B. 19-1025, C.R.S. §§ 8-2-130 (small employer exemption for just one year, from new ban on certain inquiries into job applicant criminal history).

<sup>28</sup> Prior COMPS Orders exempted agricultural work from meal periods, gave more flexibility for rest periods to *average* 10 minutes per 4 hours worked, without being at least 10 minutes in each 4 hours, as long as workers had at least 5 minutes every four hours.

<sup>29</sup> C.R.S. § 8-6-101.5(2)(c).

<sup>30</sup> C.R.S. § 8-13.5-203(3).

**E. Rule 2.4.8: Decision-Making Managers at Livestock Employers.** Rule 2.4.8 is added as a new overtime exemption for managers at livestock<sup>31</sup> employers (dairies, cattle ranches, feedlots, or similar employers) who have decision-making duties and authority, and compensation of at least the Rule 2.5 salary for most duties-based exemptions (exempt supervisors, executives, administrators, and professionals) but whose work does not otherwise fit those duties-based exemptions. This exemption is from overtime, not rest or meal periods, because SB21-87 requires rest and meal periods for *all* agricultural workers, granting the Division no authority for new rest or meal period exemptions.

This exemption was suggested in various comments, first by the Rocky Mountain Farmers Union, and then by other industry representatives, including the Colorado Dairy Farmers, whose suggested formulation of the text of the exemption was one the Division found especially apt, so it formed the basis for many of the key provisions now adopted in new Rule 2.4.8. In part because employers with significant livestock responsibilities face often-pressing animal health needs, even higher-level decision-making managers may commonly tackle such duties, so they may not not qualify for the existing “administrative” exemption (due to the manual nature of certain such work), and may not qualify for the “supervisor” exemption (because they may be too much of a “working supervisor,” spending less time supervising than that exemption requires). For this exemption, the “primary duties” test requires “routine exercise of independent judgment and discretion in matters of significance,” which the same as in, and fleshed out in a federal rule<sup>32</sup> on, the “administrative” exemption. To make clear the intended applicability to higher-level managers, the primary duties test also requires a high-level reporting structure (either supervising at least two employees or reporting to an owner, or to an executive-level employee who themselves reports to an owner, that also exercises the required independent judgment and discretion).<sup>33</sup> By way of example, assuming other requirements of the exemption are met (salary, non-seasonality, reporting structure, etc.), the “primary duties” requirement of “routine exercise of independent judgment and discretion in matters of significance”:

- (A) typically could be met by a dairy employee in charge of cow health or birthing (matters of significance to the dairy) who regularly makes independent judgment calls on what actions to take in response to health or birthing needs, what if any items to purchase for those actions, etc. (routine exercise of independent judgment and discretion on those matters); and
- (B) typically could not be met by a working supervisor of a field crew, because
  - (1) “matters of significance” justifying exemption means more than any assigned work with monetary stakes, because “an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee’s duties may cause serious financial loss to the employer” (29 C.F.R. § 541.202(f)); and
  - (2) their exercise of “judgment and discretion” typically would be too infrequent to be “routine,” and/or not “independent” enough, because “exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described” by the employer or its supervisors (29 C.F.R. § 541.202(e)).

Finally, this exemption is meant to accommodate key personnel of livestock employers that do not qualify for 56-hour overtime because they are not “highly seasonal”; accordingly, the exemption is limited to non-highly-seasonal employers and to employees who are not employed in the position on a basis that is expected or planned to be seasonal or temporary.

**F. Rule 2.4.9: Range Workers.** As discussed above (as to Rule 2.2.7(E)), the prior range worker exemption has been replaced by the new Rule 2.4.9 overtime exemption.

**G. Rule 2.5.1: Salary Thresholds for Certain Exemptions.** This rule is revised to refer to the PAY CALC Order while keeping the annual equivalent salary values explicit, and to specify that highly compensated employee compensation is calculated by reference to 29 C.F.R. Part 541 Subpart G, but with a different salary than in the other exemptions’ salary basis.

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<sup>31</sup> As used in Rule 2.4.8, “livestock” has the same meaning as in 29 C.F.R. § 780.120, included in the Appendix below: “domestic animals ordinarily raised or used on farms [... including c]attle (both dairy and beef cattle), sheep, swine, horses, mules, donkeys, and goats.” The term excludes poultry, fur-bearing animals, and bees, as defined in other federal rules, *see* 29 C.F.R. §§ 780.123-125.

<sup>32</sup> 29 C.F.R. § 541.202, included in the Appendix below.

<sup>33</sup> As used in COMPS, “primary duty” has the same meaning as in 29 C.F.R. § 541.700, included in the Appendix below.



**H. Rule 3.3: Reduced Minimum Wage.** The 15% minimum wage reduction allowable for “persons certified by the Director to be less efficient in performance of their job duties due to a physical disability” in COMPS Order #37 is removed. Colorado Senate Bill 21-039 prohibits employers from paying any wage lower than the highest applicable minimum wages as of July 1, 2021, unless the employer held a special certificate issued on or before June 30, 2021, in which case it would be permitted to submit a plan to phase out that sub-minimum wage by July 1, 2025.<sup>34</sup> However, as the Division has previously indicated in guidance, there are no valid Colorado-issued certificates, and no federally-issued certificates would exempt an employer from paying Colorado minimum wages.<sup>35</sup> This change to Rule 3.3 reflects the law as codified in SB21-039, existing Division guidance, and the General Assembly that among the SB21-39 purposes are that “the payment of subminimum wages is an economic justice issue for individuals with disabilities, impacting their ability to earn wages equal to their peers without disabilities and devaluing their contributions based on their disabilities[.]”<sup>36</sup>

**I. Rule 4: Overtime.** Rule 4.1.1 is corrected non-substantively (the Rule 2 overtime rules are “above”), and exemptions “or variances” is added (Rule 2 includes not only exemptions, but also the Rule 2.3 variances in agricultural overtime). Finally, Rule 4.1.4 is revised to remove regular rate calculation methodology, which is now in Rule 1.8.3.

**J. Rule 5.2.4: Rest Periods.** Rule 5.2.4 is amended to clarify a point that already followed from existing rules, but that the Division finds helpful to state more expressly: the requirement of additional pay to remedy a failure to provide rest periods applies “equally to any required rest period time not provided (e.g., rest periods that are incomplete, or for non-hourly-paid employees, or under any other rule or statute providing rest periods of different durations).” This is consistent with prior Rule 5.2.4 stating that it “applies equally to rest periods that Rule 5.2.1 permits to be of different durations” — *i.e.*, two 5-minute periods replacing one of 10 minutes. But due to SB21-87 and rule changes that SB21-87 charged the Division with promulgating, now there are more rest periods of different durations (*e.g.*, 15 rather than 10 minutes per four hours for hand-weeding/-thinning workers<sup>37</sup>), as well as more non-hourly-paid workers entitled to rest periods (*e.g.*, decision-making managers at livestock employers are exempt from overtime but not rest or meal periods). Those changes pursuant to SB21-87, on who receives rest periods and for how long, support clarifying Rule 5.2.4, which was always intended to say that pay is due for whatever quantity of rest period time is not provided, at whatever quantity of pay the employee would earn for that time.<sup>38</sup> Amended Rule 5.2.4 now makes that point more clearly and expressly.

Comments to the Division have called to its attention that some may be inaccurately asserting that Rule 5.2.4 grants permission to deny rest periods as long as extra compensation is provided. The Division does not at this time see a substantive rule amendment as a necessary response, because Rule 5.2 as a whole is clear. The entire text of Rule 5.2 (before its subparts that detail specifics of how to apply Rule 5.2) is: “*Every* employer *shall* authorize and permit a compensated 10-minute rest period for each 4 hours of work, or major fractions thereof, for *all* employees, as follows” (emphasis added).<sup>39</sup> Rule 5.2 offers employers no alternative of paying extra to exempt themselves from the categorical mandate that “every” employer “shall” provide rest periods to “all” employees; to the contrary, the only exemptions or variances are in Rule 2 — which states nothing about paying in lieu of providing rest periods. Rule 5.2.4 therefore merely clarifies one important remedy that is a consequence of failing to comply with the Rule 5.2 rest period mandate: that “a failure by an employer to authorize and permit a 10-minute compensated rest period is a failure to pay 10 minutes of wages at the employee’s agreed-upon or legally required (whichever is higher) rate of pay.” The Division proposed Rule 5.2.4 in November 2019, and adopted it in January 2020, for the express purpose of clarifying that the Division was rejecting prior interpretations of Division rest period rules that had deemed a rest period violation *not* to trigger any right to extra pay.<sup>40</sup> Because the Division sees no ambiguity as to this point in Rule 5.2, it sees no need to amend the Rule just to reiterate its already unambiguous provision of compensation for rest period violations as a remedy for, not as an excuse for, violating the unambiguous Rule 5.2 requirement that “every” employer “shall” provide rest periods to “all” employees. The Division therefore will aim to use a mix of outreach and enforcement through investigations to redress and correct any inaccurate assertions that extra pay eliminates the Rule 5.2 obligation to provide rest periods.

<sup>34</sup> C.R.S. § 8-6-108.7(2).

<sup>35</sup> “[Minimum and Sub-Minimum Minimum Wages for Coloradans with Disabilities](#)” (issuance by the Division dated Dec. 14, 2020).

<sup>36</sup> C.R.S. § 8-6-108.7(1).

<sup>37</sup> C.R.S. § 8-13.5-203(3).

<sup>38</sup> COMPS Rule 1.8 long has covered how to apply a “regular rate of pay” for employees not paid on an hourly basis.

<sup>39</sup> The only other part of Rule 5.2 after that excerpt is an illustrative table of how many breaks are needed based on workday length.

<sup>40</sup> See [Statement of Basis, Purpose, Specific Statutory Authority, & Findings](#), pp.47-48 (January 22, 2020) (findings as to COMPS Order #36, adopted May 25, 2020) (from subsection c.).

**K. Rule 7.4.1: Posting Requirement.** This rule is revised to state that the required COMPS Order posting must include dollar figures in the PAY CALC Order, where all such figures are now published, rather than in the COMPS Order. Also, a provision is added specifying that employers are not compliant with the COMPS Order posting requirements if they “attempt to minimize the effect of posters or notices required by statute or these Rules, such as by communicating positions contrary to, or discouraging the exercise of rights covered in, the required poster or notice.” Last year, the Division adopted a parallel requirement in the Colorado WARNING Rules, and finds the same purpose supported by adoption in the COMPS Order poster requirements: ensuring that employees receive clear and consistent notice of their rights, and because communicating to employees that their rights will not be honored would defeat the purpose of notice.<sup>41</sup>

**L. Rule 8: Administration and Interpretation.** A principle of construction from SB21-87 is added to Rule 8.7(A), as to the definition of an agricultural employer. Under SB21-87, “[t]he meaning of ‘agricultural employer’ must be liberally construed for the protection of persons providing services to an employer.”<sup>42</sup> Rule 8.9 is added to explain Division methodology for calculating values under the above rules. It identifies how inflation-based increases are calculated, as well as the Division’s general rule for calculating dollar value, rounding fractional cents of at least 0.5 up, and of under 0.5 down, except that to comply with the constitutional mandate that the minimum wage be not less than the prior year’s minimum wage plus inflation, fractional cents in increases in the minimum wage must be rounded up.

**M. Appendix A: Statutory Authority.** Citations to SB21-87’s rulemaking mandates and substantive requirements are added to the Appendix of the COMPS Order to identify this authority.

**V. EFFECTIVE DATE.** These rules take effect on January 1, 2022.



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

November 10, 2021

\_\_\_\_\_  
Date

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<sup>41</sup> As explained in greater detail in the Statement of Basis and Purpose for the Colorado WARNING Rules, 7 CCR 1103-11, this rule is informed by NLRB notice-posting rules, including that “posting of a notice adjacent to a Board notice constitutes noncompliance with the posting provision if the side notice’s language attempts to minimize the effect of the Board notice or where it suggests that respondent does not subscribe to any of the Board notice’s statements.” [Statement of Basis, Purpose, Statutory Authority, & Findings](#), p. 8 (November 9, 2020) (findings as to Colorado WARNING Rules, adopted November 9, 2020) (from sentence beginning “Rule 4.4”) (quoting NLRB Casehandling Manual § 10518.6; citing *id.* at § 10518).

<sup>42</sup> C.R.S. § 8-3-104(1)(b).

**APPENDIX****Authorities cited in COMPS Order #38 and this Statement of Basis, Purpose, Authority, & Findings:**

**Full text or, if abridged, noted with ellipses; versions in effect as adoption of COMPS Order #38 on Nov. 10, 2021.**

**20 C.F.R. § 655.210 — Contents of herding and range livestock job orders.**

[...] (c) Range housing. The employer must specify in the job order that range housing will be provided. The range housing must meet the requirements set forth in § 655.235.

(d) Employer-provided items.

(1) The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required by law, by the employer, or by the nature of the work to perform the duties assigned in the job offer safely and effectively. The employer must specify in the job order which items it will provide to the worker.

(2) Because of the unique nature of the herding or production of livestock on the range, this equipment must include effective means of communicating with persons capable of responding to the worker's needs in case of an emergency including, but not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. The employer must specify in the job order:

(i) The type(s) of electronic communication device(s) and that such device(s) will be provided without charge or deposit charge to the worker during the entire period of employment; and

(ii) If there are periods of time when the workers are stationed in locations where electronic communication devices may not operate effectively, the employer must specify in the job order, the means and frequency with which the employer plans to make contact with the workers to monitor the worker's well-being. This contact must include either arrangements for the workers to be located, on a regular basis, in geographic areas where the electronic communication devices operate effectively, or arrangements for regular, pre-scheduled, in-person visits between the workers and the employer, which may include visits between the workers and other persons designated by the employer to resupply the workers' camp.

(e) Meals. The employer must specify in the job offer and provide to the worker, without charge or deposit charge:

(1) Either three sufficient meals a day, or free and convenient cooking facilities and adequate provision of food to enable the worker to prepare his own meals. To be sufficient or adequate, the meals or food provided must include a daily source of protein, vitamins, and minerals; and

(2) Adequate potable water, or water that can be easily rendered potable and the means to do so. Standards governing the provision of water to range workers are also addressed in § 655.235(e).

[...] (g) Rates of pay. The employer must pay the worker at least the monthly AEWR, as specified in § 655.211, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action, in effect at the time work is performed, whichever is highest, for every month of the job order period or portion thereof.

(1) The offered wage shall not be based on commissions, bonuses, or other incentives, unless the employer guarantees a wage that equals or exceeds the monthly AEWR, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action, or any agreed-upon collective bargaining rate, whichever is highest, and must be paid to each worker free and clear without any unauthorized deductions.

(2) The employer may prorate the wage for the initial and final pay periods of the job order period if its pay period does not match the beginning or ending dates of the job order. The employer also may prorate the wage if an employee is voluntarily unavailable to work for personal reasons

**20 C.F.R. § 655.1304 — Contents of job offers [for range workers].**

(a) Preferential treatment of aliens prohibited. The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. Except where otherwise permitted under this section, no job offer may impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers.

(b) Job qualifications. Each job qualification listed in the job offer must not substantially deviate from the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops.

(c) Minimum benefits, wages, and working conditions. Every job offer accompanying an H-2A application must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.

(d) Housing -

(1) Obligation to provide housing. The employer must provide housing at no cost to the worker, except for those U.S. workers who are reasonably able to return to their permanent residence at the end of the work day. Housing must be provided through one of the following means:

(i) Employer-provided housing. Employer-provided housing that meets the full set of DOL OSHA standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401; or

(ii) Rental and/or public accommodations. Rental or public accommodations or other substantially similar class of habitation

that meets applicable local standards for such housing. In the absence of applicable local standards, State standards will apply. In the absence of applicable local or State standards, DOL OSHA standards at 29 CFR 1910.142 will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing. The employer must document that the housing complies with the local, State, or Federal housing standards. Such documentation may include but is not limited to a certificate from a State Department of Health or other State or local agency or a statement from the manager or owner of the housing.

(2) Standards for range housing. Housing for workers principally engaged in the range production of livestock shall meet standards of DOL OSHA for such housing. In the absence of such standards, range housing for shepherders and other workers engaged in the range production of livestock must meet guidelines issued by ETA.

(3) Deposit charges. Charges in the form of deposits for bedding or other similar incidentals related to housing must not be levied upon workers. However, employers may require workers to reimburse them for damage caused to housing, bedding, or other property by the individual workers found to have been responsible for damage which is not the result of normal wear and tear related to habitation.

(4) Charges for public housing. If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by the employer, the employer must pay any charges normally required for use of the public housing units (but need not pay for optional, extra services) directly to the housing's management.

(5) Family housing. When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, family housing must be provided to workers with families who request it.

(6) Housing inspection. In order to ensure that the housing provided by an employer under this section meets the relevant standard:

(i) An employer must make the required attestation, which may include an attestation that the employer is complying with the procedures set forth in § 654.403, at the time of filing the Application for Temporary Employment Certification pursuant to § 655.105(e)(2).

(ii) The employer must make a request to the SWA for a housing inspection no less than 60 days before the date of need, except where otherwise provided under this part.

(iii) The SWA must make its determination that the housing meets the statutory criteria applicable to the type of housing provided prior to the date on which the Secretary is required to make a certification determination under INA sec. 218(c)(3)(A), which is 30 days before the employer's date of need. SWAs must not adopt rules or restrictions on housing inspections that unreasonably prevent inspections from being completed in the required time frame, such as rules that no inspections will be conducted where the housing is already occupied or is not yet leased. If the employer has attested to and met all other criteria for certification, and the employer has made a timely request for a housing inspection under this paragraph, and the SWA has failed to complete a housing inspection by the statutory deadline of 30 days prior to date of need, the certification will not be withheld on account of the SWA's failure to meet the statutory deadline. The SWA must in such cases inspect the housing prior to or during occupation to ensure it meets applicable housing standards. If, upon inspection, the SWA determines the supplied housing does not meet the applicable housing standards, the SWA must promptly provide written notification to the employer and the CO. The CO will take appropriate action, including notice to the employer to cure deficiencies. An employer's failure to cure substantial violations can result in revocation of the temporary labor certification.

(7) Certified housing that becomes unavailable. If after a request to certify housing (but before certification), or after certification of housing, such housing becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that is in compliance with the local, State, or Federal housing standards applicable under paragraph (d)(1)(ii) of this section and for which the employer is able to submit evidence of such compliance. The employer must notify the SWA in writing of the change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance with the applicable local, State or Federal safety and health standards, in accordance with the requirements of paragraph (d)(1)(ii) of this section. The SWA must notify the CO of all housing changes and of any noncompliance with the standards set forth in paragraph (d)(1)(ii) of this section. Substantial noncompliance can result in revocation of the temporary labor certification under § 655.117.

(e) Workers' compensation. The employer must provide workers' compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the State's workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law for other comparable employment. The employer must retain for 3 years from the date of certification of the application, the name of the insurance carrier, the insurance policy number, and proof of insurance for the dates of need, or, if appropriate, proof of State law coverage.

(f) Employer-provided items. Except as provided in this paragraph, the employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. The employer may charge the worker for reasonable costs related to the worker's refusal or negligent failure to return any property furnished by the employer or due to such worker's willful damage or destruction of such property. Where it is a common practice in the particular area, crop activity and occupation for workers to provide tools and equipment, with or without the employer reimbursing the workers for the cost of providing them, such an arrangement will be permitted, provided that the requirements of sec. 3(m) of the FLSA at 29 U.S.C. 203(m) are met. Section 3(m) does not permit deductions for tools or equipment primarily for the benefit of the employer that reduce an employee's wage below the wage required under the minimum wage, or, where applicable, the overtime provisions of the FLSA.

(g) Meals. The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.114.

(h) Transportation; daily subsistence -

(1) Transportation to place of employment. If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has departed to the employer's place of employment. For an H-2A worker coming from outside of the U.S., the place from which the worker has departed is the place of recruitment, which the Department interprets to mean the appropriate U.S. consulate or port of entry. When it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so, or when the employer extends such benefits to similarly situated H-2A workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to U.S. workers. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence payment must be at least as much as the employer would charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event less than the amount permitted under paragraph (g) of this section.

(2) Transportation from last place of employment to home country. If the worker completes the work contract period, and the worker has no immediately subsequent H-2A employment, the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. For an H-2A worker coming from outside of the U.S., the place from which the worker has departed will be considered to be the appropriate U.S. consulate or port of entry.

(3) Transportation between living quarters and worksite. The employer must provide transportation between the worker's living quarters (i.e., housing provided or secured by the employer pursuant to paragraph (d) of this section) and the employer's worksite at no cost to the worker, and such transportation must comply with all applicable Federal, State or local laws and regulations, and must provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500, subpart D. If workers' compensation is used to cover such transportation, in lieu of vehicle insurance, the employer must either ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation.

(i) Three-fourths guarantee -

(1) Offer to worker. The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any. For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and has been approved by the CO. The work contract period can be shortened by agreement of the parties only with the approval of the CO. In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect. Therefore, if, for example, a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (e.g., 10 weeks × 48 hours/week = 480-hours × 75 percent = 360). If a Federal holiday occurred during the 10-week span, the 8 hours would be deducted from the total guaranteed. A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. However, all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If the employer affords the U.S. or H-2A worker during the total work contract period less employment than that required under this paragraph, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days.

(2) Guarantee for piece rate paid worker. If the worker will be paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the AEWR, whichever is higher, to calculate the amount due under the guarantee.

(3) Failure to work. Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to do so in accordance with paragraph (i)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the number of hours has been met must maintain the payroll records in accordance with paragraph (j)(2) of this section.

(4) Displaced H-2A worker. The employer is not liable for payment under paragraph (i)(1) of this section to an H-2A worker whom the CO certifies is displaced because of the employer's compliance with § 655.105(d) with respect to referrals made after the employer's date of need. The employer is, however, liable for return transportation for any such displaced worker in accordance with paragraph (h)(2) of this section.

(5) Obligation to provide housing and meals. Notwithstanding the three-fourths guarantee contained in this section, employers are obligated to provide housing and subsistence for each day of the contract period up until the day the workers depart for other H-2A employment, depart to the place outside of the U.S. from which the worker came, or, if the worker voluntarily abandons employment or is terminated for cause, the day of such abandonment or termination.

(j) Earnings records.

(1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to field tally records, supporting summary payroll records, and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (i)(3) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from the worker's wages.

(2) Each employer must keep the records required by this part, including field tally records and supporting summary payroll records, safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. All records must be available for inspection and transcription by the Secretary or a duly authorized and designated representative, and by the worker and representatives designated by the worker as evidenced by appropriate documentation (an Entry of Appearance as Attorney or Representative, Form G-28, signed by the worker, or an affidavit signed by the worker confirming such representation). Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated representative, and by the worker and designated representatives as described in this paragraph.

(3) To assist in determining whether the three-fourths guarantee in paragraph (i) of this section has been met, if the number of hours worked by the worker on a day during the work contract period is less than the number of hours offered, as specified in the job offer, the records must state the reason or reasons therefore.

(4) The employer must retain the records for not less than 3 years after the completion of the work contract.

(k) Hours and earnings statements. The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(1) The worker's total earnings for the pay period;

(2) The worker's hourly rate and/or piece rate of pay;

(3) The hours of employment offered to the worker (broken out by offers in accordance with, and over and above, the guarantee);

(4) The hours actually worked by the worker;

(5) An itemization of all deductions made from the worker's wages; and

(6) If piece rates are used, the units produced daily.

(l) Rates of pay.

(1) If the worker is paid by the hour, the employer must pay the worker at least the AEW in effect at the time recruitment for the position was begun, the prevailing hourly wage rate, the prevailing piece rate, or the Federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period; or

(2) (i) If the worker is paid on a piece rate basis and the piece rate does not result at the end of the pay period in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate, the worker's pay must be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had instead been paid at the appropriate hourly wage rate for each hour worked;

(ii) The piece rate must be no less than the piece rate prevailing for the activity in the area of intended employment; and

(iii) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and must be normal, meaning that they may not be unusual for workers performing the same activity in the area of intended employment.

(m) Frequency of pay. The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly.

(n) Abandonment of employment or termination for cause. If the worker voluntarily abandons employment before the end of the contract period, fails to report for employment at the beginning of the contract period, or is terminated for cause, and the employer notifies the Department and DHS in writing or by any other method specified by the Department or DHS in a manner specified in a notice published in the Federal Register not later than 2 working days after such abandonment or abandonment occurs, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under paragraph (h) of this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (i) of this section. An abandonment or abandonment shall be deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. Employees may be terminated for cause, however, for shorter unexcused periods of time that shall not be considered abandonment or abandonment.

(o) Contract impossibility. If, before the expiration date specified in the work contract, the services of the worker are no longer required

for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an event constitutes a contract impossibility will be determined by the CO. In the event of such termination of a contract, the employer must fulfill a three-fourths guarantee for the time that has elapsed from the start of the work contract to the time of its termination as described in paragraph (i)(1) of this section. The employer must:

(1) Return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H-2A employer (but only if the worker can provide documentation supporting such employment), whichever the worker prefers. For an H-2A worker coming from outside of the U.S., the place from which the worker (disregarding intervening employment) came to work for the employer is the appropriate U.S. consulate or port of entry;

(2) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment; and

(3) Pay the worker for any costs incurred by the worker for transportation and daily subsistence to that employer's place of employment. Daily subsistence will be computed as set forth in paragraph (h) of this section. The amount of the transportation payment will be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved.

(p) Deductions. The employer must make all deductions from the worker's paycheck that are required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

(q) Copy of work contract. The employer must provide to the worker, no later than on the day the work commences, a copy of the work contract between the employer and the worker. The work contract must contain all of the provisions required by paragraphs (a) through (p) of this section. In the absence of a separate, written work contract entered into between the employer and the worker, the job order, as provided in 20 CFR part 653, Subpart F, will be the work contract.

#### **29 C.F.R. § 541.202 — Discretion and independent judgment.**

(a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

(c) 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. For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. See also § 541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even

though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

**29 C.F.R. § 541.700 — Primary Duty.**

(a) To qualify for exemption under this part, an employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

**29 C.F.R. § 541.701 — Customarily and regularly.**

The phrase "customarily and regularly" means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed "customarily and regularly" includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

**29 C.F.R. § 780.120 — Raising of "livestock."**

The meaning of the term "livestock" as used in section 3(f) is confined to the ordinary use of the word and includes only domestic animals ordinarily raised or used on farms. That Congress did not use this term in its generic sense is supported by the specific enumeration of activities, such as the raising of fur-bearing animals, which would be included in the generic meaning of the word. The term includes the following animals, among others: Cattle (both dairy and beef cattle), sheep, swine, horses, mules, donkeys, and goats. It does not include such animals as albino and other rats, mice, guinea pigs, and hamsters, which are ordinarily used by laboratories for research purposes (*Mitchell v. Maxfield*, 12 WH Cases 792 (S.D. Ohio), 29 Labor Cases 68, 781). Fish are not "livestock" (*Dunkly v. Erich*, 158 F. 2d 1), but employees employed in propagating or farming of fish may qualify for exemption under section 13(a)(6) or 13(b)(12) of the Act as stated in § 780.109 as well as under section 13(a)(5), as explained in part 784 of this chapter.

**29 C.F.R. § 780.323 — Exemption for range production of livestock.**

Section 13(a)(6)(E) which was added to the Act by the Fair Labor Standards Amendments of 1966 provides an exemption from the minimum wage and overtime requirements of the Act for any employee "employed in agriculture" if he is "principally engaged in the range production of livestock." It is apparent from the language of section 13(a)(6)(E) that the application of this exemption depends on the type of work performed by the individual employee for whom exemption is sought and on where the work is done. A determination of whether an employee is exempt therefore requires an examination of that employee's duties and where they are performed. Some employees of the employer may be exempt while others may not.

**29 C.F.R. § 780.324 — Requirements for the exemption to apply [for range workers].**

(a) All the following conditions must be met in order for the exemption to apply to an employee:

- (1) He must be "engaged in agriculture";
- (2) Be "principally engaged";
- (3) On the "range", and
- (4) In the "production of livestock."

(b) Since the raising of livestock is included in the definition of agriculture under section 3(f) of the Act (see §§ 780.119-780.121 of subpart B of this part), the range production of livestock would normally be deemed agriculture work, and, consequently, an employee, during this time he is engaged in such activities, would meet the basic requirement of the exemption that he be "employed in agriculture."

The following sections discuss the meaning and application of the other requirements.

**29 C.F.R. § 780.325 — Principally engaged [for range workers].**

(a) To determine whether an employee is "principally engaged" in the range production of livestock, one must consider the nature of his duties and responsibilities. To qualify for this exemption the primary duty and responsibility of a range employee must be to take care of the animals actively or to stand by in readiness for that purpose. A determination of whether an employee has range production



of livestock as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the range production duties is a useful guide in determining whether this is the primary duty of the employee. In the ordinary case it will be considered that the primary duty means the major part, or over 50 percent, of the employee's time.

(b) Under this principle, an employee who spends more than 50 percent of his time during the year on the range in the duties designated as range production duties would be exempt. This is true even though the employee may perform some activities not directly related to the range production of livestock, such as putting up hay or constructing dams or digging irrigation ditches.

#### **29 C.F.R. § 780.326 — On the range.**

(a) For purposes of this exemption, “range” is defined generally as land that is not cultivated. It is land that produces native forage for animal consumption, and includes land that is revegetated naturally or artificially to provide a forage cover that is managed like range vegetation. “Forage” as used here means “browse” or herbaceous food that is available to livestock or game animals.

(b) The range may be on private or Federal or State land, and need not be open. Typically it is not only noncultivated land, but land that is not suitable for cultivation because it is rocky, thin, semiarid, or otherwise poor. Typically, also, many acres of range land are required to graze one animal unit (five sheep or one cow) for 1 month. By its nature, range production of livestock is most typically conducted over wide expanses of land, such as thousands of acres.

#### **29 C.F.R. § 780.327 — Production of livestock [for range workers].**

For an employee to be engaged in the production of livestock, he must be actively taking care of the animals or standing by in readiness for that purpose. Thus, such activities as herding, handling, transporting, feeding, watering, caring for, branding, tagging, protecting, or otherwise assisting in the raising of livestock and in such immediately incidental duties as inspecting and repairing fences, wells, and windmills would be considered as the production of livestock. On the other hand, such work as terracing, reseeding, haying, and constructing dams, wells, and irrigation ditches would not be considered as the production of livestock within the meaning of the exemption.

#### **29 C.F.R. § 780.328 — Meaning of livestock [for range workers].**

The term “livestock” includes cattle, sheep, horses, goats, and other domestic animals ordinarily raised or used on the farm. This is further discussed in § 780.120. Turkeys or domesticated fowl are considered poultry and not livestock within the meaning of this exemption.

#### **29 C.F.R. § 780.329 — Exempt work [for range workers].**

(a) The standard that must be used to determine whether the individual employee is exempt is that his primary duty must be the range production of livestock and that this duty necessitates his constant attendance on the range, on a standby basis, for such periods of time so as to make the computation of hours worked extremely difficult. The fact that an employee generally returns to his place of residence at the end of each day would not affect the application of the exemption.

(b) Thus, exempt work must be performed away from the “headquarters.” The headquarters is not, however, to be confused with the “headquarters ranch.” The term headquarters has reference to the place for the transaction of the business of the ranch (administrative center), as distinguished from buildings or lots used for convenience elsewhere. It is a particular location for the discharge of the management duties. Accordingly, the term “headquarters” would not embrace large acreage, but only the ranchhouse, barns, sheds, pen, bunkhouse, cookhouse, and other buildings in the vicinity. The balance of the “headquarters ranch” would be the “range.”

(c) Furthermore, the legislative history indicates that this exemption was not intended to apply to feed lots or to any area where the stock involved would be near headquarters. Its sponsors stated that the exemption would apply only to those employees principally engaged in activities which require constant attendance on a standby basis, away from headquarters, such as herding, where the computation of hours worked would be extremely difficult. Such constant surveillance of livestock that graze and reproduce on range lands is necessary to see that the animals receive adequate care, water, salt, minerals, feed supplements, and protection from insects, parasites, disease, predators, adverse weather, etc.

(d) The man-days of labor of employees principally engaged in the range production of livestock, even though the employees are exempt from the wage and hour requirements of the Act, are included in the employer's man-day count for purposes of application of section 13(a)(6)(A). Thus, if a cattle rancher in a particular calendar quarter uses 200 man-days of such range production labor and 400 man-days of agricultural labor performed by individuals not so engaged, he is required to pay the minimum wage to the latter employees in the following year.

#### **29 C.F.R. § 782.4 — Drivers' helpers.**

(a) A Driver's “helper,” as defined for Motor Carrier Act jurisdiction (Ex Parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 135, 136, 138, 139), is an employee other than a driver, who is required to ride on a motor vehicle when it is being operated in interstate or foreign commerce within the meaning of the Motor Carrier Act. (The term does not include employees who ride on the vehicle and act as assistants or relief drivers. Ex parte Nos. MC-2 and MC-3, supra. See § 782.3.) This definition has classified all such employees, including armed guards on armored trucks and conductorettes on buses, as “helpers” with respect to whom he has power to establish qualifications and maximum hours of service because of their engagement in some or all of the following activities which, in his opinion, directly affect the safety of operation of such motor vehicles in interstate or foreign commerce (Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 135-136): Assist in loading the vehicles (they may also assist in unloading (Ex parte Nos. MC-2 and MC-3, supra), an activity which has been held not to affect “safety of operation,” see § 782.5(c); as to what it meant by “loading” which directly affects “safety of operation,” see § 782.5(a)); dismount when the vehicle approaches a railroad crossing and flag the driver across the tracks, and perform a similar duty when the vehicle is being turned around on a busy highway or when it is entering or emerging from a driveway; in case of a breakdown: (1) Place the flags, flares, and fuses as required by the safety regulations. (2) go

for assistance while the driver protects the vehicle on the highway, or vice versa, or (3) assist the driver in changing tires or making minor repairs; and assist in putting on or removing chains.

(b) An employee may be a “helper” under the official definition even though such safety-affecting activities constitute but a minor part of his job. Thus, although the primary duty of armed guards on armored trucks is to protect the valuables in the case of attempted robberies, they are classified as “helpers” where they ride on such trucks being operated in interstate or foreign commerce, because, in the case of an accident or other emergency and in other respects, they act in a capacity somewhat similar to that of the helpers described in the text. Similarly, conductorettes on buses whose primary duties are to see to the comfort of the passengers are classified as “helpers” whose such buses are being operated in interstate or foreign commerce, because in instances when accidents occur, they help the driver in obtaining aid and protect the vehicle from oncoming traffic.

(c) In accordance with principles previously stated (see § 782.2), the section 13(b)(1) exemption applies to employees who are, under the Secretary of Transportation's definitions, engaged in such activities as full- or partial-duty “helpers” on motor vehicles being operated in transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act. (*Ispass v. Pyramid Motor Freight Corp.*, 152 F. (2d) 619 (C.A. 2); *Walling v. McGinley Co.* (E.D. Tenn.), 12 Labor Cases, par. 63,731, 6 W.H. Cases 916. See also *Levinson v. Spector Motor Service*, 330 U.S. 649; *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695; *Dallum v. Farmers, Coop Trucking Assn.* 46 F. Supp. 785 (D. Minn.)) The exemption has been held inapplicable to so-called helpers who ride on motor vehicles but do not engage in any of the activities of “helpers” which have been found to affect directly the safety of operation of such vehicles in interstate or foreign commerce. (*Walling v. Gordon's Transports* (W.D. Tenn.) 10 Labor Cases par. 62,934, 6 W.H. Cases 831, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied, 332 U.S. 774 (helpers on city “pickup and delivery trucks” where it was not shown that the loading in any manner affected safety of operation and the helper's activities were “in no manner similar” to those of a driver's helper in over-the-road operation).) It should be noted also that an employee, to be exempted as a driver's “helper” under the Secretary's definitions, must be “required” as part of his job to ride on a motor vehicle when it is being operated in interstate or foreign commerce; an employee of a motor carrier is not exempted as a “helper” when he rides on such a vehicle, not as a matter of fixed duty, but merely as a convenient means of getting himself to, from, or between places where he performs his assigned work. (See *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695, modifying, on other grounds, 152 F. (2d) 619 (C.A. 2).)

#### **49 C.F.R. § 383.5 — Definitions [as to Commercial Driver’s License Standards].**

*Commercial driver's license (CDL)* means a license issued to an individual by a State or other jurisdiction of domicile, in accordance with the standards contained in this part, which authorizes the individual to operate a class of a commercial motor vehicle.

*Commercial motor vehicle (CMV)* means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle is a -

- (1) Combination Vehicle (Group A) - having a gross combination weight rating or gross combination weight of 11,794 kilograms or more (26,001 pounds or more), whichever is greater, inclusive of a towed unit(s) with a gross vehicle weight rating or gross vehicle weight of more than 4,536 kilograms (10,000 pounds), whichever is greater; or
- (2) Heavy Straight Vehicle (Group B) - having a gross vehicle weight rating or gross vehicle weight of 11,794 or more kilograms (26,001 pounds or more), whichever is greater; or
- (3) Small Vehicle (Group C) that does not meet Group A or B requirements but that either -
  - (i) Is designed to transport 16 or more passengers, including the driver; or
  - (ii) Is of any size and is used in the transportation of hazardous materials as defined in this section.