

Updating Colorado's overtime salary threshold

Raising the Colorado salary threshold for exemption from overtime to 2.5 times the minimum wage would restore vital protections against excessive work hours for hundreds of thousands of Colorado workers

Public Comments • By [David Cooper](#) • August 16, 2019

Michael Primo
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633 17th St., Suite 600, Denver, CO 80202

Re: CDLE Request for Information on the Colorado wage order rule

Submitted via email to michael.primo@state.co.us

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. We respectfully submit the following 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, because we believe this is an excellent opportunity for the department to strengthen vital protections and improve economic conditions for Colorado workers and their families.

As explained in detail below, we recommend that Colorado restore the protections against excessive work hours originally established in the Fair Labor Standards Act of 1938 by raising the state’s salary threshold for overtime eligibility—originally intended to exempt only well-paid executive, professional, and administrative workers—to 2.5 times the state minimum wage. Doing so would set the threshold at a value of \$62,400 in 2020 dollars, although the increase could be phased in gradually over several years beyond 2020. This would return the threshold to a level consistent with the salaries of bona fide executives, administrators, and skilled professionals, and would strengthen protections against excessive work hours for an estimated 393,000 workers in Colorado.

The purpose of overtime protections

The Fair Labor Standards Act (FLSA) requires employers to pay their employees at least the federal minimum wage for all hours worked, and caps at 40 the number of hours an employee can work in a workweek without additional compensation. The FLSA created the 40-hour workweek in America by requiring that employers pay an “overtime” premium of 1.5 times an employee’s regular rate of pay for all hours worked beyond 40 hours. (Prior to the FLSA’s passage, it was not uncommon for workers to work six days a week.¹) Overtime protections ensure that employers have “skin in the game” when they ask employees to work long hours by making it more expensive to insist upon excessive hours of work. This overtime pay premium leads to two outcomes: 1) employees are fairly compensated when required to work long hours; and 2) employers are incentivized to hire more employees rather than overworking existing staff.

From the beginning, the law applied to both salaried employees and hourly workers. Congress and the Roosevelt administration recognized at the outset that there's no inherent difference between an hourly worker and a salaried worker; how they are paid is entirely at the discretion of the employer. And salaried employees need time with their families and time for themselves just as much as hourly workers do.

In the FLSA, Congress provided overtime protections to most workers, but directed the Secretary of Labor to exempt “bona fide” executive, administrative, and professional (EAP) employees from these protections under the presumption that true executives, administrators, and skilled professionals possess enough individual bargaining power in the labor market and workplace that they are not at significant risk of exploitation. As former OSHA Commissioner Ross Eisenbrey and former White House Economist Jared Bernstein point out in a 2014 report:²

It is noteworthy that the exclusion is preceded by the modifier “bona fide,” a signal that not just anyone with a corresponding title is to be excluded from the act’s protections. Congress knew from experience with exemptions under the National Industrial Recovery Act’s industrial codes and the President’s Reemployment Agreement (which in 1933 began setting maximum work hours and minimum wages) that employers would try to avoid coverage by misclassifying ordinary workers as managers, executives, or other kinds of exempt “bosses.”

The U.S. Department of Labor (DOL) recognized that the simplest, most straightforward indication of genuine EAP workers’ greater bargaining power was their higher levels of pay. Thus, to prevent the abusive misclassification of rank-and-file workers as overtime-exempt executives and administrators, DOL set a salary threshold for EAP-exempt status at \$30 per week in 1938—the equivalent of 3.0 times a 40-hour workweek at the minimum wage. No worker being paid less than this amount could be denied overtime when they worked more than 40 hours per week, regardless of their job duties.

Background on updating the EAP exemption

From 1940 through 1975, DOL periodically amended its overtime regulations, raising the salary threshold and making changes to the “duties test,” a fairly complicated test of the employee’s tasks and responsibilities that would establish them as a bona fide executive, manager, or highly trained professional *so long as they were paid above the salary threshold*. For many years, DOL maintained multiple duties tests and corresponding salary thresholds. “Long tests” were detailed assessments of executive, administrative, or professional employees’ job duties that restricted the amount of time an employee could perform “nonexempt” duties. The “short test” was far simpler, and could be quickly applied by employers to determine a worker’s exempt status. The more stringent long duties tests were paired with lower salary thresholds, while the more lenient short duties test required meeting a higher salary threshold. The objective of all of these was to strictly limit exemption from overtime to only those workers who genuinely could be considered bona fide executives, administrators, and skilled professionals.

As it was raised throughout the decades prior to 1975, the salary threshold attached to the short test—the simplest assessments of employee job responsibilities—averaged a level equal to 3.1 times the federal minimum wage. The salary threshold was as high as 6.3 times the minimum wage in 1949, and was briefly as low as 2.3 times the minimum wage in 1968 and 1969. In fact, these were the only two years in which the threshold fell below 2.5 times the minimum wage prior to 1978.³

In 1975, the last time it was meaningfully updated, the short-test overtime salary threshold was set at \$250 per week—the equivalent of 3.0 times the federal minimum wage. At that level, the threshold covered nearly 63 percent of all salaried workers in the United States—meaning that unless they qualified under the complex requirements of the EAP long tests, they were automatically eligible for overtime when they worked more than 40 hours per week. Unfortunately, between 1975 and 2003, the salary threshold was left unchanged and the share of the workforce eligible for overtime fell precipitously. By 2003, only 3 percent of salaried workers were covered under the short-test threshold.⁴

In 2004, the Department of Labor under the Bush administration—responding to employer complaints over the complexity of the duties tests—amended the regulation to eliminate the long versions of the test, establishing the short version as the sole duties test. At the same time, DOL raised the salary threshold for exemption, but did so to a level that was far below precedent. DOL set the threshold where it remains today: \$455 per week, the equivalent of \$23,660 in annual salary (this would be the equivalent of \$31,530 in 2018 dollars). The increase raised the share of the salaried workforce automatically eligible for overtime to roughly 15 percent, certainly an improvement, but far short of the nearly 63 percent covered in 1975. Unfortunately, because the Bush DOL regulation did not incorporate any automatic future adjustment mechanism, the EAP salary threshold has remained unchanged since. As of 2016, the share of salaried workers covered by the salary threshold had fallen to less than 7 percent.⁵

Recent federal efforts to update the salary threshold

As my EPI colleague and former Chief Economist at the U.S. Department of Labor Heidi Shierholz noted in recent public comments, in 2016 the Department of Labor finished an exhaustive two-year rulemaking process to raise the FLSA's salary threshold for the EAP exemption.⁶ The department met with over 200 individuals and entities, including employees, employers, business associations, nonprofit organizations, employee advocates, unions, state and local government representatives, tribal representatives, and small businesses.⁷ The department also received and reviewed over a quarter million public comments and conducted a thorough economic impact analysis. The department issued a final rule that would have raised the EAP salary threshold to \$913 per week, or \$47,476 on an annualized basis, the latter being the 40th percentile of the earnings of full-time salaried workers in the lowest-wage Census Region, which was at the time, and continues to be, the South.⁸ (This threshold level would have covered 33 percent of the U.S. salaried workforce, and 31 percent of salaried workers in Colorado.⁹) Further, the rule

provided that the threshold would be updated every three years to the 40th percentile of the earnings of full-time salaried workers in the lowest-wage Census Region, in order that the threshold would not continually erode over time as the wage distribution rises. EPI projects that the 2020 level of the threshold under the 2016 rule would be \$982 per week (\$51,064 for a full-year worker).

In November 2016—just before the 2016 rule was set to go into effect—a single district court judge in Texas enjoined the department from enforcing the rule, and the court later erroneously held the rule to be invalid. Instead of defending the rigorously determined threshold, the Labor Department under the Trump administration decided to rescind the 2016 rule and promulgate a new regulation with a much lower salary threshold. The department's 2019 proposal is to set the salary threshold under which most salaried workers are eligible for overtime pay when they work more than 40 hours per week at \$679 per week in 2020 (\$35,308 for a full-year worker). A weekly wage of \$679 is the projection to January 2020 of the 20th percentile of the earnings of full-time salaried workers in the lowest-wage Census Region, currently the South, and/or in the retail industry, excluding nonexempt workers and workers who are not subject to the FLSA or who are not subject to the salary level test. The proposal does not include automatic updating.

Though an improvement over the current threshold, the salary threshold of \$35,308 proposed in the Trump administration's rule cannot possibly be construed as an executive-level salary, and it will leave millions of low-paid salaried workers throughout the U.S. vulnerable to excessive work hours without recourse or additional compensation. EPI estimates that the Trump DOL's proposed rule would cover only an estimated 8 percent of the Colorado salaried workforce.¹⁰

Updating Colorado's overtime salary threshold

The Economic Policy Institute strongly encourages CDLE to use its authority to increase the Colorado salary threshold for the EAP exemption from overtime and follow the example of the Washington State DOL by setting the Colorado threshold at 2.5 times the state minimum wage.¹¹ 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. For example, CDLE could issue a rule increasing the threshold to 1.5 times the minimum wage in 2020, 1.75 times the minimum wage in 2021, 2.0 times the minimum wage in 2022, 2.25 times the minimum wage in 2023, and 2.5 times the minimum wage in 2024.

Setting the Colorado EAP salary threshold at 2.5 times the minimum wage 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 shown in the last two columns of **Table 1**, a Colorado threshold at 2.5 times the minimum wage is consistent with the 2016 Obama administration's aim to set the federal overtime threshold at the 40th percentile of the earnings of full-time salaried workers. Because the 2016 federal rule would have applied nationwide, DOL based it upon the 40th percentile of weekly earnings for salaried

Table 1

Proposed Colorado salary threshold for EAP exemption and projected 40th percentile salaries in the West Census Region, 2020–2024

Year	Colorado minimum wage (actual and projected)	Proposed overtime salary threshold	Proposed threshold in weekly salary	Proposed threshold in annual salary	40th percentile of weekly earnings in the West Census Region (projected)	40th percentile annual salary equivalent
2020	\$12.00	1.5 x minimum wage	\$720	\$37,440	\$1,173	\$61,013
2021	\$12.31	1.75 x minimum wage	\$862	\$44,808	\$1,210	\$62,894
2022	\$12.62	2.0 x minimum wage	\$1,010	\$52,499	\$1,246	\$64,793
2023	\$12.94	2.25 x minimum wage	\$1,165	\$60,559	\$1,284	\$66,759
2024	\$13.26	2.5 x minimum wage	\$1,326	\$68,952	\$1,322	\$68,744

Notes: Projections for the Colorado minimum wage for 2021–2024 are based upon the Congressional Budget Office's (CBO) January 2019 projections for the Consumer Price Index (CPI). The 40th percentile of earnings is projected at the CBO's projections for CPI plus 0.5 percent.

Source: Economic Policy Institute analysis using Congressional Budget Office January 2019 Economic Forecast and Bureau of Labor Statistics' Research series on deciles of usual weekly earnings of nonhourly full-time workers from the Current Population Survey, 2018

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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 salary in the West Census Region is projected to be \$1,173 in 2020—the equivalent of \$61,013 annually.¹² If salaries grow only slightly faster than inflation over the next five years, the 40th percentile for the West will equal roughly 2.5 times the Colorado minimum wage in 2024.¹³

Finally, if the salary threshold were linked to 2.5 times the state minimum wage, CDLE would not need to revisit this issue in the future, as the threshold would be automatically updated annually as the minimum wage is adjusted for inflation. This is smart policy, as it will ensure that the threshold does not again erode over time, and avoids the costly and time-consuming process of rulemaking. Automatic indexing is advantageous for employers as well, as it allows them to know exactly what to expect each year, rather than having to guess when the department or lawmakers may choose to enact changes to the regulation.

How this change would affect Colorado workers, employers, and the economy

The Economic Policy Institute estimates that raising the EAP salary threshold to 2.5 times the state minimum wage—the equivalent of \$62,400 annually in 2020 dollars—would make approximately 146,000 salaried employees in Colorado newly eligible for overtime when they work more than 40 hours per week.

Importantly, the change would also strengthen overtime protections for 247,000 salaried workers in the state who are likely eligible for overtime protection right now, but who may be misclassified as exempt. Thus, setting an appropriate threshold brings clarity to the rights of employees who are already covered and to the responsibilities of their employers. Many salaried employees paid above the current \$455 per week threshold are entitled to overtime pay because their primary duties are not executive, administrative, or professional. This includes workers in scores of occupations, such as paralegals, dental assistants, and copy editors. Most bookkeepers are entitled to overtime pay, for example, but many do not know it, and neither do their bosses. With a salary threshold at 2.5 times the minimum wage, this ambiguity goes away—employees paid less could be sure of their rights and employers would know their responsibilities.

Altogether, there are about 393,000 salaried employees in Colorado who would have their right to overtime established or clarified by this higher threshold.

As a result of the proposed change, some employers will have to adjust their pay, scheduling, and possibly staffing practices because of new overtime eligibility for some of their staff. There are several ways employers could adjust:

1. They can pay overtime (time-and-a-half) for the hours in excess of 40 per week worked by employees whose salaries are below the threshold.
2. They can reduce the hours of overworked employees and share those employees' workloads with other staff. For example, an assistant manager who now helps stock shelves and cleans floors, adding 20 extra hours to her workweek without any extra compensation, could have that work assigned to part-time employees, who would benefit from the extra hours and pay. Some employers may find it advantageous to hire additional staff rather than pay the overtime premium to existing staff.
3. They can raise salaries above the threshold if they want to continue working certain employees more than 40 hours a week without paying for or keeping track of overtime.
4. They can manage employees' time more efficiently, avoiding late-in-the-day meetings, for example, and require that employees complete their weekly tasks within 40 hours.¹⁴

It is important to understand that none of these changes would require reclassifying any salaried staff as hourly employees—although some employers may choose to do so. It would simply require that employers record hours worked when eligible salaried staff work

more than 40 hours per week. Because most employers already have at least some nonexempt staff, every major payroll system can already process overtime pay, meaning that most employers will not need to adopt new payroll or compliance systems. The change would also not stop or impede employers from having flexible scheduling policies—employees could still arrange flexible schedules; they would simply start gaining additional pay when their schedules exceed 40 hours per week.

For affected workers, these changes will lead to clear improvements in their well-being. A worker who previously was required to work long hours will now receive higher pay (either as a result of overtime premium pay or a salary increase up to the new threshold), more free time away from work, or both.

This change will also benefit the broader Colorado economy. First, 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.¹⁵ Second, as employers adjust staff schedules and workloads, they may find it advantageous to hire additional staff instead of paying overtime premiums for extra hours by existing staff. In this way, raising the overtime threshold can stimulate job growth. Third, because at least some portion of affected workers are likely to receive higher pay, expanding overtime protections can strengthen consumer buyer power, particularly for middle-class households whose spending is the core driver of U.S. economic growth. Fourth, excessive work hours are linked to a variety of worse health outcomes, including increased risk of stroke and heart disease.¹⁶ Thus, reducing overwork has public health benefits. Finally, giving workers more time away from work gives them invaluable time to spend with their families, to help their children with homework, to spend time outdoors, to engage in volunteer or civic activities, or to care for themselves or loved ones.

Conclusion

Time is the one resource that we can never get more of. Just as workplace regulations protect people's health and safety, they also need to value and protect workers' time. Unfortunately, federal policymakers have let these protections erode for far too long. As is often the case, state policymakers must now step in to protect Colorado's workforce from unfair and potentially exploitive labor practices.

Raising the Colorado salary threshold for EAP exemption from overtime would restore one of the core labor standards that helped build and grow the middle class throughout the 20th century—the right to be compensated fairly when asked to work excessive hours. To do this, the Colorado Department of Labor and Employment must set a threshold that reflects genuine executive and professional-level salaries; otherwise the regulation will not provide adequate incentive for employers to balance the additional hours they require of staff with the cost of overtime pay or raising salaries up to the new threshold.

Setting the threshold at 2.5 times the state minimum wage would be a reasonable and appropriate salary level—one that is consistent with pre-1980s precedent and with the

2016 U.S. Department of Labor’s rulemaking. By linking the threshold to the state minimum wage, it would also automate future updates, providing clarity for employers and employees alike.

Thank you for the opportunity to submit comments on the rule. Please do not hesitate to contact me at (202) 533-2566 if you have questions about EPI’s empirical analysis or any other element of these comments.

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1. Ross Eisenbrey, “[Testimony on the Department of Labor’s Regulation Expanding Overtime Rights for Salaried Employees](#),” testimony before the U.S. House Committee on Small Business, Washington, D.C., June 23, 2016.
 2. Jared Bernstein and Ross Eisenbrey, [New Inflation-Adjusted Salary Test Would Bring Needed Clarity to FLSA Overtime Rules](#), Economic Policy Institute, March 2014.
 3. Economic Policy Institute analysis of the Fair Labor Standards Act and amendments.
 4. Celine McNicholas, Samantha Sanders, and Heidi Shierholz, [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](#), Economic Policy Institute, November 2017.
 5. Celine McNicholas, Samantha Sanders, and Heidi Shierholz, [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](#), Economic Policy Institute, November 2017.
 6. See Heidi Shierholz, “[EPI Comments Regarding the Department of Labor’s Proposed Overtime Rule](#),” public comments submitted via regulations.gov to Amy DeBisschop, Acting Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, May 21, 2019.
 7. [Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees \[final rule\]](#), 81 Fed. Reg. 32396 (May 23, 2016).
 8. U.S. Department of Labor, Wage and Hour Division, “[Final Rule: Overtime](#),” revised January 2018.
 9. Economic Policy Institute analysis using Current Population Survey microdata.
 10. Economic Policy Institute analysis using Current Population Survey microdata.
 11. See Washington State Department of Labor & Industries, “[Proposed Washington State Rule Would Restore Labor Protections for Thousands of Overtime-Exempt Workers](#)” (press release), June 5, 2019.

12. 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.
13. This projection assumes salaries at the 40th percentile grow 0.5 percent faster annually than inflation.
14. For a longer discussion of these methods of adjustment, see Lonnie Golden, “[Long-Overdue Overtime Update Will Give Boost to Workers and Economy](#),” *The Conversation*, July 17, 2015.
15. See John Pencavel, “[The Productivity of Working Hours](#),” *Economic Journal* 125, no. 589 (2014): 2052–2076; 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); Allard E. Dembe, J. Bianca Erickson, Rachel G. Delbos, and Steven M. Banks, “[The Impact of Overtime and Long Work Hours on Occupational Injuries and Illnesses: New Evidence from the United States](#),” *Occupational and Environmental Medicine* 62, no. 9 (2005): 588–597; Heather Boushey and Bridget Ansel, [Overworked America: The Economic Causes and Consequences of Long Work Hours](#), Washington Center for Equitable Growth, May 2016.
16. Mika Kivimäki et al., “[Long Working Hours and Risk of Coronary Heart Disease and Stroke: A Systematic Review and Meta-Analysis of Published and Unpublished Data for 603,838 Individuals](#),” *The Lancet*, August 20, 2015.