

# **EPI comments on Colorado Overtime & Minimum Pay Standards Order (COMPS) Order #36**

**Public Comments** • By [David Cooper](#), [Margaret Poydock](#), and [Heidi Shierholz](#) • December 20, 2019

Michael Primo  
Director of Operations  
Division of Labor Standards and Statistics  
633 17th St., Suite 600  
Denver, CO 80202

Re: Colorado Overtime & Minimum Pay Standards Order (“COMPS Order”) #36 (2020)

Dear Mr. Primo:

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-income workers, and assesses policies with respect to how well they further those goals.

EPI applauds the Colorado Department of Labor and Employment’s (CDLE’s) proposal in Colorado Overtime & Minimum Pay Standards Order #36 (COMPS Order) to raise the salary threshold for exemption from overtime. Doing so will provide hundreds of thousands of Colorado workers with higher pay and a better work-life balance. Expanding eligibility for overtime will reduce the long work hours that many lower-income workers currently endure without any additional compensation, and will ensure that those workers are appropriately compensated when required to work extra hours. Decreasing excessive work hours will improve the health and safety of Colorado workers and allow them to spend more time with their families. It will also encourage stronger job growth in Colorado’s economy by incentivizing some employers to spread work hours among more staff.

The Department’s proposal is an important step toward restoring a core labor protection that helped build and grow the U.S. middle class throughout the 20th century. However, the Department’s chosen salary threshold level of \$57,500 as of January 1, 2026, is notably modest. The [Statement of Basis, Purpose, Authority, and Findings](#) for the order notes that the \$57,500 level was chosen, in part, because it is equivalent to the projected value of the 2016 federal Department of Labor (DOL) salary level that was adopted by the Obama administration and implemented by many employers. Because the 2016 federal rule would have applied nationwide, the federal 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. Yet salaries in the West Census Region, where Colorado is located, are significantly higher. By setting the Colorado salary at the *level* of the 2016 federal rule, CDLE is tailoring its order to states with much lower salary levels. To achieve overtime coverage in Colorado that is consistent with the *intent* of the 2016 federal rule, the Department should aim for a salary threshold no less than the 40th percentile of earnings for the West region. The 40th percentile salary in the West Census Region is projected to be \$1,173 weekly in 2020—the equivalent of \$61,013 annually.<sup>1</sup> Using the same inflation projections in the Statement of Basis, Purpose, Authority, and Findings, this would equal an annual wage of \$68,710 in 2026. This would still be significantly lower than the salary level recently adopted by Washington, another Western Region state, where workers will need to be paid \$79,872 by 2026 to be exempt from overtime.

## **Agriculture workers exempt from the FLSA should not be exempt from the COMPS Order**

Since the passage of the federal Fair Labor Standards Act (FLSA) in 1938, many farmworkers have been exempt from basic workplace protections, such as the minimum wage and overtime pay, despite the fact that farmworkers are some of the most vulnerable workers, often experiencing low pay and hazardous working conditions. Workers in jobs in agriculture are exempt from the entire COMPS Order if they are exempt from the minimum wage provisions of the FLSA. In 2017, there were 36,733 hired farmworkers in Colorado; of those, 13,518 worked on farms with four workers or fewer.<sup>2</sup> These workers—more than a third of all Colorado’s farmworkers—would be exempt from the FLSA and therefore would receive none of the protections in the COMPS Order. Further, this estimate of the number of workers who are exempt from FLSA is likely a substantial underestimate. Four workers working every day for a quarter of the year would have worked 364 “man-days,” well under the 500 man-days in a quarter that is the cut-off for exemption from FLSA. *Five* workers working every day for a quarter would be 455 days, also well below the 500-day cut-off. However, the data do not allow us to identify how many workers work for farms with five workers, or how many workers work on farms with even more workers but that still do not reach 500 man-days in any quarter. Thus, we can be quite certain that our estimate of the number of workers who are exempt from the COMPS Order because they are exempt from the FLSA is a substantial undercount.

However, as mentioned above, even under a conservative estimate, more than a third of farmworkers would be left behind by the COMPS Order. This should be changed; no

worker should be excluded from the most basic workplace protections. States are moving in the direction of ensuring farmworkers are receiving overtime protections. In 2016, California enacted AB-1066, which gradually phases in overtime pay for farmworkers.<sup>3</sup> Since the law was implemented in January 2019, there have not been any major negative impacts on business or production reported in California. In 2016, New York enacted legislation that applies the state’s minimum wage provisions to farmworkers.<sup>4</sup> Earlier this year, New York also enacted the Farm Laborers Fair Labor Practices Act, which extends overtime pay to the agricultural sector.<sup>5</sup> Colorado should follow similar suit and ensure all farmworkers have basic workplace protections by not excluding them from the COMPS Order.

## Colorado should protect its workers against new federal proposals

The U.S. Department of Labor has proposed two rules that, if finalized, will impact Colorado workers in a negative way, and Colorado should protect against these likely changes.

1. The U.S. Department of Labor has historically restricted the amount of time tipped workers can spend doing nontipped work if the employer is taking a tip credit. In particular, for the past 30 years, the U.S. DOL has issued guidance that nontipped work may not exceed 20% of a tipped worker’s time.<sup>6</sup> Known as the 80/20 rule, this guidance was implemented to help ensure employers were not paying tipped workers the subminimum wage for work that nontipped workers would typically perform. Under the 80/20 rule, employers can only claim a tip credit if tipped staff spend no more than 20% of their time performing nontipped functions; at least 80% of their time must be spent in tip-receiving activities. The protection provided by this rule is critical for tipped workers. For example, in a restaurant, the 80/20 rule prevents employers from expecting servers to spend hours washing dishes at the end of the night or prepping ingredients for hours before the restaurant opens. Occasionally, a server might play the role of the host, seating guests when a line has formed, or filling salt and pepper shakers when dining service has ended—but such activities cannot take up more than 20% of their time without employers paying them the full minimum wage, regardless of tips. The U.S. DOL has proposed abandoning the 80/20 rule, and would instead allow employers to take a tip credit “for any amount of time that an employee performs related, nontipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.”<sup>7</sup> We estimate that nationwide, tipped workers would lose \$705 million annually if this rule is finalized.<sup>8</sup> **We estimate that tipped workers in Colorado would lose \$20.5 million annually if the U.S. Department of Labor abandons the 80/20 rule.**<sup>9</sup> To protect its tipped workers, Colorado should codify a standard that is at least as protective as the 80/20 rule.
2. The U.S. DOL has also proposed a rule that would make it easier for employers to use the fluctuating workweek method for calculating overtime pay. Under the fluctuating workweek method, employers pay overtime premium pay at half-time, instead of time-

and-a-half. Making it easier for employers to use this method will expand the number of workers paid under this method, likely reducing the earnings and increasing the overtime hours of workers who are switched to this method. This will undermine the purposes—preventing the overwork of America’s workers and spreading employment to other workers who need additional hours—of the overtime provisions in the FLSA.<sup>10</sup> To protect its workers, Colorado should abolish the fluctuating workweek method of calculating overtime pay.

## Conclusion

EPI applauds the Colorado Department of Labor and Employment’s proposal in COMPS Order #36 to raise the salary threshold for exemption from overtime. However, we ask that (1) the salary threshold be increased to the 40th percentile of the weekly earnings of full-time salaried workers in the West Census region; (2) the COMPS Order cover all farmworkers; and (3) the COMPS Order codify a standard at least as protective as the 80/20 rule and abolish the fluctuating workweek method of calculating overtime pay. Thank you for the opportunity to comment and please do not hesitate to contact us if you have any questions.

Sincerely,

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Economic Policy Institute

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## Notes

1. Economic Policy Institute analysis using Congressional Budget Office January 2019 [10-Year Economic Projections](#) and Bureau of Labor Statistics [Research Series on Deciles of Usual Weekly Earnings of Nonhourly Full-Time Workers from the Current Population Survey](#), 2018.
2. United States Department of Agriculture, “Table 7. Hired Farm Labor — Workers and Payroll: 2017” [PDF file] [Census of Agriculture](#), accessed December 19, 2019.
3. Julia Mitric, “[Changes in Overtime Rules Coming for California Farmworkers](#),” *Capital Public Radio*, December 21, 2018.
4. New York State Department of Labor, “[Minimum Wage](#)” (web page), accessed December 20, 2019.
5. Governor Andrew M. Cuomo Pressroom, “[Governor Cuomo Signs Farm Workers Bill](#)” (press release), July 17, 2019.
6. This guidance was in effect from December 9, 1988, until January 16, 2009, and again from March 2, 2009, until November 8, 2018. U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, FLSA 2009-16 (Jan. 16, 2009); U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, FLSA 2009-23 (Jan. 16, 2009); U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, FLSA 2018-27 (Nov. 8, 2018).
7. 84 Fed. Reg. 53957.
8. Heidi Shierholz and Dave Cooper, “[Workers Will Lose More Than \\$700 Million Annually Under Proposed DOL Rule](#),” *Working Economics* (Economic Policy Institute blog), November 30, 2019.
9. The methodology behind our national level estimate that workers will lose \$705 million annually if the 80/20 rule is abolished takes into account state minimum wages and tipped minimum wages that are higher than the federal levels. Due to small sample sizes, however, we could not get state-level estimates using that methodology. Instead, we used data on earnings in food service by state from the Quarterly Census of Employment and Wages (QCEW) from the U.S. Bureau of Labor Statistics to allocate the \$705 million across states. In particular, QCEW data show that workers earned \$166.2 billion in wages in 2018 in food service (restaurants and bars and other eating and drinking places) in states that have a tip credit (all states and the District of Columbia *except* Alaska, California, Hawaii, Minnesota, Montana, Nevada, Oregon, and Washington). Of that \$166.2 billion, \$4.8 billion, or 2.9%, was earned in Colorado. Applying that share—2.9%—to \$705 million yields \$20.5 million.
10. Margaret Poydock and Heidi Shierholz, “[EPI Comments on the Department of Labor’s Proposed Rule Regarding the Fluctuating Workweek Method](#),” Economic Policy Institute, December 5, 2019.