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

Colorado Overtime & 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 is incorporated into Part I as well.

II. SPECIFIC STATUTORY AUTHORITY: The Director is authorized to adopt and amend rules and regulations to enforce, execute, apply, and interpret Articles 1, 4, and 6 of Title 8, C.R.S. (2019), 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 proposed COMPS Order #36, which is incorporated herein by reference.

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

IV. SPECIFIC FINDINGS FOR ADOPTION. The Director finds as follows.

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

Issued in 1938, the first Colorado Minimum Wage Order granted wage rights only to "women and minors in laundry occupations." In 1939 and 1940, it added three more job types: "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-1990s orders expanded the four narrow *job* categories into four broader *industry* categories, with Order #22 in 1998 finalizing the list that remains today: "(A) Retail and Service; (B) Commercial Support Service; (C) Food and Beverage; (D) Health and Medical." Since the 2000s, the Division has issued the Order annually, to publish each year's minimum wage. Yet beyond the annual minimum wage, the Order's substance is unchanged since 1998. 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: Because that decades-old list 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, have proven difficult to fit into the Order's four old 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,[1] bakeries,[2] mills and factories,[3] or mines and smelting.[4] 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 Colorado minimum wage; overtime pay for work beyond not only 40 per week (which federal law provides), but also 12 hours per day; meal and rest periods (30-minute unpaid meal periods for shifts over five hours, and 10-minute paid rest periods every four hours); and other provisions such as deduction/credit rules and having these wage rules posted or to employees.

The Order's exemptions list has proven just as troubled as its coverage categories. The exemptions are written confusingly, generating protracted litigation on what they mean. The salary requirement not only is inconsistent across similar exemptions, but requires *no* minimal level. Workers paid sub-minimum wages for long hours can, and too often are, declared exempt "professionals," "executives/supervisors," or "administrative decision-makers." Other rules too — on breaks, wage deductions, and other topics — 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 parts have numbers, while others do not; some numbered parts have lettered subparts, while others do not; 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 that wage actually is mandated by the Colorado Constitution.

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 roughly 500 people, spanning all corners of the state. All publicly posted, 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 substantial number confirm the need for reform by noting significant problems with the Order's narrowness, datedness, and lack of clarity. The comment period is continuing through a public hearing on December

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[1] *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").

[2] *Lochner v. New York*, 198 U.S. 45 (1905) (striking New York law regulating work hours for only bakers).

[3] *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").

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

16, 2019, and ending on December 31, 2019, in anticipation of a final rule by January 10, 2020, with an effective date of March 1, 2020, except with a new overtime-exempt salary postponed until July 1, 2020.

Preliminarily, to redress the 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 & Minimum Pay Standards Order (COMPS Order) #36, 7 CCR 1103-1 (2020)**.

COMPS Order #36 features two significant changes from prior Orders:

(1) expanded coverage spanning all Colorado workers, other than those in a detailed list of 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 for employee exemptions, starting at **$42,500** (approximately 20% above the federal level) and rising $2,500 annually from 2021 through 2026, reaching **$57,500** in 2026, then adjusting annually by consumer price index — to assure that workers are not deemed exempt "executives/supervisors," "professionals," or "administrative decision-makers" while logging long hours at well-below-minimum wages.

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.

Yet most rules in COMPS Order #36 are substantively unchanged, but still have revised text, 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, the Division's findings take the form of a part-by-part, subpart-by-subpart, detailing of the nature and reasons for every substantive change that Order #36 features;
- the Division is publishing a three-page fact sheet listing the key changes in Order #36; and
- the Division is holding not only the required public hearing and notice-and-comment period on Order #36, but also multiple public talks and discussions — first in late 2019 in the notice-and-comment period, then after a planned early 2020 adoption of the Order.

B. <u>Rule 1</u>. Authority and Definitions.

Rule 1.1 details the Division's statutory authority for Order #36, the name change from "Minimum Wage Order," and that this Order #36 replaces Order #35. The rest of Rule 1 consists of definitions, in Rules 1.2-1.12, of key terms in Order #36. Most of the definitions are from Order #35 with changes to grammar or style; the portions with substantive changes are detailed below.

1. Rule 1.4. "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) changed that definition. Order #36 therefore uses the new § 8-4-101(5) "employee" definition adopted by H.B. 19-1267.

2. Rule 1.5. "Employer."

Colorado H.B. 19-1267 changed not only the "employee" definition (noted above), but also the § 8-4-101(6) "employer" definition. Order #36 therefore uses the new § 8-4-101(6) "employer" definition.

3. Rule 1.7. "Regular rate of pay."

The Rule 1.7 definition of "regular rate of pay" is substantively unchanged, other than the addition of Rule 1.7.2 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 to 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[5] (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;[6] Alaska permits such agreements under only strict conditions: requiring a written agreement setting forth the hours employee is expected to work, and defaulting to a 40-hour week if hours deviate from the contract without adjusting salary.[7] The Division believes those approaches are more restrictive than necessary to protect overtime rights against waiver and mis-calculation. Rule 1.7.2(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 1.7.2(A) adopts the four factors that the federal regulation requires of valid arrangements to add overtime to non-hourly pay for non-exempt employees.[8] Rule 1.7.2(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.

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[5] *See* Lisa Nagele-Piazza, *DOL Proposes Updates to 'Fluctuating Workweek' Overtime Calculations*, Society for Human Resources Management (Nov. 5, 2019) ("Some states, including Alaska, California, New Mexico and Pennsylvania, prohibit employers from using this method to calculate overtime pay.... The Connecticut Supreme Court invalidated the method.").

[6] Cal. Labor Code § 515(d); Cal. Division of Labor Standards Enforcement Policies and Interpretation Manual 49.2.1.1.

[7] 8 Alaska Administrative Code 15.100.

[8] 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 Order #36, and that do not take any side on the ambiguity that Rule 1.7.2(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 1.7.

This is a key factor because under Colorado statute, overtime rights are non-waivable.[9] Second, if an employee is non-exempt, yet not paid overtime, then the arrangement, however well-understood by the parties, was unlawful — and the law should not enforce an *unlawful* understanding as to pay.[10]

Consequently, when a salaried but non-exempt employee is not paid overtime as required by Rule 1.7.2(A), the employee's 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 where a non-exempt employee was unlawfully not paid any overtime premium.[11]

4. Rule 1.10. "Wages or compensation."

Order #35 included a "wages or compensation" definition that intended to track the much more lengthy C.R.S. § 8-4-101(14) definition, but it risked confusion by abridging the statutory text into one very lengthy sentence with at least one grammatical error. 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 excluded or exempted.

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[9] 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).

[10] 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).

[11] *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 hours.'"); *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 CFR 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 significance of the employee's lack of knowledge of non-exempt status cannot be overstated. 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 the context of an FLSA misclassification suit when consent is inferred from the employee's conduct, that conduct will always, by definition, have been based on the false assumption that he was not entitled to overtime compensation.").

(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.[12] 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. (To be clear, the Division is not taking a side on, or endorsing, any of the below bullet-pointed arguments; it is just noting 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.[13]

- **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 illustrated by this striking example: "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."[14]

- **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

[12] Numerous attorneys for employers did not support broader coverage, but did note the need to redress ambiguity within the existing categories. *E.g.*, written comment 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 comment by Gillian Bidgood, Aug. 27, 2019 ("Rather than adding additional industries, the Division should clarify the current definitions.").

[13] Written comment 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.").

[14] Written comment by Nantiya Ruan and Laurie Saraceno, Aug, 16, 2019.

for eventual consumption (after all, they are food), but they are not sold for consumption. They are sold for resale."[15]

Reasonable people could disagree about various of the above arguments and conclusions, but they reflect a fundamental problem: that due to its four coverage categories, the Order "applies based on industry, not the type of work an individual worker performs."[16] Consequently, as all of the above bullet points show, there can be two workers doing the exact same work, but one will receive all the rights in the Order, while the other will not, based solely on the business models of their employers. 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 commercial project, not a residential project.

The Division has considered clarifying rather than eliminating the coverage categories, as some commenters recommend.[17] 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. And the opposite problem resulted from the 1990s effort to broaden from a narrow list of jobs to 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 list of industries 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 an acceptable option for rules as important as Coloradans' wage rights and responsibilities.

(2) The need to move from industry-selective regulation to, instead, presumptive coverage. Even if the 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 has fallen into deserved disuse. As a matter of economics, "the presence of an uncovered sector" — and prior wage orders left *many* sectors uncovered — can skew labor markets, and can do so with unpredictability, 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.[18] Either effect is inefficient, as a labor market skewing that, as Part (1) notes above, is not based on meaningful differences among jobs and industries.

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[15] *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1144 (10th Cir. 2011).

[16] *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).

[17] *E.g.*, written comment 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 comment by Gillian Bidgood, Aug. 27, 2019 ("Rather than adding additional industries, the Division should clarify the current definitions.").

[18] Ronald G. Ehrenberg & Robert S. Smith, *Modern Labor Economics*, p. 123 (13th ed. 2018).

Confirming that the above point is not just theoretical economics, numerous commenters stressed that they have seen these undesirable effects in action in Colorado: that selective coverage risks harm to those employers and industries that *do* provide their workers breaks, overtime, and other rights.

> 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. (Jimmy Burds, business owner of Colographics, and member of Good Business Colorado, SPEAK[19] Tr. at 14:16-21.)

> [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 in Colorado. (Tyler Jaeckel, Director of Policy and Research, Bell Policy Center, SPEAK Tr. at 108:3-13.)

> [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 contractors in the industry. (Written comment, International Union of Bricklayers & Allied Craftworkers, Aug. 7, 2019.)

In sum, the coverage categories' distinctions 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 comment 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. (Written comment by State Senators Jack Tate, Kevin Priola, and Larry Crowder, and State Representative Hugh McKean.)

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.[20]

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[19] The Stakeholder Pre-rulemaking Engagement and Kickoff ("SPEAK") was the Division's pre-rulemaking public meeting for hearing oral comments from Coloradans, in addition to the many written comments the Division received. The meeting was well-attended, with dozens offering testimony for the entire scheduled six-hour duration. A transcript of the entire SPEAK meeting is publicly available on the same webpage that lists and links all written comments the Division received.

[20] Comments from Towards Justice Regarding Modernization of Colorado's Minimum Wage Order (by David Seligman and Catherine Ordonez), Aug. 16, 2019 ("Towards Justice Comment") 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

(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 to the employee, but also society at large. Most fundamentally, longer hours increase injury risk.[21] OSHA notes that worker fatigue from long work hours causes risks ranging from traffic accidents to large-scale industrial disasters.[22] Numerous studies also show that longer hours increase many potentially long-term physical and mental health ailments, including heart disease, arthritis, diabetes, and depression.[23] One meta-analysis found that long work hours and overtime increase mortality by nearly 20 percent.[24]

Long hours also have detrimental impacts on families, and particularly on 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

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2016) (approved by Governor April 4, 2016); Massachusetts General Laws Title XXI Chapter 151: Section 1; ARS 23.362-363; RCW 49.46.010, RCW 49.46.020; 50-4-21 NMSA 1978, 50-4-22 NMSA 1978).

[21] *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 16.2 % monthly risk of a motor vehicle crash during their commute home from work.").

[22] *Id.*

[23] 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 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 2621–2628 (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 PsychiatricDisorders: 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.

[24] Joel Goh et al., *Workplace stressors & health outcomes: Health policy for the workplace*, 1 Behavioral Science & Policy 1 (2015) at 60.

parenthood, and unemployment as adults.[25] Commenters corroborated those findings.

> I can speak on that for myself. When I get home sometimes, my kids ask me to help them with their homework. But you're tired. (Joe Pimentel, SPEAK Tr. at 38:24-39:7.)

> 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. (Caroline Henkins, SPEAK Tr. at 205:20-206:2.)

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.[26]

In addition, gender inequity in the workforce is exacerbated when overtime is a widespread job requirement because women also disproportionately bear the burden of family care-giving.[27] Risk of depression from long working hours is also higher for women.[28] These hardships especially impact women in the workforce. Women, especially women of color, are disproportionately represented among low-wage workers.[29] Almost one third of women in low-wage occupations are parents of children under 18; half of those mothers are raising children on their own.[30]

(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.[31] Multiple studies confirm that without breaks, more workers suffer injury generally, and

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[25] Caroline Ratcliffe, *Child Poverty and Adult Success*, Urban Institute, Sept. 2015 (children growing up in poverty have poorer long-term outcomes, including lower educational attainment, higher rates of premarital teen birth, higher rates of arrest, 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) (longer workweeks detrimental to bonding, child wellbeing).

[26] 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 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.

[27] 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.

[28] *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).

[29] Heidi Hartmann, et al., *How the New Overtime Rule Will Help Women & Families*, Institute for Women's Policy Research and MomsRising (2015), at 4.

[30] *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 and Economic Supplement (using Miriam King et al., Univ. Of Minn., Integrated Public Use Microdata Series: Version 3.0 (2010), results at https://nwlc.org/wp-content/uploads/2015/08/final_nwlc_lowwagereport2014.pdf).

[31] *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).

"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.[32]

Another study similarly found that rest breaks, and length of rest, delayed the time until injury for on-the-job ladder falls.[33] The need for breaks for outdoor workers, such as in construction and agriculture, is exacerbated by Colorado's increasingly hot summers.[34] OSHA and CDC guidelines emphasize the importance of rest breaks in preventing heat injury.[35]

(c) The need to include work in many previously excluded industries. Many manual labor jobs that are mostly or ambiguously excluded from the 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.[36]

Other than the above paragraph, the Division offered no analysis or reasoning for removing construction — and the cited federal statute is no rationale for removing coverage in an Order that provided many more rights than that federal statute. The federal statute provides only **(i)** the federal minimum wage and **(ii)** weekly overtime after 40 hours. It does not provide *most* of the rights in the

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[32] 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).

[33] 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).

[34] *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[.]").

[35] *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).

[36] Letter from Division Director Mary Blue to Mr. Dennis Jakubowski, Director of Governmental Affairs for the Associated General Contractors of Colorado, March 10, 1998.

Order: **(iii)** Colorado's higher minimum wage,[37] **(iv)** daily overtime after 12 hours, **(v)** meal breaks, **(vi)** rest breaks, or **(vii)** other more specific yet still important protections, such as Order provisions about various credits and deductions, about the right to be told the Order's provisions in a poster, and others. Nor is there evidence of ill impact from the 10 months during which 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 an entire winter, when construction hiring often slows.[38] 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 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.[39] 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 the non-model employers unregulated, in order to save the model employers from facing wage rules.

Work in construction is particularly arduous and hazardous, with some of the highest injury and fatality rates in the country.[40] Construction accounts for 4% of U.S. employment but 21% of occupational deaths,[41] and 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.[42] These data and studies are confirmed by 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 are paid time-and-a-half for overtime, the vast majority of construction workers are non-unionized and receive neither breaks nor paid time-and-a-half for overtime; and

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[37] In 1998 the Colorado and federal minimum wages were the same, but Colorado's now has been higher for over a decade.

[38] *See* Section IV(C)(1)(3)(d)(v), *supra*.

[39] Written comment 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 construction industry. AGC/C has supported a number of measures to provide both the Department and individuals with more tools to enforce the law.").

[40] 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)).

[41] 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.").

[42] *Construction Workers Experience Higher Rates of Injury, Premature Death: Study*, Safety + Health, National Safety Council (Nov. 2, 2011).

- injuries and deaths — sometimes from accidents, sometimes from repetitive stress or occupationally-caused disease — and shortened worklife are substantial problems they face.

The above data are corroborated by comments from workers in construction and in related industrial and transportation work. Oral testimony from roughly three dozen construction workers confirms 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.
>
> 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….
>
> 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[, a m]ajority. 90 hours[, a]bout … a quarter. 100 hours[, a]bout a fifth.…

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 job, they need to take a load off their feet. They need to clear their head. They need to get some nutrition and hydrate. (Mark Thompson, SPEAK Tr. at 148:19-24.)
>
> [J]ust to be able to sit down in the shade cool off, of those, they took a lot of other angles about, you know, rest and hydration, all that, but to be able to sit back and refocus and think about what you're doing. (Orlando Martinez, SPEAK Tr at 163:20-24.)
>
> [W]e hear all the time of people getting hurt on projects, you know, 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. (James Gleason, SPEAK Tr. at 76:15-20.)
>
> [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.

(Jason Wardrip, SPEAK Tr. at 6:16-7:7.)

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. (Ricardo Cereceres, SPEAK Tr. at 192:3-13.)

[S]ome of our members, we do stretch, you know, three times. 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. (Luis Guigon, SPEAK Tr. at 189:7-11.)

[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. (Joe Pimentel, SPEAK Tr. at 41:3-25.)

As a millwright, we go travel to power plants … [in] southern Colorado, anywhere from Wyoming, anywhere. … [W]e go out, we go for 12-hour days usually, seven days a week. Now, as a union member, it's awesome because I get breaks. I get time. 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 as we are, 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 …. (Jordan Jones, SPEAK Tr. at 166:19-67:15.)

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 it just seems to be getting further and further away from what we need to do in Colorado. (Caroline Henkins, SPEAK Tr. at 203:11-17.)

Construction workers also testified that their long hours cause injuries, both acute and long-term overuse injuries that require surgery — for younger workers occasionally, but for older workers commonly and repeatedly. The long hours and injuries force still-qualified workers to involuntarily retire in their 40s and 50s. When construction workers still able to work 40-50 hours need to leave the field 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 and population able engaged in rewarding work and able to provide for themselves.

JIM 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: And you say you've seen workers who couldn't come back from needing surgeries?

JIM GLEASON: Yeah.

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

JIM GLEASON: Generally, anywhere after 40.

(James Gleason, SPEAK Tr. at 218:9-19:6, 230:25-31:5.)

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 …. [T]hey … 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 …. So seven days a week, 12 hours a day for my first 18 years. That was a typical week for us. And your body 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.

(Caroline Henkins, SPEAK Tr. at 202:8-207:7)

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. … But the stories are many. 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.
>
> (Renee Genovese, SPEAK Tr. at 209:15-210:11, 210:21-11:1.)

One individual who knew many construction workers, from both 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, even though they "[p]aid a lot less[,] … substantially less than what they would be making in the field" doing construction: school bus driver; home depot; hospital maintenance worker; and retail sales. (James Gleason, SPEAK Tr. at 226:15-228:14.)

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.[43] 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.[44] 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 good citizens for society."[45]

(d) The evidence that expanding overtime coverage reduces excessively high working hours and does not harm employment levels. Research shows that requiring overtime premium pay is

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[43] Testimony of Victor Galvan, nonprofit employee, SPEAK Tr. at 82:10-8:6 (nonprofit workers often work 68 to 70 hour weeks); Kelly Reeves, former nonprofit employee, SPEAK Tr. at 185:24-86:12 (reported working 60-hour weeks at a salary below minimum wage); comments by Isabel Cruz, nonprofit employee, Aug. 16, 2019 (worked 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 on me. … 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 it was hard to justify our teachings when we weren't even able to practice what we preach under our working conditions."); Kelly Reeves, social worker, Aug. 16, 2019 (worked 60+ hour weeks); Lida Johnson, receptionist, Aug. 16, 2019 (worked hundreds of hours of overtime, reporting "the physical to[l]l it took on my was out of control. I was sick more in the time I worked for this company than I had been in the last 10 years combined.").

[44] Testimony of Victor Galvan, nonprofit employee, SPEAK Tr. at 84:16-23, 82:20-24, *see* 82:25-84:15.

[45] Written comment by Liz Flores, retail manager, Aug. 16, 2019.

effective at decreasing overtime hours worked.[46] 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,[47] 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.[48] 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 an increase in the salary basis and liberalizing the duties test], it would take approximately 100k new full-time workers to make up the reduction in hours worked, though [the U.S.] 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 than in 2004. 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 new workers to replace overtime hours, the effect would be even smaller. For example, DOL estimates the new rules

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[46] 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").

[47] "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 to individual workers 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.'')).

[48] 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 U.S. DOL 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 also* comment by 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.

> 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%.[49]

(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."[50]

(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"),[51] which is projected to equal $51,064 by 2020.[52] That salary rule was published in late May of 2016 and enjoined in late November 2016[53] before going into effect.[54] 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.[55] Below, a month-by month graph of monthy

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[49] *US Daily: The New Federal Overtime Rules: Little Effect on Pay, Potential Boost to Payrolls (Phillips)*, Goldman Sachs Economic Research (May 18, 2016).

[50] 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.").

[51] 81 Fed. Reg. 32391 (May 23, 2016).

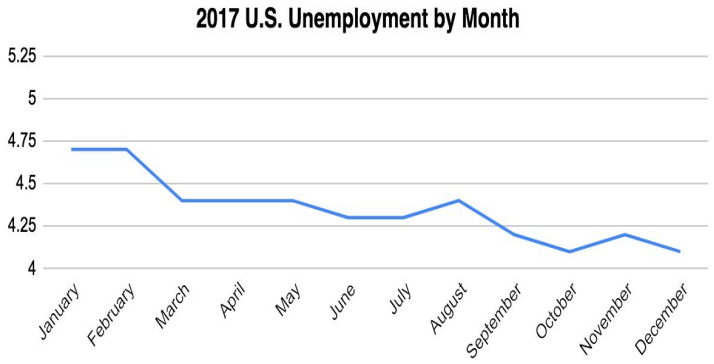
[52] Comment by Heidi Shierholz, *Updating Colorado's overtime salary threshold: How the new rule will benefit Colorado businesses, employment, and the broader Colorado economy*, Economic Policy Institute, Aug. 28, 2019. Confirmed by the Division's own calculations applying annual CPI increases to 2016 salary.

[53] *Nevada v. United States Dep't of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016).

[54] 81 Fed. Reg. 32391 (May 23, 2016); first release May 18, 2016.

[55] *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 around the country 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*

unemployment rates shows no discernible negative impact of employers' late 2016 adoptions of pay changes to comply with 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.[56]

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 late 1990s. The Division analyzed the effect on unemployment rates of the late 1990s coverage of the construction

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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 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."'").

[56] All states but Alaska implemented salary bases in 2000, one year before the 2001 recession. The salary basis did not impact these states' ability to weather the recession after implementing a higher-than-federal salary basis a year before. All three had a better than average unemployment rate, 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.

industry in the wage order. During the 10 months the construction industry was covered, job growth in construction averaged 1.0% per month — higher than before (0.6% in the preceding 10 months or after (0.8% in 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.

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%	Over the 10 Months *Before* Wage Order Coverage: +0.6%
1/1997	114,900	-0.4%	
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%	Over the 10 Months *with* Wage Order Coverage: +1.0%
11/1997	122,500	-1.7%	
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%	Over the 10 Months *After* Wage Order Coverage Removed: +0.8%
9/1998	138,200	+1.0%	
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%	+0.7%
7/1999	148,600	+0.4%	
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, both studies and comments to the Division indicate that reducing long work hours, and providing breaks, help employers and employees alike, 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.[57] 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.[58]

Corroborating these studies is the following comment by a Coloradan 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. (Jimmy Burds, SPEAK Tr. at 15:10-21.)

Finally, the impact of broader coverage is lessened by the preservation of a number of coverage exemptions and exceptions in Rule 2, detailed below in the descriptions of the remainder of Rule 2.

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

2. Rule 2.2. Exemption from all except Rules 1-2, 8-9

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

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[57] John Pencavel, *The Productivity of Working Hours*, 125 Economic Journal 589 (2014), at 2052–2076 ("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.").

[58] Comment by 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.

clarify ambiguous language. Overall, Rule 2.2 now makes clear that exemption is from the core substantive portions of the Order, and that three rules still apply: 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 partially-exempt employers).

i. Rules 2.2.1-2.2.3. Administrative, Executive, and Professional employes

The duties tests for these exemptions from 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.

ii. Rule 2.2.4. Outside salespersons.

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

iii. 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.[59]

This exemption mirrors the federal exemption,[60] 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 incorporating instead as non-profit entities 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.

iv. Rule 2.2.6. Taxi cab drivers or Interstate transport workers.

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[59] Written comment by Gillian Bidgood, Aug. 27, 2019. This comment also argued for "the computer employee exemption," which is part of Rules 2.2.3 and 2.5.2(2).

[60] 29 USC § 213(a)(1); 29 CFR § 541.101.

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 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[61] and the latter holding that "interstate" required crossing state lines (but *only* for drivers).[62] 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 is in keeping with the original intent of the rule, which may have become unclear over time with proliferation of ride-for-hire services that are not taxi cabs within the original and intended meaning of the rule.

v. <u>Rule 2.2.7</u>. In-residence workers.

Rule 2.2.7 sets forth a number of exemptions that apply only to employees who work in residences. This rule preserves a number of exemptions in Section 5 of Order #35, with a few changes.

First, "companions" and "domestic employees" employed by households are no longer exempt. That exemption in Order #35 was narrow, reaching 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 that others receive. Those needing exemption are mainly any who may qualify as "independent contractors," who already are exempted by the Order's "employee" definition. The Division finds no reason to specifically exempt those who *are* employees from the protections of the COMPS Order.

Second, in Rule 2.2.7(B) "Property managers" are now exempt only if they reside on-premises at the property they manage. Property managers who reside on-premises may be expected to be on call at all hours, making tracking and compensating overtime and arranging for regular breaks difficult or impossible. Managers who do not reside on-premises do not receive the same benefit, and their hours can be managed in regular shifts. Accordingly, an exemption is appropriate for residing-on-premises property managers, which the Division finds to be the best interpretation of the intention underlying this exemption.

Third, in Rule 2.2.7(C) "Student residence workers" exemption now requires that students employed by sororities, fraternities, college clubs, or dormitories must be employed in the residence where they reside. The Division finds no reasonable basis for exempting students who work outside of

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[61] *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)

[62] *Brunson v. Colo. Cab Co.*, 2018 COA 17 ¶¶ 17-45.

their own residence (*e.g.*, students who work as janitors in other dorms at their colleges) from the protections of the COMPS Order. Accordingly, an exemption is appropriate for student residence workers who work in their own residence, which the Division finds to be the best interpretation of the intention underlying this exemption.

Finally, in Rule 2.2.7(D) the exemption for "inmates, patients, or residents of charitable institutions" who "perform laundry services" now makes more express that this exemption is for work "in institutions where they reside." Order #35 implicitly had that requirement, but with ambiguous wording that Rule 2.2.7(D) now clarifies.

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

vii. 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).

3. Rule 2.3. Exemption from all except the Colorado minimum wage.

Rule 2.3 partially or fully exempts from the COMPS Order "agricultural jobs," the definition of which in the COMPS Order derives from, and parallels, the definition in the federal Fair Labor Standards Act ("FLSA"). First, any jobs in agriculture are exempt from the entire COMPS Order if they are not covered by, or are exempt from, the minimum wage provisions of the federal Fair Labor Standards Act — most notably, small farms and herders.

Second, for other jobs in agriculture, neither weekly overtime (Rule 4.1(A), daily overtime (Rule 4.1(B)-(C)), nor meal periods (Rule 5.1) apply. Rest periods (Rule 5.2) apply, 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 Rule 4-5 exemption would not apply to a small potential subset of agricultural employers: those who may have already been covered by prior Orders as "Retail" employers. While the vast majority of agricultural employers are not primarily (or at all) retailers, it is possible that some might have always been covered under the "Retail" definition that Orders have featured for decades. Any employer, in any industry, whether or not that industry was generally covered by wage orders, 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."[63] The Division takes no position as to whether any particular agricultural employers actually would qualify under this

[63] *See* Minimum Wage Order #35, Rule 2(A).

definition, but notes it simply so that if any such employer exists, the COMPS Order would not *remove* coverage that already existed for such an employer.

4. Rule 2.4. Exemptions from Overtime Requirements of the COMPS Order.

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).

i. Rule 2.5.1.

Rule 2.5.1 sets out the salary basis required for certain exemptions. This salary basis will be phased in over six years from July 1, 2020, through January 1, 2026: **$42,500** from July 1, 2020, through the end of 2021; then increasing $3,000 each January 1 from 2022 through 2026, reaching **$57,500** on January 1, 2026. Every January 1 after 2026, 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 to the Division — well over ⅝ — 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;[64] a business association[65] and numerous individual businesses;[66] numerous non-profit organizations, some small but also two large employers of thousands of Coloradans, Goodwill Industries and ARC Thrift Stores;[67] labor unions;[68] advocacy organizations working on behalf of children, the homeless, and employees;[69] and 33 Colorado

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[64] *E.g.*, comments by Bell Policy Center, Aug. 16, 2019; Heidi Shierholz, former USDOL Chief Economist, *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

[65] Comment by Good Business Colorado, Nov. 16, 2019.

[66] Comments by Critical Nurse Staffing, LLC, Aug. 1, 2019; Seattle Fish Company, Aug. 27, 2019; Annie Contractor, small business owner and CEO of nonprofit organization, Aug. 16, 2019.

[67] *E.g.,* comments by Goodwill Industries, Nov. 8, 2019; ARC Thrift Stores, Nov. 8, 2019.

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

[69] *E.g.*, comments by Denver Homeless Out Loud, Aug. 2, 2019; Colorado Children's Campaign, Aug. 16, 2019; 9to5 Colorado, Aug. 16, 2019.

state senators and representatives.[70]

Among the commenters supporting a salary basis who opined in favor of a particular salary figure, the vast majority advocated a starting salary basis of $62,400, with commenters typically describing that figure as 2.5 times the 2020 Colorado minimum wage for 40-hour weeks.[71] 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.[72] 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.[73] 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.[74]

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[70] Nov. 12, 2019, comment by 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.

[71] *E.g.*, 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; Seattle Fish Company, Aug. 27, 2019.

[72] Comment by 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

[73] Eric Maulbetsh, *New Poll Shows Coloradans' Overwhelming Support for Increasing Overtime Pay*, Colorado Times Recorder (Nov. 5, 2019).

[74] Comment 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; 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); Comment from Towards Justice Regarding Modernization of Colorado's Minimum Wage Order, David Seligman and Catherine Ordonez, Towards Justice, Aug. 16, 2019, 19-20.

These commenters comprised a majority (more than ⅔) 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 that Colorado should not adopt *any* salary basis above the federal level. These commenters raised concerns of detrimental impact on businesses, especially businesses that are less well-off, whether because of the nature of their industry, because of their size, or because they are in lower-income regions.

While trade associations representing multiple members, and attorneys representing multiple employers, did not express any willingness to entertain a salary above the federal level, comments by 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,[75] numerous other businesses expressed support for salaries ranging from the $40,000s to $62,400.[76]

(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 to the employer. The 2020 overtime-exempt federal salary basis of $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 exempt working a 58-hour week.[77] By 2022, it will be too low for even a *50-hour* week. The salary to be overtime-exempt shouldn't be less than minimum wage with overtime, so Colorado 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 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

[75] *E.g.* comments by Jeri Fry, Proprietor of The Cup and Cone, Mar. 28, 2019; Clint Unruh, President of Intermountain Office Supply, Aug. 2, 2019.

[76] Seattle Fish Company, Aug. 27, 2019 ($62,400 salary basis); Critical Nurse Staffing, Aug. 1, 2019 ($40,000 salary basis); Goodwill Industries, Nov. 8, 2019 ($48,000 to $52,000 salary basis).

[77] *See* Order #35 Section 5.

> 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, in our view. 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.[78]

This variety of options further decreases any prospect of an undue burden on business from expanded overtime coverage due to adoption of a salary basis.[79]

Additionally, as discussed in Section IV(C)(1)(3)(d) above, employers may also see benefits in terms of improved employee productivity.

For the above reasons, the Division finds that adopting a salary basis will likely (1) have positive, not negative, effects on jobs in Colorado, (2) improve the health of large numbers of Coloradans, and (3) improve the labor force overall by decreasing turnover and exit from the labor market.

(3) The reasons for the salary basis chosen. Advocates for the $62,400 salary that is 2.5

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[78] *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.

[79] *Id.* at 3, discussed further below.

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.[80]

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 — $57,500 in 2026, reached with a gradual phase-in from $42,500 in 2020-21 — is sufficient to achieve substantial benefits for Coloradans.

(a) $57,500 approximates "Pre-Payment" of the Colorado minimum wage with overtime for the 65-hour weeks that many Coloradans work. First, the Division views a $57,500 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.[81] Workers bringing claims for unpaid overtime similarly report regularly working 60-70 hours a week.[82] 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.[83] 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 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 can be expected to work. At the lower end of this spectrum, the

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[80] 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.

[81] SPEAK Tr. 201:2-15.

[82] *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").

[83] *Household Data Annual Averages 19. Persons at work in agriculture and nonagricultural industries by hours of work*, (BLS 2018).

Division calculates that 65 hours per week at Colorado's projected 2026 minimum wage,[84] with overtime, is $57,651 per year. Rounded to the nearest $500, this equals $57,500, the 2026 salary basis.[85]

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 Section IV(C)(5)(i)(2), *supra*, 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) $57,500 approximates the salary level that the federal Department of Labor 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[86] is projected to equal $51,064 by 2020.[87] The Division projects that this amount would reach $57,506 by 2026.[88] 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 in Section IV(C)(1)(3)(d)(i) above, analyses of this 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 alone.[89] Scaled for population growth,[90] the Division estimates that with the proposed

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[84] Projected to be $14.31 with the required adjustment by the Denver-Aurora-Lakewood CPI, which averaged 2.97% for the past three full calendar years. *See* *Inflation - Denver-Aurora-Lakewood Consumer Price Index*, published by the Colorado Department of Local Affairs based on BLS data. If the 2019 12-month CPI is included, the average CPI is 2.90%, yielding the same result with rounding. *See* *Consumer Price Index, Denver-Aurora-Lakewood – September 2019*, BLS (Oct. 10, 2019).

[85] A similar basis is supported by a more conservative CPI computation using the average Colorado minimum-wage-adjustment 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 Division's proposed salary basis.

[86] 81 Fed. Reg. 32391 (May 23, 2016).

[87] Comment by 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.

[88] Assuming growth at the average U.S. CPI rate for past the past three calendar years. *See* *Consumer Price Index increased 1.7 percent for year ending September 2019: Chart Data*, BLS (Oct. 16, 2019).

[89] 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).

[90] *See* *Estimates of Resident Population Change and Rankings*, U.S. Census Bureau (2016, 2017, and 2018 data). Assumes that 2017 and 2018 growth rate of 1.4% continues in 2019 and subsequent years.

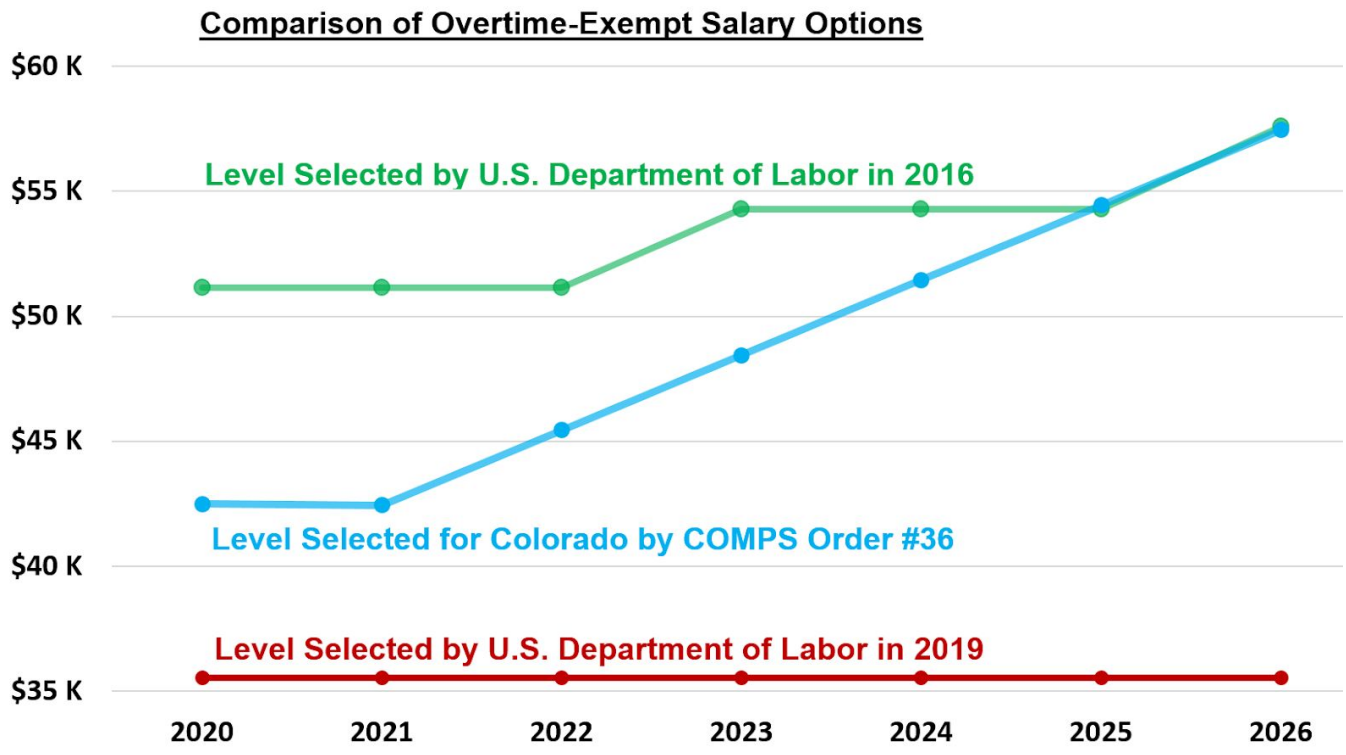
salary basis, approximately 290,000 additional Colorado workers will become eligible for overtime based on salary by 2026.

Second, as discussed in Section IV(C)(1)(3)(d)(iv) 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 figure harmed employment; to the contrary, unemployment levels 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 $57,500 salary level accommodates numerous requests by business for gradual adoption of any salary above the federal level. Finally, several commenters requested multi-year phase-in of any new salary basis.[91] The Division finds that a gradual phase-in of the 2026 salary basis is desirable to accommodate businesses that are able and willing to comply with an above-federal salary basis, but that reasonably request a gradual adjustment to that salary level. Accordingly, in the first year of implementation (2020), the Division has determined that a 20% increase over the federal salary basis ($42,442 rounded to $42,500) is a prudent increase, especially with over a half-year's notice provided before the delayed effective date of the salary basis. While the COMPS Order takes effect March 1, 2020, the new salary basis does not take effect until July 1, 2020. Then the salary will remain unchanged in 2021, before increasing $3,000 each January 1 from 2022 through 2026. Those increases will place the salary at $57,500 in 2026. After 2026, the salary will adjust annually by the same Consumer Price Index that indexes the Colorado minimum wage. Following is a graphical illustration of the salary schedule in Rule 2.5 and how it compares to the levels the U.S. Department of Labor selected in 2016 and in 2019.

[91] *E.g.,* comments from: 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.



ii. 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 Section 5 of Order #35, as well as in federal law, that doctors, lawyers, and teachers need not be paid any particular salary or hourly compensation to be exempt.[92]

Rule 2.5.2 preserves the exemption for employees paid at least $27.63 per hour in highly technical computer occupations. That is the level that the federal Fair Labor Standards Act[93] 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 $57,500 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.

[92] 29 C.F.R. 541.303(d) and 304(d).

[93] 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 Order itself or (B) the minimum wage provisions of the federal Fair Labor Standards Act.

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 1210, which will allow Colorado municipalities to set a higher-than-state minimum wage beginning January 1, 2020.

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[94] for any "amounts for labor or service performed by employees" that are "earned, vested, and determinable,"[95] 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.[96]

3. Rule 3.3. Reduced Minimum for Certain People with Disabilities and 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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[94] *See also* CRS § 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 of this title [8]."

[95] C.R.S. CRS § 8-4-101(14)(a)(I) (defining "'Wages' or 'compensation'").

[96] *Coldwell v. RITECorp Envtl. 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, and as long as, they meet the Rule 5.1 "Meal Periods" definition that they are uncompensated non-work time.

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.

Rule 5.1 makes express the Division's interpretation that a meal period, to the extent practical, 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.

Rule 5.2 offers a table showing how many breaks are required for shifts of various lengths, to resolve ambiguity in Order #35 as to what was meant by the rule that a 10-minute rest period must be provided every four hours "or major fractions thereof."

Rule 5.2.1 grants flexibility as to whether the required 10 minutes of rest must be in *one* 10-minute period, rather than in two or three shorter breaks that add up to 10 minutes. The wording of Order #35, by requiring "a" compensated 10-minute rest period, implied that the 10 minutes of rest must be in one continuous period. The Division finds that both employers and employees could benefit from flexibility as to whether 10 minutes of rest is in one continuous period or in two or three shorter periods. Importantly, however, an employer-employee agreement to divide 10 minutes of rest into 2-3 shorter breaks must be voluntary and without coercion.

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 only be permitted if "practicable." The Division finds that the intent of the rest period rule is 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.

Rules 5.2.3 and 5.2.4 clarify that where an employee is deprived of a rest break, this constitutes 10 minutes of working time for which the employee has not been compensated, which time is included in calculating minimum wages and overtime. 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."[97]

[97] *Pilmenstein v. Devereaux*, No. 2017 CV 30319 (Colo. Dist. Ct., Jefferson Cty., Sept. 5, 2019).

- "[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."[98]

- "[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."[99]

- "[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."[100]

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.[101]

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 reference and phrasing of these sections and updating 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 6.2. 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, as long as 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 Pueblo, Colorado, the lowest-wage region for which rent data were available. Rather than a flat amount regardless of housing type, Rule 6.2.1 now allows different lodging amounts,

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[98] *Sanchez v. Front Range Transp.*, No. 17-cv-00579-RBJ, 2017 WL 4099896, *4 (D. Colo. Sept. 15, 2017).

[99] *Sobolewski v. Boselli & Sons, LLC*, 342 F.Supp.3d 1178 (D. Colo. 2018).

[100] *Lozoya v. AllPhase Landscape Construction, Inc.*, No. 12-cv-1048-JLK, 2015 WL 1757080, *2 (D. Colo. Apr. 15, 2015) (citation omitted).

[101] *Marbury v. Madison*, 5 U.S. 137, 162–63 (1803).

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 of the employer, and (3) no more than the employer's cost (paralleling both the federal rule that caps the credit at "reasonable cost" and the Order #35 meal credit rule that already provided that "[n]o profits to the employer may be included" in the credit the employer takes).[102]

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 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[103] and that a written agreement is evidence that an agreement to accept employer lodging was voluntarily entered into by the employee.[104]

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[105] and allowing free employer/employee decision-making on meal provision. Rule 6.2.2 retails 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

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[102] 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)).

[103] *See* *Field Assistance Bulletin No. 2015-1*, U.S. Dep't of Labor, Wage & Hour Division, Section A(5)(5) (Dec. 17, 2015).

[104] *Id*. at Section A(5)(2).

[105] 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.").

deposit — before any damage to the uniform has actually occurred — is an impermissible deduction.[106]

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. Posting and Distribution Requirements.

a. 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 an employer that fails to post as required is ineligible for any 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 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 the employer.[107] 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

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[106] 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 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.

[107] *See, e.g., Cruz v. Maypa,* 773 F.3d 138, 147 (4th Cir. 2014) (extending failure-to-post tolling in the ADEA context to the 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) ("An employer's failure to post a statutorily required notice of this type tolls the running of any period of limitations.").

required information on those credits, exemptions, and other wage rights and responsibilities.

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

c. 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, 14, 15, 16, 18, 19, and 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; Rule 8.3. Investigations; Rule 8.4, Violations.

Rule 8.3 (former 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. Rule 8.1 (former Section 18) likewise clarifies that an employee may bring a civil action or Division complaint for all wages lawfully owed, not just the minimum wage. Rule 8.4 (Violations) has been amended from Section 19 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.

2. 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"[108] and "employee" with "person,"[109] and clarifies that prohibited reprisals are those for "for the purpose of reprisal, interference, or obstruction" related to "any actual or anticipated investigation, hearing, complaint, or other process or

[108] C.R.S. §§ 8-1-101 and 8-4-101 ("'employee' means [every/any] person")

[109] C.R.S. §§ 8-4-120 and 8-6-115 (both prohibiting "discrimination"; listing "discharge" as one *method* of discrimination).

proceeding relating to a wage claim, right, or rule" to reflects the scope of Colorado wage and hour retaliation statutes[110] and case law interpreting the analogous federal FLSA retaliation statute.[111]

3. 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 Section 22 of Order # 35 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, federal, *and local* laws or regulations setting minimum wage, overtime, and other labor standards shall apply.

4. Rule 8.7. Construction.

Rule 8.7 (Construction) has been added, and Section 17 of Order #35 has been eliminated as redundant with existing rules and Colorado 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.[112]

5. Rule 8.8. Separability.

Rule 8.8 (Separability) modifies Section 14 of Order #35 to make clear the intent of the Division that the COMPS Order is intended to 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

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[110] 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).

[111] 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).

[112] *See Bowe v. SMC Elec. Prod., Inc.*, 945 F. Supp. 1482, 1484 (D. Colo. 1996) ("Like the FLSA, the 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)).

severability provisions that courts have accepted and enforced.[113]

V. EFFECTIVE DATE. These rules take effect on March 1, 2020, or as soon thereafter as the rule-making process is completed.

November 15, 2019

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

Date

[113] *E.g., High Gear & Toke Shop v. Beacom*, 689 P.2d 624, 633 (Colo. 1984) (en banc) (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 *See Shroyer v. Sokol,* 191 Colo. 32, 550 P.2d 309 (1976)); *Shroyer v. Sokol*, 191 Colo. 32, 35, 550 P.2d 309, 311 (1976) (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); *see generally Regan v. Time, Inc.*, 468 U.S. 641, 642 (1984) ("presumption is in favor of severability").