NATIONAL EMPLOYMENT LAW PROJECT

Christine L. Owens
Executive Director

www.nelp.org

NELP National Office
90 Broad Street
Suite 1100
New York, NY 10004
212-285-3025

Washington, DC Office
1350 Connecticut Ave. NW
Suite 1050
Washington, DC 20036
202-640-6520

California Office
2030 Addison Street
Suite 420
Berkeley, CA 94704
510-982-5945

Washington State Office
300 Lenora Street #357
Seattle, WA 98121
206-324-4000

August 15, 2019

Michael Primo
Rule Coordinator
Office of Labor Market Information
Division of Labor Standards and Statistics
633 17th St., Suite 600, Denver, CO 80202

VIA EMAIL: michael.primo@state.co.us

Re: Comments of the National Employment Law Project in Response to the Colorado Department of Labor and Employment's Request for Stakeholder Feedback on the Colorado Minimum Wage Order (MWO) Regulation, 7 CCR 1103-1

Dear Mr. Primo:

The National Employment Law Project (NELP) submits these comments in response to the Colorado Department of Labor and Employment's request for stakeholder feedback on the Colorado Minimum Wage Order (MWO) regulation, 7 CCR 1103-1. We believe revising the MWO presents an important opportunity for the Department to strengthen workplace protections and improve economic conditions for Colorado workers and their families.

NELP is a non-profit research, policy, and advocacy organization that for 50 years has sought to ensure that all workers, especially those most vulnerable to workplace exploitation or abuse, receive the basic workplace protections guaranteed by our nation's labor and employment laws, including state laws. NELP supports groups with members who include low- and middle-wage earners who have been denied minimum wage and overtime protections, and works closely with worker centers, labor unions, lawyers and other economic fairness advocates who promote and protect the rights and interests of workers. NELP's National Wage & Hour Clearinghouse, at www.just-pay.org, serves more than 1,000 members, including organizers, scholars, policymakers, lawyers, and others who through organizing, litigation, and policy advocacy work to cement basic wage protections. While we are a national organization, we have worked frequently with policymakers in the Colorado, including supporting the 2006 and to 2016 voter-approved ballot initiatives that expanded and raised Colorado's minimum wage through constitutional amendments.

We believe that Colorado should: (1) update the Wage Order to extend full minimum wage protections to workers in all industries; (2) revise its exemptions for executive, administrative professional employees ("EAP exemptions") to include a salary threshold of 2 ½ times the minimum wage; and (3) extend full minimum wage protections for agricultural workers and work towards a 40 hours overtime threshold for agricultural workers. Together these reforms would help deliver stronger workplace protections for hundreds of thousands of workers in Colorado, ensuring that more workers are paid fairly when they put in long hours on the job and promoting work-life balance.

1. Colorado Should Update Its Wage Order's Industry Coverage to Protect Workers in All Industries, including Construction, Manufacturing and Wholesale Workers.

Colorado should take long overdue action to update its Minimum Wage Order to ensure coverage of workers in all industries. At the very minimum the MWO should be expanded to cover all industries that are covered by the federal Fair Labor Standards Act (FLSA) but that are not fully covered under Colorado's existing minimum wage order.

Colorado's minimum wage coverage – and, as discussed below, overtime coverage – has evolved in a halting, piecemeal fashion. As a result, the wage order – which is the state's key instrument for defining the reach of minimum wage and overtime pay protections – has significant holes in it and, at a minimum, is out of step with the breadth of federal coverage under FLSA and with the practice of most other states, which typically cover workers in all industries.

Colorado's coverage is limited because initially, the wage order was limited to women and minors in a few industries. Those industries gradually expanded and the wage order was expanded to cover men. Today the wage order covers only a select few industries: Retail and Service, Commercial Support Service, Food and Beverage, and Health and Medical. Then, in 2006, the voters approved a constitutional amendment that raised Colorado's minimum wage and extended coverage to all workers who are also covered by FLSA's minimum wage provisions. That amendment extended the state's minimum wage protections to workers in most, but not all, industries in the state.

However, CDLE and the courts interpreted that expansion of coverage to apply only to basic minimum wage protections. As a result, other key protections under Colorado's wage order such as meal and rest breaks, and overtime pay were not extended broadly to workers beyond the initial four industries. They therefore do not apply to workers in many major industries such as construction, manufacturing, wholesale, and the non-profit sector outside of healthcare. Moreover, the MWO's protections do not apply to industries and occupations not coved by FLSA, and expansion of the MWO's protections to industries not covered by FLSA should also be considered. To remedy this omission, the wage order should be amended to clarify that the full range of the wage order's protections apply to workers in all industries – and at a minimum to all industries that are covered by FLSA.

2. Colorado Should Include a Salary Threshold and Set It at 2½ Times the Minimum Wage in Its EAP Exemptions.

NELP recommends that Colorado include a salary threshold in in EAP exemptions and set it at 2 ½ times the state minimum wage earnings for a full time worker in the state. Because Colorado's minimum wage is set to rise to $12 per hour in 2020, this would set the salary threshold at the equivalent of $62,400 in 2020 dollars, although the increase in the salary threshold could be phased in over a longer period. This is a very moderate proposal. As explained below, (1) it is well within the historical range of the federal EAP salary threshold to the minimum wage, which for many decades averaged roughly 3 times the federal minimum wage; (2) it almost identical to the Western U.S. equivalent of the Obama overtime threshold – the 40th percentile of weekly earnings in the West Census Region, both of which will be nearly $69,000 by 2026; and (3) it is in line with what other similar states like Washington State and Massachusetts have adopted or are proposing.

History of Federal and Colorado EAP Overtime Coverage and Exemptions. Prior to 1996 so called "white collar" or "EAP" employees in covered industries were not exempted from the Colorado wage order and thus would have been entitled to overtime pay. MWO 20 was the first wage order that exempted "Professional, executive, managerial employees and elected officials as prescribed in the Fair Labor Standards Act." 7 CCR 1103-1.[1] Since, as described below, the EAP exemptions, as prescribed by the FLSA , contained both a salary threshold test and a duties test, so did the Colorado exemptions. It was not until 1998 in MWO 22 that Colorado promulgated its own definition of the EAP exemptions which contained duties tests similar to the FLSA but inexplicably omitted a salary threshold test.[2] Because the Colorado EAP exemptions were explicitly based upon the federal ones, a short explanation of the history and rationale of the federal EAP exemptions is warranted.

The FLSA has always contained exemptions from its maximum hours/overtime regulations for certain salaried employees based on the nature of their work and the level of their compensation. The original regulations defined the duties of the combined category of executive and administrative employees and required that such employees be compensated "at not less than $30 (exclusive of board, lodging, or other facilities) for a workweek."[3] The was the equivalent of 3.0 times a 40-hour workweek at the minimum wage. In 1940, the Department of Labor ("The Department" or "DOL") separated the terms executive and administrative and added a salary test to professional employees.[4] In 1949 the DOL established another "short" duties test with a higher salary threshold. [5]The salary levels were also adjusted in 1958, [6] 1963,[7] 1970,[8] 1975,[9] 2004,[10] and 2016[11] and there is a proposal currently under consideration at the DOL to raise it to $35,308. Following each update from 1949 to 1975 the ratio of the short test salary level to the earnings of a full-time, nonexempt, minimum wage worker equaled between approximately 3.0 and 6.25 percent.[12]

The first DOL Report ("Stein Report")[13] on the white-collar exemptions from overtime emphasized that reducing the length of the work week was a goal of the FLSA and that white-collar workers, including those making above the minimum wage, were included in that goal. But it also recognized that EAP positions provide tangible and intangible benefits. The exemptions were premised on the belief that the EAP exempted workers typically earned salaries well above the minimum wage and were presumed to enjoy other privileges to compensate them for their long hours of work, such as above-average fringe benefits, greater job security, and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay.[14] Further, the type of work EAP exempt employees performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making enforcement of the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium.[15]

The Importance of a Salary Threshold for the EAP Exemption. The Stein Report rejected arguments that all white-collar workers, regardless of earnings, should be exempted from overtime protections.[16] A salary level test has been part of the regulations since 1938 and has been long recognized as "the best single test" of exempt status.[17] The salary an employer pays an employee provides "a valuable and easily applied index to the 'bona fide' character of the employment for which exemption is claimed" and ensures that section 13(a)(1) of the FLSA "will not invite evasion of section 6 and section 7 for large numbers of workers to whom the wage-and-hour provisions should apply."[18] The 1949 Weiss Report's statement remains true today: "the experience of [the Department] since 1940 supports the soundness of the inclusion of the salary criteria in the regulations." [19] As the DOL concluded in 2016, "[t]he fact that an employee satisfies the duties test, especially the more lenient standard duties test, does not alone indicate that he or she is a bona fide executive, administrative, or professional employee."[20]

Salary tests were considered a vital tool of enforcement by the Stein Report and by the reports that followed. A high salary, sufficiently above the minimum wage and average wage of nonexempt workers, was seen as the best indication of an employer's good faith and proper classification of a worker as an exempt EAP employee. Each report rejected arguments for abandoning salary tests in favor of a duties-only or job-title test.[21]

The most recognized benefit of the salary test is that it simplifies enforcement of the Act, as it provided, "a ready method of screening out the obviously nonexempt employees" and "furnished a practical guide to the inspector as well as to employers and employees in borderline cases. In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations."[22] However, the salary tests' screening function becomes dramatically less effective if the levels are set too low. When the average salaries for clearly nonexempt employees reach or exceed the levels set by the salary tests, the tests become "obviously obsolete" and must be revised to remain effective.[23] Because a salary level test simplifies enforcement of the Wage Order, NELP recommends revising the order to include one.

The Eroding FLSA EAP Overtime Threshold. NELP recognizes that EAP workers in Colorado who are subject to FLSA are subject to its salary level test. The share of full-time salaried EAP workers guaranteed overtime pay under federal law when they work more than 40 hours a week has plummeted nationwide from 63% to less than 7%.[24] That's because the FLSA salary threshold has not been updated in years and remains just $23,660.

As a result, many low-paid employees like assistant managers in fast food restaurants, retail stores, and a wide range of other industries who struggle on modest salaries aren't eligible for overtime pay and can be forced to work 50, 60 or even 70 hours a week, losing time with their families, and not getting any overtime pay for their hard work and dedication. It also means that employers aren't hiring workers to do the extra work.

After the overtime salary threshold had languished for years causing the share of protected workers to plummet, in 2016 the Obama Administration's Labor Department ordered a long-overdue updating of it. The Obama rule raised the threshold to $47,476 a year in 2016 – and would have continued increasing it every three years so that it would have reached approximately $51,000 in 2020, $55,000 in 2023, and $59,000 in 2026. That was a very moderate standard that would have restored overtime coverage to roughly 30% of the fulltime salaried workforce – far less than the 63% that used to enjoy overtime coverage in the 1970's.

Moreover, because the Obama rule was a national benchmark that would have applied in all fifty states and the District of Columbia, it was set at a level that was deemed appropriate and safe for the lowest wage states in the country such as Alabama, Georgia and Florida.

However, a group of Republican state attorneys general blocked the increase — in a district court decision that even the Trump Administration appealed — and this spring the Trump Labor Department proposed replacing it with a meager alternative that would raise the overtime threshold to just $35,308 in 2020.

That salary level is so low as to be virtually meaningless anywhere in the United States – and certainly in a high wage, high cost-of-living state like Colorado. If it is finalized and becomes law, EPI estimates that the Trump $35,308 threshold would only cover 8 percent of Colorado's salaried workforce. [25]

The Proposed Colorado Salary Threshold of 2½ Times the Minimum Wage Is Similar to the Historical FLSA Ratio. Setting the Colorado EAP salary threshold at 2.5 times the minimum wage—the equivalent of $62,400 annually—would restore it to a level closer to what it was for the first 40 years after it was created in the FLSA, when the threshold averaged 3.1 times the minimum wage. As the Stein Report recognized "the failure to require a salary level of substantially more than the minimum wage would "invite evasion of section 6 and 7 for large numbers of workers to whom the wage-and-hour provisions should apply." Accordingly, following each update from 1949 to 1975 the ratio of the short

test salary level to the earnings of a full-time, nonexempt, minimum wage worker ranged between approximately 3.0 and 6.25.

In the table that is reprinted below, the U.S. Department of Labor laid out in detail this history of the ratio of the overtime salary threshold to the minimum wage in its 2015 Notice of Proposed Rulemaking that led to the Obama overtime rule.

Ratios of Salary Test Levels to Full-Time Minimum Wage Earnings

(reprinted from U.S. Department of Labor, Notice of Proposed Rulemaking,

80 Fed. Reg. 38515, at 38532-38533, Table B (July 6, 2015) [26]**)**

Year	Minimum wage (MW)	MW Earnings for a 40-Hour Workweek	Exempt Short Test Salary Level	Ratio of Short Salary Test to MW Earnings
1949	$0.40	$16	$100	6.25
1958	$1.00	$40	$125	3.13
1963	$1.25	$50	$150	3.00
1970	$1.60	$64	$200	3.13
1975	$2.10	$84	$250	2.98

The Proposed Colorado Salary Threshold of 2½ Times the Minimum Wage Is Almost Identical to the Obama 40th Percentile Threshold for the West Census Region. The 2.5 times the minimum wage proposal would also set the Colorado overtime threshold at a level consistent with the 2016 Obama administration threshold. Because the 2016 Obama rule would have applied nationwide, DOL based it upon the 40th percentile of weekly earnings for salaried workers in the South Census Region, the lowest-wage region of the country. However, salaries in the West Census Region where Colorado is located are significantly higher. The 40th percentile of salaries in the West Census region is projected to be $1,177 in 2020 – the equivalent of $61,204 annually. If salaries grow only slightly faster than inflation over the next 5 years, the 40th percentile for the West is projected by

the Economic Policy Institute to be $1,322 per week by 2026, or $68,744 annually. That's virtually identical to the proposed 2.5 times the state minimum wage threshold, which EPI similarly projects will be $1,326 per week by 2026, or $68,952 annually.[27]

Colorado Should Join Other States in Raising Its Salary Threshold. The rollback of the Obama overtime restoration has spurred states to start acting in to protect overtime pay for workers in their states. A group of sixteen states filed comments in May opposing the weak Trump overtime threshold as wholly inadequate.[28] Growing numbers of states are raising their thresholds to the Obama level or higher, including California,[29] New York,[30] Washington State[31] and Pennsylvania.[32]

In fact, the most recent state to act, Washington State, is benchmarking its overtime threshold to precisely the threshold that we recommend for Colorado: 2½ times the annual earnings of a full-time minimum wage worker. However, in Washington that will translate to a higher salary threshold than in Colorado – approximately $80,000 by 2026 – because Washington's minimum wage is phasing up to $13.50 per hour and so is higher than Colorado's.

It is also worth noting that Massachusetts is also proposing to raise its salary threshold to the equivalent of the level that we recommend for Colorado: the 40th percentile of earnings of full-time salaried workers in its Census Region – the Northeast region of the U.S.[33]

Finally, in historical terms, this proposal is very moderate as it would only partially restore overtime coverage to the 63% portion of the salaried workforce that used to be fall below the overtime salary threshold in the 1970's.

Employers Will Have a Variety of Options for Adjusting to the Proposed Salary Threshold.

While it is impossible to predict exactly what employers will do in response to our proposed changes to the MWO, history shows that employers will likely make a number of adjustments. Illustrative studies of employer behavior from Goldman Sachs following the federal government's 2004 rule changes, and from the National Retail Federation (NRF) predict that:

- Some employers will raise salaries for employees near the proposed threshold in order to maintain those employees as exempt; [34]

- Some employers will continue to demand that workers newly reclassified as non-exempt perform overtime, and those workers will be compensated for that extra work;

- Other employers will reduce hours for workers working more than 40 hours in a week and shift work to under-40 hour employees and hire additional workers, too – the

NRF predicted that 117,000 new jobs would have been added and Goldman Sachs' study predicted 120,00 jobs;

- And some employers could lower the wages of some salaried properly exempt workers to save on overall payroll costs and continue to require them to work long hours.[35]

Workers Will Benefit. The proposed overtime threshold of 2.5 times Colorado's minimum wage will be broadly beneficial to the state's workers. EPI projects that it would make approximately 146,000 salaried employees in Colorado newly eligible for overtime when they work more than 40 hours per week.[36] Some workers will see more money in their pockets: either a bump in their salary above the new level, or time-and-a-half pay for any overtime hours. The increased income resulting from this proposal may result in reduced need for social assistance (and by extension reduce social assistance expenditures by the government). Thus, transferring income to these workers may reduce eligibility for government social assistance programs and lower government expenditures. [37] In addition, when workers incomes rise, so does consumer spending and tax revenues of the State and its local governments.

For overworked employees who see no additional compensation for their hard work, reduced hours will be a good thing. Working long hours is correlated with an increased risk of injury or health problems.[38] It also prevents workers from spending time with their families and in their communities. Long work hours are related to stress and injuries at the workplace Long hours also contribute to a significant increase in risk of contracting specific chronic diseases, such as chronic heart disease, non-skin cancer, arthritis, and diabetes.[39] As weekly work hours increase, so too does the risk for diagnosis of hypertension[40] , and mortality rates rise by nearly 20 percent.[41]

Costs of work-related stress to American businesses due to absenteeism and employee turnover alone exceed $300 billion annually.[42] Another study this year found that the estimated annual health care expenditures related to workplace stress could be as high as $190 billion per year, with long hours, shift work, and work-family conflict all factoring into the cost.[43]

In 2014, approximately 70 percent of women with children were either working or looking for work. [44] On the days they did household activities, women spent an average of 2.6 hours on such activities, while men spent 2.1 hours.[45] The combination of hours at work and at-home afterhours work leaves families with little non-work time, generating work-family conflict that increases the odds of self-reported poor physical health by about 90 percent.[46] However, by encouraging employers to build greater efficiencies into their organizations or share work more broadly among employees to avoid overtime pay premiums, the Department's proposal has the potential to alleviate work-family conflict-related stresses too. As Professor Lonnie Golden found, using data from the General Social Survey (GSS) to analyze whether salaried workers stand to lose flexibility by gaining overtime protections:

Because salaried workers in the affected pay brackets already work mandatory overtime at the same frequency as hourly workers and more days of overtime in general than hourly workers, raising the overtime threshold for them would not increase and in fact could decrease the work stress and work-family conflict associated with mandatory overtime.[47]

The last option (reducing wages for some salaried employees) is a possibility and some employers may implement it. However, at a time when the labor market is tightening, and even employers in low wage industries are voluntarily raising their starting and minimum wages because they need to compete to attract and retain a qualified workforce, we believe that reducing nominal wages of workers would result in exceedingly bad morale and higher-than-normal turnover. [48] We also believe that many employers are well aware that this is a foolhardy business practice, and though many of their representatives in national organizations issue such doomsday prophesies, employers are simply too smart and too dependent on good personnel to implement such shortsighted and self-defeating strategies.

The announcement of the Obama overtime rule in 2016 led many employers, especially major retail chains, to raise pay of their salaried managers and assistant mangers to about $48,000 – slightly above the Obama threshold level.[49] The fact that so many employers raised their pay scales in response showed that it was a very moderate proposal to which employers could readily adjust. However, because the Obama overtime standard was later blocked, retail worker organizations report to us that few if any major retail chains have continued raising salaries above that level.

3. Colorado Should Extend Full Minimum Wage and Overtime Protection to Agricultural Workers.

Currently the MWO does not extend full minimum wage coverage to agricultural workers. For example, workers on small farms who are not subject to the FLSA are not covered by Colorado's MWO. This exclusion denies them legal protection when they are underpaid or otherwise cheated. Moreover, the wage order replicates one the of the much-criticized longstanding omissions in the FLSA: the exclusion of farmworkers from overtime pay coverage. Many historians have noted the racist origins of that exclusion as many early 20th century lawmakers were committed to maintaining unfair conditions in fields that had just a generation earlier been worked by Black slaves.[50]

Many other states require minimum wage be paid to agricultural workers including California, New York[51] and Washington State.[52] And by covering agricultural workers in Colorado under the MWO they will be entitled to much needed rest breaks.

There is also new momentum in the states to finally extend overtime pay to farmworkers. California in 2016 passed and is now phasing in a 40 hour farmworker overtime standard.[53] New York this year approved a 60 hour overtime standard for farmworkers but, more importantly, mandated a wage board that is empowered to implement a stronger standard and is likely to lower it further.[54] States including Hawaii and Minnesota have

adopted versions of overtime pay for farmworkers.[55] And litigation is underway in Washington State challenging the exclusion of farmworkers form that state's overtime law.[56]

Opposition to farmworker overtime requirements will undoubtedly focus on the costs. However, farm owners are already paying for long working hours in the form of lost productivity and increased injury levels. According to the CDC, every day 100 farmworkers across the country suffer a lost-work-time injury, and the industry suffers a high fatality rate of 21.4 deaths per 100,000 workers.[57] Significant numbers of farm workers suffer chronic musculoskeletal pain from repeated tasks like pruning, harvesting, and machine operation.[58] As weekly work hours increase, mortality rates rise by nearly 20 percent.[59] Workers are stuck between bad choices when they are compelled to work excessive hours without additional pay, because to say no to those hours means lower paychecks. However, increased risk of injury or even death may mean that in subsequent weeks, they may have to go without pay altogether, and the farm owner may be deprived of needed labor.

The arguments against paying overtime to farmworkers do not stand up to scrutiny. Farm work is not unique. Yes, farm work can be seasonal, although much of it is not. Other occupations like landscaping, construction and retail are also seasonal. Yet those workers are entitled to overtime under the FLSA, if not the MWO. Yes, some farm products are perishable, but other workers who work with perishable items are entitled to overtime. Workers in the food supply chain get overtime and food is just as perishable when it is being shipped as when it is being harvested. Workers in canneries get overtime and yet the food they process is just as perishable. Garment workers are also entitled to overtime. However, the garment that is any given year's "fashion rage" is, in its own way, just as perishable as food. Yes, hours of work can be unpredictable in agriculture, at least on any given day and the work schedule can be influenced by the weather. Construction workers' schedules are also unpredictable and influenced by the weather yet they are entitled to overtime under FLSA and hopefully in the near future under the MWO. Other workers, such as retail and fast food workers also have unpredictable schedules – so unpredictable that some that states and localities are beginning to regulate the unpredictability of these schedules. Yet these workers are entitled to overtime.

It is impossible to predict what overtime pay will cost on any given farm because farm owners have a number of options available to them in responding to any new overtime requirements. Each farm owner would have to make a decision about how to structure their business with overtime pay requirements in place. Farm owners could simply pay overtime for overtime hours worked. Some could reduce (and in certain circumstance eliminate) the number of overtime hours worked by hiring additional labor. Other employers could legally reduce the hourly wage rate paid to workers, so long as it did not reduce the rate below the minimum.

The USDA has cautioned farm owners "it is imperative for farmers to compensate good employees competitively to help keep them on the job and performing well." [60] Moreover, the USDA has found that increases in farm wages are "offset by rising productivity and/or output prices."[61]

Colorado should join the growing number of states that are finally ending the unfair exclusion of farmworkers from the basic labor protections that all other workers have enjoyed for many decades by extending full minimum wage and forty-hour overtime protections to them.

Conclusion

For the foregoing reasons, we recommend that Colorado's MWO should be revised to (1) extend full minimum wage protections to workers in all industries; (2) revise its exemptions for executive, administrative professional employees to include a salary threshold of 2½ times the minimum wage; and (3) extend full minimum wage protections for agricultural workers and work towards a 40 hours overtime threshold for agricultural workers.

Please do not hesitate to contact M. Patricia Smith at psmith@nelp.org or Paul Sonn at psonn@nelp.org if you should have any questions about these comments.

Respectfully submitted,

Christine L. Owens
Executive Director

---

[1] MWO 21, promulgated in 1997 exempted" Professional, Executive, Administrative employees, employees in highly technical computer occupations; elected officials and members of their staff; as prescribed in the Fair Labor Standards Act." 7CCR 1103-1

[2] Because Colorado recognizes that both federal and state law apply, employees who met the Colorado duties test but fall below the applicable federal salary threshold are entitled to overtime.

[3] 3 FR 2518, Oct. 20, 1938

[4] 5 FR 4077, Oct. 15, 1940

[5] 14 FR 7731, Dec. 28, 1949

[6] 23 FR 8962, Nov. 18, 1958

[7] 28 FR 9505, Aug. 30, 1963

[8] 35 FR 883, Jan. 22, 1970

[9] 40 FR 7092, Feb. 19, 1975

[10] 69FR 22122, April 23, 2004

[11] 81 FR 32391, May 23, 2016

[12] See Table A below.

[13] Harold Stein, Report and Recommendations of the Presiding Officer at Public Hearings on Proposed Revisions of Regulations, Part 541, Wage and Hour Division, U.S. Department of Labor, Oct. 10, 1940, 36 ("Stein Report")
[14] *See* Report of the Minimum Wage Study Commission, Volume IV, pp. 236 and 240 (June 1981).
[15] *Id.*
[16] Stein Report at 16.
[17] *Id*.; Harry Weiss, Report and Recommendations on Proposed Revision of Regulation, Part 541, Wage and Hour and Public Contracts Division, U.S. Department of Labor, June 30, 1949, 8 ("Weiss Report") at 8-9; Harry S. Kantor, Report and Recommendations on Proposed Revision of Regulations, Part 541, Wage and Hour and Public Contracts Division, U.S. Department of Labor, Mar. 3, 1958, 4 ("Kantor Report") at 2-3.
[18] Stein Report at 19.
[19] Weiss Report at 8.
[20] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees 81 Fed. Reg. 32395, 32413 (May 23, 2016)
[21] Stein Report, 5; Weiss Report, 9; Kantor Report, 2
[22] Weiss Report, 8
[23] *Id*. 10
[24] Economic Policy Institute, What's at stake in the states if the 2016 federal raise to the overtime pay threshold is not preserved—and what states can do about it (Nov. 2017), available at https://www.epi.org/publication/whats-at-stake-in-the-states-if-the-2016-federal-raise-to-the-overtime-pay-threshold-is-not-preserved/
[25] Economic Policy Institute, "Updating Colorado's Overtime Threshold," Aug. 16, 2019.
[26] U.S. Dep't of Labor, Notice of Proposed Rulemaking (NPRM), "Defining and Delimiting the Exemptions for Executive, Administrative,
Professional, Outside Sales and Computer Employees; Proposed Rule," 80 Fed. Reg. 38515, at 38532-38533, Table B (July 6, 2015), available at https://www.govinfo.gov/content/pkg/FR-2015-07-06/html/2015-15464.htm
[27] Economic Policy Institute, "Updating Colorado's Overtime Threshold," Aug. 16, 2019.
[28] Letter from Fourteen State Attorneys General to Hon. Alex Acosta & Melissa Smith Re: Notice of Proposed Rulemaking (RIN 1235-AA20) Defining and Delimiting the Exemptions for Administrative, Executive, Professional, Outside Sales, and Computer Employees (May 21, 2019).
[29] SHRM, "California's Exempt Salary Threshold Will Rise Regardless of Blocked Overtime Rule" (Dec. 15, 2016), available at
https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/overtime-california-employers.aspx
[30] New York State Dep't of Labor, "Administrative Employee Overtime Exemption Frequently Asked Questions (FAQ)", available at
https://www.labor.ny.gov/legal/counsel/pdf/administrative-employee-overtime-exemption-frequently-asked-questions.pdf
Note that in the remainder of New York State outside of New York City, Nassau, Suffolk and Westchester counties, the overtime salary threshold will not reach $58,500 until the state minimum wage finishes phasing up to $15 an hour. The final schedule for that state-wide phase-up to $15 is to be announced by the New York State Director of the Budget in consultation with the Commissioner of Labor, per legislation adopted in 2016.
[31] Wash. State Dep't of Labor & Indus., "Proposed Changes to Washington's Overtime Rules" (June 2019), available at
https://www.lni.wa.gov/WorkplaceRights/Wages/Overtime/OvertimeRules/default.asp . Proposed salary threshold to phase up to 2.5 times the Washington State minimum wage by 2026. Washington State minimum wage, which will be $13.50 in 2022, is projected to reach $14.84 by 2026, translating to a 2026 overtime threshold of approximately $77,000.
[32] Penn. Dept. of Labor, "Proposed Overtime Rule" (June 12, 2018), available at
http://www.irrc.state.pa.us/docs/3202/AGENCY/3202PRO.pdf
[33] An Act updating overtime protections to protect the Commonwealth's middle class workers, H. 1609 / S. 1092, 191st Leg. Session, available at https://malegislature.gov/Bills/191/H1609
[34] *See*, e.g.,Goldman Sachs letter to investors: http://www.businessinsider.com/overtime-rules-will-affect-payrolls-more-than-pay-2015-7.

[35] The National Retail Federation's report, Rethinking Overtime (https://nrf.com/sites/default/files/Documents/Rethinking_Overtime.pdf) estimates that 117,000 jobs will be created in the retail and restaurant sector alone. Goldman Sachs says 120,000 jobs will be created. See also Susann Rohwedder & Jeffrey B. Wenger, The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage, RAND Labor & Population (August 2015), at p. 37.
[36] Economic Policy Institute, "Updating Colorado's Overtime Threshold," Aug. 16, 2019.
[37] Benefits for which currently exempt EAP workers may qualify include Medicaid, the Supplemental Nutrition Assistance Program (SNAP), the Temporary Assistance for Needy Families (TANF) program, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and school breakfasts and lunches.
[38] Galinsky, E., Bond, J. T., Kim, S. S., Backon, L., Brownfield, E., & Sakai, K. (2005), Overwork in America: When the way we work becomes too much. New York: Families and Work Institute.
[39] Association Between Long Work Hours and Chronic Disease Risks over a 32 Year Period, Presentation at American Public Health Association Meeting on November 18, 2014, on National Longitudinal Survey of Youth.
[40] Yoo et al. Effect of Long Working Hours on Self-reported Hypertension among Middle-aged and Older Wage Workers, Annals of Occupational and Environmental Medicine 2014, 26:25; Goh, J, Pfeffer, J, & Zenios, S. (2015) Workplace stressors & health outcomes: health policy for the workplace. Behavioral Science & Policy, 1(1), pp 43-52.
[41] Goh, J, Pfeffer, J, & Zenios, S. (2015) Workplace stressors & health outcomes: health policy for the workplace. Behavioral Science & Policy, 1(1), pp 43-52.
[42] European Agency for Safety and Health at Work, Calculating the costs of work-related stress and psychosocial risks, 2014, citing 2001 estimated data compiled by Rosch.
[43] Goh, J, Pfeffer, J, & Zenios, S. (2015) The Relationship Between Workplace Stressors and Mortality and Health Costs in the United States. Management Science.
[44] Bureau of Labor Statistics, Employment Characteristics of Families – 2014. Released April 2015
[45] Bureau of Labor Statistics, American Time Use Survey – 2014 Results, Released June 2015.
[46] Goh, J, Pfeffer, J, & Zenios, S. (2015) Workplace stressors & health outcomes: health policy for the workplace. Behavioral Science & Policy, 1(1), pp 43-52.
[47] Golden, Lonnie, Flexibility and overtime among hourly and salaried workers, Economic Policy Institute (September 30, 2014).
[48] "Wal-Mart Raising Wages as Market Gets Tighter," THE WALL STREET JOURNAL, Feb. 19, 2015, http://www.wsj.com/articles/wal-mart-plans-to-boost-pay-of-u-s-workers-1424353742; "T.J. Maxx, Marhall's to Hike Minimum Wage for Workers," CNN MONEY, Feb. 25, 2015, http://money.cnn.com/2015/02/25/news/companies/tj-maxx-minimum-wage/index.html; "McDonalds to Raise Pay at Outlets it Operates," THE NEW YORK TIMES, April 1. 2015.
[49] Employer Survey by Compliance HR (Oct. 2017), available at http://event.lvl3.on24.com/event/15/06/73/3/rt/1/documents/resourceList1507125242509/web__chr__1004__final.pdf
[50] Cal. Dep't of Indus. Rel, Labor Enforcement Task Force, Agricultural Employer Brochure, available at https://www.dir.ca.gov/letf/Mobile/Agriculture_Employer_Brochure.pdf
[51] N.Y. State Dep't of Labor, Farm Labor, available at https://www.labor.ny.gov/workerprotection/laborstandards/farm_labor.shtm
[52] Wash. State Dep't of Labor & Indus., Wages for Agricultural Jobs, available at https://www.lni.wa.gov/WorkplaceRights/Agriculture/Wages/
[53] Cal. Dep't of Indus. Rel, Labor Commissioner's Office, Overtime for Agricultural Employers, available at https://www.dir.ca.gov/dlse/Overtime-for-Agricultural-Workers.html
[54] "Why it matters: Five ways a new bill of rights for farm workers will impact New Yorkers," DEMOCRAT & CHRONICLE, June 20, 2019, available at https://www.democratandchronicle.com/story/news/politics/albany/2019/06/20/five-ways-new-bill-rights-farm-workers-impact-new-york/1509272001/
[55] "Farmworker Overtime Across the States," The Issue Spotter, CORNELL JOURNAL OF LAW & PUB. POLICY, available at http://jlpp.org/blogzine/farmworker-overtime-across-the-states/

[56] "Washington Supreme to hear case on overtime pay for farmworkers," CAPITAL PRESS, June 28, 2019, available at https://www.capitalpress.com/ag_sectors/dairy/washington-supreme-to-hear-case-on-overtime-pay-for-farmworkers/article_464f4f54-98f7-11e9-a13b-db2db0795d58.html

[57] Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, "Agricultural Safety," viewed April 16, 2019. https://www.cdc.gov/niosh/topics/aginjury/

[58] Hong Xiao, Stephen A. McCurdy, Maria Stoecklin-Marois, Chin-Shang Li, and Marc B. Schenker, "Agricutural work and chronic musculoskeletal pain among Latino farm workers: the MICASA study," Am J Ind Med: 56 (3) February 2013.

[59] Goh, J, Pfeffer, J, & Zenios, S. (2015) Workplace stressors & health outcomes: health policy for the workplace. Behavioral Science & Policy, 1(1), pp 43-52.

[60] USDA, National Agricultural Statistics Service, 2017 Census of Agriculture, Id. at 4 p. 1.

[61] USDA, National Agricultural Statistics Service, 2017 Census of Agriculture, https://quickstats.nass.usda.gov/?source_desc=CENSUS#C067E6C8-2770-39D7-8E94-E2504C8706B4