

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

**Colorado Overtime and Minimum Pay Standards Order (COMPS Order) #36, 7 CCR 1103-1 (2020)**

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

**II. SPECIFIC STATUTORY AUTHORITY.** The Director is authorized to adopt and amend rules and regulations to enforce, execute, apply, and interpret Articles 1, 4, and 6 of Title 8, C.R.S. (2020), 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, and 6, including C.R.S. §§ 8-1-101, 8-1-103, 8-1-107, 8-1-108, 8-1-111, 8-1-130, 8-4-111, 8-6-102, 8-6-104, 8-6-105, 8-6-106, 8-6-108, 8-6-109, 8-6-111, 8-6-116, 8-6-117, and 8-12-115. Each of the preceding provisions is quoted in Appendix A to COMPS Order #36, with summaries of key provisions in Part IV(B)(1) below as well; both COMPS Order Appendix A and Part IV(B)(1) below are 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 also are incorporated into this finding; **(B)** proper statutory authority exists for the rules, as detailed in the list of statutory authority in Part II, which also is incorporated into this finding; **(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 specific findings for adoption (the “Findings”) are as follows.

**A. Overview and Summary of Changes, Findings, and the Rulemaking Process.**

Issued in 1938, Colorado’s first Minimum Wage Order (“Order”) granted wage rights only to “women and minors in laundry occupations.” In 1939 and 1940, it added three more jobs: “beauty,” “public housekeeping,” and “retail.” With minimal change, that limited coverage — just women and minors, just four narrow job types — remained for decades. After Order #18 in 1978 finally removed the “women and minors” limit, 1980s-90s orders expanded the four narrow *job* categories into four broader *industry* categories, with Order #22 in 1998 setting the list that remained until now: “(A) Retail and Service; (B) Commercial Support Service; (C) Food and Beverage; (D) Health and Medical.” Since the 2000s, the Division has updated each year’s minimum wage — yet the Order’s substance has gone unchanged for two decades. Much of the text dates to the 1970s, despite all the economic, social, and technological change since.

This history shows why employers, employees, courts, and the Division have had such difficulty applying the Order’s idiosyncratic four-industry list: It was never chosen for modern labor markets, evolving directly from a job list written eight decades ago to protect women and minors in

the Great Depression. Many modern jobs, nonexistent decades ago, are difficult to fit into four outdated industry categories. Datedness aside, categories like “commercial support services” have proven inherently ambiguous, making wage disputes more frequent, more prolonged, more costly for employers and employees alike, and more difficult for the Division and courts to resolve.

Yet even if the Order’s four-industry list were not a mismatch for modern labor markets, the entire approach of applying wage rules only to selected industries is an archaic one. In the early-mid twentieth century, many states had industry-specific wage laws limited to (for example) laundries,<sup>1</sup> bakeries,<sup>2</sup> mills and factories,<sup>3</sup> or mines and smelting.<sup>4</sup> But modern wage laws, federal and in other states, have broad, not industry-limited, coverage — because choosing some but not other industries for wage rules is now a disfavored pick-and-choose approach. It is economically inefficient, distorting labor markets between covered and uncovered sectors. It is inequitable, denying wide swaths of workers critical labor protections: the state minimum wage; overtime pay for hours beyond not only 40 per week (which federal law provides), but also 12 per day; meal and rest periods (30-minute unpaid meal periods for shifts over 5 hours, and 10-minute paid rest periods every 4 hours); and other provisions such as deduction/credit rules and having wage rules posted or given to employees.

The Order’s exemptions list has proven just as troubled as its coverage categories. Many exemptions are written confusingly, generating litigation on what they mean. The salary requirement not only is inconsistent across similar exemptions, but requires *no* minimal level. Workers paid sub-minimum wage for long hours can, and too often are, declared exempt “professionals,” “executives/supervisors,” or “administrative” decision-makers. Other rules too — on breaks, deductions, and more — have proven both confusingly hard to apply and outdatedly narrow.

Substance aside, the Order’s archaic text has proven confusing, lacking the clarity that modern rules offer. The problem is partly organization: some but not all parts have numbers; some but not all numbered parts have lettered subparts; and one rule has three separate sets of lettered subparts that all start with “a, b, ....” The problem is partly pure grammar: there are numerous court cases, which employers and employees have had to litigate burdensomely, trying (mostly in vain) to resolve confusion generated by the Order’s absence of needed punctuation in key sentences.

Even the Order’s name — a “Minimum Wage” Order — generates broad confusion. Many comments to the Division show broad misapprehension that the Order is just the Division discretionarily choosing a state minimum wage, when in reality the minimum wage is set by the Colorado Constitution, and the Order is a comprehensive set of wage-and-hour regulations.

Given the many reasons to modernize the Order, the Division has spent most of 2019 conducting extensive economic, legal, and workplace research — and equally extensive outreach to Coloradans. The Division began an eight-month *pre*-rulemaking comment period on March 6, 2019, drawing comments from over 1300 people, spanning virtually all regions and industries in Colorado. The commenters range widely: workers; employers; public officials; unions; trade associations; and a broad range of policy analysts and advocates for labor and employers alike. Comments vary, but a

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<sup>1</sup> *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding Oregon law that “no female [shall] be employed in any mechanical establishment, or factory, or laundry ... more than ten hours during any one day”).

<sup>2</sup> *Lochner v. New York*, 198 U.S. 45 (1905) (striking New York law regulating work hours for only bakers).

<sup>3</sup> *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding Oregon law that “[n]o person shall be employed in any mill, factory or manufacturing establishment ... more than ten hours in any one day”).

<sup>4</sup> *Holden v. Hardy*, 169 U.S. 366 (1898) (upholding Utah law regulating work hours for only miners and smelters).

substantial number confirm the need for reform by noting significant problems with the Order's narrowness, datedness, and lack of clarity. The comment period continued for 10 months, through a pre-rulemaking public hearing on August 28, 2019, publication of proposed COMPS Order #36 on November 15, 2019, and a second hearing (the official rule-making hearing) on December 16, 2019, with the comment period ending on December 31, 2019, though the Division extended it to allow late-arriving comments through the first week of January 2020. All comments and both hearing transcripts were publicly posted and linked from the Division homepage, and all were reviewed by the Division, where the Division's "Policy Team" — all labor standards policy-making officials in the Division — met repeatedly over five months (from just after the first hearing in August 2019 until just before final adoption of COMPS Order #36 in January 2020) to discuss all stakeholder input, the Division's research and drafting, and various proposals under consideration. Final decisions were made by the Director of the Division, in consultation with, and reporting to, the Office of the Executive Director of the Colorado Department of Labor and Employment.

Preliminarily, to redress confusion generated by a wide range of wage rules being called simply a "Minimum Wage" Order, the Order's new name is the "Colorado Overtime & Minimum Pay Standards Order," or the "COMPS Order." Because the COMPS Order follows and replaces Minimum Wage Order #35 (2019), just as Order #35 replaced the prior year's Order #34, the COMPS Order retains the numbering and citation of the Minimum Wage Orders: **Colorado Overtime and Minimum Pay Standards Order (COMPS Order) #36, 7 CCR 1103-1 (2020)**.

As adopted, COMPS Order #36 has an effective date of March 16, 2020, except with new overtime-exempt salaries postponed until July 1, 2020. The two most significant new aspects of COMPS Order #36 are as follows:

- (1) **expanded coverage spanning all Colorado workers, other than those in listed exemptions** — to level the playing field across the labor market and assure labor protections for some of the workers who need them most; and
- (2) **a new minimum salary of \$55,000 in 2024 for employee exemptions** (equal to the \$57,500 in 2026 that was proposed), phased in over 4½ years, with an initial salary of \$35,568 in July 2020 (equal to the federal exemption salary), then rising gradually until 2024, to give employers years to adjust to this rule.

Given the many archaic portions of prior orders, COMPS Order #36 adopts several other changes as well — each less weighty than the above two, but as a whole, they aim to substantially improve the clarity, efficiency, and fairness of Colorado's wage rules.

Most rules in COMPS Order #36 are substantively unchanged, but many still have revisions for clarity, a mix of increased detail and edits to improve the Order's problems of writing (*e.g.*, confusing provisions) and organization (*e.g.*, inconsistent numbering and lettering). Because of the extent of the textual changes from Order #35, no line-by-line redline can show all changes. To maximize the clarity of COMPS Order #36 for employers, employees, courts, and other stakeholders, the Division is undertaking multiple forms of explanation and outreach:

- below, Division findings take the form of a section-by-section detailing of the nature and reasons for all material changes and clarifications in COMPS Order #36;

- the Division is publishing a fact sheet explaining key provisions in COMPS Order #36, as well as a series of fact sheets offering further details on specific topics; and
- the Division will hold numerous outreach events for workers, employers, and other stakeholders, and has trained staff answering inquiries through its call center and public-facing email that is open for inquiries on every business day.

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

Rule 1.1 details statutory authority, the name change to the COMPS Order, and the effective date. The rest of Rule 1, in Rules 1.2-1.13, defines key terms. Most definitions are from Order #35 with changes to grammar or style; key parts with more detail or substantive changes are noted below.

**1. Rule 1.1. Authority.**

Rule 1.1 details the Division’s statutory authority for COMPS Order #36, the name change from “Minimum Wage Order,” that this COMPS Order #36 replaces Order #35, and the effective date. As noted in Rule 1.1, the Division’s authority to promulgate COMPS Order #36 and all preceding Minimum Wage Orders arises under C.R.S. Title 8, Articles 1, 4, and 6, with relevant authority-granting provisions listed in Appendix A to the COMPS Order.<sup>5</sup> The Division’s authority to promulgate these rules has not been challenged under the prevailing standard for legislative delegation of rulemaking authority.<sup>6</sup>

**2. Rule 1.5. “Employee.”**

Order #35 used the “employee” definition of C.R.S. § 8-4-101(5), but Colorado H.B. 19-1267 (approved May 16, 2019, and effective January 1, 2020) amended that definition. COMPS Order #36 therefore uses the new § 8-4-101(5) “employee” definition adopted by H.B. 19-1267. Because this standard is new under Colorado law, below is a summary of the import of the amended “employee” definition now in COMPS Order #36 Rule 1.5.

Preliminarily, as to whether an individual is an employee under the applicable definition, Colorado law, like the federal Fair Labor Standards Act (“FLSA”),<sup>7</sup> looks to the underlying “economic reality” of the relationship between the putative employee and employer — not to the

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<sup>5</sup> The listed statutory authority in Appendix A to the COMPS Order is incorporated by reference herein. As a partial list, *see, e.g.*, C.R.S. §§ 8-1-101, 103, 104, 107, 111 (rulemaking and findings authority to determine and enforce employment conditions); §§ 8-6-105, 106 (authority to inquire into and determine adequacy of wages and other conditions); §§ 8-6-108, 109, 116 (rulemaking authority to investigate and set minimum wage standards); §§ 8-6-111 (rulemaking authority to set overtime standards and conditions).

<sup>6</sup> Colorado courts have not accepted narrower views of rulemaking authority delegation, such as that legislative delegation is limited to filling in “details” within the limits of legislative guidance and policy. Yet even under that standard, the above-cited authority shows the legislature has enacted numerous specific statutes that assign the Division to fill in details through traditionally executive tasks such as investigation, fact-finding, and rulemaking as to what wage, hour, and employment condition rules properly effectuate the guidance and policy within the enacted legislative scheme.

<sup>7</sup> *See, e.g., Baker v. Flint Eng'g & Const. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998) (applying FLSA: “[O]ur inquiry is not limited by any contractual terminology or by traditional common law concepts of ‘employee’ or ‘independent contractor.’ Instead, the economic realities of the relationship govern, and ‘the focal point is whether the individual is economically dependent on the business to which he renders service . . . or is, as a matter of economic fact, in business for himself.’”) (citations & quotation marks omitted).

parties' characterization of the relationship.<sup>8</sup> H.B. 19-1267's new definition of "employee" replaces the enumeration of specific types of behavioral and directional control in former C.R.S. § 8-4-101(5) (*i.e.*, "the employer may command when, where, and how much labor or services shall be performed"), with a more nuanced analysis that looks to the "*degree of control the employer may or does exercise over the person.*" C.R.S. § 8-4-101(5) (2020) (emphases added). This change recognizes that control may be exercised in varied ways (*i.e.*, it is not limited to "command[ing] when, where, and how much labor or services shall be performed"), and that the degree of supervision actually required for a particular job may vary based on the nature of the work. Additionally, in looking to whether an employer "may or does" exercise control, the new definition explicitly provides that such control need not be actually exercised (*i.e.*, it can be contractually reserved or exercised indirectly, such as through an intermediary). Regardless of its form, the more control that exists over a worker, the more likely the worker qualifies as an employee, and the less control that exists, the less likely the worker qualifies as an employee.

The new definition also adds an entirely new factor to the "employee" analysis: "the degree to which the person performs work that is the *primary work of the employer.*" C.R.S. § 8-4-101(5) (emphasis added). Other Colorado statutes have not applied this factor, and neither do typical wage laws in other states. However, in applying the FLSA, state wage-and-hour laws, and unemployment and workers' compensation insurance laws, courts have long examined similar issues, such as whether "the service rendered is an integral part of the alleged employer's business," *see Baker v. Flint Engineering & Construction Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998), and whether "the worker performs work that is outside the usual course of the hiring entity's business," *McPherson Timberlands, Inc. v. Unemployment Ins. Comm'n*, 714 A.2d 818, 822 (Maine 1998). *See generally Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987) (noting the "presumption that similar language in two labor law statutes has a similar meaning").

In making these determinations, courts have examined the type of work the business performs, including how it defines itself and holds itself out to the public; whether the work performed by an individual is necessary to or in furtherance of the overall operation of the business; whether the work occurs regularly or only on isolated occasions; and whether the work was a source of a business's revenues. For example, *Finlay v. Storage Tech. Corp.*, 764 P.2d 62, 66–67 (Colo. 1988), held that cleaning services provided by janitorial contractor for a computer manufacturer were in the "regular business" of the manufacturer for purposes of the workers' compensation statute, because the manufacturer "depended on the regular and thorough performance of ... [the] janitorial services." *Id.* *Finlay* instructed that the "regular business test" looks to "the constructive employer's total business operation, including the elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer," and specifically noted

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<sup>8</sup> *See, e.g., Colo. Custom Maid, LLC v. Indus. Claim Appeals Office*, 2019 CO 43, ¶ 2, 441 P.3d 1005, 1007 (determining employment status based on "the realities of [the maid service's] relationship with its cleaners," not the formal characterization of the cleaners as independent contractors); *Stampados v. Colo. D & S Enters., Inc.*, 833 P.2d 815, 817, 1992 WL 5951 (Colo. App. 1992) ("Permitting the label rather than the actual nature of the relationship to control would be contrary to the policy of the Act by allowing easy evasion of workers' compensation liability"); *Dana's Housekeeping v. Butterfield*, 807 P.2d 1218, 1221 (Colo. App. 1990) ("[The employer] argues that we should give determinative weight to the parties' characterization in the agreement that claimant was an independent contractor. However, the way parties refer to themselves does not determine whether a claimant is an independent contractor or an employee"); *Jackson Cartage, Inc. v. Van Noy*, 738 P.2d 47, 48 (Colo. App. 1987) (disregarding agreement stating "that the parties intend to create an independent contractor-employer relationship.... [W]e are primarily concerned with what is done under the contract and not with what the contract says").

that a “narrow interpretation” of the “regular business” test would “clearly contravene” the “humanitarian purpose” and liberal construction of the Act. *Id.*

For example: if a retail clothing store hires an outside plumber on a one-time or sporadic basis to make repairs as needed, the plumber’s services are not part of the store’s primary work — selling clothes. On the other hand, when a clothing manufacturer hires work-at-home seamstresses to make dresses, from cloth and patterns supplied by the manufacturer, that the manufacturer will sell, or when a bakery hires cake decorators to work on a regular basis on custom-designed cakes, the workers are performing the “primary work” of the hiring business.

The second part of the statutory “employee” definition provides that “an individual *primarily free from control and direction* in the performance of the service, both under any contract governing the work *and in fact*, and who is *customarily engaged in an independent* trade, occupation, profession, or business related to the service performed is not an ‘employee.’” C.R.S. § 8-4-101(5) (emphases added). In evaluating whether an individual is a covered employee or is engaged in an “independent trade, occupation, profession or business” under the Colorado Employment Security Act (CESA),<sup>9</sup> the Colorado Supreme Court looks to the “totality of the circumstances.” *Indus. Claim Appeals Office v. Softrock Geological Servs., Inc.*, 2014 CO 30, ¶ 2, 325 P.3d 560, 562.

As to whether an individual is “primarily free from control and direction,” although an “employer’s firm hand in controlling the details of the manner and method of job performance” evidences an overall right of control, “control over the details of performance is not required.” *Colo. Custom Maid*, 2019 CO, ¶ 13, 441 P.3d at 1009 (internal citation omitted). *Colorado Custom Maid* held that a maid service that classified its cleaners as independent contractors exercised sufficient control over their work that the cleaners were statutory employees under the CESA. *Id.* Though the housekeepers were not supervised as to the “details of the cleaning,” the maid service still exerted “quality control” (*i.e.*, “control over the cleaners in the resolution of client complaints”); had the right to control whom the cleaners hired as assistants; controlled the collection and distribution of fees paid by clients; and set the prices for cleaning work based on the time the cleaning would take (making cleaners’ payments akin to hourly rates). ¶¶ 19–21, 441 P.3d at 1010–11. Additionally, some of the cleaners “worked for [the cleaning service] for years in an open-ended relationship.” *Id.*

As to whether the individual providing services “is customarily engaged in an independent trade or a business related to the services performed,” the Colorado Supreme Court, in the same CESA case, explained that, “[s]tripped of legal jargon, this question asks whether the worker is an independent contractor with his or her own business that provides the particular services.” *Id.*, ¶ 15, 441 P.3d at 1009–10. C.R.S. § 8-70-115(1)(c) of the CESA provides that a putative employer may rebut an employment presumption with a written document, signed by both parties, with the following express limitations on the relationship:

[T]he person for whom services are performed does not: (I) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for the said person for a finite period of time specified in

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<sup>9</sup> Under the CESA, the employer must show that (1) the worker “is free from control and direction in the performance of the service,” and (2) the worker “is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.” C.R.S. § 8-70-115(1)(b). The Colorado Wage Claim Act (“CWCA”) definition of “employee” is almost identical, providing that the individual must be “*primarily free* from control and direction *both under his or her contract* for the performance of service *and in fact*” and “customarily engaged in an independent trade, occupation, profession, or business related to the service performed.” C.R.S. § 8-4-101(5) (emphases added).

the document; (II) Establish a quality standard for the individual; except that such person can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed; (III) Pay a salary or hourly rate but rather a fixed or contract rate; (IV) Terminate the work during the contract period unless the individual violates the terms of the contract or fails to produce a result that meets the specifications of the contract; (V) Provide more than minimal training for the individual; (VI) Provide tools or benefits to the individual; except that materials and equipment may be supplied; (VII) Dictate the time of performance; except that a completion schedule and a range of mutually agreeable work hours may be established; (VIII) Pay the individual personally but rather makes checks payable to the trade or business name of the individual; and (IX) Combine his business operations in any way with the individual's business, but instead maintains such operations as separate and distinct.

Although consideration of the nine conditions in C.R.S. § 8-70-115(1)(c) “is helpful” in determining whether an individual is “customarily engaged in an independent trade or a business related to the services performed,” those conditions alone do “not end the inquiry,” which extends to the “totality of the circumstances” — *i.e.*, not only those nine factors, but also “any other information relevant to the nature of the work and the relationship between the employer and the individual.” *Colo. Custom Maids*, ¶ 15, 441 P.3d at 1009–10. Because these nine factors are merely part of a holistic test, they are equally relevant to CESA and wage cases. Relevant factors include the following that *Colorado Custom Maids* delineated — whether the putative employee: (1) had business cards, a business address, or a business telephone number; (2) made a financial investment in the services such that he or she could be vulnerable to financial loss in connection with performance of the service; (3) had his or her own equipment;<sup>10</sup> (4) set the price of the service; (5) employed assistants; and (6) carried his or her own liability or workers’ compensation insurance. *Id.* (noting that the cleaners fulfilled none of these conditions supported finding that they were statutory employees rather than independent contractors). Additionally, although not dispositive, “maintaining outside clients supports a finding that individuals are engaged in an independent trade.” *Id.*

### **3. Rule 1.6. “Employer.”**

Colorado H.B. 19-1267 changed not only the “employee” definition (as noted as to Rule 1.5 above), but also the C.R.S. § 8-4-101(6) “employer” definition. Rule 1.6 therefore uses the new § 8-4-101(6) “employer” definition. As noted as to the “employee” definition in Rule 1.5 above, the “economic realities” equally govern the analysis of whether an entity is an “employer.”

The new “employer” definition adopts “the same meaning as set forth in the federal ‘Fair Labor Standards Act’, 29 U.S.C. Sec. 203(d).” C.R.S. § 8-4-101(6). The FLSA defines “employer” broadly, as “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d). In adopting the new “employer” definition in May 2019, Colorado expressly referenced the FLSA statutory definition, making clear it was codifying FLSA law as it existed at that point in time — which is a rule of Colorado statutory interpretation as well:

When a statute specifically incorporates enumerated provisions of another statute, in

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<sup>10</sup> “As courts have noted, the ‘investment,’ which must be considered as a factor is the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself.” *Dole v. Snell*, 875 F.2d 802, 810 (10th Cir. 1989); *see also Benion v. LeCom, Inc.*, 336 F. Supp. 3d 829, 850 (E.D. Mich. 2018) (“Investment in something like welding equipment signals a greater degree of economic independence because it is not a common item that most people use daily.”).

contrast to referring to another law in general terms, the General Assembly is considered to be adopting the contents of the other provision *as of the time of the adoption*. ... [A]bsent express legislative declaration to the contrary, subsequent amendments to the adopted statute will not affect the terms originally adopted.

*Ball Corp. v. Fisher*, 51 P.3d 1053, 1058 (Colo. App. 2001) (emphasis added; citation and quotation marks omitted); *See Sch. Dist. No. 1 in Arapahoe Cnty. v. Hastings*, 220 P.2d 361, 364 (Colo. 1950) (“It is a general rule that when a statute adopts a part or all of another statute ... by a specific and descriptive reference thereto, the adoption takes the statute as it exists at that time, *and does not include subsequent additions or modifications of the adopted statute*, where it is not expressly so declared”) (emphasis added; quotation marks omitted); *Accord Brizzee v. Fred Meyer Stores, Inc.*, No. CV04-1566-ST, 2006 WL 2045857, at \*11–12 (D. Or. July 17, 2006) (state statute “cannot incorporate future federal regulations not yet promulgated at the time of the enactment”; doing so amounts to unconstitutional delegation of power to amend state statutes to federal regulatory authorities, and Oregon legislature did not intend to “empower the [US]DOL to fill in any gaps in the [Oregon Family Leave Act]. Instead, it authorized ... the Oregon Bureau of Labor and Industries”); *State v. Rodriquez*, 365 So. 2d 157, 160 (Fla. 1978) (Florida Legislature intended “to incorporate federal law and regulations in effect at the time [the law] was enacted”; “to adopt in advance any federal act or ruling of any federal administrative body which may be adopted in the future would amount to an unlawful delegation of legislative authority”); *Advocates for Effective Regulation v. City of Eugene*, 1981 P.2d 368, 379 (Or. App. 1999) (“A state statute, for example, cannot incorporate future federal regulations not yet promulgated at the time of enactment; the effect of doing so is to delegate the power to amend the statute to the federal regulatory authority”).

Individual liability is provided for by amended C.R.S. § 8-4-101(6), because the incorporated FLSA rule in effect as of the enactment of H.B. 19-1267 is that individual liability is included within the “employer” definition. In 2003, *Leonard v. McMorris* held that under Colorado law, individual officers and agents of a corporation cannot be personally liable for unpaid wages the corporation owes employees under the then-existing “employer” definition. 63 P.3d 323, 325–26 (Colo. 2003); *see also Fuentes v. Compadres, Inc.*, 2018 WL 1444209, at \*10 (D. Colo. Mar. 23, 2018) (“pursuant to *Leonard*,” because defendants were “officers, or at the very least agents, of the Corporate Defendants,” they could not be personally liable for wages). In explaining its adoption of the FLSA “employer” definition, H.B. 19-1267 criticized *Leonard*: “Existing law, as interpreted by the Colorado supreme court in *Leonard v. McMorris*, 63 P.3d 323 (2003), does not provide sufficient protections for workers and their families; and [i]n order to protect all workers, it is necessary to close loopholes that allow for the exploitation of human labor for profit.” 2019 Colo. Legis. Serv. Ch. 182 (H.B. 19-1267). H.B. 19-1267 thus expressly replaced the prior “employer” definition with the definition “set forth in the federal ‘Fair Labor Standards Act’, 29 U.S.C. Sec. 203(d).” *Id.* (codified at C.R.S. § 8-4-101(6)).

“[A]n FLSA ‘employer’ is recognized as either an individual or an entity.” *Phillips v. Carpet Direct Corp.*, No. 16-CV-02438-MEH, 2017 WL 121630, at \*5 (D. Colo. Jan. 10, 2017); *see also Hodgson v. Okada*, 472 F.2d 965, 966, 968–69 (10th Cir. 1973) (affirming finding that, in addition to incorporated farm, “the Okadas [the owners] and Ramon Medelez, the crew leader, were joint employers” individually liable for wages under FLSA); *Mitchell v. Hertzke*, 234 F.2d 183, 185, 189–90 (10th Cir. 1956) (affirming finding “that Rodriguez and the Hertzkes were employers” under FLSA); *Inniss v. Rocky Mountain Inventory, Inc.*, 385 F. Supp. 3d 1165, 1167 (D. Colo. 2019); *Powers v. Emcon Assocs., Inc.*, No. 14-cv-03006-KMT, 2016 WL 1111708, at \*5–6 (D. Colo. Mar.



22, 2016) (“[A] corporate officer may be an employer within the meaning of the FLSA (and thus jointly and severally liable along with the corporation”); *Fuentes v. Compadres, Inc.*, No. 17-cv-01180-CMA-MEH, 2018 WL 1444209, at \*4 (D. Colo. Mar. 23, 2018) (“Separate persons or entities that share control ... may be deemed joint employers under the FLSA.... *Falk v. Brennan*, 414 U.S. 190, 195 (1973) (observing in a FLSA case that apartment building maintenance workers were employed by both building management company and building owners).”). Accordingly, *Leonard* and other cases preceding H.B. 19-1267 that disallowed individual wage liability under § 8-4-101(6) have been legislatively overruled and abrogated, respectively.<sup>11</sup>

Joint employment is similarly provided for by amended C.R.S. § 8-4-101(6) because under FLSA law as it stood upon enactment of H.B. 19-1267, “[s]eparate persons or entities that share control ... may be deemed joint employers under the FLSA.” *Fuentes v. Compadres, Inc.*, No. 17-cv-01180-CMA-MEH, 2018 WL 1444209, at \*4 (D. Colo. Mar. 23, 2018). Like *Fuentes*, all FLSA individual liability cases from the U.S. Court of Appeals for the Tenth Circuit and District of Colorado that were cited in the preceding paragraph also are joint employment cases.

In *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017), the leading case on the standard for joint employment that is commonly cited (including by courts in Colorado, as noted below), the U.S. Court of Appeals for the Fourth Circuit delineated six non-exclusive factors as relevant to the joint employment inquiry:

- (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
- (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker’s employment;
- (3) The degree of permanency and duration of the relationship between the putative joint employers;
- (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
- (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
- (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers’ compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

*Id.* at 141–42. The Division finds, as a number of courts in Colorado and within the Tenth Circuit have found, that the *Salinas* test “focuses upon the relevant relationship — ‘the relationship between the putative joint employers’ — as opposed to the relationship between the employee and the putative employers.” *Sanchez v. Simply Right, Inc.*, No. 15-cv-00974-RM-MEH, 2017 WL 2222601,

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<sup>11</sup> *Montrose v. Pub. Utilities Comm’n of State of Colo.*, 732 P.2d 1181, 1193 (Colo. 1987) (where “the legislature acted within its authority” in “effectively overrull[ing]” a prior Colorado Supreme Court holding, the legislature “has spoken on this matter and it is not within the purview of this court to question the legislature’s choice of policy”).

at \*6 (D. Colo. May 22, 2017); *see also* *Merrill v. Pathway Leasing LLC*, 16-cv-2242-KLM, 2018 WL 2214471, at \*3–6 (D. Colo. May 14, 2018) (applying *Salinas* in FLSA joint employment inquiry); *Alfaro-Huitron v. WKI Outsourcing Sols.*, 347 F. Supp. 3d 635, 644 (D.N.M. 2018) (same).

#### **4. Rule 1.8. “Regular rate of pay.”**

The Rule 1.8 definition of “regular rate of pay” is substantively unchanged, other than the addition of Rule 1.8.2 regarding how to calculate regular rates for only those employees who (a) work overtime hours, (b) are non-exempt and therefore entitled to overtime premium pay, and (c) are paid a salary or other non-hourly basis, yielding ambiguity as to how to calculate the regular rate to which overtime is added. Order #35 did not address overtime pay for non-hourly-paid employees, which federal law permits (to let parties strike any pay arrangements they choose, which parties can change week by week if they wish), but which a number of states prohibit or restrict<sup>12</sup> (to bar arrangements that working more hours decreases regular rates, and thus overtime rates, causing extra overtime to be paid at declining rates, arguably contrary to a rule that overtime be paid at 50% over the regular rate). For example, California rejects such agreements altogether, requiring calculation of the regular rate by dividing weekly salary by 40 regardless of any contrary agreement;<sup>13</sup> Alaska permits such agreements under only strict conditions: requiring a written agreement setting forth the hours the employee is expected to work, and defaulting to a 40-hour week if hours deviate from the contract without adjusting salary.<sup>14</sup> The Division believes those approaches are more restrictive than necessary to protect overtime rights against waiver and mis-calculation. Rule 1.8.2(B) adopts a more moderate approach, defaulting to a 40-hour workweek only when requirements for a valid fluctuating workweek agreement are not met.

Rule 1.8.2(A) adopts the four factors that the federal regulation requires of valid arrangements to add overtime to non-hourly pay for non-exempt employees.<sup>15</sup> Rule 1.8.2(B) then clarifies that when an employee is misclassified as overtime-exempt, or otherwise is not paid required overtime, then the arrangement cannot qualify as the required “clear mutual understanding” as to overtime for two reasons.

First, failure to pay overtime means there was no “clear mutual understanding” of a key factor in a valid arrangement for non-hourly pay: that overtime is paid in addition to the non-hourly weekly pay. This is a key factor because under Colorado statute overtime rights are non-waivable.<sup>16</sup> Second, if an employee is non-exempt, yet not paid overtime, then the arrangement, however

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<sup>12</sup> Lisa Nagele-Piazza, [DOL Proposes Updates to ‘Fluctuating Workweek’ Overtime Calculations](#), Soc’y for Human Resources Mgmt. (Nov. 5, 2019) (“Some states, including Alaska, California, New Mexico and Pennsylvania, prohibit employers from using this method to calculate overtime.... The Connecticut Supreme Court invalidated the method.”).

<sup>13</sup> Cal. Labor Code § 515(d); Cal. Div. of Labor Standards Enforcement Policies & Interpretation Manual 49.2.1.1.

<sup>14</sup> 8 Alaska Administrative Code 15.100.

<sup>15</sup> On November 5, 2019, the U.S. Department of Labor proposed revisions to that rule that are not material to what would be included in COMPS Order #36, and that do not take any side on the ambiguity that Rule 1.8.2(B) clarifies. [Fluctuating Workweek Method of Computing Overtime](#), U.S. Dep’t of Labor, Wage & Hour Div. (Nov. 5, 2019). Accordingly, the revised federal rule (if adopted) would remain complementary to, and consistent with, Rule 1.8.

<sup>16</sup> C.R.S. § 8-4-121 (“Any agreement, written or oral, by any employee purporting to waive or to modify such employee’s rights in violation of this article shall be void.”); C.R.S. § 8-4-121 (requiring payment of wages).

well-understood by the parties, was unlawful — and the law should not enforce an *unlawful* understanding as to pay.<sup>17</sup>

Accordingly, if a salaried, but non-exempt, employee is not paid overtime required by Rule 1.8.2(A), the hourly regular rate of pay is the salary divided by 40, the number of hours that federal and state law presume as a regular workweek. While the federal courts are split on this issue, the Division agrees with the numerous courts that have refused to calculate the regular rate based on fluctuating hours when a non-exempt employee was unlawfully not paid any overtime premium.<sup>18</sup>

## **5. Rule 1.9. “Time Worked.”**

After the COMPS Order was proposed, a number of knowledgeable employment attorneys and advocates commented that the COMPS Order should do more to clarify where Colorado does and does not follow federal wage law.<sup>19</sup> Drawing particular attention after the Division proposed the COMPS Order were the rules on time worked and travel time, with a notable number of those knowledgeable attorneys and advocates urged the Division to revise the rule to offer more clarity. Some advocated express adoption of the federal standard,<sup>20</sup> while others advocated rejection of that

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<sup>17</sup> Under established contract law, enforcing even a clearly agreed-upon agreement is contrary to public policy if the terms are unlawful. *E.g.*, *Potter v. Swinehart*, 184 P.2d 149, 152 (Colo. 1947) (refusing to enforce “the terms of an illegal contract”: “If ... it appears that the bargain forming the basis of the action is opposed to public policy or transgresses statutory prohibitions, the courts ordinarily give him no assistance.”); *Condado Aruba Caribbean Hotel v. Tickel*, 39 Colo. App. 51, 53, 561 P.2d 23, 24 (1977) (refusing to enforce agreement to pay gambling debt).

<sup>18</sup> *E.g.*, *Russell v. Wells Fargo & Co.*, 672 F. Supp. 2d 1008, 1016 (N.D. Cal. 2009) (“[T]he background and policy of the FLSA, the Supreme Court’s decision in *Overnight Motor* and the DOL’s 1968 interpretive rules demonstrate that the FWW method cannot be used to calculate overtime pay retroactively for the purposes of determining damages under the FLSA in a misclassification case.”); *Russell*, 672 F. Supp. 2d at 1014 (“29 C.F.R. § 778.114(c) requires contemporaneous overtime pay: the FWW method cannot be used ‘where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime.’”); *Blotzer v. L-3 Commc’ns Corp.*, No. CV-11-274-TUC-JGZ, 163 Lab. Cas. P 36081, 2012 WL 6086931, at \*11 (D. Ariz. Dec. 6, 2012) (“Application of the FWW in a misclassification case gives rise to a ‘perverse incentive’ for employers, because the employee’s hourly ‘regular rate’ decreases with each additional hour worked.”); “29 C.F.R. § 778.114(c) provides that the FWW method cannot be used ‘where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for non-overtime hours.’”); *Urnikis-Negro v. American Family Prop.*, 616 F.3d 665, 666 (7th Cir. 2009) (fluctuating workweek method in 29 C.F.R. 778.114(a) cannot be used where an employee was not paid required overtime due to misclassification); *Ransom v. M. Patel Enters., Inc.*, 825 F. Supp. 2d 799, 810 n.11 (W.D. Tex. 2011) (“The fundamental assumption underpinning the FWW is that it is fair to use it to calculate overtime pay because the employee consented to the payment scheme. But in ... an FLSA misclassification suit when consent is inferred ... , [it] conduct will always, by definition, have been based on the false assumption that he was not entitled to overtime.”).

<sup>19</sup> Numerous attorneys for employers noted the need to redress ambiguities in prior wage orders, and to clarify where state wage law would and would not follow federal law, albeit with most also expressing a preference for state law to go no further than federal law in various respects. *E.g.*, Written comments by Craig M. Finger and Martine T. Wells, Esqs., Dec. 24, 2019 (“Whether the CDLE intends to follow federal law on these common, yet somewhat nuanced issues, or to adopt a different standard for Colorado, either would be workable. Our clients simply ask for clarity. Employees, too, will benefit from a clearer understanding of the law and their rights.”); Written comments by Bechtel, Santo, & Severn, Aug. 16, 2019 (“we would request that the Order revise its definitions of the identified industries to better identify which industries are covered.”); Written comments by Gillian Bidgood, Esq., Aug. 27, 2019 (“the Division should clarify the current definitions” in Order #35).

<sup>20</sup> Written comments by Brownstein Hyatt Farber Schreck (by Martine T. Wells and Craig M. Finger, Esqs.), Dec. 15, 2019 (“The COMPS Order Rule 1.8 proposed definition of time worked improved upon prior versions of the MWO.... However, the Division should provide further clarity with regard to several common uncertainties. Specifically, the Division should clarify the compensability of certain pre- and post-shift tasks common across workplaces, as to, for

standard in favor of a broader one.<sup>21</sup>

In line with those comments, Rule 1.9, which defines what time qualifies as “time worked” that must be compensated, is revised to clarify that Colorado has not followed, and will not follow in the COMPS Order #36, the federal Portal-to-Portal Act (“PTPA”), 29 U.S.C. § 251 *et seq.* That Act narrowed the rights the FLSA provides, but in the ensuing decades, no Colorado statute, nor any Colorado rule, has adopted the language of the PTPA, nor any similar language.

The basic definitions in Rule 1.9 (time worked), Rule 1.9.2 (travel time), and Rule 1.9.3 (sleep time) are materially unchanged. Rule 1.9 retains the same basic definition of compensable “time worked” as Order #35, though replacing time “subject to [employer] control” with time “performing labor or services for the benefit of an employer,” because HB 19-1267, effective January 1, 2020, made “control” no longer as dispositive an indicator that work is “employment.” But Rule 1.9 still applies only to time spent as “an employee.” With a similar modification (from employer “control” to employer “benefit”), the first sentence of Rule 1.9.2 retains the same basic definition of compensable “travel time” as Order #35: “‘Travel time’ means time spent on travel for the benefit of an employer, excluding normal home to work travel, and shall be considered time worked.” Rule 1.9.2 (sleep time) is substantively unchanged from Order #35 in its entirety.

What the COMPS Order mainly adds, in Rule 1.9.1, are (a) at the beginning of Rule 1.9.1, the elaboration of what time is deemed compensable (“on the employer’s premises, on duty, or at a prescribed workplace”) from a leading pre-PTPA case, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690–91 (1946) (“the statutory workweek includes all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace”), and (b) more examples and specific applications of the basic time worked and travel time rules. Those

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example, commute time, donning and doffing time, time spent clocking in and out, etc. The FLSA has a robust framework for determining the compensability of pre- and post-shift activities, whereas Colorado’s statutes and regulations are silent. This leads to significant uncertainty for employers with Colorado operations. Under federal law, Congress adopted the Portal-to-Portal Act of 1947 .... This addition to the FLSA provides a practical structure for determining compensability of certain activities that are considered pre- and postliminary to the principal activity of work. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005). This framework requires inquiry into those principal activities for which an employee is employed, whether any pre- or post-shift activities are “integral” and “indispensable” to the workday, and whether any pre-shift time is noncompensable as “de minimis” time, which is insubstantial and is administratively impractical to record. *See* 29 C.F.R. § 785.47; *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1333 (10th Cir. 1998). These concepts are well vetted and established in federal statutes, regulations, and subsequent case law.”); Written comments by National Federation of Independent Business (by Anthony Gagliardi), Dec. 19, 2019 (as to rule that “defines travel time[,] [w]e request that it be made consistent with the Fair Labor Standards Act, in that it only include travel time that occurs during the employee’s regular work hours, whether that is during the workweek or ... weekend”).

<sup>21</sup> Written comments by Colorado Plaintiff Employment Lawyers Ass’n (by Ian Kalmanowitz, Esq.), Dec. 31, 2019 (asking Division to state expressly that it rejects application under state law of a rule “along the lines of Portal to Portal Act”; “[d]ifferent Federal circuits and district courts view this exclusion differently”); Written comments by Towards Justice (by David Seligman, Esq.), Dec. 31, 2019 (“Instead of adopting the Portal-to-Portal Act, the COMPS Order should rely on a clearer and less easily manipulatable definition of ‘time worked.’ We recommend relying on a traditional definition, under which an employee is working when he or she is engaged to perform activities at the direction of or under the control of an employer and for the benefit of an employer.”); Written comments by El Centro Humanitario Para Los Trabajadores (by Sarah Shikes) (“we disagree with the position taken by some employers that the CDLE should expressly adopt the standards of the Fair Labor Standards Act ... the Portal to Portal Act ... as part of the COMPS Order.... It would ... cause more confusion in the application of Colorado wage and hour law because there is often no consensus among federal courts regarding the correct interpretations of the FLSA and Portal to Portal Act standards these employers wish to incorporate into the Order.”).

examples and applications illustrate that Colorado has followed, and continues to follow in the COMPS Order, the basic FLSA provisions on compensable time worked and travel time *without* the ensuing PTPA narrowing of rights to compensation for certain pre- and postliminary activities. The FLSA's original provisions on compensable time worked and travel time remain intact in federal law, because "[t]he Portal-to-Portal Act did not change the rule except to provide an exception for preliminary and postliminary activities."<sup>22</sup> Accordingly, federal regulation still details those FLSA definitions and scope, which Colorado law parallels:

The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." (*Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944)) Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." (*Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Skidmore v. Swift*, 323 U.S. 134 (1944)) The workweek ordinarily includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place". (*Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946))<sup>23</sup>

Rule 1.9 similarly clarifies that Colorado's "time worked" definition does not incorporate another federal statute that amended the FLSA to exclude certain time "changing clothes or washing at the beginning or end of each workday." 29 U.S.C. § 203(o). As with the PTPA, no Colorado statute or regulation incorporates the § 203(o) language or any similar language.

The clarification that Colorado law on compensable time worked and travel time parallels the basic FLSA definitions and scope, not later statutory amendments with no parallel in Colorado, is consistent with decisions from numerous state and federal courts. In *Integrity Staffing Solutions v. Busk*, the U.S. Supreme Court reaffirmed the longstanding FLSA definition of work time:

[The FLSA] defined "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). Similarly, it defined "the statutory workweek" to "includ[e] all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680-91 (1946).

574 U.S. 27 (2014). The Court then held that the PTPA rendered the alleged unpaid work time

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<sup>22</sup> 29 C.F.R. § 785.7; *see also* *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005); *In re: Amazon.Com, Inc. Fulfillment Ctr. Fair Labor Standards Act (FLSA) & Wage & Hour Litig.*, 905 F.3d 387, 400 (6th Cir. 2018) ("Nothing in ... *Integrity Staffing* changed this definition of 'work' or the recognition in *IBP, Inc.* and § 785.7 that the Portal-to-Portal Act did not change the Court's longstanding definition of 'work.'"), *cert. denied sub nom. Integrity Staffing Sols., Inc. v. Busk*, 140 S. Ct. 112, 2019 WL 4921284 (2019).

<sup>23</sup> 29 C.F.R. § 785.7.

noncompensable under federal law. On remand, the U.S. Court of Appeals for the Sixth Circuit held that while the FLSA definition of “work” may be read into state statutes incorporating or mirroring the basic FLSA definition, the PTPA was inapplicable to state wage claims under two states’ laws, because their wage laws did not incorporate the PTPA or any similar provisions<sup>24</sup> — and the Supreme Court denied review of that Sixth Circuit decision.<sup>25</sup>

Numerous other state and federal courts, analyzing the wage laws of several jurisdictions, have held identically: that absent incorporation of the PTPA and Section 3(o) into state law, the PTPA and Section 3(o) are inapplicable to the state wage and hour laws of several other jurisdictions.<sup>26</sup> More specifically, federal and state courts have held compensable under state law the following time, much if not all of which would be excluded by the PTPA such as:<sup>27</sup> security screenings,<sup>28</sup> waiting in line;<sup>29</sup> safety protocols;<sup>30</sup> maintaining required uniforms “off the clock”;<sup>31</sup>

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<sup>24</sup> *In re: Amazon.Com*, 905 F.3d at 405 (finding “nothing to suggest” Nevada or Arizona legislatures intended to adopt Portal-to-Portal Act, and “refus[ing] to read-in such a significant statute by inference or implication”).

<sup>25</sup> *Integrity Staffing Sols., Inc. v. Busk*, 140 S. Ct. 112 (2019).

<sup>26</sup> *Ceja-Corona v. CVS Pharmacy, Inc.*, No. 1:12-CV-01868-AWI-SA, 2015 WL 222500, at \*1–2, 4 (E.D. Cal. Jan. 14, 2015), *report and rec. adopted*, 2015 WL 925598 (E.D. Cal. Mar. 3, 2015) (citing *Morillion v. Royal Packing Co.*, 995 P.2d 139 (2000)) (“The Supreme Court’s opinion in *Integrity Staffing Solutions* was premised on its interpretation of the Portal-to-Portal Act of 1947 and how it exempts employers from liability for certain categories of work-related activities. In contrast, California law’s definition for ‘hours worked’ is defined differently and California law does not include an exemption similar to the Portal-to-Portal Act.”) (approving class settlement as to unpaid time putting belongings in lockers, collecting tools, walking on-premises, waiting in line to clock in, and waiting for and going through security screening under California law); *Miranda v. Coach, Inc.*, No. 14-cv-02031-JD, 2015 WL 1788955, at \*2 (N.D. Cal. Apr. 17, 2015) (recognizing California-law claims for time spent during bag check where claims were not brought under FLSA, and thus PTPA and *Integrity Staffing Solutions* were inapplicable (citing *Ceja-Corona* and *Morrillion*, *supra*)); *Dinkel v. MedStar Health Inc.*, No. 11-998 (CKK), Doc. No. 145, at 13 (D.D.C. Sept. 1, 2015) (“[I]t is wholly sensible to exclude interpretations of the Portal Act from the interpretation of the DC-MWA because the DC-MWA simply does not include the exclusionary language of the Portal Act. Because the DC-MWA does not include the language of the Portal Act, ... it would defy reason to rely on those interpretations in determining the scope of the DC-MWA.”); *Lugo v. Farmers Pride, Inc.*, 967 A.2d 963, 966–68 (Pa. Super. Ct. 2009) (rejecting argument that Pennsylvania “legislature adopted the standards of the Fair Labor Standards Act”; holding that cases interpreting and applying FLSA Section 3(o) were inapplicable to the Pennsylvania wage law, and thus that time donning, doffing, and sanitizing protective gear were compensable under state law); *Levias v. Pac. Mar. Ass’n*, 760 F. Supp. 2d 1036, 1053, 2011 A.M.C. 1617, 2011 WL 62134 (W.D. Wash. 2011) (“Although the MWA is generally construed consistent with the FLSA, Washington has not adopted language similar to the Portal-to-Portal Act or EFCA.... As a result, the Washington Supreme Court has held that ... ‘to determine whether drive time is compensable [under MWA], we must examine the undisputed facts and assess whether [employees] are ‘on duty’ at the ‘employer’s premises’ or ‘prescribed work place’”); *Frank v. Gold’n Plump Poultry, Inc.*, No. 04-CV-1018 PJS/RLE, 2007 WL 2780504, at \*6–9 (D. Minn. Sept. 24, 2007) (Minnesota wage and hour rule to be interpreted independently of FLSA regulations where text of rule was discordant with federal regulation).

<sup>27</sup> Rule 1.9.1 provides that compensable time worked “includ[es]” but is “not limited to” the enumerated examples. This language is meant literally: the listed examples are not an exhaustive list of tasks constituting “time worked”; and any other tasks that fall within the Rule 1.9 definition “time worked” are also compensable time.

<sup>28</sup> *Miranda*, 2015 WL 1788955, at \*2 (recognizing California state claims for unpaid time waiting for and going through security screening, and holding claims were not impacted by Portal-to-Portal Act); *In re: Amazon.Com*, 905 F.3d at 405 (recognizing Nevada state claims for unpaid time waiting for and undergoing security screening, despite federal claims being precluded by Portal-to-Portal Act.).

<sup>29</sup> *Id.*; *Morillion v. Royal Packing Co.*, 995 P.2d 139 (Cal. 2000) (agricultural workers’ time under employer control, including compulsory travel and waiting, was “hours worked” under California law).

<sup>30</sup> *Armenta v. Osmose, Inc.*, 37 Cal. Rptr. 3d 460, 463, 427 (Cal. Ct. App. 2005) (affirming judgment under California law for unpaid work time, including pre-shift in-transit safety meetings); *Cardenas v. McLane FoodServices, Inc.*, 796 F.

donning and doffing required uniforms or gear;<sup>32</sup> and work-related meetings.<sup>33</sup> In contrast, cases applying the PTPA have held that this same time is non-compensable under federal law.<sup>34</sup>

Rule 1.9 is also consistent with the expressed intent of the Colorado legislature and Division practice. “Time worked” is not defined within Title 8; authority to define compensable work time is granted to the Division by the above-cited statutes granting authority to regulate the matters addressed in COMPS Order #36. Since Congress enacted the PTPA, the Colorado Revised Statutes titles on wage law — Articles 1, 4, and 6 of Title 8 — and Colorado wage regulations (regularly issued Minimum Wage Orders and the Wage Protection Act Rules) have been amended many times. None of those Colorado statutes or regulations ever were amended to incorporate the Portal-to-Portal Act, § 203(o), or language similar to either.

While clarifying that the PTPA’s inapplicability to Colorado wage law, the Division has amended Rule 1.9.1 to preclude potential overbroad applications of “time worked” and “travel time” that the PTPA serves to preclude under federal law. Rule 1.9.1 provides that time spent traveling to or from a workstation on an employer’s premises, or in employer-provided transportation, is compensable only if it occurs after compensable time starts — *i.e.*, after the employee is deemed to be “on the clock” by Rule 1.9 — and before compensable time ends. This rule is consistent with key FLSA cases that preceded the PTPA. *Tennessee Coal* and *Anderson*, above, both held that travel within employer premises was compensable when it followed other compensable activities: employees had already clocked in after an eight-minute wait to punch the time clock (*Anderson*, 328 U.S. at 683) or had changing into work clothes, picked up necessary equipment, and checked in (*Tennessee*, 321 U.S. at 594–96). The PTPA abrogated those cases, partly due to fears that they would make employees entitled to compensation as soon as they set foot on employer premises, even if they were still doing nothing other than part of their commute to work. Rule 1.9.1 declares such

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Supp. 2d 1246, 1249, 1252 (C.D. Cal. 2011) (employer liable under California law for failure to pay drivers for all hours worked, including pre-shift “vehicle safety-checks”).

<sup>31</sup> *Dinkel*, Doc. No. 145, at 13 (D.D.C. Sept. 1, 2015) (recognizing claims for unpaid uniform maintenance time under D.C. law, despite non-compensability under PTPA).

<sup>32</sup> *Anderson*, 328 U.S. 680, 692–93 (1946) (“The employees proved ... they pursued certain preliminary activities after arriving at their places of work, such as putting on aprons and overalls, [and] removing shirts.... These activities are clearly work falling within the definition enunciated and applied in the *Tennessee Coal* and *Jewell Ridge* cases. They involve exertion of a physical nature, controlled or required by the employer and pursued necessarily and primarily for the employer’s benefit. They are performed solely on the employer’s premises and are a necessary prerequisite to productive work. There is nothing in such activities that partakes only of the personal convenience or needs of the employees. Hence they constitute work that must be ... compensat[ed] under the statute.”).

<sup>33</sup> *Armenta*, *supra*; *Carranza v. Dovex Fruit Co.*, 416 P.3d 1205, 1210–13 (Wash. 2018) (piece-rate employees entitled to compensation for mandatory work meetings under Washington law, but not under FLSA).

<sup>34</sup> *Olive v. Tennessee Valley Auth.*, No. 15-cv-00350, 2015 WL 4711260, at \*3 (N.D. Ala. Aug. 7, 2015) (mandatory radiation screening non-compensable under PTPA and *Integrity Staffing*: “While it is undisputed that passing through the radiation scans, a safety regulation imposed by the Nuclear Regulatory Commission ... cannot be dispensed with, the plaintiffs overlook that ‘indispensable is not synonymous with integral.’ ... [I]t is evident from the complaint that plaintiffs are employed to provide security, not to wait in line and undergo radiation scanning.” (citations omitted)); *Dinkel v. MedStar Health Inc.*, 99 F. Supp. 3d 37, 40–43 (D.D.C. 2015) (unpaid uniform maintenance time non-compensable under PTPA and *Integrity Staffing*); *Dekeyser v. Thyssenkrupp Waupaca, Inc.*, No. 08-C-0488, 2015 WL 1014612, \*3–4 (E.D. Wis. Mar. 9, 2015) (denying compensability for changing and showering under PTPA and *Integrity Staffing*, because such activities are not compensable unless they “significantly” reduce health risk); *Stanley v. Car-Ber Testing*, NO. 13-CV-374, 2015 WL 3980272 (E.D. Tex. June 29, 2015) (denying compensability of time spent on refinery protective gear (eg. safety glasses, ear protection) because *Integrity Staffing* “forecloses ... arguments ... that [the gear] ... [is] ‘integral and indispensable’”) (citation omitted).

time non-compensable. Rule 1.9.1 also clarifies that travel time in employer-provided transportation is not compensable unless it not only is required by the employer, but also either (a) materially prolongs the employee's commute or (b) is time the employees are on call or on duty, or (as in *Tennessee Coal*, above) at heightened physical risk. This is consistent with cases applying similar "time worked" statutes, which hold that while most commute time is non-compensable, it is compensable if "employees were required to use employer vehicles for home-to-jobsite travel, had to remain available en route," and were subject to employer control during the time.<sup>35</sup>

## **6. Rule 1.11. "Wages or compensation."**

Order #35 included a "wages or compensation" definition intended to track the longer C.R.S. § 8-4-101(14) definition, but it risked confusion by abridging the statutory text into a long sentence with at least one grammatical error. COMPS Order #36 clarifies that it intends no variation from the statute, by stating that it simply applies the § 8-4-101(14) "wages or compensation" definition.

## **C. Rule 2. Coverage, Exceptions, and Exemptions.**

### **1. Rule 2.1. Scope of Coverage.**

Rule 2.1 modifies Section 1 of Order #35 by expanding coverage from four broadly defined industries (Retail and Service, Food and Beverage, Commercial Support Service, and Health and Medical), and instead presumptively covering all employees, unless specifically exempted.

**(1) The inherent ambiguity of the four coverage categories.** While there is a difference of opinion as to broadening coverage, there is strong consensus that the existing categories are not as clear as would be ideal for an important set of wage rules.<sup>36</sup> Having to determine which if any category an employer fits into ("commercial support service," "retail and service," etc.) is time-consuming, which adds uncertainty, delay, and (for cases requiring attorneys) substantial legal cost. The Division and courts have expended considerable resources resolving complaints that turn on whether a particular job is within a covered industry — determinations that have grown increasingly necessary, time-consuming, and indeterminate as jobs are transformed by evolution of the Colorado economy, culture, and technology. Due to the ambiguity of coverage categories such as "commercial support" and "retail and service," Order #35 is ambiguous as to coverage in many industries, including the following.<sup>37</sup>

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<sup>35</sup> *Stevens v. Brink's Home Sec., Inc.*, 169 P.3d 473, 476 (Wash. 2007) (holding employees "on duty" at "a prescribed work place" under Washington law where employees were required to use employer vehicles for home-to-jobsite travel, had to remain available en route, and were prohibited from personal activities or errands, carrying non-employee passengers or alcohol, disobeying traffic or parking laws, or failing to lock vehicle).

<sup>36</sup> Numerous attorneys for employers did not support broader coverage, but did note the need to redress ambiguity within the existing categories. *E.g.*, Written comments by Bechtel, Santo, & Severn, Aug. 16, 2019 (firm representing employers not supporting broader coverage, but noting: "we would request that the Order revise its definitions of the identified industries to better identify which industries are covered"); Written comments by Gillian Bidgood, Aug. 27, 2019 ("Rather than adding additional industries, the Division should clarify the current definitions.").

<sup>37</sup> To be clear, the Division is not taking a side on, or endorsing, any of the below bullet-pointed arguments. The Division is noting simply that ambiguity within the four categories generates such arguments, yielding costly disputes and uncertainty about rights and responsibilities.



- **Construction:** Much construction work is not “commercial support,” but potentially, one business providing specialty construction services to another could be argued to qualify, as could a labor broker providing labor services to a construction firm.<sup>38</sup>
- **Professional services:** Two commenters who have been “supervisors of law clerks and paralegals in different law offices, including small and large law firm settings,” noted how the “law is unclear whether law firms are covered under the ‘commercial support services’ category,” as this striking example shows: “employees in law offices that represent injured individuals in personal injury cases might not be considered ‘commercial support,’ while employees in law firms that represent insurance companies in the same personal injury cases might be deemed ‘commercial support.’ This type of distinction makes no sense for coverage and it would be unfair for only some law firms to be covered based on the type of clients their lawyers serve.”<sup>39</sup>
- **Food:** The “food and beverage” category confusingly may not cover certain food jobs, as shown by one court holding that wholesale food manufacturers are not covered, because while they “prepare[] and offer[] [food and beverages] for sale,” they do not “prepare or sell those items ‘for consumption either on or off the premises’”; instead, the foods “are prepared for eventual consumption (after all, they are food), but they are not sold for consumption. They are sold for resale.”<sup>40</sup>

Reasonable people can disagree about the various above arguments and conclusions, but they reflect a fundamental problem: Due to its coverage categories, the Order “applies based on industry, not the type of work an individual worker performs.”<sup>41</sup> Consequently, as the above bullet points show, two workers may do the exact same work, but one will receive all the rights in the Order, while the other will not, based solely on their employers’ business models. A janitor cleaning a food processing plant may be covered if the food is sold to the public, not to restaurants; an unskilled laborer may be covered if his work is for a commercial project, not a residential project.

The Division has considered clarifying, rather than eliminating, the coverage categories, as some commenters recommend.<sup>42</sup> The Division finds that no clarification would work. A *narrower* list could be clearer — but a narrowing would come at the unacceptable cost of leaving *more* workers unprotected by wage rules and causing a *more* uneven playing field between covered and uncovered employers, employees, and industries. The opposite problem arose from the 1990s effort

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<sup>38</sup> Written comments by Associated General Contractors of Colorado, Sept. 20, 2019 (noting that a “particular subset of the construction industry – labor brokers – could already fit under the covered industries in the current Order.... ‘Commercial Support Services’ are one of the four industry sectors covered .... Construction labor brokers are ‘engaged directly or indirectly in providing services to other commercial firms’ – specifically, temporary labor. Examples of such employees given in the definition under 2(B) include landscaping, which is a construction specialty contracting service. Labor brokers providing temporary construction-related labor to other commercial firms clearly fit under the spirit, and likely the letter, of the existing definition.”).

<sup>39</sup> Written comments by Nantiya Ruan and Laurie Saraceno, Aug. 16, 2019.

<sup>40</sup> *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1144 (10th Cir. 2011).

<sup>41</sup> *Blanco v. Xtreme Drilling & Coil Servs., Inc.*, 16-CV-00249-PAB-CBS, 2017 WL 951150, at \*3 (D. Colo. Mar. 8, 2017), *reconsideration denied*, 16-CV-00249-PAB-CBS, 2018 WL 1138293 (D. Colo. Mar. 2, 2018).

<sup>42</sup> *E.g.*, Written comments by Bechtel, Santo, & Severn, Aug. 16, 2019 (firm representing employers not supporting broader coverage, but noting: “we would request that the Order revise its definitions of the identified industries to better identify which industries are covered”); Written comments by Gillian Bidgood, Aug. 27, 2019 (“Rather than adding additional industries, the Division should clarify the current definitions.”).

to expand a narrow list of jobs into a broader list of industries: to capture a wide enough range of workers, it ended up needing excessively vague industry categories. Especially given the diverse range of jobs and industries in twenty-first century Colorado, any industry list that tries to avoid being narrow is bound to need items as indeterminate as “commercial support services,” “retail and service,” and “food and beverage.” The Division thus finds that regulating only listed industries is an unacceptable option that presents a choice between (a) narrowness with clarity on the one hand, or (b) breadth with ambiguity on the other. Neither is an acceptable option for regulations as important as rules on Coloradans’ wage rights and responsibilities.

**(2) The need to move from industry-selective regulation to, instead, presumptive coverage.** Even if coverage categories *could* simply be clarified, selecting only certain jobs or industries for wage rules is (as Part (A) notes above) a form of pick-and-choose regulation that was common in the early/mid-twentieth century, but is now an archaic approach that fell into deserved disuse. As a matter of economics, “the presence of an uncovered sector” — and prior wage orders left *many* sectors uncovered — skews labor markets, with unpredictable effects in either direction: if being uncovered helps a business (for example) undercut competitors, then coverage “might serve to shift employment out of the covered to the uncovered sector”; or coverage could “serve to *increase* employment among some firms in the covered sector,” if it impacts different sub-sectors differently.<sup>43</sup> Either effect is an inefficient labor market skew that, as Part (1) notes above, is not based on meaningful differences among jobs and industries.

Confirming that the above point is not just theoretical economics, numerous commenters stressed that they have seen these undesirable effects in action in Colorado: selective coverage can harm employers and industries that *do* provide workers breaks, overtime, and other rights.<sup>44</sup>

Explicitly stating that all workers are covered ... levels the playing field for businesses who are already instituting these practices. This creates fair and healthy competition between businesses based on quality of service.<sup>45</sup>

[B]usiness[es] that value employees’ time ... have to compete with businesses that will do anything to reduce their bottom line, even if it is not in the long-term benefit of their business. ... [Broader overtime coverage] is important to both ensuring that employees’ time is respected and to also creating a fair and competitive economy.<sup>46</sup>

[E]xclusion of the construction industry ... creates a competitive disadvantage for union contractors who must pay better wages and overtime under collective bargaining agreements. Nonunion contractors, because they are exempted[,] ... need not fear enforcement efforts ..., depress the costs of labor, hurting the competitiveness of well-meaning, higher-paying

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<sup>43</sup> Ronald G. Ehrenberg & Robert S. Smith, *Modern Labor Economics*, p. 123 (13th ed. 2018).

<sup>44</sup> The Stakeholder Pre-rulemaking Exchange and Kickoff (“SPEAK”) was the Division’s pre-rulemaking public meeting for hearing oral testimony from Coloradans, in addition to the many written comments the Division received. The December 16, 2019 Public Hearing (“Hearing”) was the Division’s rulemaking public meeting for hearing oral testimony from Coloradans regarding the Proposed COMPS Order #36. Both meetings were well attended with dozens offering testimony for their entire scheduled durations. The transcripts of both the SPEAK meeting and the Dec. 16 Hearing are publicly available on the same webpage that lists and links all written comments the Division received.

<sup>45</sup> Oral testimony by Jimmy Burds, owner of Colographics and Good Business Colorado member, SPEAK Tr. at 14:16-21.

<sup>46</sup> Oral testimony by Tyler Jaeckel, Director of Policy and Research, Bell Policy Center, SPEAK Tr. at 108:3-13.

contractors in the industry.<sup>47</sup>

In sum, the coverage categories serve neither of two key purposes of the Order: to provide clear rules about which employees and employers are or are not covered; and to determine who is and is not covered based on meaningful distinctions as to who warrants coverage. The Division therefore agrees with the following written comments submitted jointly by four Colorado legislators:

Arbitrary carve-out exemptions drive wages down for workers in those industries, which is a detriment to workforce development efforts and thus to the economic security of those affected and their families. ... [W]e strongly urge the Division to adopt rules that presumptively include all non-public sector workers in Section 1 (“Coverage”), with exceptions made only on a case-by-case basis in conjunction with a full public hearing.<sup>48</sup>

The Division similarly agrees with the approach taken by federal wage law and the vast majority of state wage laws, including the vast majority of western states (New Mexico, Arizona, Nevada, Oregon, Washington, and California): To cover all workers, except for certain categories expressly excluded upon a showing of a sufficiently strong justification.<sup>49</sup>

**(3) The need to cover a broader range of jobs previously excluded from wage rights and responsibilities.** Based on the inadequacy of the four coverage categories and the Division’s duty to determine wage rules after investigation, the Division gathered testimony and other information on jobs outside those in the four 1990s-established coverage categories. It finds that coverage expansion is an imperative need due to the above-detailed inadequacy of the four coverage categories and the below-detailed need for broader coverage.

**(a) The need for long overtime to be exceptional, not the norm.** Longer workdays and workweeks come with significant risks and costs, many of which span all occupations and harm not just the employee, but also society at large. Most fundamentally, longer hours increase injury risk.<sup>50</sup> OSHA notes that worker fatigue from long work hours causes risks ranging from traffic accidents to large-scale industrial disasters.<sup>51</sup> Numerous studies also show that longer hours increase many potentially long-term physical and mental health ailments, including heart disease, arthritis, diabetes, and depression.<sup>52</sup> One meta-analysis found that long work hours and overtime increase mortality by

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<sup>47</sup> Written comments by International Union of Bricklayers & Allied Craftworkers, Aug. 7, 2019.

<sup>48</sup> Written comments by State Senators Jack Tate, Kevin Priola, and Larry Crowder, and State Representative Hugh McKean, Aug. 15, 2019.

<sup>49</sup> Written comments by Towards Justice (by David Seligman and Catherine Ordoñez), Aug. 16, 2019, at 5 (citing [O.R.S. Chapter 653 Sections 010-025](#); [SB 3, “An act to amend Sections 245.5, 246, and 1182.12 of the Labor Code, relating to labor”](#) (Leno, Chapter 4, Statutes of 2016) (approved Apr. 4, 2016); Massachusetts Gen’l Laws Title XXI Ch. 151: Sec. 1; ARS 23.362-363; RCW 49.46.010, RCW 49.46.020; 50-4-21 NMSA 1978, 50-4-22 NMSA 1978).

<sup>50</sup> [Long Work Hours, Extended or Irregular Shifts, and Worker Fatigue, Occupational Safety and Health Administration](#), OSHA (last visited Oct. 29, 2019) (“Research indicates that working 12 hours per day is associated with a 37% increased risk of injury. In a 2005 study reporting on a survey of 2737 medical residents, every extended shift scheduled in a month increased by 162% monthly risk of a motor vehicle crash during their commute home.”).

<sup>51</sup> *Id.*

<sup>52</sup> Marc Fadel, MD, et al., [Association Between Reported Long Working Hours and History of Stroke in the CONSTANCES Cohort](#), American Heart Association, May 6, 2019 (“[w]orking long hours increases the risk of heart disease, and of decline in cognitive function,” and substantially increases the risk of stroke, and increases the likelihood of smoking, excessive drinking, and weight gain.); Marianna Virtanen et al., [Overtime Work as a Predictor of Major Depressive Episode: A 5-Year Follow-Up of the Whitehall II Study](#), PLoS ONE 7(1): e30719, Jan. 25, 2012 (“[P]eople who routinely put in more than 11-hour days more than double their chances of major depression, compared to

nearly 20 percent.<sup>53</sup> Testimony to the Division about the psychological and cardiological impact of long overtime hours corroborates the findings of these studies.<sup>54</sup>

Long hours also detrimentally impact families, particularly as to children. Studies show that longer workweeks and lower wages negatively impact children, resulting in higher risks of poorer emotional bonding, academic performance, and long-term outcomes — including incarceration, teen parenthood, and unemployment as adults.<sup>55</sup> Commenters corroborated those findings.

When I get home sometimes, my kids ask me to help them with their homework. But you're tired.<sup>56</sup>

So seven days a week, 12 hours a day for my first 18 years. ... [N]o time with my family. Luckily, I don't have kids because the ones that do are not even getting to see their children. So it's just a crying shame.<sup>57</sup>

The above harms and costs of long hours show that overtime increases how demanding a job is — and study findings show that physically and mentally demanding jobs shorten worklife.<sup>58</sup>

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employees who typically work about eight hours a day.”); [Working long hours is linked to depression in women](#), Understanding Society (U.K.), Feb. 26, 2019 (women working 55+ hours per week more likely to be depressed); Mahée Gilbert-Ouimet et al., [Adverse effect of long work hours on incident diabetes in 7065 Ontario workers followed for 12 years](#), Jul. 2, 2018 (longer hours increases diabetes risk for women); Mika Kivimäki et al., [Long working hours as a risk factor for atrial fibrillation: a multi-cohort study](#), 39 European Heart Journal 34 (Sept. 7, 2017) at 2621–28 (compared to people who worked a normal week of between 35–40 hours, those who worked 55 hours or more were approximately 40% more likely to develop atrial fibrillation during the following ten years); CS Andreassen et al., [The Relationships between Workaholism and Symptoms of Psychiatric Disorders: A Large-Scale Cross-Sectional Study](#), PLoS ONE 11(5): e0152978, 2016; Allard E. Dembe et al., [Association Between Long Work Hours and Chronic Disease Risks over a 32 Year Period](#), American College of Occupational and Environmental Medicine, 2016.

<sup>53</sup> Joel Goh et al., [Workplace stressors & health outcomes: Health policy for the workplace](#), 1 Behavioral Science & Policy 1 (2015) at 60.

<sup>54</sup> Oral testimony by Carmen Flores, former manager for a janitorial service, Hearing Tr. Dec. 16, 2019, at 13:14–18, 14:12–15:14 (“6:00 a.m. to 10 p.m. is 16 hours a day, seven days a week, 112 hours. My pay for the company I work for was 52,000 a year. I worked for this company from May 20th to August 12th.... At one of the sites, I was hurt, and ... drove myself to the emergency room. They found that my blood pressure was at 180 over I don't know what, and it should be at 130. I was put on blood pressure medication and advised to quit my job immediately.... During that time period, they had found four aneurysms.... I was on an eight-hour work restriction but I still worked the entire time.... I ended up going to the emergency room that day. I couldn't walk in. I was put in a wheelchair.... I had severe headaches, dizzy, nervousness.... I got another job within a week, and after about three weeks, I had no more headaches, ... and found that I had no aneurysms.”); Oral testimony by Nicholas Culp, Hearing Tr. Dec. 16, 2019, at 132:19–25–133:1 (“As a sous chef, I was required to work 70-plus hours a week at a restaurant ... for a salaried compensation which would average out to about \$8 an hour, ... far less than those I was managing were making, resulting in burnout and a growing alcohol problem to cope. I now work hourly and make about a hundred dollars less a month with half of the hours.”).

<sup>55</sup> Caroline Ratcliffe, [Child Poverty and Adult Success](#), Urban Institute, Sept. 2015 (children raised in poverty have poorer long-term outcomes, including lower educational attainment, higher premarital teen birth rates, higher arrest rates, and lower rates of consistent employment); [set up to fail: when low-wage work jeopardizes parents' and children's success](#), National Women's Law Center, 2016 (negative impact on parents and children of working low-wage jobs with long and unpredictable hours); Carolyn J. Heinrich, [Parents' Employment and Children's Wellbeing](#), 24 The Future of Children 1 (Spring 2014) (long workweeks detrimental to bonding and child wellbeing).

<sup>56</sup> Oral testimony by Joe Pimentel, SPEAK Tr. at 38:24–39:7.

<sup>57</sup> Oral testimony by Caroline Henkins, SPEAK Tr. at 205:20.

<sup>58</sup> ME von Bonsdorff et al., [Work strain in midlife and 28-year work ability trajectories](#), 38 Scandinavian J. of Work, Env't, & Health 6 (2010) (workers reporting low mental and physical work strain in mid worklife more likely to maintain

Gender inequity in the workforce also is exacerbated when overtime is a widespread job expectation, because women still disproportionately bear family care-giving burdens.<sup>59</sup> Risk of depression from long work hours is also higher for women.<sup>60</sup> Women, especially women of color, are disproportionately represented among low-wage workers.<sup>61</sup> Almost one-third of women in low-wage occupations have children under 18; half of those mothers are raising children on their own.<sup>62</sup>

**(b) The need for breaks.** Numerous studies and comments confirm that reduced length and frequency of breaks increases risk of accidents and injuries. The U.S. Department of Labor Occupational Safety and Health Administration (“OSHA”) and U.S. Centers for Disease Control and Prevention (“CDC”) recommend rest breaks to avoid a variety of workplace injuries, including heat and strain injuries.<sup>63</sup> Multiple studies confirm that without breaks, more workers suffer injury generally, and “traumatic injury” in particular. For example, one study found:

Workers with no rest break worked a median of 2.0 hours before their injury occurred, whereas workers with rest break durations of 1-30, 31-60, and >60 minutes, worked significantly longer ( $P<0.001$ ) into their work shift without injury (5.4, 5.5, and 6 hours, respectively) .... [B]reaks of any duration have a significant effect on delaying the onset of a work-related traumatic injury.... [W]orkers reporting rest breaks were able to work significantly longer into their work shift without an injury than those with no rest break.<sup>64</sup>

Another study similarly found that rest breaks, and length of rest, delayed the time until injury for on-the-job ladder falls.<sup>65</sup> The need for breaks for outdoor workers, such as in construction and agriculture, is exacerbated by Colorado’s increasingly hot summers.<sup>66</sup> OSHA and CDC

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long worklife); *see also* Juhani Ilmarinen, JIC Ltd, Gerontology Research Centre University of Jyväskylä, “[Promoting active ageing in the workplace](#),” Finnish Institute of Occupational Health (1970–2008), accessed Oct. 29, 2019.

<sup>59</sup> Navaie-Waliser et al., [When the caregiver needs care: The plight of vulnerable caregivers](#), 92 American Journal of Public Health 3 (Mar. 2002) at 409–413.

<sup>60</sup> [Working long hours is linked to depression in women](#), Understanding Society (U.K.), Feb. 26, 2019 (women working 55+ hours per week are more likely to be depressed).

<sup>61</sup> Heidi Hartmann, et al., [How the New Overtime Rule Will Help Women & Families](#), Institute for Women's Policy Research and MomsRising (2015), at 4.

<sup>62</sup> [Set up to fail: when low-wage work jeopardizes parents' and children's success](#), National Women’s Law Center, 2016, at 3 n.7–9 citing Nat’l Women’s Law Ctr. calculations based on U.S. Census Bureau, Current Population Survey, 2013 Annual Social & Economic Supplement (using [Miriam King et al., Univ. Of Minn., Integrated Public Use Microdata Series: Version 3.0](#) (2010), at [https://nwlc.org/wp-content/uploads/2015/08/final\\_nwlc\\_lowwagereport2014.pdf](https://nwlc.org/wp-content/uploads/2015/08/final_nwlc_lowwagereport2014.pdf)).

<sup>63</sup> [Hazard: Improper Body Positioning](#), OSHA (last viewed Oct. 29, 2019); [WATER. REST. SHADE: Keeping Workers Safe in the Heat](#), OSHA (last viewed Oct. 29, 2019); [Heat Stress Work/Rest Schedules](#), CDC (last viewed Oct. 29, 2019).

<sup>64</sup> David A. Lombardi et al., [The effects of rest breaks, work shift start time, and sleep on the onset of severe injury among workers in the People's Republic of China](#), 40 Scandinavian J. of Work, Env’t, & Health 146 (2014).

<sup>65</sup> Anna Arlinghaus et al., [The Effect of Rest Breaks on Time to Injury -A Study on Work-Related Ladder-Fall Injuries in the United States](#), 38 Scandinavian J. of Work, Env’t, & Health 560 (2012) (documenting correlation between reduced injury risk and longer cumulative total break time).

<sup>66</sup> [What Climate Change Means for Colorado](#), U.S. Environmental Protection Agency (Aug. 2016) (“Most of the state has warmed one or two degrees (F) in the last century. Throughout the western United States, heat waves are becoming more common[.]”).

guidelines emphasize the importance of rest breaks in preventing heat injury.<sup>67</sup>

**(c) The need to include work in many previously excluded industries.** Many manual labor jobs that are mostly or ambiguously excluded from the Order’s four coverage categories present some of the highest risks of long hours, of serious injury, of chronic disease, and of shortened worklife. The exclusion of work outside the four existing categories is mostly historical happenstance, as detailed above — but whether to include one particular industry, construction, was a decision on which the Division made opposing choices over two decades ago. Construction was included in Order #21 in October 1997, but then removed from Order #22 in August 1998, with the following written rationale from the Division.

After reviewing the circumstances surrounding your industry and the information you supplied in our meeting, specifically, the information that “99.9%” of the construction industry is involved in interstate commerce and thus subject to the federal Fair Labor Standards Act, I have determined that it is not necessary to include this industry in the new Colorado Minimum Wage Order #22.<sup>68</sup>

Other than the above paragraph, the Division offered no analysis or reasoning for removing construction — and the cited federal law, the FLSA, is no rationale for removing coverage in an Order that provided many more rights than the FLSA. The FLSA provides only **(i)** federal minimum wages and **(ii)** weekly overtime after 40 hours. It does not provide *most* rights in the Order: **(iii)** Colorado’s higher minimum wage,<sup>69</sup> **(iv)** daily overtime after 12 hours, **(v)** meal breaks, **(vi)** rest breaks, or **(vii)** other more specific yet still important protections, such as provisions about various credits and deductions, the right to be told the Order’s provisions in a poster, and more. Nor is there evidence of ill impact from the 10 months when construction was included in the Order. To the contrary, as detailed below, job growth in construction was *better* during those 10 months than before or after, even though those months included a winter, when construction hiring often slows.<sup>70</sup> The Division finds that the 1998 removal of construction from the wage order had insufficient justification — and, as detailed below, there is strong reason to include construction in the COMPS Order.

Many construction firms are model employers, and a leading construction trade association, the Associated General Contractors of Colorado, has been a key contributor to efforts to redress sub-standard conditions at certain employers.<sup>71</sup> But legal rules are needed for those who are *not* model citizens, and the inherently hazardous nature of construction — which the best employers can lessen but not eliminate, and the worst employers leave unacceptably high — makes it unpalatable to leave non-model employers unregulated, in order to save model employers from facing wage rules.

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<sup>67</sup> [WATER. REST. SHADE. Keeping Workers Safe in the Heat](#), OSHA (last viewed Oct. 29, 2019); [Heat Stress Work/Rest Schedules](#), CDC (last viewed Oct. 29, 2019).

<sup>68</sup> Letter from Division Director Mary Blue to Mr. Dennis Jakubowski, Director of Governmental Affairs for the Associated General Contractors of Colorado, March 10, 1998.

<sup>69</sup> In 1998, the Colorado and federal minimum wages were the same; Colorado’s minimum wage now has been higher than the federal minimum wage for over a decade.

<sup>70</sup> See pages 29-30 below.

<sup>71</sup> Written comments by Associated General Contractors of Colorado, Sept. 30, 2019 (“The AGC/C is a member of the CDLE’s Joint Enforcement Task Force on Payroll Fraud and Employee Misclassification in the Construction Industry, which has spent more than a year looking into the labor abuses created by labor brokers in the ... industry. AGC/C has supported a number of measures to provide both the Department and individuals with more tools to enforce the law.”).



Work in construction is particularly arduous and hazardous, with some of the highest injury and fatality rates in the country.<sup>72</sup> Construction accounts for 4% of U.S. employment but 21% of occupational deaths.<sup>73</sup> One study found that during a 45-year career, a construction worker has a 75% chance of a disabling injury, and a 1-in-200 chance of a fatal injury.<sup>74</sup> These data and studies are confirmed by (quoted below) comments from construction workers:

- that workers in construction and agriculture work some of the longest shifts of any Colorado workers — often 6-7 days per week, 12 hours or more per day;
- that while the small minority of construction workers who are in unionized workplaces have breaks and receive time-and-a-half for overtime, the vast majority of construction workers are non-union and receive neither breaks nor time-and-a-half overtime pay; and
- injuries and deaths — sometimes from accidents, sometimes from repetitive stress or occupational disease — and shortened worklife are substantial problems they face.

Numerous written comments, as well as the below-quoted oral testimony from roughly three dozen workers in construction and related industrial and transportation work, confirm that extremely long hours in construction are common, and have been for many years.

RENEE GENOVESE: ... I do work out in the hot sun. I do carry heavy materials, that being sheets of plywood, drywall, bags of concrete, in the hot sun, for hours and hours. And I've worked side by side with nonunion workers for years.<sup>75</sup>

EVAN GRIMES: ... Are you seeing similar hours worked by nonunion employees?

RENEE GENOVESE: Yes. The companies that are the nonunion on my project, they work at another project all day for eight to ten hours, and then I'm on night shift right now, so they come to our job to work nights. And they tell us that they don't even get overtime at all....<sup>76</sup>

EVAN GRIMES: Can I see a show of hands, who in here has worked more than 60 hours in a week? What about 70? 80? 90? ...

SCOTT MOSS: So let the record show ... 60 hours[, a]lmost everybody. 70 hours[, a]t least three-quarters. 80 hours[, m]ajority. 90 hours[, a]bout ... a quarter. 100 hours[, a]bout a fifth.<sup>77</sup>

Construction worker testimony also confirms that while many employers do provide breaks and overtime pay, many do not.

Safety is a big part of taking a break, taking a lunch. Workers that have such a physical

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<sup>72</sup> [U.S. Bureau of Labor Statistics \("BLS"\) 2017 Census of Fatal Occupational Injuries Charts](#) (last viewed Oct. 29, 2019) (In 2017, construction had the largest number (971) of fatal occupational injuries, though agriculture had the highest rate (23.0 fatal injuries for every 100,000 full-time workers)).

<sup>73</sup> [Number of Fatal Work Injuries by Employee Status, 2013-15](#), BLS (2016); [Agricultural Safety](#), CDC The National Institute for Occupational Safety and Health (NIOSH) (last viewed Oct. 29, 2019) ("Agriculture ranks among the most hazardous industries.").

<sup>74</sup> [Construction Workers Experience Higher Rates of Injury, Premature Death: Study](#), Safety + Health, National Safety Council (Nov. 2, 2011).

<sup>75</sup> Oral testimony by Renee Genovese, SPEAK Tr. at 196:21-25.

<sup>76</sup> *Id.* at 198:23-199:5.

<sup>77</sup> SPEAK Tr. at 201:2-15.

job, they need to take a load off their feet. They need to clear their head. They need to get some nutrition and hydrate.<sup>78</sup>

[J]ust to be able to sit down in the shade [to] cool off, ... [or] other angles about ... rest and hydration, all that.<sup>79</sup> ... [W]e hear all the time of people getting hurt on projects ... whether it be a back injury, a shoulder injury. If you're lifting drywall for 10, 12 hours a day without a break or a meal break, and being driven to do it, chances are it's going to happen.<sup>80</sup>

[W]orking for the Sheet Metal Workers ... I negotiated probably 50 contract[s]. And every time they .... said, "Hey, we really want to eliminate the morning break....," and I thought, What about the people that have diabetes? What about those people that have to maintain your equipment or run your equipment or run a scissor lift 110 feet in the air, or a boom lift — what happens if they have a problem with their blood sugar? It blows me out of the water to think that they wouldn't have that opportunity to be able to eat something to make sure that they would not endanger themselves or others running the heavy equipment in construction.<sup>81</sup>

I think construction workers, they deserve the same right to have a break.... I don't think that's fair to them or to us to work this many hours without have some, you know, rest, you know, drink water, whatever is the case.<sup>82</sup>

[S]ome of our members, we do stretch.... All our members know that, you know, after so many hours, you need to take a break. If you don't, that's when accidents happen.<sup>83</sup>

[T]hat's how these accidents are starting to happen. They have flaggers.... But some of these guys ... [t]hey don't get no breaks .... And these temp agencies [employing the workers] .... ain't asking you how many hours you had of sleep, are you good? ... So they have this flagger that's supposed to be protecting these guys who have a family and have to go back home, and also protect the public, half asleep, holding the sign, like that.<sup>84</sup>

As a millwright, we go travel to power plants ... [in] southern Colorado, .... anywhere.... 12-hour days usually, seven days a week.... [A]s a union member, it's awesome because I get breaks.... I get overtime. But the guys that don't get the overtime, I can see in their eyes. I was on a job where we were going hand-in-hand, union, nonunion. The nonunion guys were sitting over here, busting their behinds, working just as hard ... , not as skilled but just as hard, and we would go ahead and take a break. And you could just see that they're having to work through break. Beads of sweat running down their face. As for us, we get a break time, short, sweet, concise, but we're back and ready. We're rejuvenated. These guys are beat ....<sup>85</sup>

I built all the bridges for the Light Rail .... So we would be out on them bridges till my hard hat was froze to the back of my head. ... No breaks on the bridges. There was no breaks for us. And we could go 16 hours a day. I might go eight or nine hours without something to eat, unless I put something in my tool bag. I was literally out there building the bridges. And

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<sup>78</sup> Oral testimony by Mark Thompson, SPEAK Tr. at 148:19-24.

<sup>79</sup> Oral testimony by Orlando Martinez, SPEAK Tr at 163:20-24.

<sup>80</sup> Oral testimony by James Gleason, SPEAK Tr. at 76:15-20.

<sup>81</sup> Oral testimony by Jason Wardrip, SPEAK Tr. at 6:16-7:7.

<sup>82</sup> Oral testimony by Ricardo Cereceres, SPEAK Tr. at 192:3-13.

<sup>83</sup> Oral testimony by Luis Guigon, SPEAK Tr. at 189:7-11.

<sup>84</sup> Oral testimony by Joe Pimentel, SPEAK Tr. at 41:3-25.

<sup>85</sup> Oral testimony by Jordan Jones, SPEAK Tr. at 166:19-167:15.



it just seems to be getting further and further away from what we need to do in Colorado.<sup>86</sup>

Construction workers also testified that their long hours cause injuries, both acute and long-term overuse, that require surgery — for younger workers occasionally, but for older workers commonly and repeatedly — and that the long hours and injuries force still-qualified workers to involuntarily retire in their 40s to 50s. When those still able to work 40-50 hours need to leave construction work due to inability to work 60-80 or more hours, many never work in jobs that pay as well again — illustrating that long hours contribute to the challenge of keeping an aging workforce engaged in rewarding work and able to provide for themselves.

JAMES GLEASON: ... As far as on-the-job injuries for older people, a lot of that is caused by them being pushed so hard. ... [W]hen I was a young man, I could work 10, 12, 14 hours a day, no problem. I couldn't go out and do the same thing now and not injure myself. And it's ... trying to produce, when you haven't had the ability to rest, or grab a Gatorade, ... or grab a protein bar, just to nourish yourself.... And it's hard to compete. I've seen people die because of the same thing, old people that, they've gone to a job with the expectation that they're going to work ten hours .... [N]ext thing you know, a hole in the floor, walk by, picks up a piece of plywood, steps right into the hole, falls feet and cracks the back of his head.

SCOTT MOSS: ... [Y]ou've seen workers who couldn't come back from needing surgeries?

JAMES GLEASON: Yeah.

SCOTT MOSS: And is that more older workers? Younger workers?

JAMES GLEASON: Generally, anywhere after 40.<sup>87</sup> ...

CAROLINE HENKINS: ... I'm 57. And so the industry is pushing harder and harder, and the people that are getting older and older .... I've been doing this since I was 18. ... I'm thinking, how much longer can I keep the pace and keep my job ....

SCOTT MOSS: And the folks who have had to stop working construction due to age, do you know whether any indicated they might have kept working if the hours were lighter?

CAROLINE HENKINS: Yeah ... if they would have had lighter hours ... [T]hey can't keep the pace with those hours .... [They] get laid off .... That's what I've seen.

SCOTT MOSS: ... [A]re there injuries that either you or others you've seen as you get older are common, injuries you either work through or can't work for a time?

CAROLINE HENKINS: Myself, I've had a knee replacement, a shoulder replacement, and five back surgeries, and I'm still working, still doing the same physical work that I did. But that's my injuries that I came back from and was lucky to come back from. Most people, they get surgeries, you're either laid off and you're not hired again because you've had an injury, but it's knee injuries, shoulder injuries, and back because we wear our bodies out....

SCOTT MOSS: Five back surgeries. Is that exceptional that you've had these surgeries or unusual, or have you heard of other workers having multiple –

CAROLINE HENKINS: It's not unusual for scaffold builders like myself .... [S]even days a week, 12 hours a day for my first 18 years. That was a typical week for us. And your body

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<sup>86</sup> Oral testimony by Caroline Henkins, SPEAK Tr. at 203:11-17.

<sup>87</sup> Oral testimony by James Gleason, SPEAK Tr. at 218:9-219:6, 230:25-231:5.

just can't hold up to it. You know, your knees wear out. Your shoulders wear out when you're pushed to work that.... My knee was swole up so bad, I couldn't even bend it.... I'm out there doing the concrete work, ... I couldn't even bend my knee.... I limped my knee along for three years until I could afford to have surgery.<sup>88</sup> ...

RENEE GENOVESE: ... [W]hen we pull those hundred-hour weeks, a lot of the workers that are older, you could see, like, when they're done, they're, like, listen, I'm done and I'm tired.... I can't do no more. And with the people who have been doing it for many years, a lot of the common things are the carpal tunnel, the shoulder, hernias from the heavy lifting. So I've heard many, many people and their stories of who I work with.... And it's people 30 and up that I see getting the surgery.

SCOTT MOSS: ... [H]ave you seen any folks not able to come back from an injury or surgery?

RENEE GENOVESE: Yes. I have a friend right now in his mid 50s who may not come back to work. I've seen another gentleman in his 60s who did not go back to work.<sup>89</sup>

One individual who knew many construction workers, from working decades in construction and then serving as a union official, cited numerous examples of workers who, as they aged, still wanted to and could work full-time, but had to leave construction for jobs with lighter hours that “[p]aid a lot less ... than what they would be making” in construction: school bus driver; home depot; hospital maintenance worker; and retail sales.<sup>90</sup> Workers in a wide range of other industries, including nonprofit, retail, teaching, and social work, gave testimony similar to that offered by the construction workers. These workers testified to working 60 to 70 or more hours per week, and to “burnout” due to overwork, even for the most mission-driven workers.<sup>91</sup> One nonprofit employee testified that he loved community organizing because “you get to fight for what inspires you on a daily basis,” but that this “passion turns to exploitation” when nonprofit workers are expected to work long weeks at meager salaries.<sup>92</sup>

These workers also testified and commented that long workweeks deprived them of time for self-care and time with their families. One retail manager commented regarding the impact expanded overtime coverage would have on her family: “I am a mother of two trying to pursue a career but face everyday challenges trying to be at home and comply with the hours I have to work in a weekly basis. My children would be able to spend more time with us and grow up to be good people and

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<sup>88</sup> Oral testimony by Caroline Henkins, SPEAK Tr. at 202:8-07:7.

<sup>89</sup> Oral testimony by Renee Genovese, SPEAK Tr. at 209:15-210:11, 210:21-11:1.

<sup>90</sup> Oral testimony by James Gleason, SPEAK Tr. at 226:15-228:14.

<sup>91</sup> Oral testimony by Victor Galvan, nonprofit employee, SPEAK Tr. at 82:10-88:6 (nonprofit workers often work 68-70 hour weeks); Oral testimony by Kelly Reeves, former nonprofit employee, SPEAK Tr. at 185:24-186:12 (reporting work of 60-hour weeks at salary below minimum wage); Written comments by Isabel Cruz, nonprofit employee, Aug. 16, 2019 (work of 50-60 hours a week; “While I was passionate about my work, the financial and emotional stress of barely being able to meet my needs or find time to see my loved ones began to take a toll.... We were supposed to be role models for our students, showing them the value of going to college, advocating for yourself, and taking care of your emotional and physical health, but ... we weren't even able to practice what we preach.”); Written comments by Lida Johnson, receptionist, Aug. 16, 2019 (worked hundreds of hours of overtime, reporting “the physical to[al] it took on my was out of control. I was sick more in the time I worked for this company than ... in the last 10 years combined.”).

<sup>92</sup> Oral testimony of Victor Galvan, nonprofit employee, SPEAK Tr. at 84:16-23, 82:20-24, *see* 82:25-84:15.

good citizens for society.”<sup>93</sup>

**(d) The evidence that expanding overtime coverage reduces excessively high work hours and does not harm employment levels.** Research shows that requiring overtime premium pay is effective at decreasing overtime hours.<sup>94</sup> Expanding overtime coverage disincentivizes the especially long workdays and workweeks that are common across a wide range of industries, and also ensures that employees receive fair compensation when they are required to work such overtime hours. This is why, as multiple studies confirm, expanding overtime coverage increases jobs — because it induces employers to spread work among more employees, rather than to assign heavy overtime to fewer employees. That was the original purpose of the federal overtime statute in 1938,<sup>95</sup> and studies confirm that rules expanding overtime coverage do have that intended positive effect.

**(i) Goldman Sachs study.** A nationally leading investment bank, Goldman Sachs, studied the impact of the 2016 proposed federal rule that, by increasing the minimum salary for overtime exemption, aimed to expand overtime coverage. Goldman Sachs estimated that an increase in the overtime-exempt salary would yield a total of 120,000 new hires nationwide.<sup>96</sup> It elaborated that these new jobs would be created without undue cost to employers, because increasing overtime coverage leaves employers with multiple compliance options: they can *either* (a) raise salaries, (b) pay hourly rates with overtime, or (c) shift hours among employees to avoid overtime — the option that increases jobs, by spreading work among more employees.

Our analysis of CPS microdata suggests that if a similar share of employers cut back overtime hours as did in 2004 [after similar rule changes], it would take approximately 100k new full-time workers to make up the reduction in hours worked, though DOL’s estimates of affected workers and average overtime hours suggests that the effect could be as small as 40k. However, since the latest policy change does not loosen the rules in certain respects the way the 2004 changes did, we would expect that the share of employers that cut back overtime hours would be greater.... The upshot is that a central estimate of around 100k full-time workers looks reasonable. We assume this effect would take place over several months or up to a year, potentially adding around 10k or more to monthly payroll growth in 2017.

By contrast, the new rules should have little effect on wages in the aggregate. If employers chose to pay all affected overtime workers 150% of their regular hourly-equivalent wage on overtime hours, this would boost the level of average hourly earnings by about 0.1%; however, since most employers are likely to reduce base pay or hire

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<sup>93</sup> Written comments by Liz Flores, retail manager, Aug. 16, 2019.

<sup>94</sup> Helene Jorgensen and Lonnie Golden, [Time After Time: Mandatory Overtime in the U.S. Economy Report](#), Economic Policy Institute (Jan. 1, 2002) (citing “evidence that the required overtime pay premium for these “non-exempt” workers is effective,” including that “about 44% of exempt workers (*i.e.*, qualifying executives, supervisors, administrators, professionals, and outside salespeople) work over 40 hours weekly, compared to about 20% of non-exempt workers”).

<sup>95</sup> “The second [FLSA] objective .. is to reduce overwork and its detrimental effect on the health and well-being of workers.” 80 Fed. Reg. 38516 (July 6, 2015) at 35519 (citing *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 739 (1981) (“FLSA was designed to give minimum protections ... and to ensure that each employee ... would receive a fair day’s pay for a fair day’s work and would be protected from the evil of overwork as well as underpay.”)).

<sup>96</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 81 Fed. Reg. 32391 (May 23, 2016) at 32503 (in analysis of proposed federal rule, “Goldman Sachs concluded that an increase in the salary threshold from \$455 to \$970 would result in a total of 120,000 new hires.”); see Heidi Shierholz, [Updating Colorado’s overtime salary threshold: How the new rule will benefit Colorado businesses, employment, and the broader Colorado economy](#), Economic Policy Institute, Aug. 28, 2019.

new workers to replace overtime hours, the effect would be even smaller. For example, DOL estimates the new rules will increase aggregate pay by \$1.2 billion per year; it would take an increase several times this large to raise AHE [average hourly earnings] by even 0.1%.<sup>97</sup>

(ii) **National Retail Federation study.** A study by the National Retail Federation reached a similar conclusion to the Goldman Sachs study: “a salary threshold of \$970 per week would create 117,100 part-time jobs in the retail industry alone.”<sup>98</sup>

(iii) **Division study of 2016 federal overtime rule.** A Division analysis found no discernable impact on U.S. unemployment rates from the 2016 U.S. Department of Labor (“USDOL”) 2016 salary basis of \$47,476 annually (“2016 USDOL Salary”),<sup>99</sup> which is projected to equal \$51,064 by 2020.<sup>100</sup> That salary rule was published in late May of 2016 and enjoined in late November 2016<sup>101</sup> before going into effect.<sup>102</sup> Yet because the rule was not enjoined until days before its effective date, by late 2016 a substantial fraction of employers — a majority, by multiple sources of credible data — already had increased compensation, or reclassified salaried employees as hourly, to comply with the new salary rule — and a large share of employers preserved these new compensation structures after the injunction, rather than rescind just-announced pay changes.<sup>103</sup>

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<sup>97</sup> *US Daily: The New Federal Overtime Rules: Little Effect on Pay, Potential Boost to Payrolls (Phillips)*, Goldman Sachs Economic Research (May 18, 2016).

<sup>98</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 81 Fed. Reg. 32391 (May 23, 2016) at 32503 (in analysis of proposed federal rule, “Legal Aid Society-Employment Law Center referenced a publication by the NRF [National Retail Federation] which, relying on data from Oxford Economics, estimated that a salary threshold of \$970 per week would create 117,100 part-time jobs in the retail industry alone.”).

<sup>99</sup> 81 Fed. Reg. 32391 (May 23, 2016).

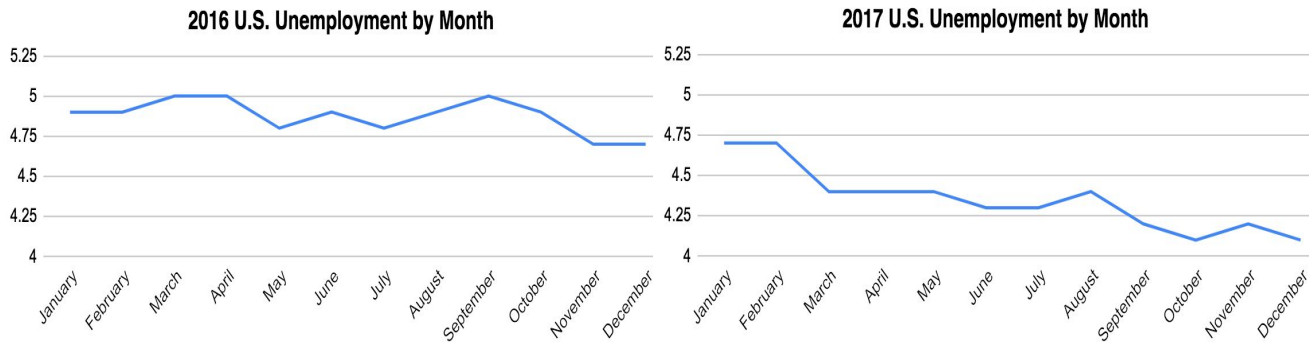
<sup>100</sup> Heidi Shierholz, *Updating Colorado’s overtime salary threshold: How the new rule will benefit Colorado businesses, employment, and the broader Colorado economy*, Economic Policy Institute, Aug. 28, 2019 (confirmed by the Division’s own calculations applying annual CPI increases to 2016 salary figures).

<sup>101</sup> *Nevada v. United States Dep’t of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016).

<sup>102</sup> 81 Fed. Reg. 32391 (May 23, 2016); first release May 18, 2016.

<sup>103</sup> See Heather Harmon, *Small Business Owners Plan to Stay the Course on Overtime Changes*, Manta (Dec. 8, 2016) (post-injunction “poll of 1,170 small business owners found that 84% plan to implement new overtime rules even after a federal court put the changes on hold.”); *Korn Ferry Hay Group Survey: Despite Injunction to FLSA Overtime Ruling, More Than Half of Retail Companies Still Plan to Comply*, Korn Ferry (Nov. 20, 2016) (post-injunction survey found that “nearly two-thirds (65 percent) of those who had planned to increase exempt employees to the \$47,476 salary threshold still plan to do so, with 35 percent saying they will wait for the ruling.”); Martha C. White, *Obama’s Overtime Law Failed, But Still Helped Thousands*, NBC News (Dec. 16, 2016) (“‘There’s a whole set of companies that had already communicated to their employees that they were going to change their employment status or give them raises,’ said Brian Kropp, HR practice leader at CEB. Because the rule was halted only about a week before it was set to take effect, many companies had already made the switch.”; one compensation consulting service reported that “roughly 40 percent” of client businesses had “implemented either raises or worker reclassification”; another study found an 18 percent drop in job postings between the 2016 USDOL Salary and the previous salary threshold”). See also individual reports from businesses that raised salaries, or converted salaried employees to hourly, in advance of the 2016 USDOL Salary effective date, and kept these changes after the salary basis was enjoined: Jed Graham, *How Overtime Pay Ruling Affects Wal-Mart, Dollar Tree, Fast Food*, Investors Business Daily (Nov. 23, 2016) (Wal-Mart, Dollar Tree, Carrols Restaurant Group (Burger King franchiser), and Planet Fitness planned or had implemented changes prior to Dec. 1, 2016, effective date); Joyce M. Rosenberg, *Workers May Get Raises Following Overtime Ruling*, Associated Press (Nov. 28, 2016) (two employers to maintain raises in spite of injunction: “‘We think it’s unfair and unethical to propose new compensation to our employees that gives them additional income and then to pull the rug out from under them at the last minute....’”); Jonelle Marte, *Millions of Workers in Limbo After Rule Expanding Overtime Pay Eligibility Is Put on Hold*, Washington Post (Dec. 1, 2016) (“Many employers said after the ruling that they would move ahead with changes

Below, a month-by-month graph of unemployment shows no discernible negative impact of widespread late 2016 adoptions of pay changes based on the impending overtime-exempt salary rule.



(iv) **Division study of state overtime rules.** Another study by this Division, of analogous *state* overtime rules (*i.e.*, expanding overtime rights by increasing the overtime-exempt salary), found that in states that instituted overtime-exempt salaries above the federal level, the unemployment rate *dropped*, by an average of 0.6% compared to the national unemployment rate.<sup>104</sup>

State	Salary Basis in 2020	Unemployment Rates Before & After Salary Basis Adoption																Difference: The 2 Yrs After Minus the 2 Yrs Before	
		2 Yr Before			1 Yr Before			State-US: Avg 1&2 Yr Before	Yr of Adoption			1 Yr After			2 Yr After				State-US: Avg 1&2 Yr After
		State	US	State - US	State	US	State - US		State	US	State - US	State	US	State - US	State	US	State - US		
AK	\$42,390	7.3	5.8	+1.5	7.8	6.0	+1.8	+1.7	7.5	5.5	+2.0	6.9	5.1	+1.8	6.6	4.6	+1.9	+1.8	+0.2
CA	\$54,080	6.0	4.5	+1.5	5.2	4.2	+1.0	+1.2	5.0	4.0	+1.0	5.4	4.7	+0.7	6.7	5.8	+0.8	+0.8	-(0.5)
ME	\$36,000	4.5	4.5	-(0.0)	3.9	4.2	-(0.3)	-(0.1)	3.4	4.0	-(0.6)	3.8	4.7	-(0.9)	4.4	5.8	-(0.8)	-(0.8)	-(0.7)
NY	\$58,500	5.6	4.5	+1.1	5.2	4.2	+1.0	+1.0	4.5	4.0	+0.5	4.8	4.7	+0.1	6.1	5.8	+0.3	+0.2	-(0.8)
Weighted Average		+1.3			+1.0			+1.1	+0.8			+0.5			+0.6			+0.6	-(0.6)

(v) **Division study of construction coverage in Colorado in the 1990s.** In the late 1990s, the wage order covered construction for 10 months, and during that time, job growth in construction averaged 1.0% per month — higher than before (0.6% in the preceding 10 months) or after (0.8% in the 10 months after construction was removed from the wage order). Nor was there a negative impact on pay in the late-1997 to mid-1998 coverage period, as the below tables show.

even though the future of the rule is murky. TJX, the parent company for T.J. Maxx and Marshalls, said this week that it would “move forward as planned” on the new rule, without elaborating on what those changes would be.”); Chris Opfer, [Walmart, White Castle Raises Could Color Trump Overtime Rule](#), Bloomberg Law (Oct. 18, 2018) (employers including Staples, CKE Restaurants (Carl’s Junior and Hardee’s), and White Castle implemented changes in advance of effective date; White Castle preserved these changes: “‘We weren’t necessarily in agreement with where the final rule came in, but we did go ahead and honor it,’ Jamie Richardson, White Castle’s vice president for government relations, said of the Obama proposal. ‘The uncertainty about the rule put us in a position where we said, “Let’s lean toward doing the right thing, and if we make that commitment, let’s not punish people by whipsawing them back.”’”).

<sup>104</sup> All states but Alaska implemented salary bases in 2000, one year before the 2001 recession, and doing so did not impact their ability to weather the recession: all three had a better than average unemployment rates, compared to the nation, in the two years that included the recession; all were -0.5 to -0.8 percentage points lower than the national rate, compared to the two years prior to adopting a salary basis.



Monthly Jobs in Construction, 1996-2000			
Month	Jobs	Incr.	Avg. Incr.
1/1996	108,100		+0.7%
2/1996	109,100	+0.9%	
3/1996	110,100	+0.9%	
4/1996	111,200	+1.0%	
5/1996	112,100	+0.8%	
6/1996	112,900	+0.7%	
7/1996	111,700	-1.1%	
8/1996	113,000	+1.2%	
9/1996	113,400	+0.4%	
10/1996	114,000	+0.5%	
11/1996	115,800	+1.6%	
12/1996	115,400	-0.3%	
1/1997	114,900	-0.4%	Over the 10 Months Before Wage Order Coverage: +0.6%
2/1997	116,800	+1.7%	
3/1997	117,700	+0.8%	
4/1997	118,500	+0.7%	
5/1997	119,800	+1.1%	
6/1997	120,400	+0.5%	
7/1997	121,400	+0.8%	
8/1997	121,500	+0.1%	
9/1997	123,200	+1.4%	
10/1997	124,600	+1.1%	
11/1997	122,500	-1.7%	Over the 10 Months with Wage Order Coverage: +1.0%
12/1997	124,900	+2.0%	
1/1998	127,000	+1.7%	
2/1998	128,900	+1.5%	
3/1998	130,200	+1.0%	
4/1998	131,500	+1.0%	
5/1998	132,700	+0.9%	
6/1998	133,500	+0.6%	
7/1998	135,400	+1.4%	
8/1998	136,800	+1.0%	
9/1998	138,200	+1.0%	Over the 10 Months After Wage Order Coverage Removed: +0.8%
10/1998	139,200	+0.7%	
11/1998	139,700	+0.4%	
12/1998	141,000	+0.9%	
1/1999	142,500	+1.1%	
2/1999	144,000	+1.1%	
3/1999	144,700	+0.5%	
4/1999	148,500	+2.6%	
5/1999	146,400	-1.4%	
6/1999	148,000	+1.1%	
7/1999	148,600	+0.4%	+0.7%
8/1999	149,500	+0.6%	
9/1999	149,500	+0.0%	
10/1999	151,500	+1.3%	
11/1999	153,200	+1.1%	
12/1999	154,900	+1.1%	
1/2000	156,500	+1.0%	
2/2000	158,700	+1.4%	
3/2000	161,100	+1.5%	
4/2000	161,600	+0.3%	
5/2000	163,000	+0.9%	
6/2000	163,900	+0.6%	
7/2000	164,400	+0.3%	
8/2000	165,400	+0.6%	
9/2000	166,100	+0.4%	
10/2000	167,000	+0.5%	
11/2000	166,900	-0.1%	
12/2000	168,500	+1.0%	
Source: CDLE, Office of Labor Market Information, Current Employment Statistics (CES)			

Pay in Construction, 1996-2000		
Year	Avg. Pay	Incr.
1996	\$30,064	
1997	\$31,382	+4.4%
1998	\$33,602	+7.1%
1999	\$34,851	+3.7%
2000	\$37,259	+6.9%
Source: CDLE, Labor Market Information, Quarterly Census of Employment and Wages (QCEW)		

In addition to not harming employment, studies and comments to the Division indicate that reducing long work hours and providing breaks help employers too — especially in the long run, by increasing productivity, decreasing turnover, and avoiding the sorts of premature retirements common in, among other fields, construction. Long working hours decrease productivity and

increase turnover, which is costly for employers.<sup>105</sup> Citing studies, the former Chief Economist of the U.S. Department of Labor noted in a comment to the Division that expanding overtime eligibility

will likely increase productivity. ... [E]mployers may organize workers' time more efficiently. Reducing overwork can also increase efficiency, since overworked employees are less productive. Research shows that employees who have adequate time to rest and recuperate each week, or between shifts, are more productive and less prone to at-work accidents and injuries.<sup>106</sup>

Corroborating these studies is the following comment by one Colorado business owner:

We have a team of dedicated people that work to improve every day. Every team member has a lot of autonomy, so we don't — you know, they take breaks when they know they need breaks, and they're very productive. I always turn to the old adage, "I don't pay you to think. I pay you to work." I always joke with them, "I don't pay you to work. I pay you to think." When people have, you know, some breaks and some time and — they are more creative, and they will do a better job. And thinking is how they get that done, not just doing stuff for hours on end.<sup>107</sup>

Finally, the impact of broader coverage is lessened by the retention of numerous coverage exemptions and exceptions in Rule 2, detailed below.

For the above reasons, the Division determines that all Colorado employees shall be presumptively covered by COMPS Order #36 unless expressly exempted in Rule 2.

## **2. Rule 2.2. Exemption from all except Rules 1, 2, and 8**

Rule 2.2 preserves most exemptions in Section 5 of Order #35. It adds a new exemption (owners and proprietors in Rule 2.2.5), narrows an existing exemption (eliminating in-home domestic and companion employees in Rule 2.2.7), and adds clarifying language to others that had proven to be ambiguously worded. Rules 2.2.1-2.2.3 and 2.5 add and/or clarify standards of minimum pay for the administrative, executive, and professional exemptions. Rules 2.2.6-2.2.9 are partially rewritten to clarify ambiguous language. Overall, Rule 2.2 now makes clear that exemption is from the core substantive portions of the COMPS Order, with only three rules still applicable: Rules 1-2 (the rules that (a) grant the exemptions and (b) have definitions of both statutory and rule terms that might still apply to exempt employers) and Rule 8 (administration and interpretation, which is relevant to any disputes about exemptions and any complaint processes that might apply to

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<sup>105</sup> John Pencavel, [The Productivity of Working Hours](#), 125 Economic Journal 589 (2014), at 2052–76 (“This paper has suggested a different reason for an optimizing employer to care about the length of working hours: employees at work for a long time may experience fatigue or stress that not only reduces his or her productivity but also increases the probability of errors, accidents, and sickness that impose costs on the employer.”); Lonnie Golden, [The Effects of Working Time on Productivity and Firm Performance](#), *Research Synthesis Paper*, International Labor Organization (ILO) Conditions of Work and Employment Series 33 (2012) (“While additional working hours may reflect a worker’s work ethic or commitment to the job, workplace, employer or labour force and the hope of attaining higher current or future earnings, at some point, longer working hours inevitably begin to create risks and time conflicts that interfere not only with the quality of non-work life, but also on-the-job performance.”).

<sup>106</sup> Heidi Shierholz, [Updating Colorado’s overtime salary threshold: How the new rule will benefit Colorado businesses, employment, and the broader Colorado economy](#), Economic Policy Institute, Aug. 28, 2019.

<sup>107</sup> Oral testimony by Jimmy Burds, SPEAK Tr. at 15:10-21.

partially-exempt employers).

**a. Rules 2.2.1-2.2.3. Administrative, Executive, and Professional employees**

The duties tests for the exemptions in Sections 5(a)-(c) of Order #35 remain substantively unchanged. The rules now add and/or clarify standards of minimum pay for the administrative, executive, and professional exemptions by cross-referencing Rule 2.5, which is discussed below.

**b. Rule 2.2.4. Outside salespersons.**

Rule 2.2.4 preserves Section 5(d) of Order #35 with no substantive changes.

**c. Rule 2.2.5. Owners or proprietors.**

Rule 2.2.5 newly exempts employees who own at least 20% of the employer company and are actively engaged in the management of the company. As one commenter noted:

[I]f the Division adds a salary minimum, it will be important to add some additional FLSA exemptions to the Wage Order. Specifically, given Colorado's booming startup and emerging companies, the owner exemption from the FLSA should be added to the Wage Order. This exemption is critical to the early workers in startups, who are also substantial owners and often must make early sacrifices in order for the business to succeed.<sup>108</sup>

This exemption mirrors the federal exemption,<sup>109</sup> with the exception that the Rule 2.2.5 exemption is broader in one regard: It also exempts the highest-ranking and highest-paid individual at a nonprofit, as long as s/he is paid at least the minimum salary for exemption in Rule 2.5.

The reasons for this additional exemption are twofold. First, it accommodates non-profit organizations whose top employees may not qualify for the Rule 2.2.2 "executives or supervisors" exemption, whether because they supervise mainly volunteers who are not "employees" or for other reasons specific to their duties running non-profit entities. Second, it prevents non-profits from losing an exemption that for-profits enjoy: If for-profit entities have owners exempted, then entities incorporating instead as non-profit should not lose that exemption — as long as the top employees are paid enough. For-profit "owners" receive compensation in ownership equity, which non-profit employees cannot receive. Consequently, the equivalent exemption as a non-profit "proprietor" — defined here as the highest-ranked and highest-paid employee — requires at least the Rule 2.5 minimum salary for overtime exemption.

**d. Rule 2.2.6. Taxi cab drivers or Interstate transport workers.**

Rule 2.2.6 preserves the exemption in Section 5 of Order #35 for "interstate drivers, driver helpers, loaders or mechanics of motor carriers, [and] taxi cab drivers," with important clarifications. The construction of "interstate drivers, drivers helpers, loaders or mechanics of motor carriers" in Order #35 left unclear (1) whether "interstate" qualified "drivers" only, or qualified "drivers helpers, loaders or mechanics"; and (2) whether "interstate" was intended to have the definition used in the federal Motor Carrier Act of 1935 ("MCA") (essentially, in interstate commerce), or to mean

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<sup>108</sup> Written comments by Gillian Bidgood, Aug. 27, 2019.

<sup>109</sup> 29 USC § 213(a)(1); 29 CFR § 541.101.



actually crossing state lines. This ambiguity created conflicting federal and state precedent, with the former holding that the exemption was coextensive with the FLSA MCA exemption<sup>110</sup> and the latter holding that “interstate” required crossing state lines (but *only* for drivers).<sup>111</sup> The Division’s original intent with this exemption was in line with the state court precedent: to exempt employees whose work took them across state lines and thus beyond the Division’s jurisdiction. Rule 2.2.6 now clarifies this intended interpretation, which applies to drivers as well as drivers helpers, loaders, and mechanics.

Rule 2.2.6 also clarifies that “taxi cab drivers” are those “employed by a taxi service provider licensed by a state or local government authority.” This preserves the intent of the rule, which may have become unclear over time with proliferation of ride-for-hire services lacking the sort of locally monitored traditional taxi cab services that were within the intended meaning of the rule.

**e. Rule 2.2.7. In-residence workers.**

Rule 2.2.7 details various exemptions applying only to employees working in residences. This rule preserves various exemptions in Order #35 Section 5, with changes detailed below.

Absent from Rule 2.2.7 is a narrow “companions” and “domestic employees” exemption present in Order #35. That Order #35 exemption had reached only those employed directly “by households or family members to perform duties in private residences.” Order #35 therefore inconsistently covered work provided by a business, but not the same work done directly for customers, disadvantaging such businesses and depriving some low-wage workers of protections enjoyed by others with the same job. Those needing exemption are mainly those qualifying as “independent contractors,” who already are exempted by the “employee” definition. The Division finds no reason to exempt those who *are* employees from COMPS Order protections.

Rule 2.2.7(B) clarifies that exempt “property managers” are those who reside on-premises at the property they manage. Order #35 never defined what scope of work qualifies as exempt “property manag[ing].” The Division’s interpretation of its rule is that it applies only to those residing on-premises — because those are the type of employees for whom exemption has justification because they (a) receive housing as part of their employ and (b) may be expected to be on call at all hours. Managers not residing on-premises do not receive such housing benefits, and their hours are manageable in regular shifts, eliminating any exemption basis. The Division finds this to be the best interpretation of the exemption and the intent underlying the exemption.

Rule 2.2.7(C) similarly clarifies that exempt “student residence workers” must be employed in residences where they reside, for similar reasons as stated for Rule 2.2.7(B). The Division finds no reason to exempt students working outside their residences — *e.g.*, students who are janitors in other dorms at their colleges — from COMPS Order protections. The Division finds this to be the best interpretation of the exemption and the intent underlying the exemption.

Rule 2.2.7(D) similarly clarifies that exempt “inmates, patients, or residents of charitable institutions” who “perform laundry services” are those who work “in institutions where they reside,” for similar reasons as stated for Rule 2.2.7(B). The Division finds this to be the best interpretation of

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<sup>110</sup> See *Deherrera v. Decker Truck Line, Inc.*, 820 F.3d 1147, 1161 (10th Cir. 2016); *Combs v. Jaguar Energy Servs., LLC*, 683 F. App’x 704, 705–07 (10th Cir. 2017)

<sup>111</sup> *Brunson v. Colo. Cab Co.*, 2018 COA 17 ¶¶ 17–45.

the exemption and the intent underlying the exemption.

Rule 2.2.7(E) declares “range workers” exempt if provided key protections under federal law governing such workers. This leaves range workers exempt from stricter wage rules applicable to other jobs, while assuring that they are not exempt if their conditions of employ fall below a floor required by federal law — which also protects employers compliant with federal law against competition from other employers who save money through non-compliance.

Rule 2.2.7(F) exempts in-residence field staff of seasonal camps and outdoor education programs. Beginning January 1, 2021, these employees may be paid a flat weekly rate based on the Colorado minimum wage for a 42-hour workweek, but (a) reduced 10%, (b) reduced an additional 25% for non-profit entities, and (c) reduced \$100 weekly for the required provision of lodging and all meals. This exemption responds to numerous comments received from summer camps and outdoor education programs<sup>112</sup> that are generally exempt from the FLSA minimum wage and overtime requirements under a broad statutory exemption in the FLSA (the seasonal amusement and recreational establishment exemption, 29 U.S.C. § 213(a)(3)), but absent from any Colorado wage statute. Exemption for the in-residence counselors and educators is warranted to reflect the unique mix of recreation and work time, and the difficulty of tracking time, in such jobs. The Division also finds that the pay scheme in Rule 2.2.7(F) is comparable to those of numerous other states that allow flat pay rates for field employees of camps and outdoor education programs that are well below minimum wage for all their hours. Finally, the Division finds that a fixed \$100 credit for meals and lodging is warranted for such employment due to the difficulty of ascertaining fair market value or cost of non-standard lodgings, such as tents in rented forest acreage or beds in bunks or dormitories shared with minors who are paying campers that the employees are required to care for and/or supervise. Similar difficulties arise in calculating the value and cost of meals that may be shared with and/or prepared by paying campers or students.

The Division finds that adopting the FLSA seasonal amusement and recreation exemption would be unfair and unsound policy, as to not only camps but also other employers who may qualify for that FLSA exemption. That exemption would exclude from COMPS Order wage protections not just jobs warranting exemption (e.g., camp counselors), but entire industries — leaving many blue-collar and otherwise lower-paid employees exempt even though they do *not* reside on-premises, have on-duty hours that are difficult to track, or receive the non-monetary benefits that field instructors receive. Exempting (for example) janitors, maintenance workers, cooks, and administrative assistants, from some industries but not others, even if they do the same work for the same hours, would cause economically inefficient skewing of the labor market. That sort of inconsistency due to exempting by *industry* rather than by *job warranting exemption* was a core problem with prior wage orders, and a problem that the COMPS Order aims to minimize, not continue.

**f. Rule 2.2.8. Bona fide volunteers and work-study students.**

Rule 2.2.8 preserves “bona fide volunteers” exemption and clarifies the “students employed in a work experience study program” exemption. The exemption for students now requires that they

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<sup>112</sup> See Written comments by: Lauren E. Schmidt, Executive Director, and Sarah Hartley, Board Chair, Colorado Outward Bound School, Dec. 11, 2019; Russell N. Watterson, Jr., Executive Board Member, Denver Area Council of the Boy Scouts of America, Dec. 24, 2019; J. Stephen Rottler, Member of Executive Board of Directors Denver Area Council of the Boy Scouts of America, Dec. 24, 2019; Casey Klein, President, Colorado Camps Network, Dec. 30, 2019.

be (1) “enrolled” and (2) “receiving credit,” so that students’ work is only exempt where it materially benefits the student by conferring academic credit.

**g. Rule 2.2.9. Elected officials and their staff.**

Rule 2.2.10 preserves the exemption for elected officials and members of their staff, clarifying that the relevant “election” must be to public office (*e.g.*, not election to the presidency of a club or other private organization).

**h. Rule 2.2.10. Highly technical computer-related occupations.**

Rule 2.2.10 added an exemption for skilled workers in highly technical computer-related occupations.<sup>113</sup> The exemption permits employees to obtain either formal or informal knowledge of an advanced type, because self-study or non-degree-granting courses are sufficient for many such jobs.<sup>114</sup> The listed job duties are derived verbatim from the FLSA’s regulation exempting “Computer Employees.” *See* 29 C.F.R. § 541.400.

**3. Rule 2.3. Agriculture.**

Rule 2.3 partially exempts “agricultural jobs” from the COMPS Order, the definition of which in the COMPS Order derives from, and parallels, the definition in the FLSA. First, all jobs in agriculture are exempt from Rule 4 (Overtime) and Rule 5.1 (Meal Periods). Second, jobs in agriculture are also exempt from the minimum wage if they are exempt from the federal minimum wage — most notably, agricultural jobs on small farms, as defined by the FLSA. Third, Rule 5.2 (Rest Periods) applies, but with the significant additional flexibility that Rule 2.3.1 provides: to merely *average* 10 minutes *per* 4 hours worked, rather than to provide at least 10 minutes in each 4 hours — as long as workers receive at least 5 minutes of rest every four hours. This Rules 4-5 exemption does not apply to a small potential subset of agricultural employers: any who were already covered by prior Orders as “Retail[ers].” While the vast majority of agricultural employers are not primarily (or at all) retailers, it is possible that some may have been covered under the “Retail” definition that prior Orders featured for decades. Any employer, in any industry, whether or not that industry was generally covered, would qualify as a covered “Retail” employer if it “sells or offers for sale, any service, commodity, article, good, . . . wares, or merchandise to the consuming public” and draws “50% or more of its annual dollar volume . . . from such sales,” rather than from sales to other businesses “for resale.”<sup>115</sup> The Division takes no position as to whether any particular agricultural employer actually does qualify under this definition, but notes it simply so that if any such employer exists, the COMPS Order would not *remove* coverage that already existed.

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<sup>113</sup> *See, e.g.*, written comments by Dan Block, Dec. 23, 2019 (“[T]here could be employees in computer-related positions that could be considered ‘highly skilled’ positions who don’t fit into the professional employees exemption”); Written comments by Gillian Bidgood, Aug. 27, 2019 (“[B]ecause of Colorado’s booming technology sector, it [sic] the Wage Order should also include the computer employee exemption”).

<sup>114</sup> Written comments by Dan Block, Dec. 23, 2019 (“[A]lthough many years ago the individuals employed in . . . computer-related positions might typically have obtained their skills through a prolonged course of specialized intellectual instruction and study, in more recent times most individuals employed, and who will in the future be employed, . . . did not and will not obtain that knowledge through a prolonged course of specialized intellectual instruction and study. Instead, they acquire those skills on their own after limited instruction by others related to computers, including limited on-the-job training.”).

<sup>115</sup> *See* [Minimum Wage Order #35, Rule 2\(A\)](#).

**4. Rule 2.4. Exemptions from COMPS Order #36 Overtime Requirements.**

Rule 2.4 preserves the exemptions in Section 6 of Order #35 with non-substantive changes to headings and minor corrections.

**5. Rule 2.5. Salary Thresholds for Certain Exemptions.**

Rule 2.5 establishes a minimum salary (“salary basis”) that applies to four exemptions: administrative employees (Rule 2.2.1); executives or supervisors (Rule 2.2.2); professional employees (Rule 2.2.3); and proprietors of non-profit organizations (Rule 2.2.5).

**a. Rule 2.5.1. Salaries Required for Exemption**

Rule 2.5.1 sets out the salary basis required for certain exemptions. This salary basis will be phased in over 4½ years, from July 1, 2020, through January 1, 2024: **\$35,568** from July 1 to December 31, 2020; \$40,500 in 2021; \$45,000 in 2022; \$50,000 in 2023; and **\$55,000** in 2024. Every January 1 after 2024, the salary will adjust by the same Consumer Price Index (“CPI”) that annually adjusts the Colorado minimum wage.

**(1) The range of opinions expressed on a salary basis.** The vast majority of written comments advocated for a salary basis well above the federal threshold of \$35,568 in 2020 and Colorado’s current salary basis requirement of minimum wage for all hours worked by exempt employees. These included dozens of comments from individual workers, as well as comments from economists and economic analysis organizations;<sup>116</sup> a business association with approximately 200 business members;<sup>117</sup> numerous individual businesses<sup>118</sup> and non-profit organizations, some small<sup>119</sup> but also two large employers of thousands of Coloradans, Goodwill Industries and ARC Thrift Stores;<sup>120</sup> numerous labor unions;<sup>121</sup> advocacy organizations working on behalf of children, the

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<sup>116</sup> E.g., Written comments by Bell Policy Center, Aug. 16, 2019; Heidi Shierholz, [\*Updating Colorado’s overtime salary threshold: How the new rule will benefit Colorado businesses, employment, and the broader Colorado economy\*](#), Economic Policy Institute, Aug. 28, 2019

<sup>117</sup> Oral testimony by Jimmy Burds speaking for Good Business Colorado, Hearing Dec. 16, 2019, at 108:22-24 (“We’re happy that the overtime threshold is increasing, but we believe it should be rolled out faster.”).

<sup>118</sup> Written comments by: Critical Nurse Staffing, LLC, Aug. 1, 2019; Seattle Fish Company, Aug. 27, 2019; Denver Beer Company, Dec. 31, 2019; Annie Contractor, small business owner and nonprofit entity CEO, Aug. 16, 2019.

<sup>119</sup> Oral testimony by Brad Laurvick, SPEAK Tr. at 92:2-23 (Pastor serving as chief executive of church with 19 employees: Requiring a minimum exemption salary of \$62,400 “begins to create space for people to live and exist, and it also holds employers to a higher level of accountability for, is draining this person’s life worth it to me financially?”); Oral testimony by David Seligman for Towards Justice, SPEAK Tr. at 176:13-177:18 (Executive Director of non-profit entity: “[W]e have employees who are salaried who make less than the proposed salary threshold, and we treat them as nonexempt.... I appreciate that treating salaried professionals as nonexempt creates certain challenges for management.... We gotta be more careful about how we use our employees’ time, because we’re not in a position where we say, look, this salaried worker can be forced to work however many hours we want without any consequence. ... [I]n some weeks, that means that we understand that we’ll be paying them overtime. But in other weeks, it means that we send them home and maybe reshuffle their work, or in some cases, it also means that we have a more accurate assessment of our need to, for example, hire ... because we can’t do all the work with just them.”).

<sup>120</sup> E.g., Written comments by Goodwill Industries, Nov. 8, 2019; Written comments by ARC Thrift Stores, Nov. 8, 2019.

<sup>121</sup> E.g., Written comments by: Colorado AFL-CIO, Aug. 16, 2019; United Food and Commercial Workers International Union, Local 7, Aug. 15, 2019; Southwest Regional Council of Carpenters, Aug. 15, 2019; Local 105 of

homeless, and employees;<sup>122</sup> and 33 Colorado state senators and representatives.<sup>123</sup>

Among commenters supporting a salary basis who supported a particular figure, the vast majority advocated \$62,400 in 2020, typically described as 2½ times the 2020 Colorado minimum wage for 40-hour weeks.<sup>124</sup> Many of these comments provided substantial economic research and impact analyses, including comments from the former Chief Economist of the U.S. Department of Labor.<sup>125</sup> One comment also noted that, in addition to the comments received by the Division, a poll by Keating Research found that 77% of Coloradans surveyed supported a \$62,000 salary basis.<sup>126</sup> Some of those commenters further argued that this figure is below the mean and median historical ratios between the overtime-exempt salary and the minimum wage. For example, in 1975, the federal overtime threshold was more than 4 times higher than the poverty level for a family of four.<sup>127</sup>

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Service Employees International Union (SEIU), Aug. 16, 2019; Int'l Union of Painters & Allied Trades District Council 81, Aug. 16, 2019.

<sup>122</sup> E.g., Written comments by Denver Homeless Out Loud, Aug. 2, 2019; Written comments by Colorado Children's Campaign, Aug. 16, 2019; 9to5 Colorado, Aug. 16, 2019.

<sup>123</sup> Written comments, Nov. 12, 2019, by: Jeni Arndt, State Representative House District 53; Jeff Bridges, State Senator Senate District 26; Yadira Caraveo, State Representative House District 31; Lois Court, State Senator Senate District 31; Lisa Cutter, State Representative House District 25; Jessie Danielson, State Senator Senate District 20; Monica Duran, State Representative House District 24; Stephen Fenberg, Senate Majority Leader Senate District 18; Rhonda Fields, State Senator Senate District 29; Mike Foote, State Senator Senate District 17; Meg Froelich, State Representative House District 3; Leroy Garcia, Senate President Senate District 3; Julie Gonzales, State Senator Senate District 34; Serena Gonzales-Gutierrez, State Representative House District 4; Chris Hansen, State Representative House District 6; Edie Hooton, State Representative House District 10; Dominique Jackson, State Representative House District 42; Sonya Jaquez Lewis, State Representative House District 12; Chris Kennedy, State Representative House District 23; Cathy Kipp, State Representative House District 52; Susan Lontine, State Representative House District 1; Dominic Moreno, State Senator Senate District 21; Kyle Mullica, State Representative House District 34; Brittany Pettersen, State Senator Senate District 22; Dylan Roberts, State Representative House District 26; Jonathan Singer, State Representative House District 11; Emily Sirota, State Representative House District 9; Tammy Story, State Senator Senate District 16; Tom Sullivan, State Representative House District 37; Kerry Tipper, State Representative House District 28; Brianna Titone, State Representative House District 27; Mike Weissman, State Representative House District 36; Faith Winter, State Senator Senate District 24.

<sup>124</sup> E.g., Written comments by: Heidi Shierholz, former USDOL Chief Economist, Aug. 27, 2019; Colorado Fiscal Institute, Aug. 16, 2019; National Employment Law Project, Aug. 15, 2019; Colorado Plaintiff Employment Lawyers Association, Aug. 16, 2019; Hispanic Affairs Project, Aug. 16, 2019; Bell Policy Center, Aug. 16, 2019; Colorado Education Association and American Federation of Teachers, Aug. 16, 2019; 9to5 Colorado, Aug. 16, 2019; Raquel Lane-Arellano, Colorado Immigrant Rights Coalition, Aug. 27, 2019; Colorado Latino Leadership Advocacy & Research Organizations, Jul. 31, 2019; Economic Policy Institute, Aug. Aug. 13, 2019; Colorado Center on Law and Policy, Aug. 15, 2019; Interfaith Alliance of Colorado, Aug. 15, 2019; The Buck Foundation, Aug. 15, 2019; A Better Balance, Aug. 15, 2019; Written comments by Seattle Fish Company, Aug. 27, 2019.

<sup>125</sup> Heidi Shierholz, [\*Updating Colorado's overtime salary threshold: How the new rule will benefit Colorado businesses, employment, and the broader Colorado economy\*](#), Economic Policy Institute, Aug. 28, 2019

<sup>126</sup> Eric Maulbetsh, [\*New Poll Shows Coloradans' Overwhelming Support for Increasing Overtime Pay\*](#), Colorado Times Recorder (Nov. 5, 2019).

<sup>127</sup> Written comments by A Better Balance, Aug. 15, 2019 at 1-2 (citing Overtime FAQs, The Bell Policy Center (2018), <http://www.bellpolicy.org/wp-content/uploads/2018/04/Overtime-FAQs.pdf>; Heidi Hartmann, et al., How the New Overtime Rule Will Help Women & Families, Institute for Women's Policy Research and MomsRising (2015), p.1, [https://iwpr.org/wp-content/uploads/wpallimport/files/iwprexport/publications/Women%20and%20Overtime%20\(Final\).pdf](https://iwpr.org/wp-content/uploads/wpallimport/files/iwprexport/publications/Women%20and%20Overtime%20(Final).pdf); U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs, Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health & Human Services (2019), <https://aspe.hhs.gov/poverty-guidelines>); Written comments by Towards Justice (by David Seligman and Catherine Ordenez), Aug. 16, 2019, 19-20.

These commenters comprised a strong majority of written comments received by the Division addressing salary basis, as well as a large percentage of live testimony at the Division's public comment hearing.

Comments from trade associations and attorneys representing employers argued against adopting *any* salary basis above the \$35,568 federal level. These commenters raised concerns about detrimental impact on businesses, especially businesses that are less well-off, such as because of the nature of their industry, their size, or their presence in lower-income regions.

While many trade associations representing *multiple* members, like attorneys representing multiple employers, did not express any willingness to entertain a salary above the federal level, comments by *individual* businesses and business owners, speaking just for themselves, were mixed on adopting an above-federal salary basis. While numerous businesses echoed the trade associations and attorneys for employers in expressing opposition to any above-federal salary,<sup>128</sup> numerous other businesses expressed support for salaries from the \$40,000s to \$62,400.<sup>129</sup>

**(2) The likely positive effects, and likely lack of negative effects, from adoption of a minimum salary for exemption.** Absent an appropriate salary basis, employers can demand essentially unlimited hours from salaried employees at no additional cost. The 2020 overtime-exempt federal salary basis, \$35,568, is actually unlawfully low for many Coloradans working overtime. In 2020, \$35,568 is below the Colorado minimum wage with overtime for a Coloradan with a 52-hour week, and below the current Colorado requirement of minimum wage for all hours worked for a 58-hour week.<sup>130</sup> By 2022, it will be below minimum wage with overtime for even a *50-hour* week.<sup>131</sup> The Division finds that the salary to be overtime-exempt should not be less than minimum wage with overtime, and that Colorado therefore needs its own overtime-exempt salary, as federal law allows.

Above, Parts (3)(a)-(c) of the findings on Rule 2.1 detail extensive evidence that expanding overtime and breaks coverage reduces significant harms that excessively long hours can cause. Part (3)(d) of the findings on Rule 2.1 then detail extensive evidence that expanding overtime coverage increases rather than decreases employment levels. These findings equally support implementing a minimum salary for exemption from overtime and breaks, because that increases the coverage of the overtime and break rules in the COMPS Order. Accordingly, the Division finds that adopting a

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<sup>128</sup> E.g. Written comments by Jeri Fry, Proprietor of The Cup and Cone, Mar. 28, 2019; Written comments by Clint Unruh, President of Intermountain Office Supply, Aug. 2, 2019.

<sup>129</sup> E.g., Written comments by: Seattle Fish Company, Aug. 27, 2019 (\$62,400 salary basis); Denver Beer Company, Dec. 31, 2019 ("The levels proposed by the new wage order are reasonable and doable for businesses. The phase in allows business owners and employers time to successfully implement the rules in a way that makes sense for them."); Goodwill Industries, Nov. 8, 2019 (\$48,000 to \$52,000 salary basis); Critical Nurse Staffing, Aug. 1, 2019 (\$40,000 salary basis).

<sup>130</sup> See Order #35 Section 5.

<sup>131</sup> Colorado's 2022 minimum wage is projected to be \$13.29 with the required adjustment by the Denver-Aurora-Lakewood CPI, which averaged 2.26% for the past ten full calendar years (2009-2018). See [Inflation - Denver-Aurora-Lakewood Consumer Price Index](#), published by the Colorado Department of Local Affairs based on BLS data (2015-201); *Consumer Price Index, All Items (CPI-U)*, published by the Colorado Legislative Council Staff based on BLS data (2008-2019). This 2.26% ten-year average also equals the average of (a) the 2.58% average of the Colorado CPI for the past five full years (2014-2018) (*id.*); and (b) the 1.93% average of the fall 2019 Colorado Governor's Office of State Planning and Budgeting ("OSPB") projected Colorado CPI for 2019-2021. This minimum wage multiplied by 40 hours of "straight time" and 10 hours of time-and-a-half overtime premium pay equals \$36,050.



minimum salary for exemption would beneficially decrease the harms generated by excessively long work hours, and would more likely increase rather than decrease employment levels.

Further indicating that a salary requirement for exemption will not unduly burden employers: Employers have many options to comply with a salary basis rule, as detailed by Goldman Sachs in its study of the impact of the salary basis proposed by the federal Department of Labor in 2016:

The effect of the new rules on the labor market will depend largely on employers, who could respond in several ways depending on how much overtime an employee is expected to work and how close an employee is to the new threshold. We would not expect many employers to make significant adjustments for employees who only occasionally work more than 40 hours per week, at least initially. These workers account for about 1/4 of the affected overtime hours we calculate from the ... CPS data.

However, employers are likely to adapt their compensation practices to the new rules for employees who usually work overtime. They are likely to consider three general options.... First, they could reduce these employees' regular weekly salary or convert them to an hourly wage, so that their total compensation, including overtime, remains roughly constant. Employers seem most likely to follow this strategy for employees who "usually" work more than 40 hours ... for a fixed salary. ... [I]n some cases this would be difficult, particularly if employees do not work a consistent amount of overtime.

A second approach would be to raise workers' weekly salaries to just above the threshold to exempt them from the new rules. This seems likely only for employees whose salary is very close to the new threshold, since in most cases employers would be likely to choose a less costly option.

As a third option, some employers may limit newly affected workers to 40 hours per week and hire new employees to work the remaining hours at a normal (*i.e.*, non-overtime) rate. This appears to have occurred to a degree following the last increase in the salary threshold in 2004. We can estimate the employer response by studying changes in the share of employees who worked overtime in the 12 months before and after those prior changes took effect, based on whether they were under the old threshold, above the new threshold, or in between the two and therefore affected by the change. The results suggest that the higher threshold led to a roughly 10-15% reduction in the share of employees who worked overtime in the newly affected group. This probably represents the low end of the potential effect, because the 2004 policy changes simultaneously raised the earnings threshold, which made more salaried workers potentially eligible for overtime, but loosened the duties test, which reduced overtime eligibility.<sup>132</sup>

The above-detailed variety of options further decreases any prospect of an undue burden on business from expanded overtime coverage due to adoption of a salary basis.<sup>133</sup> Additionally, as discussed in Part IV(C)(1)(3) above, employers may also see benefits in improved employee productivity.

For the above reasons, the Division finds that adopting a salary basis will likely (1) have positive, not negative, effects on Colorado jobs, (2) improve the health of large numbers of

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<sup>132</sup> [\*US Daily: The New Federal Overtime Rules: Little Effect on Pay, Potential Boost to Payrolls \(Phillips\)\*](#), Goldman Sachs Economic Research (May 18, 2016) at 2-3.

<sup>133</sup> *Id.* at 3, discussed further below.



Coloradans, and (3) improve the labor force overall by decreasing turnover and labor market exit.

**(3) The reasons for the salary basis chosen.** Advocates for the \$62,400 salary that is 2.5 times the 2020 Colorado minimum wage cite similar ratios between the federal exemption salary and the federal minimum wage. Since 1940, the federal Department of Labor has included a salary test for the administrative, executive, and professional (“EAP”) exemptions from overtime. The basic salary basis was \$250 per week in 1975, then not increased until 2004, when it rose to \$455 per week, or \$23,660 annually. On January 1, 2020, it will increase again to \$684 a week, or \$35,568 annually. Overall, the historical ratio between the federal minimum wage and the federal salary basis for 40-hour workweek has ranged from 2.21 to 6.25 times the minimum wage, with a mean of 2.53 and a median of 2.29.<sup>134</sup>

While the Division finds that a salary basis is necessary and would more likely help than harm the health of labor markets, for several reasons the Division believes its chosen salary basis — \$55,000 in 2024, reached with a gradual phase-in from mid-2020 to early 2024 — is sufficient to achieve substantial benefits for Coloradans.

**(a) \$55,000 approximates “Pre-Payment” of the Colorado minimum wage with overtime for the 66-hour weeks that many Coloradans work.**

First, the Division views a \$55,000 salary as requiring an employer, if it wants exemption from overtime, essentially to prepay the Colorado minimum wage plus overtime for a reasonably full week of overtime hours. Many commenters, particularly in live testimony, credibly reported commonly working 60-70 hours per week, and working more than 90 hours a week occasionally or during busy construction or agricultural seasons.<sup>135</sup> Workers bringing claims for unpaid overtime similarly report regularly working 60-70 hours a week.<sup>136</sup> A 2018 Census survey found that about 8.5% of all full-time U.S. workers (hourly and salaried) work 60 or more hours per week, with no clear upper bound.<sup>137</sup> This figure is likely much higher for salaried employees, who can be required to work additional hours with no added cost to the employer.

Based on these sources and the Division’s extensive experience monitoring labor conditions in Colorado and handling employee questions and complaints, the Division finds that it is common

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<sup>134</sup> Compare historical salary basis (see 84 Fed. Reg. 10900 (Mar. 19, 2019) at 10917 for years prior to 2016) with historical minimum wage (*History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938 - 2009*, U.S. DOL). Prior to 2004, different salary bases applied for the “long” (more duties-intensive) and “short” tests. The short test is analogous to the current standardized test, and thus rates for the short test were used in computing the salary to minimum wage ratio. Where multiple rates existed for administrative, executive, and professional employees, the highest rate was used.

<sup>135</sup> SPEAK Tr. 201:2-15.

<sup>136</sup> See, e.g., *Ali v. Jerusalem Rest., Inc.*, No. 14-cv-00933-MEH, 2015 WL 1345326, at \*4 (D. Colo. Mar. 23, 2015) (plaintiff employee “provided sufficient testimony to permit a reasonable inference that she worked an average of 17.5 hours of overtime a week”); *Aldama v. Fat Alley, Inc.*, No. 19-CV-524-WJM-MEH, 2019 WL 4645427, at \*2 (D. Colo. Sept. 24, 2019) (sufficient showing to grant certification of FLSA collective action where plaintiff employee at Telluride restaurant reported he “normally worked 60 hours per week (twelve hours per day, five days a week) [and] ... during festival season, he worked approximately 75 hours per week”); *Avendano v. Averus, Inc.*, No. 14-CV-01614-CMA-MJW, 2015 WL 1529354, at \*2 (D. Colo. Mar. 31, 2015) (sufficient showing to grant certification of FLSA collective action where plaintiff employee alleged he “worked 60–75 hours per week”).

<sup>137</sup> [\*Household Data Annual Averages 19. Persons at work in agriculture and nonagricultural industries by hours of work\*](#), BLS (2018).

for Colorado salaried workers to work 65 to 70 hours per week. That may not be *most* workers, but the Division finds that a proper salary basis should reflect the highest reasonably common workweek that a meaningful portion of Colorado workers are expected to work. Near the lower end of that range, 66 hours per week at Colorado's projected 2024 minimum wage,<sup>138</sup> with overtime, is \$54,607 per year. Rounded to the nearest \$500, that equals \$55,000, the 2024 salary basis.<sup>139</sup>

A salary provides certainty for employers and employees by allowing an employer to essentially prepay hourly and overtime compensation for hours the employee may reasonably be expected to work. It should not translate to a rate of compensation that is below the minimum wage with overtime for hours worked. This is especially true because, as noted in Part IV(C)(1) above, employers may convert an employee to an hourly basis if minimum wage plus overtime for that employee's work hours would be less than the required salary, but an employee whose long workweeks bring compensation below the minimum wage plus overtime has no recourse.

**(b) \$55,000 approximates the salary level the federal Labor Department selected in 2016 — and that worked well when the vast majority of employers implemented it.**

The exemption salary that the federal Department of Labor selected in 2016, \$47,476 annually<sup>140</sup> is projected to equal \$50,530 by 2020.<sup>141</sup> The Division projects that this amount would reach about \$55,000 by 2024 and \$57,500 by 2026.<sup>142 143</sup> The Division views that as a safe figure to reach because, although this rule did not go into permanent effect, analyses of it were highly positive, and it worked well when a substantial number of employers adopted it in late 2016.

First, as discussed on pages 27-31 above, analyses of the salary basis predicted that it would generate upwards of 120,000 jobs nationwide, with nominal cost impact to employers. The 2016 USDOL salary was predicted to make 248,000 salaried Colorado workers eligible for overtime based on salary.<sup>144</sup> Scaled for population growth<sup>145</sup> and accounting for the “floor” set by the 2020 USDOL

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<sup>138</sup> Projected to be \$13.29 with adjustment by the 2.26% projected Colorado CPI rate (see footnote 131).

<sup>139</sup> A similar basis is supported by a more conservative CPI computation using the average Colorado CPI for the past ten years. See [Consumer Price Index, All Items \(CPI-U\)](#), published by the Colorado General Assembly based on BLS data. The 2010-2019 average CPI of 2.59% yields 2026 hourly plus overtime compensation of \$56,379 at 65 hours and \$61,835 at 70 hours, averaging \$59,107 — well over the COMPS salary basis.

<sup>140</sup> 81 Fed. Reg. 32391 (May 23, 2016).

<sup>141</sup> Based on U.S. CPI inflation for 2017 through 2019. See [Consumer Price Index Historical Tables for U.S. City Average](#), BLS, last viewed Jan. 20, 2020.

<sup>142</sup> Assuming CPI inflation at a 2.16%, the estimated 2.26% Colorado CPI forecast (see footnote 131) minus 0.1%. Colorado and U.S. CPI changes have varied greatly, with Colorado's over the past 10 years ranging from -3.3% below the federal rate to 2.0% above it. But over the long term, Because the long-term trend is for Colorado's CPI to be at least usually higher than that of the U.S., we use an estimated U.S. CPI of 0.1% below the Colorado CPI.

<sup>143</sup> This and subsequent estimates are rounded to the nearest \$100 because they rely on future CPI projections and thus cannot be forecast with to-the-dollar precision.

<sup>144</sup> Ross Eisenbrey and Will Kimball, [The new overtime rule will directly benefit 12.5 million working people: Who they are and where they live](#), Economic Policy Institute (May 17, 2016).

<sup>145</sup> See [Estimates of Resident Population Change and Rankings](#), U.S. Census Bureau (2016, 2017, and 2018 data). This assumes that 2017 and 2018 growth rates of 1.4% continue in 2019 and subsequent years.

salary, the Division estimates that the COMPS Order exemption salary will make approximately 170,000 additional Colorado workers eligible for overtime based on salary by 2024.<sup>146</sup>

Second, as detailed in pages 27-29 above, a substantial number of employers adopted the federal salary that was planned in 2016, because it was not enjoined until 10 days before its effective date. There is no evidence that widespread adoption of that salary harmed employment. To the contrary, unemployment kept declining in late 2016 and early 2017.

For the above reasons, the Division finds that the planned 2016 federal salary is one that (a) extensive credible analysis showed to have positive effects, and (b) proved benign or helpful to the labor market when it was widely adopted. Consequently, the Division finds that adopting that salary level is prudent and promises to be beneficial for Colorado labor markets.

**(c) A multi-year phase-in of the \$55,000 salary accommodates numerous requests by business for gradual adoption of any salary above the federal level.** Finally, a number of commenters requested multi-year phase-in of any new salary basis, both before publication of the proposed COMPS Order<sup>147</sup> and after publication, when a common critique from business was that the proposed starting level, \$42,500 from July 1, 2020, through December 31, 2021, was too quick to adopt a salary above the federal level.<sup>148</sup> The Division finds that gradual phase-in of the 2024 salary basis of \$55,000 is desirable to accommodate businesses that are able and willing to comply with an above-federal salary, but that reasonably request time to adjust to that salary level. Accordingly, the Division has determined that while the COMPS Order #36 takes effect March 16, 2020, Colorado should adopt new salary thresholds only as of July 1, 2020, and should only match the federal exemption salary of \$35,568 in 2020, then rising only to \$40,500 in 2021 — in contrast to the \$42,500 for 2020 and 2021 that was in the COMPS Order as proposed. This change from proposed COMPS Order lowers the first three years by an aggregate of \$6,000 (in present value).

**(d) Balancing out the delayed phase-in by rising more quickly after the first three years — to \$55,000 in 2024 — accommodates numerous requests by labor to accelerate the reaching of the ultimate salary level.** Whereas business commenters focused on slowing down the first few years of the salary phase-in, labor commenters focused on accelerating the later years, arguing that 2020 to 2026 was longer than warranted to bring Colorado workers to a level that matched the salary level that the federal Labor Department planned in 2016.<sup>149</sup> Accordingly, with the

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<sup>146</sup> This figure varies from the previous 2026 estimate of 290,000 primarily because (1) it excludes the impact of the 2020 UDSOL salary basis, which is estimated to make 105,000 Colorado workers overtime-eligible based on salary; and (2) it does not include population growth for 2025-2026.

<sup>147</sup> E.g., Written comments by: Goodwill Industries, Nov. 8, 2019; ARC Thrift Stores, Nov. 8, 2019; Colorado Nonprofit Association, Aug. 16, 2019; Local 105 of Service Employees International Union (SEIU), Aug. 16, 2019; National Employment Law Project (NELP), Aug. 16, 2019; Economic Policy Institute, Aug. 16, 2019.

<sup>148</sup> E.g., Written comments by: Colorado Chamber of Commerce, Nov. 22, 2019 (July 2020 salary increase “is logistically problematic” because it “presents budgetary and administrative challenges for businesses that weren’t anticipating these new expenses in 2020.”); Colorado Nonprofit Association, Aug. 16, 2019 (“Because any change made by the Division is likely to occur while nonprofits are in the middle of performing work on state grants or contracts, nonprofits may be required to pay higher wages to employees while their reimbursement rates remain unchanged.”); Colorado Association of Mechanical and Plumbing Contractors, Dec. 3, 2019 (“Implementing changes like these ... mid-calendar year will be hugely problematic for many employers.”).

<sup>149</sup> E.g., Oral testimony by Marilyn Winokur, Board member of Coloradans for the Common Good, Hearing Tr. Dec. 16, 2019, at 18:14-22 (“While we understand the need for business to be able to plan for an increase in overtime pay, we

first three years (2020-22) lowered \$6,000 to accommodate business, the Division finds it appropriate to raise the next three years (2023-2025) by the same amount (\$6,000, also in present value) to accommodate labor. The below table and graph illustrate the salary schedule in Rule 2.5 and how it compares to both the salary schedule in proposed COMPS Order and the levels that the U.S. Department of Labor selected in 2016 and 2020.

Year	(A) COMPS, As Proposed:	(B) COMPS, As Adopted:	For reference, USDOL salary with:		Difference between COMPS (A) As Proposed & (B) As Adopted:
	\$42.5K in 2020 & 2021; +\$3K/yr to 2026; then CPI-adjust (est. 2.26%*)	\$35,568 in '20, then \$40.5/\$45/\$50/\$55K (in '24), then CPI	(C) 2016 Rule \$47,476 in '16; CPI (cumulative) every 3 years	(D) 2020 Rule \$35,568 in 2020; nor CPI- indexed	
2020	\$42.5	\$35.568	\$50.5	\$35.6	-\$3.5
2021	\$42.5	\$40.5	\$50.5	\$35.6	-\$2.0
2022	\$45.5	\$45.0	\$50.5	\$35.6	-\$0.5
2023	\$48.5	\$50.0	\$53.9	\$35.6	\$1.5
2024	\$51.5	\$55.0	\$53.9	\$35.6	\$3.5
2025	\$54.5	\$56.2	\$53.9	\$35.6	\$1.7
2026	\$57.5	\$57.5	\$57.5	\$35.6	\$0.0

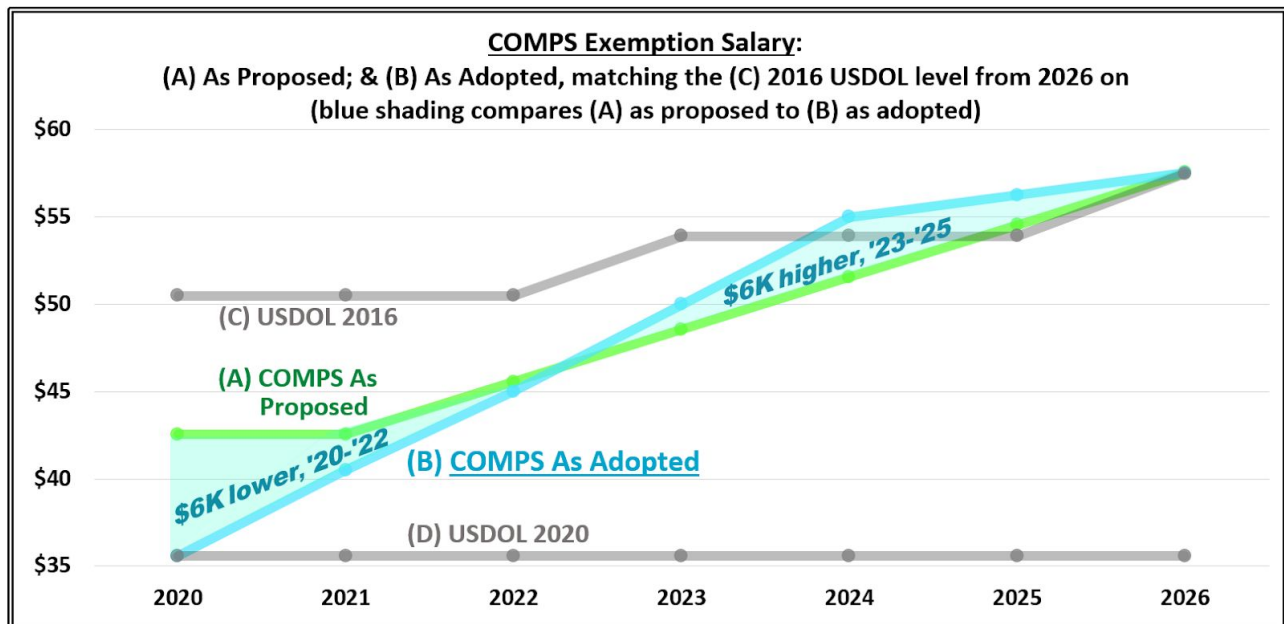
**Lower years 1-3, higher years 4-6 (each by \$6K), identical 2026→**

**Years 1-3, lower (in present value) by: -\$6.0**

**Years 4-6, higher (in present value) by: +\$6.0**

**Same, 2026→**

\* 2.26% is the average Colorado CPI change of the past 10 years, and it identically is the average of (A) OSPB's projection for the next 3 years (1.93%) and (B) the past 5 years' CPI increases (2.58%). Future US CPI is estimated at 0.1% lower than Colorado.



are urging the CDLE to ramp up by 2023 to 57.5 and not wait until 2026.... Workers should not have to wait six years to have these protections restored.”).

(e) **Exempting small businesses and most non-profits from the 2020 salary.** Small businesses and non-profit organizations both noted their greater difficulty adjusting quickly to a new salary threshold — small businesses because their budgets feature less budget flexibility, non-profits because many are funded by grants or government funds that cannot readily be adjusted within a year. Further, some small businesses and non-profits may not already face the \$35,568 federal exemption salary if they have annual gross sales or other business revenue below the \$500,000 that triggers automatic federal coverage under the FLSA. For such entities, adopting even a \$35,568 salary level in 2020 could be an actual change. Accordingly, the Division finds it appropriate not to apply the 2020 salary level to businesses with annual gross revenues below \$1 million (double the federal level) and non-profit organizations with annual gross revenues below \$50 million. The non-profit level was chosen to be high enough to cover most non-profit organizations, because even many mid- to high-revenue non-profits still cannot change their revenues within a year.<sup>150</sup>

**b. Rule 2.5.2. Exemption for Certain Professionals Exempt from the Salary Requirement under Federal Wage Law.**

Rule 2.5.2 preserves the rule in Order #35 Section 5, and federal law that doctors, lawyers, and teachers need not be paid any particular salary or hourly compensation to be exempt.<sup>151</sup> Rule 2.5.2 also preserves the exemption for employees paid at least \$27.63 per hour in highly technical computer occupations. That is the level that the FLSA<sup>152</sup> set in 1996 — but it chose that level as 6.5 times the then-minimum wage of \$4.25. At the time, \$27.63 was a quite high wage, far above the basic overtime-exempt salary. Adjusted for inflation, \$27.63 in 1996 would be over \$45.00 now. Yet \$27.63, unadjusted for inflation, is *below* the eventual \$55,000 salary basis in the COMPS Order. Consequently, the Division finds that the hourly rate of \$27.63 should have been adjusted annually, both because the intent was for this pay to be at a high level and because Coloradans' choice to inflation-adjust the state minimum wage makes it anomalous to have other unadjusted pay thresholds. However, retroactively adjusting this figure for over two decades of inflation is more drastic than is necessary. Accordingly, the \$27.63 threshold will remain unchanged in 2020, but will be adjusted annually thereafter by the same CPI as will be used to adjust both the Colorado minimum wage and (eventually) the exemption salary set in the COMPS Order.

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<sup>150</sup> For example, Colorado has many non-profit organizations with budgets in the millions of dollars that provide medical and related services that are funded primarily by Medicaid — which is set by annual government budgeting. Such entities often do have multiple sources of revenue, but cannot readily explore funding options in less than a year. *E.g.*, Colorado Bluesky Enterprises, Inc., 2017/18 Budget, p.3 (“2017/18 Summary of Revenue Sources” detailing that Medicaid is 70%, other state funds 16%, with other sources that include “room/board” and a “transfer of income ... from residential,” which constitute 6%) (reports available from the member list on the website of of Alliance Colorado, which submitted Written comments); Community Connections, Inc., 2018 Annual Report, p.7 (“Most of Community Connections funding (75%) comes from Medicaid programs,” with other funds from additional “[l]ocal and state government” funding and “private foundation and individual donations”); Developmental Disabilities Resource Center, 2018 Annual Report, p.5 (66% from state funds (including Medicaid); 23% from local government; 11% from vocational contracts, grants, donations, and other sources).

<sup>151</sup> 29 C.F.R. 541.303(d) and 304(d).

<sup>152</sup> 29 C.F.R. 541.400(b).

**D. Rule 3. Minimum Wages.**

**1. Rule 3.1. Statewide Minimum Wage.**

Rule 3.1 adopts the Colorado minimum wage in the amount mandated by the Colorado Constitution and preserves the non-numbered rule on the first page of Order #35 that those entitled to the Colorado minimum wage are those either within the coverage definition of (A) the COMPS Order itself or (B) the federal minimum wage provisions of the FLSA.

**2. Rule 3.2. Minimum and Overtime Wage Requirements of Other Applicable Jurisdictions.**

Rule 3.2 preserves in part the mandate of Section 22 of Order #35 that the greater minimum wage and other protections afforded by applicable state or federal law shall apply, but provides that the greater of state, federal, *and local* laws or regulations minimum wage, overtime, and other labor standards shall apply. This is necessary to effect the intent of the original Section 22 and to avoid inconsistency with Colorado’s HB 19-1210, which newly allowed Colorado municipalities to set a local minimum wage above the state minimum wage.

Just as federal wage law lets states set higher standards, Colorado law as of 2019 lets localities set higher standards, including local minimum wages. Because this is a common point of confusion for employers and employees, Rule 3.2 clarifies that what applies is the greater of all applicable federal, state, or local wage rules.

Because C.R.S. § 8-4-111(2)(a)(I) requires the Division to accept and investigate “unpaid wage[]” complaints<sup>153</sup> for any “amounts for labor or service performed by employees” that are “earned, vested, and determinable,”<sup>154</sup> Rule 3.2 clarifies that the Division must accept complaints for unpaid wages required by federal, state, or local law — in conformity with court holdings that unpaid wages required by federal law are a violation of Colorado’s wage payment law.<sup>155</sup>

**3. Rule 3.3. Reduced Minimum for Certain People with Disabilities, Minors.**

Rule 3.3 preserves the exemption in Section 3 of Order #35 with non-substantive changes to phrasing and structure.

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<sup>153</sup> See also C.R.S. § 8-4-101(13) (defining “Wage complaint” as “a complaint filed with the division from an employee for unpaid wages alleging that an employer has violated section 15 of article XVIII of the Colorado constitution, this article [4], article 6 of this title [8], or any rule adopted by the director pursuant to this article [4] or article 6”).

<sup>154</sup> C.R.S. § 8-4-101(14)(a)(I) (defining “‘Wages’ or ‘compensation’”).

<sup>155</sup> *Coldwell v. RITECorp Env'tl. Prop. Sols.*, No. 16-CV-01998-NYW, 2018 WL 5043904, at \*10-11 (D. Colo. Oct. 17, 2018) (“Plaintiffs had done that work that, under FLSA and related laws, entitled them to compensation, and CWCA supported their claim because CWCA operates as an enforcement mechanism for employees to collect wages to which they are entitled. While CWCA does not create a substantive new entitlement to overtime, it can enforce preexisting entitlements under the FLSA.” (citing *Irigoyen-Morales v. Concreations of Colorado, Inc.*, No. 15-CV-02272-LTB-KLM, 2016 WL 9735757, at \*2 (D. Colo. 2016) (“Plaintiffs may collect any unpaid wages they have earned under CWCA, whether under an applicable employee agreement or statute.”))).

**E. Rule 4. Overtime Hours.**

Rule 4 preserves Section 4 of Order #35, with non-substantive changes to phrasing and structure. The sole substantive addition is making explicit the Division’s interpretation that in counting whether an employee has worked enough hours to trigger overtime pay, meal periods do *not* count, because they are uncompensated non-work time under the Rule 5.1 “Meal Periods” definition, provided that such meal periods meet the Rule’s requirements.

**F. Rule 5. Meal and Rest Periods.**

Rule 5 consolidates Sections 7 (Meal Periods) and 8 (Rest Periods) of Order #35 into one rule and removes confusing punctuation.

**1. Rule 5.1. Meal Periods.**

Rule 5.1 makes express the Division’s interpretation that a meal period, to the extent practicable, should not be in the first or last hour of a shift. The intent of the rule is to allow a break for consuming food and/or beverages as a break within a shift of over five hours. Allowing such consumption only in the first or last hour of the shift does not serve the purpose of the Rule, because that would require the employee to work substantially all of the shift without a meal break.

**2. Rule 5.2. Rest Periods.**

Rule 5.2 offers a table showing how many breaks are required for shifts of various lengths, to resolve ambiguity in Order #35 on the meaning of requirement of a 10-minute rest period every four hours “or major fractions thereof.” Rule 5.2.3 is substantively unchanged from Order #35; changes to Rules 5.2.1, 5.2.2, and 5.2.4 are detailed below.

**a. Rule 5.2.1. Additional Flexibility with Rest Periods**

Rule 5.2.1 grants flexibility as to whether the required 10 minutes of rest must be in *one* 10-minute period, or in multiple shorter breaks that add up to 10 minutes. Adopted Rule 5.2.1 is amended from the proposed rule by (1) allowing two five-minute breaks rather than two to three breaks of unspecified length totalling 10 minutes as in the proposed rule, and (2) except that employees covered by a collective bargaining agreement (“CBA”) or providing certain in-home services for a 75%-Medicaid-funded employer may receive rest periods of any number and duration so long as the breaks total 10 minutes per 4 hours worked and the employee receives at least 5 minutes of rest every 4 hours.

The wording of Order #35, by requiring “a” compensated 10-minute rest period, implied that the 10 minutes must be in one continuous period. Construction industry commenters noted that proposed Rule 5.2.1 could interfere with, or at least require changing, existing CBAs that may not expire for years,<sup>156</sup> and that the construction industry generally requires more flexibility in breaks.<sup>157</sup>

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<sup>156</sup> Written comments by Colorado Association of Mechanical and Plumbing Contractors, Dec. 3, 2019 (“The contractor members that we represent have seven Collective Bargaining Agreements in place until mid-year 2022 at the earliest. All of these Agreements have outlined break and mealtime provisions in them . . . Since this order proposes to include construction, we would request that the COMPS Order #36 not interfere with contractual agreements between employers and employees.”).

<sup>157</sup> See Written comments by Associated General Contractors of Colorado, Dec. 20, 2019.



A representative of Medicaid-funded home-care providers also noted that providing 10-minute breaks is challenging within the home-care industry.<sup>158</sup> For such employers that have demonstrated need for flexible rest periods (Medicaid-funded home care and where a CBA is in place), flexible rest periods are automatically available under Rule 5.2.1(B).

For all other employers, the dual 5-minute rest periods authorized by Rule 5.2.1(A) are only available if an employee agrees to such breaks voluntarily and without coercion.

**b. Rule 5.2.2. Timing of Rest Periods.**

Rule 5.2.2 modifies Section 7 of Order #35 first by clarifying the prior language that “[e]very employer shall authorize and permit rest periods, which, insofar as practicable, shall be in the middle of each four (4) hour work period.” This language has generated some confusion, with employers arguing that breaks need not be provided *at all* if doing so is not “practicable.” The Division finds that the intent of the rest period rule has been, and remains, that the *timing* of the break should be mid-shift if “practicable,” but *having* the break is required without qualification. Rule 5.2.2 restructures the language of the rule to eliminate this ambiguity.

**c. Rule 5.2.4. Compensation for Deprivation of Rest Periods.**

Rule 5.2.4 clarifies that where an employee is deprived of a rest period, the lost rest time constitutes time worked for which the employee has not been compensated, which time is included in calculating minimum wages and overtime.<sup>159</sup> The Division agrees with, and thereby adopts, the following holdings and interpretations by Colorado state and federal courts.

- “An employee who is deprived of her rest period effectively provides the equivalent number of minutes of work to her employer without additional compensation.”<sup>160</sup>
- “[B]ecause [employee] was (allegedly) denied reasonable rest periods, for which she would have been paid, she effectively provided the equivalent number of minutes of work to [employer] without additional compensation.”<sup>161</sup>
- “[A]n employer could pay an hourly employee ... an hourly rate above the required minimum[,] but not pay that employee for meal and rest breaks that are required to be compensated under the Wage Order. In such a case, the hypothetical employee is ultimately receiving less than the legal minimum wage ... for all hours worked.”<sup>162</sup>

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<sup>158</sup> Written comments by Alliance Colorado Communities United for People with Developmental Disabilities, Dec. 16, 2019 (asserting that 10-minute rest period can be impractical for certain direct care workers).

<sup>159</sup> The Division declines to view compensation for a missed rest break as requiring “additional” compensation beyond the time missed, as is required in other states. *E.g.*, Cal. Labor Code § 226.7(c) (“If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, ... the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each workday that the meal or rest or recovery period is not provided.”).

<sup>160</sup> *Pilmenstein v. Devereaux*, No. 2017 CV 30319 (Colo. Dist. Ct., Jefferson Cty., Sept. 5, 2019).

<sup>161</sup> *Sanchez v. Front Range Transp.*, No. 17-cv-00579-RBJ, 2017 WL 4099896, \*4 (D. Colo. Sept. 15, 2017).

<sup>162</sup> *Sobolewski v. Boselli & Sons, LLC*, 342 F.Supp.3d 1178 (D. Colo. 2018).

- “[T]he idea that missed rest periods can constitute ‘wages or compensation’ has been accepted by other courts.... [Employees] may prevail on their claim for lost wages because of unused rest breaks.”<sup>163</sup>

Without such a rule, employees would have no remedy for deprivation of rest breaks, contrary to one of the most fundamental principles of American law:

If he has a right, and that right has been violated, do the laws of this country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.<sup>164</sup>

However, proposed Rule 5.2.4 is modified in the adopted rule to reflect that the Rule 5.2 “rest period” requirement is (and was in Order #35) that the “employer shall authorize and permit” such breaks (the wording of Rule 5.2) — not that the employee actually “have” (*i.e.*, actually take) such breaks (the originally proposed wording of Rule 5.2.4). This change redresses possible inconsistency between the rule providing rest periods (Rule 5.2) and the rule providing consequences for rest period violations (Rule 5.2.4). That difference that can matter when an employer authorizes and permits breaks, but the employee voluntarily declines to take those breaks — an issue that has arisen in complaints to the Division many times.

If an employer asserts that an employee had permission to take a rest period, but in reality the employee was discouraged or unable to do so, then the employer has not “authorize[d] and permit[ted]” the required rest periods. This rejection of a narrow, formalistic interpretation of “authorize and permit” gives meaning to both “permit” and “authorize”: “authorize” is the formal permission to take a break, but “permitting” means that, given the realities of the workplace, the employee actually was able to take a break without repercussion. A handbook, policy, or employee schedule is not dispositive evidence that a break was authorized or permitted, if the employee produces evidence that the realities of the workplace created pressure to forego or practical obstacles to the employee’s ability to take a break.

This analysis is consistent with court holdings that where an employer is required to authorize and permit breaks, the “employer may not undermine a formal policy of providing . . . breaks by pressuring employees to perform their duties in ways that omit breaks.” *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 546 (Cal. 2012).

“The wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentives to forgo, or otherwise encouraging the skipping of legally protected breaks.” . . . Thus, for instance, even if an employer has a formal policy that is compliant . . . , proof of an informal but common scheduling policy that makes taking breaks extremely difficult, or other informal means of exerting pressure to discourage taking meal and rest breaks, would be sufficient to establish liability to a class.

*Brewer v. Gen. Nutrition Corp.*, No. 11-CV-3587, 2014 WL 5877695, at \*7 (N.D. Cal. Nov. 12, 2014) (citations omitted) (quoting and applying rule from *Brinker*, which addressed meal breaks, to

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<sup>163</sup> *Lozoya v. AllPhase Landscape Construction, Inc.*, No. 12-cv-1048-JLK, 2015 WL 1757080, \*2 (D. Colo. Apr. 15, 2015) (citation omitted).

<sup>164</sup> *Marbury v. Madison*, 5 U.S. 137, 162–63 (1803).

rest breaks). For example, an employer did not “*permit . . . rest breaks*” where (a) employees felt pressure not to take breaks due to the need to complete work quickly, (b) employers knew breaks were not being taken, and (c) employees were not adequately informed that rest breaks were paid.<sup>165</sup>

**G. Rule 6. Deductions, Credits and Charges.**

Rule 6 consolidates the portion of Section 3 of Order #35 concerning “Allowable Credits” and Sections 10 and 11 of Order #35 concerning “Presents, Tips, or Gratuities” and “Wearing of Uniforms,” respectively. Rule 6 makes non-substantive changes to statutory references and phrasing of these sections and updates the amount of the allowable tip credit to reflect the maximum \$3.02 tip credit and 2020 minimum wage set by Colorado Constitution, Article XVIII, Section 15. Substantive modifications are made to the rules on credits and deductions for lodging, meals, and uniforms.

**1. Rule 6.1. Tips or Gratuities.**

Rule 6.1 has been modified to clarify that it is not unlawful for employers to disallow presents, tips, or gratuities — for example, in order to comply with regulations as to nursing homes, as comments from the industry noted.<sup>166</sup> The specific change is that whereas proposed COMPS Order stated that employers may not “deny” tips or gratuities, the adopted rule mirrors the language of C.R.S. § 8-4-103(6) — simply disallowing employers from attempting to claim, control, or assert ownership in employee tips.

**2. Rule 6.2. Credits Toward Minimum Wages.**

**a. Rule 6.2.1. Lodging Credit.**

Rule 6.2.1 has been modified from the analogous rule in Order #35 to increase the maximum lodging credit that employers may claim, from \$25 per week to \$100 per week if the lodging is a private apartment or house, rather than just a room in a shared dwelling (such as a hotel or dormitory room), which remains at \$25 per week. These credits are based on 2019 rents, housing costs, and price-to-rent ratio data for the lowest-wage region for which rent data were available.<sup>167</sup> Rather than a flat amount regardless of housing type, Rule 6.2.1 now allows different lodging amounts, based on the type of housing, to allow employers a higher credit for housing of higher cost or value.

Rule 6.2.1 now better parallels federal lodging credit rules requiring that employer-provided housing must be (1) voluntary for the employee, (2) provided primarily for the benefit or convenience of the employee, not the employer, and (3) no more than the employer’s cost (matching both the federal rule capping the credit at “reasonable cost” and the Order #35 meal credit rule that

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<sup>165</sup> *Cicairos v. Summit Logistics, Inc.*, 35 Cal. Rptr. 3d 243, 253 (Cal. Ct. App. 2005), *as modified on denial of reh'g* (Nov. 23, 2005) (emphasis original).

<sup>166</sup> *E.g.*, Written comments by Doug Farmer, Colorado Health Care Association, Dec. 24, 2019.

<sup>167</sup> Different calculation methods show average Pueblo rents of \$741 (based on a price-to-rent ratio of 25.8 for Colorado in 2018) to \$1,073 (a private entity’s estimate of median rent). The credit is lower (\$100 per week, or approximately \$433 per month) because much employer housing is (a) sized for one person, while median housing data includes large housing for families, (b) procured or provided by the employer at a cost well below market value, and/or (c) used mainly by lower-income workers.

“[n]o profits to the employer may be included” in meal credits the employer takes).<sup>168</sup>

Rule 6.2.1 also requires a written agreement that need not be as formal as a lease, but that must simply state the fact and amount of the credit, and can be electronic (such as an email) rather than on paper. Given the C.R.S. § 8-4-103 “pay statement” requirements and the COMPS Order #36 Rule 7 record-keeping requirements, the Division finds that having no records of as significant a deduction from wages as a lodging credit would be anomalous, and would create loopholes in the records of pay that C.R.S. § 8-4-103 and Rule 7 require. While the federal lodging credit does not expressly require a written agreement, the U.S. Department of Labor and federal court decisions have long provided that employers must keep accurate records to deduct their lodging expenses<sup>169</sup> and that a written agreement is evidence that an agreement to accept employer lodging was voluntarily entered into by the employee.<sup>170</sup>

**b. Rule 6.2.2. Meal Credit.**

Rule 6.2.2 has been modified from the analogous rule in Order #35 to remove the requirement that “[t]he meal must be consumed before deductions are permitted.” This requirement unreasonably penalized employers if employees changed their minds after meals were prepared, were not hungry, only consumed parts of their meals, or otherwise failed to consume meals for reasons outside of employers’ control. Rule 6.2.2 provides instead that employee acceptance of a meal must be “voluntary,” paralleling the federal rule<sup>171</sup> and allowing free employer/employee decision-making on meal provision. Rule 6.2.2 retains the existing requirement that meals must be provided at cost or value, without added profits.

**2. Rule 6.3. Uniforms.**

Rule 6.3 modifies Section 11 of Order #35 by removing the language: “An employer may require a reasonable deposit (up to one-half of actual cost) as security for the return of each uniform furnished to employees upon issuance of a receipt to the employee for such deposit.” The Division finds that such a deposit — before any damage to the uniform has actually occurred — is an impermissible deduction.<sup>172</sup>

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<sup>168</sup> 29 C.F.R. 531.30 (“Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be voluntary and uncoerced.” (citing *Williams v. Atlantic Coast Line Railroad Co.* (E.D.N.C.). 1 W.H. Cases 289); see [Field Assistance Bulletin No. 2015-1](#), U.S. Dep’t of Labor, Wage & Hour Division, Section A(5)(4) and (5)(2) (Dec. 17, 2015) (“An employer may not include the cost of lodging in an employee’s wages unless the employee receives the primary benefit of the lodging”; credit disallowed where “lodging is ‘of little benefit to employees,’ such as ‘where an employer requires an employee to live on the employer’s premises to meet some need of the employer.’” (citations omitted)).

<sup>169</sup> See [Field Assistance Bulletin No. 2015-1](#), U.S. Dep’t of Labor, Wage & Hour Division, § A(5)(5) (Dec. 17, 2015).

<sup>170</sup> *Id.* at Section A(5)(2).

<sup>171</sup> 29 C.F.R. 531.30 (“Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be voluntary and uncoerced.”).

<sup>172</sup> C.R.S. § 8-4-105(1) provides that “No employer shall make a deduction from the wages or compensation of an employee except” under limited circumstances, including “[a] deduction for the amount of money or the value of property that the employee failed to properly pay or return to the employer in the case where a terminated employee was entrusted during his or her employment with the collection, disbursement, or handling of such money or property.” (§ 8-4-105(1)(e).) Such deduction is permissible only upon *termination*, not at the beginning of employment. *Id.* By enumerating all allowable deductions — which include a deduction for damage to employer property *at the end of* employment but not *before or during* employment — C.R.S. § 8-4-105(1) makes clear that a deposit in advance of

Rule 6.3 also removes the limitation in Section 11 of Order #35 that uniforms the employer can ask the employee to buy must be “white or any light colored” clothing. The Division finds that color limitation to be an archaic description of the colors of clothing that, when this rule was written decades ago, were most (a) common as work attire or (b) readily available for purchase.

## **H. Rule 7. Employer Record-Keeping and Posting Requirements**

Rule 7 consolidates Section 12 and 21 of Order #35 into a single rule, clarifying Section 12 by use of subheadings and correcting ungrammatical phrasing. Section 21 of Order #35 is preserved, with additional posting and distribution requirements of Rule 7.4 as detailed below.

### **1. Rule 7.4.1. Posting.**

Rule 7.4.1 amends the previous rule by requiring that if the work site or other conditions make a physical posting impractical, the employer shall “provide a copy of the COMPS Order or poster to each employee within his or her first month of employment” in addition to the prior requirement to make the poster available “upon request.” This provision better ensures that employees — who may not know that a poster even exists to request it — will be informed about the protections of the COMPS Order. Rule 7.4.1 also provides that employers that fail to post as required are ineligible for employee-specific credits or exemptions — because if employees are not told of rules, those rules should not be used against them. This is consistent with numerous cases finding that failure to post a required wage law or other employment rights and responsibilities poster prevents the employer from benefitting from a statute of limitations defense to a wage claim, on the theory that an employer should not benefit from a wage claim deadline that a worker was not informed about by an employer under an obligation to inform the employee through the poster.<sup>173</sup> The Division finds that if employers wish to benefit from a credit or exemption that the COMPS Order provides employers, they should provide employees the required information on those credits, exemptions, and other wage rights and responsibilities.

### **2. Rule 7.4.2. Distribution.**

Rule 7.4.2 now requires (a) that published employee handbooks, manuals, and written or posted policies include a copy of the COMPS Order or a COMPS Order poster, and (b) that if employees must sign a manual, handbook, or policy within the first month of employment, such documents should include a copy of the COMPS Order or a COMPS Order poster, and the employee should sign an acknowledgement of receiving the Order or poster. The Division declines to require these measures of employers that do *not* already distribute any handbook, manual, or written or posted policies to employees. Rather, the Division limits this obligation to those employers that

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prospective damage is an impermissible deduction from wages. The Division has previously found that a deposit to “ensure[] that [an employer] w[ill] have funds available to cover the cost of any damage done” to its property by an employee is an impermissible deduction pursuant to C.R.S. § 8-4-105. *In re KTDC, LLC*, DLSS Case #4580-15, at 2–3 (Hearing Officer Decis. No. 17-030, Apr. 20, 2017). Nor is an impermissible deduction made permissible by characterization as a “loan” pursuant to C.R.S. § 8-4-105(1)(b); otherwise, an employer could demand payment for any impermissible deduction from its employee, then “loan” the deduction amount to the employee and validly extract repayment by payroll deduction.

<sup>173</sup> See *Cruz v. Maypa*, 773 F.3d 138, 147 (4th Cir. 2014) (extending ADEA failure-to-post tolling to FLSA); *Yu G. Ke v. Saigon Grill, Inc.*, 595 F. Supp. 2d 240, 259 (S.D.N.Y. 2008) (“[F]ailure to provide required notice of the governing legal requirements may be a sufficient basis for tolling.”); *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324, 328 (E.D. Pa. 1984) (“employer’s failure to post a statutorily required notice of this type tolls the running of any period of limitations.”).

*already* distribute a handbook, a manual, or policies to employees.

**3. Rule 7.4.3. Translation.**

Rule 7.4.3 requires employers to use a Spanish-language version of the COMPS Order and poster, which the Division will make freely available, if the employer has Spanish-speaking employees with limited English abilities. If employees with limited English abilities speak a language other than Spanish, employers should contact the Division to request a translation in the employee's preferred language, which the Division will provide to the extent feasible.

**I. Rule 8. Administration and Interpretation.**

Rule 8 consolidates Sections 13-16, 18-20, and 22 of Order #35 into one rule. Rule 8 makes non-substantive changes to headings and statutory references and corrects ungrammatical phrasing in Section 15 (Rule 8.2) of Order #35. Substantive changes are discussed below.

**1. Rule 8.1. Recovery of Wages**

**a. Rule 8.1(A). Availability of Court Action or Division Complaint.**

Rule 8.1(A) (former Order 35 Section 18) clarifies that an employee may bring a civil action or Division complaint for all wages lawfully owed, not just the minimum wage.

**b. Rule 8.1(B). No Minimum Claim Size (no “*de minimis*” doctrine).**

Rule 8.1(B) clarifies that unlike under federal wage law, there is not, and has not been, a *de minimis* doctrine applicable to Colorado wage claims. This responds to the numerous requests for clarity as to time worked and the Division's follow-up research on the subject, as noted above,<sup>174</sup> because part of clarifying the “time worked” that must be compensated is clarifying what “time worked” claims to compensation will be deemed valid when filed.

The FLSA precludes “*de minimis*” claims, defined narrowly by federal regulation:

[I]nsubstantial or insignificant periods of time beyond the scheduled working hours, which *cannot as a practical administrative matter be precisely recorded* for payroll purposes, may be disregarded.... This rule applies *only* where there are *uncertain and indefinite* periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may *not* arbitrarily fail to count as hours worked *any part, however small*, of the employee's fixed or regular working time or *practically ascertainable* period of time he is *regularly required* to spend on duties assigned to him.

29 C.F.R. § 785.47 (emphases added).

Recent federal caselaw, however, has extended the FLSA *de minimis* doctrine beyond the limits of that federal regulation. The Tenth Circuit applied the doctrine as a “ground for ignoring some activities at the beginning and end of the work day,” even though the task at issue (daily donning and doffing of work gear) appeared to be regularly required, and identical each day. *Castaneda v. JBS USA, LLC*, 819 F.3d 1237, 1242 (10th Cir. 2016). *Castaneda* so held despite the

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<sup>174</sup> See the first paragraph of Part IV(B)(5) above.

regulatory rule that “[a]n employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.” 29 C.F.R. § 785.47. Similarly, *Peterson v. Nelnnet Diversified Sols., LLC*, held that the time call center representatives spent setting up their computers and loading programs to make their calls each day was “an integral and indispensable” activity to their principal work of making calls, as well as readily ascertainable by the employer — but still applied the *de minimis* doctrine to dismiss the employees’ FLSA claims (which collectively exceeded \$30,000), declaring it “practically burdensome for such time to be reliable [sic] recorded given the use of the [employer’s existing] timekeeping system.” 400 F. Supp. 3d 1122, 1135, 1138 (D. Colo. 2019).

The Division finds that for four reasons, the *de minimis* rule has no basis in, does not apply to, and has not previously applied to, Colorado wage law. First, Colorado law lacks any regulatory or statutory provision similar to the federal *de minimis* rule codified at 29 C.F.R. § 785.47. Extensive Colorado caselaw cautions against importing into Colorado law a federal doctrine derived from federal provisions absent from Colorado law.

Although federal law may be instructive when interpreting a Colorado statute, its helpfulness is limited to those instances “where the state and federal statutes are identical or substantially so.” *Colonial Bank v. Colo. Fin. Servs. Bd.*, 961 P.2d 579, 583 (Colo. App. 1998); *see Colo. Civil Rights Comm’n v. Big O Tires, Inc.*, 940 P.2d 397, 399 (Colo. 1997) (federal law is helpful when the language of the Colorado law closely parallels that of its federal counterpart).

*Brunson v. Colo. Cab Co., LLC*, 2018 COA 17, ¶ 24, 433 P.3d 93, 97–98 (Colo. App. 2018).

Defendant argues that although the CWA [Colorado Wage Act] does not have an express safe-harbor provision, this court should still interpret the CWA in harmony with the FLSA.... Defendant contends that the court should graft federal law into a state statute without any express written support in the CWA itself. The court rejects this invitation.... [T]he FLSA’s relationship to the CWA is a protective floor — not a ceiling — for employee rights. States can, therefore, through statutory verbiage (or no verbiage at all), use their police powers to add to worker protections above and beyond the federal right..

*Jordan v. Maxim Healthcare Servs., Inc.*, No. 15-CV-01372-KMT, 2018 WL 1535507, at \*5 (D. Colo. Mar. 29, 2018).

[I]t is not appropriate to interpret the MWO under federal case law and legislation. Because the MWO provides more protection by virtue of its broader definition ... and sets a higher standard, the MWO should be the applicable standard.

*Bowe v. SMC Elec. Prods.*, 935 F. Supp. 1126, 1134 (D. Colo. 1996). *Accord Mendiola v. CPS Security Sols., Inc.*, 340 P.3d 355 (Cal. 2015) (cautioning against “confounding federal and state labor law”; “where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced”).

Second, Colorado law commands the opposite, declaring non-payment of any amount of wages actionable. By statute, employers must pay “[a]ll wages or compensation” (C.R.S. § 8-4-103(1)(a)), and authorizes civil actions “to recover *any* amount of wages or compensation (C.R.S. § 8-4-110(1)) and Division complaints “for *any* violation” (C.R.S. § 8-4-111(1)(a)).



(Emphases added.) By regulation, compensable time includes “*all* time [an employee] is suffered or permitted to work.” COMPS Order #36, Rule 1.9.

Third, the policy premise of the federal *de minimis* rule was that claims to “split-second absurdities” cannot “be computed in light of the realities of the industrial world.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). That rationale had more logic in the world of 1946, before automated, to-the-minute timekeeping technology, and portable devices that can track time. Modern technology makes it far less likely that failure to count all time worked is justified by the “industrial reality” that small amounts of time cannot “be computed,” *id.* — as one court in Colorado recently noted, even for federal claims for which the *de minimis* rule is codified: “[I]t is unclear to the Court that the [FLSA’s] *de minimis* exception applies given that defendants use electronic time clocks to record employees’ comings and goings.” *Flavie Bondeh Bagoue v. Developmental Pathways, Inc.*, No. 16-CV-01804-PAB-NRN, 2019 WL 4597869, at \*9 (D. Colo. Sept. 23, 2019).<sup>175</sup>

Fourth, even if there were ambiguity as to whether any claims should be excluded as *de minimis*, the statutory and regulatory liberal construction rules in C.R.S. § 8-6-102 and COMPS Order #36 Rule 8.4(A) require resolving that ambiguity in favor of the broader interpretation that allows, rather than precludes, such claims. *See Dillabaugh v. Ellerton*, 259 P.3d 550, 554 (Colo. App. 2011) (“if ambiguity exists, a broader interpretation comports with the requirement ... [of] liberal interpretation”); *Mesa Sand & Gravel Co. v. Landfill, Inc.*, 776 P.2d 362, 365 (Colo. 1989) (applying liberal construction canon to choose interpretation that allowed rather than disallowed disputed relief (prejudgment interest): “Because the phrase is susceptible to more than one interpretation, we conclude it is ambiguous.... Permitting the prevailing party to recover prejudgment interest under section 5-12-102 compensates the nonbreaching party for the loss ... and thereby furthers the legislative purpose .... We therefore apply a liberal construction ... and conclude that the General Assembly intended section 5-12-102(1)(b) to permit ... prejudgment interest.”); *Mountain Mobile Mix, Inc. v. Gifford*, 660 P.2d 883, 885 (Colo. 1983) (where statute “should be construed liberally[,] ... [i]f the language of a statute is not dispositive, courts must resolve the ambiguity by interpreting the statute in accordance with the purposes”).<sup>176</sup>

Of course, if a wage claim alleges time so “split-second” and irregular that it cannot be tracked in a way susceptible to proof that satisfies the employee’s burden, the claim will fail — but it will fail on the merits, not under a *per se* rule targeting small claims. Accordingly, the Division

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<sup>175</sup> *See also Troester v. Starbucks Corp.*, 421 P.3d 1114, 1124 (Cal. 2018) (“[M]any of the problems in recording employee work time ... may be cured or ameliorated by technological advances that enable employees to track and register their work time via smartphones, tablets, or other devices. We are reluctant to adopt a rule purportedly grounded in ‘the realities of the industrial world’ when those realities have been materially altered in subsequent decades”) (internal citation omitted); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 954 (W.D. Wis. 2008) (observing that with today’s technology, one could argue that all work time can be recorded to the minute, which could effectively eliminate employers’ *de minimis* defense, “especially when one considers that the *de minimis* exception was created within the context of 1940’s technology”).

<sup>176</sup> The California Supreme Court rejected the *de minimis* doctrine for state wage claims, for several of the reasons noted above. *Troester v. Starbucks Corp.*, 421 P.3d 1114, 1120, 1125 (Cal. 2018) (so holding based on California “Wage Order’s remedial purpose requiring a liberal construction, its directive to compensate employees for all time worked, the evident priority it accorded that mandate notwithstanding customary employment arrangements, and its concern with small amounts of time .... [N]othing in the language of the [California state] wage orders or Labor Code shows an intent to incorporate the federal *de minimis* rule .... Although [the *de minimis* rule] has been incorporated into the Code of Federal Regulations for over 50 years, neither the Labor Code statutes nor any wage order has been amended to recognize a *de minimis* exception.... [W]e will not presume the [California Industrial Welfare Commission] intended to incorporate a less protective federal rule without evidence of such intent, and we see no sign of such intent here.”).

finds, and COMPS Order #36 Rule 8.1(B) therefore clarifies, that unlike under federal wage law, there is not, and has not been, a *de minimis* doctrine applicable to Colorado wage claims.

**2. Rule 8.3. Investigations.**

Rule 8.3 (former Order #35 Section 16) now clarifies the Division’s extant authority and duty to investigate violations pursuant to C.R.S. Title 8, Articles 1, 4, and 6, not limited to the Colorado Wage Act, C.R.S. § 8-4-101, et seq.

**3. Rule 8.4. Violations.**

Rule 8.4 has been amended from Section 20 of Order #35 to reflect the language of 2019 House Bill 19-1267 that amended C.R.S. § 8-4-114 and C.R.S. § 8-6-116.

**4. Rule 8.5. Reprisals.**

Rule 8.5 (Reprisals) has been amended from Section 19 of Order #35 to (1) include all Colorado wage and hour statutes that bar various forms of reprisals (C.R.S. §§ 8-1-116, 8-4-120, and 8-6-115), not merely C.R.S. § 8-6-115; and (2) to better reflect the full scope of what may constitute unlawful reprisal under those statutes. Rule 8.5 replaces “discharge” with “discriminate”<sup>177</sup> and “employee” with “person,”<sup>178</sup> and clarifies that prohibited reprisals are those “for the purpose of reprisal, interference, or obstruction” related to “any actual or anticipated investigation, hearing, complaint, or other process or proceeding relating to a wage claim, right, or rule” to reflect the scope of Colorado wage and hour retaliation statutes<sup>179</sup> and case law interpreting the analogous federal FLSA retaliation statute.<sup>180</sup>

**5. Rule 8.6. Division and Dual Jurisdiction.**

Rule 8.6 combines Sections 13 and 22 of Order #35 with substantive changes only to Section 22. This rule preserves the mandate of Order # 35 Section 22 that the greater minimum wage and other protections afforded by applicable state or federal law shall apply. But given that as of 2020, Colorado allows *local* wage laws, Rule 8.6 provides that the greater and more protective of state,

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<sup>177</sup> C.R.S. §§ 8-1-101 and 8-4-101 (“‘employee’ means [every/any] person”)

<sup>178</sup> C.R.S. §§ 8-4-120, 8-6-115 (both prohibiting “discrimination”; listing “discharge” as one *method* of discrimination).

<sup>179</sup> C.R.S. § 8-1-116 (prohibiting any person from hindering or obstructing the “director or any such person authorized by the director in the exercise of any power conferred by this article.”); C.R.S. §§ 8-4-120 and 8-6-115 (both prohibiting employers from engaging in adverse employment actions for the purpose of interfering with or obstructing employees from engaging in protected activities).

<sup>180</sup> 29 U.S.C. § 215(a)(3) (FLSA retaliation provision, providing that “it shall be unlawful for any person ... to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.”); *see Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011) (activity protected against retaliation need not be a formal complaint filing, and instead can be an oral complaint that gave the employer “fair notice” that the employee was asserting statutory rights.); *Morgan v. Future Ford Sales*, 830 F. Supp. 807, 814–15 (D. Del. 1993) (employee fired after calling labor department to inquire whether employer was violating wage requirements, then sharing the information with his co-workers, engaged in protected activity despite never filing a complaint, because employee was acting on “the purposes of the [FLSA]”); *Saffels v. Rice*, 40 F.3d 1546 (8th Cir. 1994) (if employer mistakenly believes an employee engaged in protected activity, and retaliates based on that belief, employee is protected under FLSA); *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987) (same).

federal, *and local* laws or regulations setting minimum wage, overtime, and other labor standards shall apply.

## **6. Rule 8.7. Construction.**

Rule 8.7 (Construction) has been added, and Order #35 Section 17 has been eliminated as redundant with existing rules and statutes. Rule 8.7 states that, in accord with the liberal construction rule in C.R.S. § 8-6-102, the provisions of the COMPS Order shall be liberally construed, and exceptions and exemptions within the Order narrowly construed. This Rule effectuates C.R.S. § 8-6-102 and judicial interpretations mandating similar construction of Colorado wage orders. *See, e.g., Bowe v. SMC Elec. Prod., Inc.*, 945 F. Supp. 1482, 1484 (D. Colo. 1996) (“[T]he MWO is remedial in nature and its coverage should be liberally construed.”); *Deherrera v. Decker Truck Line, Inc.*, 820 F.3d 1147, 1161 (10th Cir. 2016) (“Like the other terms in the Wage Order, ‘interstate drivers’ is not defined. Because it is an exemption, the court should construe it narrowly.” (citation omitted)).

Narrow construction of Colorado wage law exemptions, by the Division and the above-cited cases, paralleled decades of federal wage law until 2018. In *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018), the U.S. Supreme Court held that FLSA exemptions should be given a “fair (rather than narrow) interpretation,” rejecting nearly six decades of precedent “that FLSA ‘exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit.’” *Id.* at 1147–48 & n.7 (Ginsburg, J., dissenting) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

However, a change to federal law, such in *Encino Motorcars*, does not automatically change state law — especially where, as here, the federal law change is a narrowing of rights, and state law expressly adopts broader rights above the floor that federal law sets. The Division “promulgate[s] a wage order independent of the FLSA, expressly stating that the Wage Order shall apply instead of the FLSA when it provides greater protection than the FLSA affords.” *Brunson v. Colo. Cab Co., LLC*, 2018 COA 17, ¶ 23, 433 P.3d 93, 97 (Colo. App. 2018); *see also Redmond v. Chains, Inc.*, 996 P.2d 759 (Colo. Ct. App. 2000) (FLSA does not preempt the CMWA because the CMWA provides relief that is not available under the FLSA); *Bowe v. SMC Elec. Prod., Inc.*, 935 F. Supp. 1126, 1134 (D. Colo. 1996) (“[T]he FLSA’s relationship to the CWA is a protective floor — not a ceiling — for employee rights. States can, therefore, through statutory verbiage (or no verbiage at all), use their police powers to add to worker protections above and beyond the federal right”); *Insul-Lite Window & Door Mfg., Inc. v. Indus. Comm’n*, 723 P.2d 151, 152 (Colo. App. 1986) (“[W]e are not bound by federal law here because the language of [the workers’ compensation statute] has been interpreted to include a broader concept of employment than the common law doctrine embodied in federal law”).

Unlike the FLSA, the Colorado Minimum Wage Act, a source of authority for the COMPS Order, explicitly mandates that it “shall be liberally construed.” C.R.S. § 8-6-102. A core aspect of liberal construction is that if two plausible interpretations exist, the broader, more rights-protective interpretation must be chosen. *See Dillabaugh v. Ellerton*, 259 P.3d 550, 554, 2011 WL 2474520 (Colo. App. 2011) (“if ambiguity exists, a broader interpretation comports with the requirement that Colorado’s exemption statutes be given liberal interpretation”); *Mesa Sand & Gravel Co. v. Landfill, Inc.*, 776 P.2d 362, 365, 1989 WL 68218 (Colo. 1989) (“Because the phrase is susceptible to more than one interpretation, we conclude it is ambiguous. ... Permitting the prevailing party to recover prejudgment interest under section 5-12-102 compensates the nonbreaching party for the loss ... and thereby furthers the legislative purpose .... We therefore apply a liberal construction ... and

conclude that the General Assembly intended section 5-12-102(1)(b) to permit ... prejudgment interest.”); *Mountain Mobile Mix, Inc. v. Gifford*, 660 P.2d 883, 885 (Colo. 1983) (where a statute “should be construed liberally[,] ... [i]f the language of a statute is not dispositive, courts must resolve the ambiguity by interpreting the statute in accordance with the purposes”).

A related core aspect of liberal construction is that broadly construing statutory rights necessarily means narrowly construing exemptions from those rights; declining to construe exemptions from rights *narrowly* is declining to construe *entitlement* to the right *liberally*. Thus, the statutory mandate of liberal construction, present in Colorado law but absent from federal law, precludes Colorado wage law from applying the *Encino Motorcars* departure from narrowly construing exemptions. Accordingly, the rule remains that exemptions from the Colorado Minimum Wage Act or the COMPS Order must be construed narrowly; and under precedent defining narrow construction of wage law exemptions, the employer bears the burden to “plainly and unmistakably” demonstrate that an employee is exempt. *See, e.g., Deherrera v. Decker Truck Line, Inc.*, 820 F.3d 1147, 1161 (10th Cir. 2016) (internal citation omitted) (“Like the other terms in the Wage Order, ‘interstate drivers’ is not defined. Because it is an exemption, the court should construe it narrowly”); *Brunson v. Colo. Cab Co., LLC*, 2018 COA 17, ¶ 23, 433 P.3d 93, 97 (Colo. App. 2018) (“exemptions, such as the [Wage Order’s] overtime pay exemption, should be construed narrowly”) (citing *Comm’r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989) (where “a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision”)); *Chase v. Farmers Ins. Exch.*, 129 P.3d 1011, 1014–15 (Colo. App. 2004) (employer “bears the burden of demonstrating that its employee ‘plainly and unmistakably’ qualifies for an exemption” under Colorado law”).

## **7. Rule 8.8. Separability.**

Rule 8.8 (Separability) modifies of Order #35 Section 14 to make clear the Division’s intent that the COMPS Order should remain in effect to the maximum extent possible. Accordingly, if any part (including any section, sentence, clause, phrase, word, or number) is held invalid, (A) the remainder of the Order remains valid, and (B) if the provision is held not wholly invalid, but merely in need of narrowing, the provision should be retained in narrowed form. This is consistent with other severability provisions that courts have accepted and enforced.<sup>181</sup>

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<sup>181</sup> *E.g., High Gear & Toke Shop v. Beacom*, 689 P.2d 624, 633 (Colo. 1984) (Colorado’s general severability statute, even absent a severability provision within a specific statute, “can be used not only to sever separate sections, subsections, or sentences, but may also be used to sever words and phrases.” (citing *Shroyer v. Sokol*, 191 Colo. 32, 550 P.2d 309 (1976)); *see Shroyer*, 550 P.2d at 311 (after striking as unconstitutional a “40 per cent statutory requirement” and “restrict[ing] the recall petition powers of the people to registered voters,” allowing severability so “the statute can be given legal effect” by “incorporat[ing] by implication” a different numerical threshold and eligible elector rule, a “25 per cent limitation and the electors (not necessarily registered) requirement set forth” in another provision); *Regan v. Time, Inc.*, 468 U.S. 641, 642 (1984) (“presumption is in favor of severability”).

**V. EFFECTIVE DATE.** These rules take effect on March 16, 2020.



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

\_\_\_\_\_  
January 22, 2020

Date