



December 2018

COLORADO NEEDS A MODERN DEPARTMENT OF LABOR AND EMPLOYMENT TO PROTECT THE STATE'S WORKERS AND RESPONSIBLE EMPLOYERS

The Colorado Department of Labor and Employment (CDLE) is one of the most important agencies in state government for attacking economic inequality. It is charged, among other things, with the critical tasks of ensuring that workers receive the pay they are legally owed and administering the states' workers' compensation and unemployment insurance benefits, two of the state's largest and most important social safety nets. CDLE has the power to ensure workers' rights are protected and responsible businesses are not forced to compete with law-breaking employers.

Colorado has yet to leverage the potential of this agency to achieve all it can for the workers and employers of Colorado. The Polis Administration has an opportunity to do more. Relying on best practices developed by state, city, and federal agencies around the country, this report makes a series of recommendations for strengthening CDLE by: (1) adopting a strategic enforcement program in partnership with community organizations, reassuring immigrant workers who may fear coming forward to report violations, and cracking down on employers who retaliate against workers who do choose to speak up; (2) increasing CDLE's staff and budget in order to keep pace with Colorado's rapidly growing workforce and economy; (3) issuing rules or guidance to protect contracted and online platform workers; (4) restoring overtime pay to deliver a middle-class raise; and (5) updating, enforcing, and defending Colorado's workers' compensation and unemployment insurance programs.

1. ■ COLORADO NEEDS A PROACTIVE CDLE THAT USES STATE-OF-THE-ART ENFORCEMENT AND COMPLIANCE TOOLS TO PROTECT THE STATE'S WORKFORCE AND RESPONSIBLE EMPLOYERS

Every week, [millions of workers are cheated when employers short their paychecks](#), force them to work off the clock, fail to pay even the minimum wage, or skirt employment laws by denying they are employees. This type of wage theft is a national epidemic that robs U.S. workers and our economy of billions of dollars a year and hurts law-abiding employers who are put at an unfair disadvantage.

The situation in Colorado is no less dire. While our unemployment rate is among the lowest in the country, too many of our working families are struggling to make ends meet. For many, the core impediment to economic mobility is not a lack of available jobs; it is employers not paying them what they are owed.

The Colorado Fiscal Institute [reported](#) Colorado employers stole about \$750 million a year from their workers in 2014. And that number is likely even higher now, particularly as immigrant communities face increased fear of immigration consequences for reporting unlawful conduct by

employers. Wage theft at this scale harms workers, law-abiding employers, and the state of Colorado itself, which loses out on critical tax revenue.

Private enforcement efforts can only do so much. A [recent case](#) provides a helpful illustration: in 2018, a large group of drywall workers was able to recover approximately \$1 million in stolen wages and overtime pay for work performed on a large-scale downtown development project. Going forward, however, the employer has adopted arbitration agreements and class waivers that would make it very difficult for its workers to bring that same case today. Instead, those workers would need to rely on public enforcement efforts from state and local agencies.

CDLE should do more to enforce core labor protections. The Colorado Wage Act prescribes that “[i]t is the duty of the director [of CDLE] to inquire diligently for any violation of this article, and to institute the actions for penalties or fines provided for in this article in such cases as he or she may deem proper, and to enforce generally the provisions of this article.” C.R.S. § 8-4-111(1)(a). But the agency’s enforcement efforts are currently focused on adjudicating complaints of wage theft pursuant to the administrative adjudication process spelled out in C.R.S. § 8-4-111(2), rather than proactively enforcing labor laws. While the agency deserves credit for proposing procedures regarding future directed enforcement efforts, those proposed rules don’t go far enough. For example, [the proposed rules](#) require the agency to provide employers with notice of an investigation 14 days before investigative steps are taken.

Even without increasing CDLE’s budget, the Polis Administration could significantly strengthen enforcement by adopting two best practices that are being successfully used by other enforcement agencies across the country: (1) adopting a targeted, strategic enforcement program in partnership with community organizations across the state; and (2) taking strong action to combat retaliation and protect workers who come forward to report violations. These steps would serve the interests of both workers and law-abiding businesses that are too often put at an unfair disadvantage when competitors get away with cheating their workers. It would also help to ensure economic prosperity and growth are shared across Colorado’s economy.

CDLE Should Implement Strategic Enforcement Strategies and Partner with Community Organizations

Enforcement of labor standards faces several serious obstacles in the current landscape:

- Labor standards enforcement agencies at the federal, state, and local levels all face significant constraints when it comes to resources, especially given the prevalence of wage theft across industries.
- Widespread changes to the way employment relationships operate, such as increased use of outsourcing, misclassification, and franchising, and foster noncompliance can obscure both employment relationships and accountability.

- In many contexts, enforcement of our labor standards laws, such as minimum wage and overtime protections, is impeded by relying on complaints from workers who may not understand their rights or may be fearful of coming forward to assert them.
- And even when workers do understand their rights have been violated, impediments to private enforcement approaches, including arbitration clauses and class action bans, often prevent them from filing suit.

Understanding these and other limitations, academics, advocates, and other practitioners around the country have focused on developing best practices for what has come to be termed “strategic enforcement.”

As Colorado native David Weil, who headed the U.S. Department of Labor’s Wage and Hour Division during the Obama administration, has explained, strategic enforcement policies “aim to change employer behavior so that practices that result in underpayment of wages do not occur in the first place.”¹ It also “entails changing behavior of employers at the market level, rather than on a case-by-case basis.”² A 2018 report defines strategic enforcement as “agencies being selective about where and how they use resources” so that “[a]gencies prioritize and direct efforts to where the problems are largest, where workers are least likely to exercise their legal rights, and where the agency can impact industry-wide compliance.”³ In other words, strategic enforcement is ultimately about directing enforcement in a way that changes the culture of compliance and leverages limited public resources to maximize public benefit.

Considering the prevalence of labor standards violations (both reported and unreported) and CDLE’s resource limitations, Colorado should adopt a robust strategic enforcement strategy that includes these five components:

- **Target Actors at the “Top” of Industry Structures:** Companies operating at the top of industry structures can exert valuable influence on companies operating throughout the industry.⁴ CDLE should target violators at the top of the employment structure, including franchisors and contractors. Where possible, CDLE can also grow collaborative relationships with responsible brands to encourage greater compliance among direct employers further down the employment structure.

¹ David Weil, Boston University, *Improving Workplace Conditions Through Strategic Enforcement: A Report To the Wage and Hour Division* (May 2010) at 75, <https://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

² *Id.*

³ Tanya L. Goldman, *The Labor Standards Enforcement Toolbox* (Tool 4: Introduction to Strategic Enforcement) (Aug. 2018), https://www.clasp.org/sites/default/files/publications/2018/09/2018_introductiontostrategicenforcement.pdf.

⁴ Weil at 77–80.

- **Enhance Deterrence:** CDLE should target enforcement efforts and calibrate penalties to maximize deterrence.⁵ Weil has suggested imposing higher civil monetary penalties in some cases, assessing liquidated damages more broadly where possible, and publicizing the agency's enforcement activities widely.⁶ The agency should also target resources toward employers that are unlikely to be held accountable through private enforcement efforts because, for example, they have used arbitration agreements and class waivers that make it difficult for workers to hold them accountable through private litigation. Furthermore, for particularly egregious violations, an agency carrying out strategic enforcement may also consider referring a case for criminal investigation, as well as policies to address situations like labor trafficking.⁷
- **Combine a Complaint-Based Approach with "Directed Investigation Activity":** Currently, CDLE investigations are driven exclusively by complaints. But complaint-based enforcement models will always be impeded by pervasive fear among workers of asserting their rights and a lack of understanding of labor standards, particularly among misclassified workers who may not understand that employment protections apply to them. Instead of relying exclusively on complaints, CDLE should use complaints, targeted covert and overt investigations, and information obtained from other state, federal, and local agencies to identify strategic targets whether or not their workers have filed complaints.⁸
- **Promote Ongoing Compliance:** In order to "create sustainable and systemic change" through strategic enforcement, CDLE should also "creat[e] mechanisms . . . that promote ongoing compliance beyond the boundaries of one firm" or one enforcement action.⁹ Potential mechanisms may include monitoring and settlement agreements that address future behavior.¹⁰

⁵ Weil at 81.

⁶ Weil at 81–82; see also National Employment Law Project, The Top 5 Enforcement Tools for Local Minimum Wage Laws (Dec. 2015) at 3, <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Top-Five-Enforcement-Tools-Local-Minimum-Wage.pdf> (discussing the importance of strong remedies and penalties in order to deter violations); National Employment Law Project for the Just Pay Working Group, Just Pay: Improving Wage and Hour Enforcement at the United States Department of Labor (2010) at 10, <https://www.nelp.org/wp-content/uploads/2015/03/JustPayReport2010.pdf> (discussing the importance of seeking all remedies available).

⁷ Weil at 82–83; see also National Employment Law Project, Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft (Jan. 2011) at 34, <https://www.nelp.org/wp-content/uploads/2015/03/WinningWageJustice2011.pdf> (discussing the use of criminal penalties as part of effective enforcement); Terri Gerstein, "Stealing From Workers Is a Crime. Why Don't More Prosecutors See It That Way?", *The Nation*, May 24, 2018, <https://www.thenation.com/article/stealing-from-workers-is-a-crime-why-dont-prosecutors-see-it-that-way/> (discussing criminal penalties in the context of wage theft).

⁸ *Id.*; see also National Employment Law Project, Winning Wage Justice: Strategies for Effective Local Wage Law Enforcement (Oct. 2017) at 3, <https://s27147.pcdn.co/wp-content/uploads/strategies-for-effective-local-wage-law-enforcement.pdf> (noting how an agency may approach complaints differently based on the potential impact of an investigation).

⁹ Weil at 87.

¹⁰ Weil at 87–88; see also National Employment Law Project, Winning Wage Justice: Strategies for Effective Local Wage Law Enforcement (Oct. 2017) at 5, <https://s27147.pcdn.co/wp-content/uploads/strategies-for-effective-local-wage-law-enforcement.pdf> (discussing the potential use of settlements to promote long-lasting compliance).

- **Partner with Community Groups:** Numerous experts on wage theft and enforcement also recommend enforcement agencies form strategic partnerships with community groups and other non-governmental organizations.¹¹ Cities like San Francisco, Seattle, and Los Angeles have established strategic partnerships with community-based organizations to leverage existing resources and expertise. Community-based organizations have ties to workers in specific industries and sectors, as well as roots in certain racial or ethnic communities, which can significantly improve the agency's outreach and education efforts; detection and reporting of violations; and identification of strategic enforcement targets. Some specific ways for enforcement agencies to engage community groups include:¹²
 - Regular engagement with community advocates, state enforcement agencies, and other stakeholders to learn of issues faced by workers;
 - Convening task forces on specific problem areas or industries, inviting workers' advocates and stakeholders to share information and participate in other appropriate ways;
 - Allocation of resources to community groups to conduct education and outreach to workers about their rights and identify workers and workplaces with wage violations.

As one of the longest-running local wage enforcement agencies, the experience of San Francisco's Office of Labor Standards Enforcement (OLSE) offers compelling evidence that strong community partnerships can substantially augment enforcement capacity. The agency created the Workers' Rights Community Collaborative (WRCC), comprised of worker centers and community-based organizations and focused on education and outreach concerning San Francisco's local labor law. In FY 2014–2015, OLSE secured \$4,527,758 in back wages and interest for workers. 85 percent of the complaints filed with OLSE came from WRCC partners.¹³ More recently established local enforcement agencies have followed

¹¹ See, e.g., National Employment Law Project, The Top 5 Enforcement Tools for Local Minimum Wage Laws (Dec. 2015), <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Top-Five-Enforcement-Tools-Local-Minimum-Wage.pdf> (naming "Community Partnerships" as one of the top 5 tools for effective enforcement of minimum wage laws); Janice Fine, New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships between Government and Civil Society Are Showing the Way Forward, Univ. of Chicago Legal Forum (Vol. 2017, art. 7) (2018), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1594&context=uclf>; Tia Koonse et al., UCLA Center for Labor Research and Education and UC Berkeley Center for Labor Research and Education, Enforcing City Minimum Wage Laws in California: Best Practices And City-State Partnerships (Oct. 2015), <http://laborcenter.berkeley.edu/pdf/2015/minimum-wage-enforcement.pdf>; Tanya L. Goldman, The Labor Standards Enforcement Toolbox (Tool 4: Introduction to Strategic Enforcement) (Aug. 2018), https://www.clasp.org/sites/default/files/publications/2018/09/2018_introductiontostrategiceenforcement.pdf.

¹² National Employment Law Project, Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft (Jan. 2011) at 39, <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf>.

¹³ On file with author.

OLSE's lead. Seattle's office, established in 2015, aims to utilize \$1.5 million in 2017 and an additional \$1.5 million in 2018 to fund its Community Outreach and Education Fund.¹⁴

California's Labor Commissioner has incorporated community partnerships into the state's enforcement work. For example, the agency has successfully contracted with the Wage Justice Center in Los Angeles to improve collection of unpaid wages¹⁵ and separately partnered with community organizations to "identify workers for complaints and communicate with workers more effectively."¹⁶ A recent partnership between the California Department of Labor Standards Enforcement, the National Employment Law Project, and local worker organizations has provided grants to groups who work to identify cases for enforcement and collaborate closely with the state agency.¹⁷

CDLE Should Make it Easier for Workers to Come Forward and Crack Down on Employers Who Retaliate Against Workers Who Do Speak Up

Even if CDLE embraces a strategic enforcement model, effective enforcement will never be fully possible if workers fear the consequences of coming forward. CDLE must do more to ensure workers see the agency as a partner in protecting their rights.

First, CDLE should expressly and publicly announce that Colorado employment protections apply to all workers, regardless of their immigration status, and CDLE will not cooperate in any way or share information with federal immigration enforcement authorities. Data supports the widespread experience of workers and advocates that wage theft markedly increases when immigrant workers are fearful of the immigration consequences of reporting violations to government agencies. The U.S. Department of Labor, for example, had tremendous difficulty completing investigations in early 2017, when immigrants feared a sharp increase in immigration enforcement.¹⁸ CDLE should do everything it can to communicate to workers that its mission is to protect them from exploitation, not to enforce or facilitate the enforcement of federal immigration laws.

Second, CDLE should do more to guard against employer retaliation. A recent national survey found 43 percent of workers who complained to their employer about their wages or working

¹⁴ Seattle Office of Labor Standards, Community Outreach and Education Fund, 2017–2019 Guidelines, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiv57Trp_rVAhUJdyYKHZG0AcQFggoMAA&url=https%3A%2F%2Fwww.seattle.gov%2FDocuments%2FDepartments%2FLaborStandards%2FOLS%2520RFP_2016-2018_1103201616.doc&usq=AFQjCNFN2AlvOnnkEo9y-9GpMmVds8Rdog.

¹⁵ Seema N. Patel et al., California Co-Enforcement Initiatives that Facilitate Worker Organizing at 17, Harvard Law School Symposium "Could Experiments at the State and Local Levels Expand Collective Bargaining and Workers' Collective Action?" (2017), <http://harvardlpr.com/wp-content/uploads/2017/11/Patel-Fisk-CoEnforcement.pdf>.

¹⁶ *Id.* at 18.

¹⁷ *Id.* at 19.

¹⁸ Sam Levin, *The Guardian*, March 30, 2017, available at <https://www.theguardian.com/us-news/2017/mar/30/undocumented-workers-deportation-fears-trump-administration-department-labor>

conditions experienced retaliation.¹⁹ Retaliation can severely undermine the goals of a minimum wage law. A recent national survey found 20 percent of workers never made a complaint because they feared retaliation or thought it would not make a difference.²⁰ Undocumented immigrant workers are particularly vulnerable to retaliation. By calling or threatening to report undocumented workers to Immigration and Customs Enforcement, employers can coerce workers into silence.²¹

In order to better address retaliation, the California Labor Commissioner has established a separate Retaliation Complaint Investigation Unit (RCI).²² Workers can submit complaints reporting alleged retaliation to this unit and the unit may issue determinations following an investigation.²³ When the Labor Commissioner determines that a violation occurred, they may issue an order to cease and desist and “may order, where appropriate, rehiring or reinstating the aggrieved employees, reimbursing them for lost wages and interest thereon, paying civil penalties, and posting a notice acknowledging the unlawful treatment of the employees.”²⁴

Directing a particular unit within the agency to address retaliation claims helps the agency tackle those cases faster and more efficiently. CDLE should consider adopting this model in order to ensure workers experiencing retaliation receive the protection they need to secure their livelihood and, in some cases, their very safety.

2. CDLE'S STAFF AND BUDGET MUST CATCH UP WITH THE NEW SCALE AND COMPLEXITY OF COLORADO'S ECONOMY

A comparison between CDLE's Division of Labor Standards and Statistics staffing and funding in the late 1970s and current levels shows CDLE resources for enforcement of basic labor rights have been slashed in recent decades, while Colorado's workforce has more than doubled in size. The mismatch between CDLE's reduced enforcement staffing and budget, and the exploding state workforce it is charged with protecting, underscores the urgent need for the agency to adopt a more proactive and strategic enforcement program. It also provides the new administration an opportunity to prioritize CDLE for budget and staffing growth.

The current Division of Labor Standards and Statistics administers Colorado laws pertaining to: “wages paid, hours worked, minimum wage, labor standards, child labor, employment-related

¹⁹ National Employment Law Project, *Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft* (2011) at 55, <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf>.

²⁰ *Id.*

²¹ *Id.*

²² State of California Department of Industrial Relations, *Retaliation Complaint Investigations Unit (RCI)*, <https://www.dir.ca.gov/dlse/dlseRetaliation.html> (last viewed Nov. 20, 2018).

²³ Julia A. Su, California Labor Commissioner, 2017 Retaliation Complaint Report (Labor Code §98.75), <https://www.dir.ca.gov/dlse/RCILegReport2017.pdf>.

²⁴ *Id.*

immigration laws, and working conditions.”²⁵ The Division also “gathers, analyzes and produces comprehensive labor market information on employment conditions in Colorado and conducts union agreement elections, certifications of union provisions, and investigates and mediates allegations of unfair labor practices.”²⁶ In 1977, the then-Division of Labor administered substantially similar laws and programs.²⁷

In FY 2018-2019, the Division of Labor Standards and Statistics employed 56.1 full-time employees (FTEs) with a budget of \$4,094,954.²⁸ Between 1976 and 1977, the same Division of Labor employed 148 full-time employees with a budget of \$2,985,608, which in 2017 dollars translates to \$11,026,208 – two-and-a-half times the current budget. See Table A.

Colorado’s workforce is currently more than twice as large as it was in 1977 (2,658,600 nonfarm workers in 2017 compared with 1,058,100 nonfarm workers in 1977.) See Table B. Thus, while the Division of Labor Standards employed one FTE for every 7,149 workers in the state in 1977, the current Division employs just one FTE for every 47,390 employees across the state. See Table B.

Ultimately, this historical analysis reveals CDLE’s Division of Labor Standards and Statistics must now enforce key labor laws for a workforce 251% the size it was in 1977 on a budget that has shrunk by 63 percent in real, inflation-adjusted terms.

²⁵ Colorado Department of Labor and Employment, Colorado Department of Labor and Employment 2019-2020 Performance Plan at 9, https://www.colorado.gov/pacific/sites/default/files/FY19-20%20CDLE%20Performance%20Plan_0.pdf.

²⁶ *Id.*

²⁷ The Division of Labor in 1977 administered the Workmen’s Compensation Act; the wage payment law; the Colorado Youth Employment Opportunity Act; the Minimum Wages of Women and Child Labor Law; laws associated with prevailing wages, employees, and goods to be used on public works projects; other “activities associated with improving and maintaining good labor relations in the State;” the private employment and theatrical agency licensure program; public safety programs; a boiler and pressure vessel inspection program; an oil inspection program; and the Apprenticeship Council program. Colorado Department of Labor and Employment, Long Range Plan (Jan. 10, 1977) at 175, http://hermes.cde.state.co.us/drupal/islandora/object/co%3A11049/datastream/OBJ/download/Long_range_plan.pdf.

²⁸ According to a Colorado Department of Labor and Employment budget breakdown for FY 2018-19 (on file with author).

Table A. Current Staffing and Budget of the Division of Labor Standards and Statistics Are Much Smaller than in 1977

Staffing and Budget of the Division of Labor Standards and Statistics (Current) and the Division of Labor (1977)			
	1976-1977	FY 2018-2019	Difference
Full-Time Employees	148 ²⁹	56.1 ³⁰	<i>Current staffing just 38% of 1976-1977 staffing</i>
Budget	\$11,026,208 (The 1976-1977 budget of \$2,985,608 ³¹ equals \$11,026,208 in 2017 dollars when adjusted for inflation using the CPI-U-RS).	\$4,094,954 ³²	<i>Current budget just 37% of 1976-1977 budget</i>

Source: Analysis of Colorado Department of Labor and Employment, Long Range Plan (Jan. 10, 1977) and Colorado Department of Labor and Employment budget breakdown for FY 2018-19 (on file with author).

²⁹ Colorado Department of Labor and Employment, Long Range Plan (Jan. 10, 1977) at 193, http://hermes.cde.state.co.us/drupal/islandora/object/co%3A11049/datastream/OBJ/download/Long_range_plan.pdf (Total Full-Time employees authorized for the Division of Labor as of September 1, 1976).

³⁰ According to a Colorado Department of Labor and Employment budget breakdown for FY 2018-19 (on file with author).

³¹ Department of Labor and Employment, Long Range Plan (Jan. 10, 1977) at 180, http://hermes.cde.state.co.us/drupal/islandora/object/co%3A11049/datastream/OBJ/download/Long_range_plan.pdf.

³² According to a Colorado Department of Labor and Employment budget breakdown for FY 2018-19 (on file with author).

Table B. Colorado's Workforce Has Grown Significantly Since 1977 While CDLE's Dedicated Enforcement Staff Has Shrunk

Colorado Workforce (1977 vs. 2017) (Nonfarm employment) ³³			
1977	2017	Difference	Division of Labor Employees Per Worker in Colorado Workforce (Nonfarm employment)
1,058,100	2,658,600	Current workforce 251% the size of 1977 workforce	1977: 7,149 workers per Division of Labor FTE ³⁴ 2017: 47,390 workers per Division of Labor and Statistics FTE ³⁵

Source: Analysis of Federal Reserve Economic Data, Federal Reserve Bank of St. Louis (All Employees: Total Nonfarm in Colorado, Thousands of Persons, Annual, Not Seasonally Adjusted); Colorado Department of Labor and Employment, Long Range Plan (Jan. 10, 1977); and Colorado Department of Labor and Employment budget breakdown for FY 2018-19 (on file with author).

While it may be difficult restore CDLE funding and staffing to 1977 levels in light of TABOR constraints, the sharp decline in funding for an agency charged with protecting many of our most important employment protections should be addressed. The new administration has the opportunity to prioritize CDLE for increased staffing and funding, while simultaneously adopting a more strategic, targeted enforcement program in order to more effectively deploy the agency's limited current resources.

3. CDLE NEEDS TO ISSUE GUIDANCE TO PROTECT CONTRACTED AND ONLINE PLATFORM WORKERS

A major driver of unstable and insecure work is our increasingly "fissured" economy. Today, much of the workforce for major corporations is employed indirectly through temp and staffing agencies or other contract firms or labeled—and often mislabeled—as independent contractors. Employees wrongly treated as independent contractors are excluded from the protections of our core labor laws, such as the minimum wage, overtime, anti-discrimination protections, workers' compensation, and unemployment insurance. And employees working for major companies

³³ Analysis by Economic Policy Institute of Federal Reserve Economic Data, Federal Reserve Bank of St. Louis, <https://fred.stlouisfed.org/series/SMU08000000000000001A> (All Employees: Total Nonfarm in Colorado, Thousands of Persons, Annual, Not Seasonally Adjusted).

³⁴ See number of workers in nonfarm employment in 1977 divided by FTEs in 1976-77.

³⁵ See number of workers in nonfarm employment in 2017 divided by FTEs in 2018-2019.

indirectly through what are often thinly capitalized, fly-by-night contractors are left wondering: [who's the boss](#)? The practice is of particular concern in sectors where workers of color are relegated to low-paid and often dangerous work, such as janitorial, delivery, home care, agriculture, landscaping, security, hospitality, trucking, transportation, and warehousing.

Corporations' use of these work structures—subcontracting, temp and staffing, and calling workers “franchisees” or “independent contractors”—are key drivers of eroding labor standards and occupational segregation. They shift power away from workers toward corporations, and in many cases, are employed as a tactic to side-step compliance with labor laws.

As their workforces struggle with increasingly unstable work, states are responding with policy solutions to hold major companies that are the real economic actors accountable for the treatment of these workers.

CDLE Should Issue Clear Guidance on “Joint Employment” Responsibilities of Businesses and Misclassification of Independent Contractors

Under existing employment laws, companies that use contracted workforces to staff their operations can already be held responsible as “joint employers” for those employees’ labor standards. And many purported independent contractors are, in fact, misclassified. Tightening up joint employer and independent contractor standards and improving their enforcement are key strategies for improving accountability and job standards in the fissured economy.

In 2016, the Obama Labor Department issued [guidance outlining the basis for broad joint employer enforcement](#) and companion guidance under the Fair Labor Standards Act, as well as [companion guidance on independent contractor misclassification](#). However, the Trump Administration [withdrew both](#). CDLE should protect workers against the Trump rollback by adopting similar guidance or regulations to aid agency personnel, businesses, and workers in interpreting coverage of state employment laws such as wage and hour, anti-discrimination, unemployment insurance, and workers’ compensation.

CDLE Should Clarify That Baseline Employment Laws Apply to Online Platform Workers

When it comes to misclassification, corporations have, for decades, characterized workers as “self-employed” in order to shift economic risk onto workers while maximizing revenue for investors and CEOs. In the past, it was sectors like home care, trucking, and delivery that used these tactics. Today, it is also the companies that dominate the so-called on-demand, online platform, or “gig” economy that are aggressively seeking to shed responsibility for employees. By attempting to sidestep basic employment protections—from employer social insurance program contributions, to the minimum wage and overtime, to anti-discrimination and health and safety protections—these companies are leaving their workforces impoverished and vulnerable.

As the on-demand sector matures, the public is gaining a clearer understanding of the poor quality of these jobs. States and cities are responding both by clarifying that these workers are covered by our nation's baseline employment protections, and by promoting innovative sectoral solutions to improve wages and benefits for workers in sectors where work is dispatched both on- and off-online platforms, including transportation and domestic work. At the same time, the multi-billion-dollar gig economy corporations are mounting an aggressive lobbying push to try to exempt themselves from responsibility for the well-being of the people who perform their services.

Colorado should start addressing the problems created by misclassification in the gig economy by clarifying—through agency interpretation of existing laws or by amending those laws—that state employment laws (such as state minimum wage and overtime, anti-discrimination, unemployment insurance, and workers' compensation laws) protect on-demand workers regardless of whether the business labels them as "employees." This will ensure on-demand workers are treated as employees, and that on-demand platform businesses are accountable for the protections that all other employers provide.

For example, in April 2018 the California Supreme Court issued a unanimous decision in the *Dynamex* case that will make it harder for companies, including digital platform companies, to misclassify their employees as independent contractors. Under the "ABC" test adopted in *Dynamex*, businesses that seek to treat workers as independent contractors have to show that workers are (A) free from control and direction by the hiring company; (B) perform work outside the usual course of business of the hiring entity; and (C) are independently established in that trade, occupation, or business. This test is simple, clear, and easy to enforce. More than half of the states already have the ABC test in their state unemployment insurance laws, and several including Connecticut, Massachusetts, and New Jersey have adopted it for use under their wage and hour protections.

Similarly, Oregon's labor agency issued [an opinion advising that drivers at transportation network companies like Uber and Lyft qualify as employees](#) who are covered by the state's employment laws. [New York has ruled that platform employers](#) are covered under the state's unemployment insurance law. San Francisco amended its minimum wage protections to clarify that they apply to independent contractors and employees alike. The New York City Council recently passed a slate of laws meant to guarantee a \$15 hourly minimum wage to transportation network company (TNC) drivers and to stop the race to the bottom that has impoverished taxi drivers and TNC drivers alike. Through CDLE interpretation or amendment, Colorado should do the same for all baseline employment laws.

CDLE and the Administration Should Fight Employment Protection Carve-Out Bills

On defense, CDLE and the new administration should fight back against stealth attacks on platform worker rights, such as the "[marketplace platform bills](#)" that online platform employers have passed in several states to carve their workforces out of basic protections such as the minimum wage, unemployment insurance, and workers' compensation. The idea that it is

excessive or burdensome for the multi-billion-dollar tech giants of the platform economy to provide the same basic employment protections all other employers must follow is outrageous and should be rejected—as the Colorado legislature did in 2018 when such legislation was proposed.

4. CDLE SHOULD RESTORE OVERTIME PAY TO DELIVER A MIDDLE-CLASS RAISE

It used to be if your boss asked you to put in extra hours at work, you got overtime pay in return. Not anymore. Today, the share of salaried workers guaranteed overtime pay when they work more than 40 hours a week [has plummeted](#). Currently, [only about 8 percent of salaried workers](#) automatically qualify for overtime pay compared to 62 percent nationally who automatically qualified in 1975.³⁶ That's because the salary threshold under which salaried workers are guaranteed overtime when they put in long hours [hasn't been updated in years](#) and remains less than \$24,000.

This means millions of U.S. workers are working 50 or 60 hours a week, losing time with their families, and not getting any overtime pay for their hard work and dedication. It also means employers aren't hiring workers to do the extra work. The Obama administration ordered a long-overdue update of the overtime threshold to about \$48,000 a year. But a group of Republican state attorneys general blocked the increase, and the Trump Labor Department is now reconsidering the proposed rule and is expected to water it down.

[California](#), [New York](#), [Pennsylvania](#), and [Washington State](#) are already acting to deliver this long-overdue middle-class overtime raise for workers in their states.

Colorado should strive to join those states, but the new administration will have work to do in order to catch up. Under Colorado's current overtime rule, which is promulgated by CDLE pursuant to Colo. Rev. Stat. § 8-6-111(4), there is a broad exemption from overtime protections for administrative, executive, or professional staff, such as low-level managers at fast food or retail chains, so long as they are paid at least the minimum wage for all hours that they work in a workweek. On January 1, 2019, Colorado's minimum wage will go to \$11.10 per hour, which translates to \$444 for a 40-hour workweek. That means such workers are exempt from overtime under Colorado law so long as they are paid at least \$23,088 a year—a level that is even lower than the woefully out-of-date federal overtime salary threshold.

³⁶ Raising the Overtime Pay Threshold Will Help More Workers Get the Pay They Deserve. Economic Policy Institute, Fact Sheet, August 4, 2015. <https://www.epi.org/publication/raising-the-overtime-pay-threshold-will-help-more-workers-get-the-pay-they-deserve/>

CDLE should set a specific salary threshold for exempting workers from overtime pay that more accurately reflects current wages in the marketplace and the historic level of the threshold at the federal level. For example, it could use the overtime salary threshold enacted by the Obama Administration, which adjusted for projected wage growth would equal \$55,234 by 2022.

A 2018 [report](#) by the Bell Policy Center showed fully adjusting the 1975 federal overtime threshold for inflation would equal \$53,872 in 2017 dollars. By raising the salary threshold to this level, over 320,000 Coloradans would automatically qualify for overtime pay. Women, younger workers, people of color, and those with a high school diploma or some college would benefit the most proportionately.³⁷

5. CDLE SHOULD UPDATE, ENFORCE, AND DEFEND ITS WORKERS' COMP AND UNEMPLOYMENT INSURANCE PROGRAMS TO PROTECT COLORADO'S WORKERS AND ECONOMY

Along with crafting and enforcing Colorado's wage and hour laws, CDLE is also responsible for administering Colorado's workers' compensation and unemployment insurance benefit programs. This is a critically important function. Workers' compensation and unemployment insurance are among our most lasting and critical social safety nets. For individuals and families facing sudden injury or layoff, they are often all that guards against financial ruination. They often ensure children can continue to live in their homes, attend school, and have access to care even when their parents have fallen on hard times. On a social level, these programs provide critical stability through economic fluctuations and labor market contractions.

The new administration should take strategic action to restore these vital programs for workers in Colorado—and prepare their economies for the next recession or natural disaster.

Restore a Strong Unemployment Insurance System

The unemployment insurance (UI) system is the first line of defense against the economic impacts of unemployment. When working people lose their jobs for reasons beyond their control, such as recession or natural disaster, UI provides partial wage replacement that allows them to continue to meet basic needs – rent, food, transportation – while they seek the next best job. Unemployment compensation bolsters consumer spending and thereby stabilizes the economy during downturns.

³⁷ <http://www.bellpolicy.org/wp-content/uploads/2018/05/Modernizing-Overtime-Rules-in-Colorado-FINAL.pdf>.

Most economists agree that UI is a critical, effective automatic economic stabilizer. During the Great Recession, when the national unemployment rate peaked at 10 percent³⁸ (over 9 percent in Colorado) UI lifted more than 11 million Americans above the poverty line, prevented approximately 1.4 million home foreclosures,³⁹ and closed 18 percent of the gap in real GDP.⁴⁰ Without UI, families, businesses, and communities suffer the effects of downturns and disasters longer and more severely.

Over the past 10 years, Colorado has made modest improvements to its UI system. By expanding the workers who are eligible through the implementation of an alternative base period for calculating wages, clarifying that UI is available to workers who leave a job for compelling personal reasons, reorganizing the department for better customer service and faster benefit processing, simplifying the premium rates and increasing and indexing the taxable wage base. CDLE has taken steps in the right direction. However, with another recession likely in the coming years, Colorado should act to restore and preserve hard-earned benefits to protect workers, their families, and their communities from the inevitable downturn. In particular, Colorado should continue to crack down strategically and forcefully on misclassification to make sure all workers can benefit from UI. Colorado should do more to increase overall reciprocity rates (in 2017, just 22 percent of the unemployed in Colorado collected an unemployment check, compared to 33 percent in 2015), making this important program available to more people who have lost their jobs through no fault of their own.

The State should also shore up its UI program by increasing the taxable wage base used to calculate employer premiums. While CDLE recently convened a stakeholder group to explore increasing the wage base to ensure solvency in a future recession no action was taken.⁴¹ At that time, CDLE recommended stepping up the taxable wage base to \$24,000 over a period of three years and indexing, coupled with a drop in the minimum premium rate to zero for businesses with the best experience rating. Right now, premiums are based on a maximum wage base of \$12,600. That is substantially less than the wage base used to calculate premiums in neighboring states like New Mexico (\$24,200), Wyoming (\$24,700), and Utah (\$34,300). Without taking action, a downturn will put Colorado and its workers at a serious disadvantage. In fact, Colorado has only about 7 months of reserves in its UI trust fund to pay benefits at a recession level, which ranks 37th in the nation. CDLE should reconvene its stakeholder group and revisit the proposal it presented in 2017.

NELP's [extensive toolkit](#) details a full range of key UI reforms many states have already implemented and Colorado should consider.

Strengthen Workers' Compensation Laws.

³⁸ <https://data.bls.gov/timeseries/LNS14000000>

³⁹ https://s27147.pcdn.co/wp-content/uploads/Closing-Doors-on-the-Unemployed12_19_17-1.pdf

⁴⁰ https://wdr.doleta.gov/research/FullText_Documents/ETAOP2010-10.pdf

⁴¹ <https://www.bizjournals.com/denver/news/2018/01/24/colorado-legislators-consider-raising-unemployment.html>

Like UI, Workers' Compensation is a decades-old, proven program that bolsters the economy and helps working people and their families in those rare times that a worker is injured or killed on the job. Colorado, like most states, requires all public and private employers to provide workers' compensation insurance for all employees. Injured workers are insured against injury on the job and employers are insured against liability for those injuries. States allow few exceptions to the compulsory nature of workers' compensation laws, and for good reason. Federal and state governments determined long ago, at the rise of the industrial revolution, that insuring against injuries and death on the job was a more effective and efficient way of creating safe workplaces for workers, certainty for businesses and employers, and cost savings to governments and courts.

Before workers' compensation laws were enacted, workers who were injured on the job, or families of those workers killed or severely disabled on the job, had little recourse but to sue. The outcomes for families and employers were uncertain, and the process was costly and slow.⁴² Workers' compensation insurance created a system where people who were injured on the job could receive modest wage replacement while recovering from their injury, their medical needs were paid for, and job retraining was made available if they could not return to their previous position. Families were compensated for the lost income of loved ones killed.

In short, workers' compensation is good for working people, businesses and entrepreneurs, and Colorado's economy. Workers' compensation allows injured workers to heal and get back on the job as quickly as possible, and the ability to provide for their families and stay connected to the labor force. It also allows workers to retrain for a new field if their injury was so severe they can no longer do the job they had done before they were injured. This allows all working people to rebound from tragedy and fully participate in our economy through work rather than public benefits.

Workers' compensation also provides security and certainty to employers. They pay a modest, known insurance premium on their workers that alleviates their liability for workplace injuries or deaths. CDLE and workers' compensation insurers (such as Pinnacol) help to guide and inform employers in implementing the best practices for their industry so they are doing the most they can to create safe and healthy workspaces and simultaneously limit their liability.

Finally, state government, courts, and the broader economy benefit from workers' compensation. Employees are able to contribute fully and employers are able to plan and direct resources to expansion. As a result, state government plays a small, administrative role while state economies flourish.

Unfortunately, over the past two decades, state legislatures—including the Colorado General Assembly—haven't done enough to bolster their workers' compensation laws, resulting in unfair, weak, or nonexistent benefits for injured workers. For example, Colorado is one of just a few

⁴² https://www.colorado.gov/pacific/sites/default/files/Employers_Guide_2015.pdf

states where employers can choose the doctor that injured workers must visit. And the current workers compensation law contains no anti-retaliation protections at all.

Colorado should take on the challenge of reforming workers' compensation, recognizing the importance of this economic safety net to workers, businesses, and our economy. Key workers' compensation reforms needed now include: (1) stronger anti-retaliation protections for injured workers; (2) insurance coverage for prompt medical care in contested cases; (3) extending coverage to all workers including gig and other contingent workers, particularly those in high risk industries; and (4) ensuring workers have the right to choose their own doctor.

CONCLUSION

As Governor-Elect Polis and his transition committee work to set an ambitious agenda that will bring Colorado boldly forward, they should pay special attention to the important role that the CDLE can and should play in ensuring that our economic prosperity is shared by everyone. The proposals recommended here are not earth shattering. All of them have been embraced by forward thinking federal, state, or local agencies in some form or another, and they have proved successful in leveraging government resources for the benefit of workers and law-abiding businesses.

The advocacy groups who have prepared this report strongly urge the Governor to take seriously the recommendations of workers' rights advocates with expertise in this field and to select leadership for the CDLE that is eager to modernize the agency and pursue these reforms.