

Protecting Children from Dangerous Work



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Proposals for the U.S. Department of Labor

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Most nights after school, a 16-year-old boy named Duvan Thomas Pérez clocked into his graveyard cleaning shift at a chicken processing plant in Mississippi. He donned ill-fitting safety equipment and navigated the cavernous facility, in which an array of sharp, high-powered machines sat atop floors slicked with animal blood, fat, and harsh chemicals. One night in July 2023, Duvan was doing a deep clean of a piece of machinery in the plant's deboning area. Proper supervision and precautions failed, and a moving component on the machine caught Duvan, pulled him in, and killed him.¹ A 16-year-old boy near Orlando, Florida, was working on a construction site of a two-story house in 2019. He was balancing a 24-foot flooring joist while climbing a step ladder to the second floor. When he reached the top, he lost balance and fell from a height of approximately 8 feet. The joist fell on his chest and killed him.²

Many assume that children working long hours in dangerous jobs is a thing of the distant past in the United States. Unfortunately, they're wrong. Although it has been nearly a century since Congress enacted the Fair Labor Standard Act (FLSA), which authorized some restrictions on dangerous child labor, too many children are still exploited.³ In fact, in recent years there have been noted increases in child labor violations,⁴ workplace injuries,⁵ and chronic absenteeism from school.⁶

Injury rates, which almost doubled among workers under 18 between 2011 and 2020,⁷ are driven by a wide range of factors, including the employment of children in hazardous occupations – especially those in agriculture, where the risks are highest and the regulations are the weakest.⁸ Youth employment is also more dangerous when kids are scheduled for long, overnight hours that lack adequate supervision and disrupt sleep schedules, in addition to making it harder for them to get to and succeed in school.⁹

Instead of addressing the troubling increase in workplace injuries among children, industry-aligned groups like those behind Project 2025 have actually proposed to change federal regulations to let more young people work in more dangerous jobs, claiming “young adults show an interest in

¹ Jesus Jiménez, U.S. Faults Mississippi Poultry Plant in Death of 16-Year-Old, *New York Times*, (Jan. 6, 2024), <https://www.nytimes.com/2024/01/16/business/mississippi-marjac-poultry-teen-death.html>; Pérez was employed unlawfully due to restrictions on child labor in the meatpacking industry. See 29 C.F.R § 570.61.

² Occupational Safety and Health Administration, Inspection 1417646.015, Jj & J Construction Contractors, Inc., (Jul. 19, 2019), https://www.osha.gov/ords/imis/establishment.inspection_detail?id=1417646.015; it appears that the boy was working in an allowable occupation, as there is currently no child labor hazardous order against working in construction, nor is there a restriction on working at a height of 8 feet. See 29 C.F.R. Part 570 Subpart E.

³ Workplace injuries and illnesses among workers under 18-years-old nearly doubled between 2011 and 2020. Patrick Terpstra, *More kids are getting hurt in American workplaces*, *Scripps News*, (Jul. 24, 2024), <https://scrippsnews.com/stories/more-kids-are-getting-hurt-in-american-workplaces/>

⁴ Department of Labor, *Increases in Child Labor Violations, Young Workers' Injuries Prompts Enhanced Outreach, Strong Enforcement by US Department of Labor*, (Jul. 29, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220729>.

⁵ *Id.*

⁶ The White House, *FACT SHEET: Biden-Harris Administration Announces New Actions and Resources for Increasing Student Attendance and Engagement as Part of the White House Every Day Counts Summit*, (May 15, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/15/fact-sheet-biden-harris-administration-announces-new-actions-and-resources-for-increasing-student-attendance-and-engagement-as-part-of-the-white-house-every-day-counts-summit>.

⁷ Patrick Terpstra, *More kids are getting hurt in American workplaces*, *Scripps News*, (Jul. 24, 2024), <https://scrippsnews.com/stories/more-kids-are-getting-hurt-in-american-workplaces/>.

⁸ Linda Geist, *Farming: The most dangerous job in the U.S.*, *University of Missouri*, (Sept. 8, 2022), <https://extension.missouri.edu/news/farming-the-most-dangerous-job-in-the-us>; *Compare, e.g.*, 29 U.S.C. § 203(l) and 29 U.S.C. § 213(c)(2).

⁹ See enclosed memorandum “Safer Hours for Child Labor.”

inherently dangerous jobs.”¹⁰ For their part, legislators in more than thirty states have actually taken steps to *weaken* child labor protections since 2021.¹¹ Citing labor shortages and under pressure from industry groups, these states have taken steps to: allow children under 18 – often much younger – to work in dangerous occupations, limit employer liability when their child workers are injured, and let employers schedule children for overnight shifts.¹²

Of course, such state laws legitimately apply to the very small proportion of minors that are not covered by the FLSA, either individually or due to their employer’s small size.¹³ But the more prevalent practical result of these conflicting standards is confusion for employers and employees about how to comply with child labor protections – the result of which is an increase in federal child labor law violations.

To its great credit, since 2021 the U.S. Department of Labor (DOL) has ramped up enforcement of current federal regulations, imposing maximum penalties on employers that have committed some of the worst abuses.¹⁴ Full-throated enforcement of current regulations certainly can help – Duvan Thomas Pérez, whose tragic story is mentioned above, was employed in violation of the current rules. But the regulations themselves are out of date and insufficient; for example, the other child whose death is recounted above was employed under currently-allowed conditions that should be prohibited.¹⁵ As this report details, the last federal effort to substantially revise child labor regulations achieved mixed success, and several recommendations to the DOL from the nation’s leading occupational safety and health experts went unheeded. It is time to jumpstart consideration of new options.

Governing for Impact (GFI), Economic Policy Institute (EPI), and Child Labor Coalition (CLC) undertook this project to review the DOL’s statutory authorities to protect child workers and identify potential regulatory efforts that would ensure that the agency better fulfills its mandate.

The memoranda contained in this report cover a range of issues and make a number of recommendations, including:

1. **Nonagricultural hazardous occupations (Section 01):** expand the list of occupations deemed too hazardous for workers under 18-years-old (including jobs in security services and milling operations) and narrow exemptions to existing regulations (including exemptions allowing children to operate radiation-emitting machinery);
2. **Agricultural hazardous occupations (Section 02):** increase protections for child workers in hazardous agricultural jobs for the first time in nearly sixty years, including by preventing children from handling highly toxic chemicals or power-driven machinery; and
3. **Working hours for children (Section 03):** issue regulations prohibiting employers from scheduling certain child workers for overnight shifts and requiring rest breaks and one day off per week for others.

¹⁰ Project 2025, Mandate for Leadership 595, (Accessed: Sept. 11, 2024), https://static.project2025.org/2025_MandateForLeadership_CHAPTER-18.pdf.

¹¹ Economic Policy Institute, Child Labor, (Accessed: Aug. 27, 2024), <https://www.epi.org/research/child-labor/>.

¹² *Id.*

¹³ An employer is covered by the FLSA if it does \$500,000 in business or sales annually. 29 U.S.C. § 203(s)(1)(A).

¹⁴ Department of Labor, Increases in Child Labor Violations, Young Workers’ Injuries Prompts Enhanced Outreach, Strong Enforcement by US Department of Labor, (Jul. 29, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220729>.

¹⁵ There is currently no hazardous occupation order on construction work or working from heights in nonagricultural industries.

In addition to the options outlined in the memoranda above, the DOL could explore deploying its yet-unused statutory authority to require employers to obtain proof of age from their employees.¹⁶

Gruesome media reports, DOL investigations, and states kowtowing to industry have opened the country's eyes to the clear and present dangers facing young workers. A renewed national conversation on the issue presents an opportunity for the DOL to fully implement the FLSA and deliver much needed protections to the most vulnerable among us.

¹⁶ See 29 U.S.C. § 212(d).

Regulatory Options for Safer Nonagricultural Child Labor



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Strengthening hazardous occupation orders to protect young workers in nonagricultural occupations

I. INTRODUCTION

Elevated rates of child labor violations,¹ injuries,² and chronic school absenteeism³ underscore the need for protections to ensure that youth employment does not have negative effects on children's health and well-being. Unfortunately, state governments around the country, at the behest of industry, are taking steps to eliminate the very protections that are most urgently needed.⁴

Fortunately, the Wage and Hour Division (WHD) of the United States Department of Labor (DOL) has robust and long-standing authority to, on a nationwide basis, prohibit the employment of children in the most dangerous occupations. The Fair Labor Standards Act (FLSA) empowers the Secretary of Labor to issue hazardous occupation orders (HOs) to raise the allowable age for certain nonagricultural occupations to 18.⁵ The DOL has repeatedly exercised this authority since the law's enactment, sometimes including exceptions to the HOs for 16- and 17-year-olds working in "student-learner" or apprenticeship capacities.

Over a decade ago, the DOL sought recommendations from the National Institute for Occupational Safety and Health (NIOSH) on how to revise and add to its HO regulations to ensure they kept up with the modern economy and evolving risk landscape for employed youths.⁶ In a regulatory process that stretched from 1998 to 2010, the WHD adopted several of NIOSH's recommendations.⁷ However, despite child labor advocates' urging, the WHD rejected or never publicly considered several key recommendations, including those to revise existing HOs, create new HOs, close or narrow exemptions to several HOs, and make revisions to agricultural child labor regulations.

This memorandum proposes that the WHD restart its efforts to prevent oppressive child labor by conducting a notice-and-comment rulemaking process to:

1. revise existing HOs according to NIOSH recommendations;

¹ Department of Labor, Increases in Child Labor Violations, Young Workers' Injuries Prompts Enhanced Outreach, Strong Enforcement by US Department of Labor, (Jul. 29, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220729>.

² *Id*; Patrick Terpstra, *More kids are getting hurt in American workplaces*, Scripps News, (Jul. 24, 2024), <https://scrippsnews.com/stories/more-kids-are-getting-hurt-in-american-workplaces/>; OSHA, US Labor Department's OSHA working with agriculture community, (Sept. 16, 2013), <https://www.osha.gov/news/newsreleases/national/09162013-0>.

³ The White House, FACT SHEET: Biden-Harris Administration Announces New Actions and Resources for Increasing Student Attendance and Engagement as Part of the White House Every Day Counts Summit, (May 15, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/15/fact-sheet-biden-harris-administration-announces-new-actions-and-resources-for-increasing-student-attendance-and-engagement-as-part-of-the-white-house-every-day-counts-summit>.

⁴ Nina Mast, *Child labor remains a key state legislative issue in 2024*, Economic Policy Institute, (Feb. 7, 2024), <https://www.epi.org/blog/child-labor-remains-a-key-state-legislative-issue-in-2024-state-lawmakers-must-seize-opportunities-to-strengthen-standards-resist-ongoing-attacks-on-child-labor-laws/>.

⁵ 29 U.S.C. § 203(l).

⁶ National Institute for Occupational Safety and Health, NIOSH Recommendations to the U.S. Department of Labor for Changes to Hazardous Orders, (May 3, 2002), <https://www.sonlight.com/media/uploads/niosh.pdf> (hereinafter "NIOSH Report").

⁷ Department of Labor, Child Labor Regulations, Orders and Statements of Interpretation, 75 Fed. Reg. 28404, (May 20, 2010) (hereinafter "2010 Final Rule").

2. revise and eliminate hazardous occupation order exemptions according to NIOSH recommendations; and
3. create new hazardous occupation orders according to NIOSH recommendations, new workplace safety data, and WHD proposals.

II. JUSTIFICATION

Workplace injuries, illnesses, and child labor violations involving minors under age 18 have increased dramatically in recent years.⁸ An analysis of U.S. Bureau of Labor Statistics survey data revealed that injuries nearly doubled in frequency between 2011 and 2020.⁹ This increase coincided with a surge in documented violations of federal labor laws and regulations.¹⁰ As the Economic Policy Institute (EPI) explained in a recent report, the DOL has taken significant actions against prominent child labor violators, including Hyundai-Kia, a meatpacking sanitation subcontractor that services JBS, Cargill, and Tyson, and various McDonald's franchises.¹¹ The surge in violations has occurred economy-wide, with all child labor violations increasing almost four-fold between 2015 and 2022, while violations of the DOL's HOs more than doubled in the same time period.¹²

At the same time as risks to working children have increased, several state governments have moved to weaken their child labor standards. Citing labor shortages in a tight labor market, Republican-led states have introduced and enacted legislation to reduce restrictions on the types of jobs, and hours and conditions thereof, that children are permitted to work.¹³ In particular, some states have eliminated restrictions on child labor in hazardous occupations. These changes sometimes even conflict with federal minimum requirements (see the appendix of this report for examples). Violations of federal HOs, which may be made more likely by confusing and conflicting state standards, account for the vast majority of nonagricultural child labor injuries reported to the DOL.¹⁴

Prior to the past few years, the primary purpose of state child labor codes had been to regulate above the federal minimums established under the FLSA.¹⁵ State efforts in the 2020s, however, have sought

⁸ Department of Labor, *Increases in Child Labor Violations, Young Workers' Injuries Prompts Enhanced Outreach, Strong Enforcement* by US Department of Labor, (Jul. 29, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220729>.

⁹ Patrick Terpstra, *More kids are getting hurt in American workplaces*, Scripps News, (Jul. 24, 2024), <https://scrippsnews.com/stories/more-kids-are-getting-hurt-in-american-workplaces/>; OSHA, *US Labor Department's OSHA working with agriculture community*, (Sept. 16, 2013), <https://www.osha.gov/news/newsreleases/national/09162013-0>.

¹⁰ Department of Labor, *Increases in Child Labor Violations, Young Workers' Injuries Prompts Enhanced Outreach, Strong Enforcement* by US Department of Labor, (Jul. 29, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220729>.

¹¹ Jennifer Scherer & Nina Mast, *Child labor laws are under attack in states across the country*, (Dec. 21, 2023), <https://www.epi.org/publication/child-labor-laws-under-attack/>.

¹² *Id.*

¹³ *Id.*

¹⁴ Department of Labor, *Increases in Child Labor Violations, Young Workers' Injuries Prompts Enhanced Outreach, Strong Enforcement* by US Department of Labor, (Jul. 29, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220729>.

¹⁵ Lauren Kaori Gurley, *America is divided over major efforts to rewrite child labor laws*, Washington Post, (Mar. 31, 2024), <https://www.washingtonpost.com/business/2024/03/31/us-child-labor-laws-state-bills/>.

to drop these restrictions below federal minimums.¹⁶ Of course, such state laws legitimately apply to the very small proportion of minors that are not covered by the FLSA, either individually or due to their employer's small size.¹⁷ But the more prevalent practical results of these conflicting standards is confusion for employers and employees about how to comply with the relevant child labor protections and increases in violations of federal child labor laws. As a result, the federal HOs now have a more profound impact on the workforce and must be revised to be clear and easily applied to reduce confusion and ensure that the statutory requirements are given full effect.

For example, the West Virginia legislature enacted a statute creating an exemption to all hazardous orders for youth apprentices, which conflicts with federal regulations permitting apprentices to work only in specific hazardous occupations.¹⁸ And, as the DOL noted in a letter to Iowa lawmakers, the new child labor laws in that state are inconsistent with federal regulations in part because they do not provide safeguards to student-learner exemptions.¹⁹ Changes on the state level like these mean that more children can rely only on federal protections to ensure their employment is safe.

The agency can point to its experience with enforcement and to updated injury data to justify its decision to take many of the actions proposed here. For example, to justify the proposal to modify HO 10 to prohibit 16- and 17-year-old apprentices and student-learners from occupations involving several meat-related operations, the DOL could point to its extensive investigatory and enforcement efforts that have exposed the high risks that children in slaughtering and meatpacking facilities face.²⁰ DOL officials described the chemical burns that children employed by a meatpacking sanitation contractor suffered in the process of cleaning dangerous equipment, often overnight.²¹ Closing the student-learner and apprenticeship exemptions for these activities, the agency could find, would reflect the urgent risks present in these occupations.

While Congress must of course empower the WHD with additional funding and personnel to ensure that regulatory and enforcement programs have their intended effect, the WHD and the nation's leading occupational safety and health experts at NIOSH have identified regulatory actions, including new and revised HOs, that should also play a role in tackling the child labor crisis. The WHD took some of these actions already in a prolonged regulatory process that culminated in a 2010 final regulation.²² But several of NIOSH's recommendations went unheeded in part, as the DOL explained in a 2007 proposal, "for administrative reasons ... to keep the size and scope [of the rulemaking] manageable."²³ The WHD should revisit NIOSH's recommendations and evaluate whether they could be revised and adopted.

¹⁶ *Id.*

¹⁷ An employer is covered by the FLSA if it does \$500,000 in business or sales annually. 29 U.S.C. § 203(s)(1)(A).

¹⁸ West Virginia House Bill 5162 (2024).

¹⁹ Department of Labor letter to The Honorable Nate Boulton, (Aug. 24, 2023), <https://www.senate.iowa.gov/democrats/wp-content/uploads/2023/08/DOL-Letter-082423.pdf>.

²⁰ Department of Labor, US Department Of Labor Seeks Nationwide Court Injunction To Stop Packers Sanitation Services' 'oppressive Child Labor' Violations At Processing, (Nov. 9, 2011), <https://www.dol.gov/newsroom/releases/whd/whd20221109>; see also Department of Labor, Increases in Child Labor Violations, Young Workers' Injuries Prompts Enhanced Outreach, Strong Enforcement by US Department of Labor, (Jul. 29, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220729>.

²¹ Steve Karnowski, *Meat plant cleaning service fined \$1.5M for hiring minors*, Associated Press, (Feb. 17, 2023), <https://apnews.com/article/grand-island-us-department-of-labor-health-business-children-3afa3ace009791b8cf29fa91f2a8e6e4>.

²² 2010 Final Rule.

²³ Department of Labor, Child Labor Regulations, Orders and Statements of Interpretation, 72 Fed. Reg. 19337, (Jul. 16, 2007) (hereinafter "2007 Proposed Rule").

In addition to implementing NIOSH's recommended changes to the scope of certain existing HOs and recommended additional HOs, the WHD should examine whether its HOs that include exemptions for student-learner and apprenticeship workers should be revised to ensure that child labor regulations are bright line rules that minimize employer confusion. EPI has documented a proliferation of state vocational training programs that test the limits of allowable employment for workers younger than the general allowable age.²⁴ Employers may be more likely to take advantage of these state programs in violation of federal law if the federal regulation does not plainly close the door to workers of specific ages. We know generally that state laws that set child labor standards below federal minimums can confuse employers and cause them to inadvertently violate the federal standards.²⁵ Making federal law as clear and free of exemptions and loopholes as possible could help ameliorate this problem.

The WHD should also consider replicating NIOSH's methodology using updated workplace fatality data to identify industries that might need additional protections, as well as identify hazards like distracted driving and extreme heat that may warrant new HOs.

III. CURRENT STATE

Although the default rule for nonagricultural occupations is that children must be 16-years-old for most occupations, the FLSA empowers the DOL to issue orders prohibiting employment for 16- and 17-year-olds in occupations that it finds are "particularly hazardous."²⁶ Since the FLSA's enactment in 1938, the DOL has used its regulatory authority under the FLSA to issue 17 nonagricultural HOs. For example, the first HO that DOL issued prohibits minors under 18 years of age from working in any occupation "in or about plants or establishments manufacturing or storing explosives or articles containing explosive components."²⁷

In the course of issuing some of its HOs, the DOL created exemptions to the orders for children employed as "student-learners" and as part of apprenticeship programs.²⁸ The rulemaking records regarding the original creation of the student-learner and apprenticeship exemptions are relatively sparse, but what is clear is that the DOL originally established these exemptions on a piecemeal basis as new HOs were considered, reflecting the particular risk profiles of the relevant occupations and

²⁴ See, e.g., Iowa Code § 92.8A (permitting 16- and 17-year-old apprentices to work in hazardous occupations without the apprenticeship program being subject to minimum requirements required under 29 C.F.R. § 570.50.)

²⁵ See, e.g., Ethan Humble, *'It's confusing': Iowa restaurant owner fined for child labor violations despite following state law*, KCCI, (Jun. 13, 2024), <https://www.kcci.com/article/iowa-restaurant-owners-confused-frustrated-over-discrepancies-in-federal-and-state-child-labor-laws/61103129>.

²⁶ 29 U.S.C. § 203(l).

²⁷ 29 C.F.R. § 570.51 (Order 1).

²⁸ 29 C.F.R. § 570.50.

crafts.²⁹ As an example, the original proposal for HO 8, which prohibited 16- and 17-year-olds from working in “occupations involving the operation of power-driven metal forming, punching, and shearing machines” concluded that “only a limited amount of work in such crafts relates to work in the hazardous occupations discussed herein” and, “considering the fact that the employment of apprentices in the crafts recognized as apprenticeable trades is nonhazardous as a whole, and giving due consideration to the disadvantage of any delay in learning a trade after formal schooling, an exemption for apprentices” was warranted.³⁰

The DOL began a lengthy regulatory process to update its HO regulations in 1998, when it provided funding to NIOSH to conduct a review of available data and research to assess “workplace hazards and the adequacy of the current youth employment HOs to address them.”³¹ NIOSH issued its report in 2002.³² The report made 35 recommendations for revising the then-existing HOs and recommended the creation of 17 new HOs.³³ The DOL also commissioned a report from a third-party vendor that provided limited quantitative analysis to compare the costs and benefits of implementing the NIOSH recommendations.³⁴

Based on these inputs, the DOL took actions to implement many of NIOSH’s recommendations, but completely omitted NIOSH’s recommendations to create new HOs. The DOL issued a final rule in 2004, which adopted six of the 35 NIOSH recommendations to revise existing HOs.³⁵ In 2007, the DOL issued a proposed rule that addressed 25 of the remaining 29 NIOSH recommendations to revise existing HOs, as well as a few topics not considered in the NIOSH report.³⁶ Most of the 2007 proposals were adopted in a 2010 final rule.³⁷ For example, the WHD adopted NIOSH’s recommendation to expand HO 4, which previously had only restricted employment in logging occupations and related facilities, to include restrictions on minors’ work in forest fire fighting and prevention.³⁸ Additionally, the WHD expanded HO 14 to apply to several new categories of prohibited machinery including chainsaws and wood chippers.³⁹

²⁹ As the 2007 Advance Notice of Proposed Rulemaking explained about the advent of the exemptions: “It was agreed that a blanket exemption for apprentices — one that would apply to every HO — was not appropriate. Representatives of the Children’s Bureau, which at that time was the agency responsible for the promulgation of the HOs, postulated that if the basic characteristics of a particular occupation were hazardous, and the work of a hazardous nature was relatively continuous, such work would remain hazardous for youth even if enrolled in an apprenticeship program. On the other hand, if the craft for which the apprentice is being trained is basically nonhazardous, but requires the occasional performance of hazardous work to complete the training, an exemption for apprentices might be feasible under certain circumstances.” Department of Labor, Child Labor Regulations, Orders and Statements of Interpretation, 72 Fed. Reg. 19328, (Apr. 16, 2007) (hereinafter “2007 ANPRM”).

³⁰ Some commenters requested an expanded exemption that included apprentice-like programs and others wanted a cap of 25 percent of the time that the apprenticeship could focus on the machines covered by the HO, but the Department declined to adopt those recommendations. Department of Labor, Proposed Rule: Occupations Particularly Hazardous for Employment of Minors Between 16 and 18 Years of Age and Detrimental to Their Health or Well-Being, 15 Fed. Reg. 175, 176 (Jan. 12, 1950), <https://heinonline.org/HOL/P?h=hein.fedreg/015007&i=28>.

³¹ 2007 ANPRM at 19329.

³² NIOSH Report.

³³ *Id.* at 21-66. The report also made recommendations for revising hazardous occupation in agriculture orders (HOAs), which we address in a companion memorandum to this one.

³⁴ 2007 ANPRM at 19330.

³⁵ 2004 Final Rule.

³⁶ 2007 Proposed Rule.

³⁷ 2010 Final Rule.

³⁸ 2010 Final Rule at 28429.

³⁹ 2010 Final Rule at 28442.

The 2010 rule was adopted with little to no controversy. The proposed rule generated only 27 comments.⁴⁰ This stood in stark contrast to a rulemaking process to update hazardous occupation orders in agricultural occupations, which sparked fierce industry backlash and over ten thousand regulatory comments that forced the Department to withdraw the proposed rule.⁴¹

The 2004 and 2010 final rules, however, did not incorporate all of the remaining NIOSH recommendations. For example, it did not adopt NIOSH's recommendation to revise three HOs that currently refer to machines based on the material upon which they act rather than more broadly on the function of the machines.⁴² NIOSH also urged the WHD to revise an HO that prohibits work with power-driven woodworking material to include a prohibition on machines that operate on materials other than wood, like machines used for drilling or boring materials like metal.⁴³ Nor did the WHD adopt any of NIOSH's recommendations to create wholly new HOs, for instance for occupations requiring work in confined spaces.⁴⁴ In a 2007 advanced notice of proposed rulemaking (ANPRM) issued simultaneously with the 2007 proposed rule, the DOL sought public comment on some of the NIOSH recommendations that it did not implement. (However, the 2007 ANPRM only included a request for comment on one of the 17 new HOs that NIOSH recommended).⁴⁵ As discussed below, the Department received very little public comment on these topics.

Also notably absent from the 2010 final rule were NIOSH's recommendations to close or narrow the student-learner and apprenticeship exemptions in four of the Department's HOs. The WHD included a request for comment on those recommendations in its 2007 ANPRM, explaining that it sought to establish uniform "criteria as to when an exemption" is appropriate before it made any changes to the existing exemptions.⁴⁶ In its regulatory comments in 2007, the Child Labor Coalition criticized this decision as a "delaying tactic" and asserted that "[i]t makes much more sense in the child labor context to look at each HO, and then to examine the evidence of safety and health hazards in those particular prohibited jobs to see whether an apprenticeship or student-learner program could adequately protect against those hazards."⁴⁷ The ANPRM received very little public engagement and there is no public indication that the DOL ever established such a criteria document. The HO exemptions remain unchanged.

⁴⁰ Wage and Hour Division, Docket Comments: Child Labor Regulations, Orders and Statements of Interpretation (NPRM), (Apr. 17, 2007), <https://www.regulations.gov/document/WHD-2007-0002-0001/comment>. Of course, WHD issued the proposed rule and closed the comment period in 2007 during the Bush administration, which helps explain why industry and conservatives were less motivated to mount a significant opposition.

⁴¹ Wage and Hour Division, Docket Comments: Child Labor Regulations, Orders and Statements of Interpretation: Violations-Civil Money Penalties, (Sept. 2, 2011), <https://www.regulations.gov/document/WHD-2011-0001-0001/comment>; U.S. Department of Labor, "Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations-Civil Money Penalties," 77 Fed. Reg. 31549, (May 29, 2012) (hereinafter "2012 Withdrawal").

⁴² 2010 Final Rule at 28433.

⁴³ NIOSH Report at 31-32.

⁴⁴ *Id.* at 127.

⁴⁵ 2007 ANPRM at 19331 (stating explicitly that "[t]heir absence from this current round of rulemaking is not an indication that the Department believes them to be of less importance or that they will not be given the same level of consideration as the recommendations addressing the current nonagricultural HOs.>").

⁴⁶ 2007 ANPRM at 19332-3.

⁴⁷ Child Labor Coalition comment on Child Labor Regulations, Orders and Statements of Interpretation, 72 Fed. Reg. 19337 (Jul. 13, 2007), <https://www.regulations.gov/comment/WHD-2007-0002-0004> (emphasis added).

IV. PROPOSED ACTION

The FLSA prohibits “oppressive child labor” and engaging in commerce connected to “oppressive child labor.”⁴⁸ Subject to several exceptions, the statute defines “oppressive child labor” to include “a condition of employment under which ... any employee under the age of sixteen years is employed by an employer.”⁴⁹ However, the general minimum age of 16 for nonagricultural employment is raised to 18 in “any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous” or “detrimental to [the] health or well-being” of the children.⁵⁰

The WHD currently maintains 17 HOs that restrict the nonagricultural employment of 16- and 17-year-old workers.⁵¹ Seven of those HOs⁵² contain exemptions that permit the employment of 16- and 17-year-olds when they are employed in the context of a student-learner or apprenticeship program.⁵³

Although the DOL made progress in 2004 and 2010 by adopting some of NIOSH’s recommendations, the WHD should begin notice-and-comment rulemaking to fully do so. Full implementation of the NIOSH recommendations for nonagricultural child labor would include: revising existing HOs, revising or eliminating several exemptions that currently exist in select HOs, and creating new HOs.

The proposals are summarized in the table below, with more detail available in the sections that follow.

Provision	Recommendation	Source of recommendation
HO 5, Woodworking	<ul style="list-style-type: none"> Expand scope (to non-wood materials) 	NIOSH Report
HO 6, Radiation	<ul style="list-style-type: none"> Expand scope (to any machine that generates radiation) 	NIOSH Report
HO 8, Metal	<ul style="list-style-type: none"> Expand scope (to non-metal materials) 	NIOSH Report
HO 9, Mining	<ul style="list-style-type: none"> Expand scope (to oil drilling and natural gas extraction and remove exemptions for some job activities) 	NIOSH Report
HO 10, Meat	<ul style="list-style-type: none"> Narrow exemptions 	NIOSH Report

⁴⁸ 29 U.S.C. § 212(a),(c).

⁴⁹ 29 U.S.C. § 203(l).

⁵⁰ Children ages 14 and 15 are also permitted to work in certain nonagricultural occupations that are enumerated by the DOL to be age-appropriate. 29 U.S.C. § 203(l).

⁵¹ 29 C.F.R. Part 570 Subpart E.

⁵² HOs 5, 8, 10, 12, 14, 16, and 17.

⁵³ 29 C.F.R. § 570.50.

HO 14, Saws	<ul style="list-style-type: none"> • Narrow exemptions 	NIOSH Report
HO 16, Roofing	<ul style="list-style-type: none"> • Eliminate exemptions 	NIOSH Report
HO 17, Excavation	<ul style="list-style-type: none"> • Eliminate exemptions 	NIOSH Report
New HOs	<ul style="list-style-type: none"> • Create new HOs for several new occupations • Apply NIOSH' 2002 methodology to identify new hazardous order occupations 	NIOSH Report; updated workplace injury and fatality data; 2011 Proposed Rule

A. Revise existing hazardous occupation orders⁵⁴

The WHD should incorporate NIOSH's 2002 recommendations in its existing HOs:

- **Order 5, Power-driven machinery:** The WHD should update Order 5, "Occupations involved in the operation of power-driven woodworking machines," to expand the HO to include similar power-driven machines used to operate on materials other than wood.⁵⁵ While the WHD did modify HO 5 in 2010 to update the definition of power-driven woodworking machines to align with a new statutory definition, it declined to implement NIOSH's recommendation to expand HO 5 beyond wood materials to "address the function of the machines rather than the material processed."⁵⁶
- **Order 6, Hazardous exposure:** The WHD should update Order 6, "Exposure to radioactive substances and to ionizing radiations," to expand the HO to include "working with any machine that generates ionizing radiation, including assisting in diagnostic or therapeutic radiology procedures involving ionizing radiation."⁵⁷ The WHD included this recommendation in the 2007 ANPRM, asking whether adopting this recommendation would be feasible and whether the current maximum level of exposure should be eliminated or modified.⁵⁸ None of the public comments to the ANPRM addressed the topic.⁵⁹
- **Order 8, Power-driven forming, punching, and shearing:** The WHD should update Order 8, "Occupations involved in the operation of power-driven metal forming, punching, and shearing machines," to expand the HO to include several types of metalworking machinery currently excluded from the HO and expand the HO to materials other than metal. The WHD declined to make this change in its 2010 rule, instead including the recommendation in its 2007 request

⁵⁴ Consistent with NIOSH's recommendations, other HOs were not modified (HOs 3, 13, 15, 17), or were modified in (partial or full) accordance with NIOSH recommendations in 2004 (HOs 1, 2, 4, 16) or in 2010 (HOs 7, 10, 11, 12, 14). None of NIOSH's recommendations for revising or eliminating student-learner and apprenticeship exemptions were adopted.

⁵⁵ NIOSH Report at 31; the 2010 Final Rule declined to adopt the proposal because of the proposal's complexity. 2010 Final Rule at 28432

⁵⁶ 2010 Final Rule at 28432.

⁵⁷ NIOSH Report at 34-35.

⁵⁸ 2007 ANPRM at 19334-5.

⁵⁹ Wage and Hour Division, Docket Comments: Child Labor Regulations, Orders and Statements of Interpretation: Violations-Civil Money Penalties, (Sept. 2, 2011), <https://www.regulations.gov/document/WHD-2007-0001-0001/comment?filter=radiation> (filtered comments to "radiation").

for comment in the ANPRM.⁶⁰ Only one comment to the ANPRM addressed the recommendation, and did so cursorily.⁶¹

- **Order 9, Mining:** The WHD should update Order 9, “Occupations in connection with mining, other than coal,” to expand the HO to include all work performed in connection with petroleum and natural gas extraction and remove exemptions for repair and maintenance of roads and railroad tracks.⁶² The WHD declined to make this change in its 2010 rule, instead including the recommendation in its 2007 request for comment in the ANPRM.⁶³ It is worth noting that 2022 workplace fatality data suggests that these occupations are still quite dangerous, with an average fatality rate of 16.6 deaths per 100,000 full-time equivalents (FTE) (versus a 3.7 per 100,000 FTEs for all workers).⁶⁴

B. Revise and eliminate hazardous occupation order exemptions⁶⁵

The WHD should also adopt the 2002 NIOSH report recommendations related to revising or eliminating exceptions to the HOs for student-learners and apprenticeships. Specifically:

- **Order 10, Meat:** The WHD should update Order 10, “Occupations in the operation of power-driven meat-processing machines and occupations involving slaughtering, meat and poultry packing, processing, or rendering,” to narrow the apprenticeship and student-learner exemptions in the HO, allowing them in retail, wholesale, and service industries, but not in meat products manufacturing industries.⁶⁶
- **Order 14, Saws:** The WHD should updated Order 14, “Occupations involving the operation of circular saws, band saws, guillotine shears, chain saws, reciprocating saws, wood chippers, and abrasive cutting discs,” to narrow the apprenticeship and student-learner exemptions in the HO to disallow exemption for work with chainsaws and other hand-held power saws.⁶⁷
- **Order 16, Roofing:** The WHD should update Order 16, “Occupations in Roofing Operations,” to eliminate the apprenticeship and student-learner exemptions in the HO.⁶⁸
- **Order 17, Excavation:** The WHD should update Order 17, “Occupations in Excavation Operations,” to eliminate the apprenticeship and student-learner exemptions in the HO.⁶⁹

Many of the student-learner and apprenticeship exemptions to these HOs were created to encourage learning on the job and enhance opportunities for young workers to, under supervision, create safe habits in dangerous work environments. According to the DOL in its discussion of the advent of the

⁶⁰ 2007 ANPRM at 19334.

⁶¹ National Association of Home Builders comment on Child Labor Regulations, Orders and Statements of Interpretation, 72 Fed. Reg. 19337 (Jul. 24, 2007), <https://www.regulations.gov/comment/WH-D-2007-0001-0071> at 6. (“There are several statutes already in place that work to safeguard the use of certain power-driven machines. In residential construction, proper instruction and use are at the core of the issue regardless of function or material.”)

⁶² NIOSH Report at 40.

⁶³ 2007 ANPRM at 19335.

⁶⁴ Bureau of Labor Statistics, Hours-based fatal injury rates by industry, occupation, and selected demographic characteristics, (2022),

<https://www.bls.gov/iif/fatal-injuries-tables/fatal-occupational-injuries-hours-based-rates-2022.xlsx>.

⁶⁵ The NIOSH Report recommended that the DOL retain the exemptions as-is in HOs 5, 8, and 12.

⁶⁶ NIOSH Report at 41.

⁶⁷ NIOSH Report at 56.

⁶⁸ NIOSH Report at 60.

⁶⁹ NIOSH Report at 63.

exemptions, whether exemptions in an HO were warranted hinged on the risk profiles of jobs covered by the HO:

if the basic characteristics of a particular occupation were hazardous, and the work of a hazardous nature was relatively continuous, such work would remain hazardous for youth even if enrolled in an apprenticeship program. On the other hand, if the craft for which the apprentice is being trained is basically nonhazardous, but requires the occasional performance of hazardous work to complete the training, an exemption for apprentices might be feasible under certain circumstances.⁷⁰

Particularly when the hazardous activity proscribed by the HO is only infrequently required in most jobs that would be subject to the order, the DOL has found it appropriate to allow exemptions for student-learners and apprentices so as not to “delay” learning.⁷¹

However, as NIOSH explained in its 2002 report, workplace injury data reveals that it is not feasible to mitigate risks in the occupations covered by HOs 10, 14, 16, and 17 to the extent necessary to justify maintaining the current exemptions. Rather the hazards of the occupations are often continuous and unlikely to be easily mitigated.⁷² Recent workplace injury and fatality data confirm that these occupations remain dangerous. For example, OSHA’s enforcement data detail several incidents wherein workers under 18 suffered lacerations and other injuries while operating meat processing equipment (covered by HO 10).⁷³ Additionally, the fatal injury rate for roofers (covered by HO 16) is more than 15 times that of all workers.⁷⁴ Finally, due to an “alarming rise” in excavation and trenching (covered by HO 17) deaths in 2022, the DOL recently launched a special enforcement effort targeted at this industry.⁷⁵

C. Create new hazardous occupation orders

The WHD should consider creating new HOs, as recommended in the 2002 NIOSH Report, according to updated workplace injury and fatality data, and as discussed in the 2011 Proposed Rule’s preamble.

1. Implement NIOSH recommendations

The NIOSH report made recommendations for new HOs, including: commercial fishing operations; construction occupations; work in refuse occupations; water transportation industries; work in scrap

⁷⁰ 2007 ANPRM at 19331.

⁷¹ Department of Labor, Proposed Rule: Occupations Particularly Hazardous for Employment of Minors Between 16 and 18 Years of Age and Detrimental to Their Health or Well-Being, 15 Fed. Reg. 175, 176 (Jan. 12, 1950), <https://heinonline.org/HOL/P?h=hein.fedreg/015007&i=28>. (speaking of HO 8).

⁷² See NIOSH’s discussion of these proposals in NIOSH Report at 42, 56, 60, 63. NIOSH generally recommended eliminating exemptions in HOs in which the hazards are difficult to mitigate through close supervision or training. For example, many deaths in excavation are due to things like cave-ins. See WeatherBuild, Weather Impacts to Trenching and Excavation Safety and Cave-In Risks, (Oct. 29, 2018), <https://weatherbuild.co/2018/10/29/weather-impacts-to-trenching-and-excavation-safety-and-cave-in-risks/>.

⁷³ OSHA Enforcement Data, (Accessed: Aug. 19, 2024), https://enforcedata.dol.gov/views/data_summary.php (for example, incident 200536233 where 16-year-old “employee amputate[d] finger cleaning meat machine.”)

⁷⁴ Bureau of Labor Statistics, Hours-based fatal injury rates by industry, occupation, and selected demographic characteristics, (2022), <https://www.bls.gov/iif/fatal-injuries-tables/fatal-occupational-injuries-hours-based-rates-2022.xlsx>.

⁷⁵ OSHA, Alarming rise in trench-related fatalities spurs US Department of Labor to announce enhanced nationwide enforcement, additional oversight (Jul. 14, 2022), <https://www.osha.gov/news/newsreleases/national/07142022>.

and waste materials industry; farm product raw materials wholesale trade industry; railroad industry; work at heights; tractors; heavy machinery; welding; confined spaces; work involving powered conveyors; pesticide handling; exposure to lead, exposure to silica; and work requiring the use of respiratory protection.⁷⁶

The WHD has yet to take any action on all but two of these recommendations. The 2007 ANPRM requested comment on the feasibility of implementing NIOSH's recommendation to create an HO covering construction occupations.⁷⁷ A since-withdrawn 2011 proposed rule sought to restrict youth employment in certain parts of farm-product raw materials wholesale trade industries.⁷⁸ As for the rest of the new HOs that NIOSH recommended, the Department stated in 2007 that:

The Department is continuing to review the remaining recommendations, but for administrative reasons excluded them from its consideration of the NIOSH proposals covered in this phase to keep the size and scope manageable. Their absence from this current round of rulemaking is not an indication that the Department believes them to be of less importance or that they will not be given the same level of consideration as the recommendations addressing the current nonagricultural HOs.⁷⁹

There is no public indication of WHD's continued consideration of these recommendations.

2. Apply NIOSH's 2002 methodology to identify new hazardous order occupations

In addition to fully implementing the recommendations that NIOSH already made, the WHD could use a methodology similar to that set forth in the NIOSH report to identify HOs that should be established in light of the more than twenty years that have passed since NIOSH conducted its analysis. Because child labor data is scarce, the 2002 NIOSH report decided on a proxy threshold: it would deem an industry to be particularly hazardous for children if the "risk of death [for all workers in an occupation] was more than twice the risk for all workers [in all occupations], measured by a summary rate published by the BLS for multiple years."⁸⁰

For illustrative purposes only, we attempted to recreate parts of NIOSH's methodology. We faced several limitations,⁸¹ so it is by no means exhaustive or definitive.

Based on 2022 data from the BLS,⁸² we identified several industries that have a workplace fatality rate more than two times that of all workers. The fatality rate for all workers in 2022 was 3.7 deaths per 100,000 FTEs, so the industries for which new HOs may be warranted are those that have a rate that is more than double (i.e., above 7.4 deaths per 100,000 FTE). The WHD should consider recreating

⁷⁶ NIOSH Report at 99-137.

⁷⁷ 2007 ANPRM at 19331.

⁷⁸ 2011 Proposed Rule.

⁷⁹ 2007 ANPRM at 19331.

⁸⁰ NIOSH Report at 17.

⁸¹ Among them: our data is based on one year, 2022, rather than data averaged across several years; our fatality rates are based on deaths per 100,000 FTEs, not workers, though the NIOSH report actually stated that FTE was a more appropriate measure; and the 2022 data available from BLS is based on the North American Industry Classification System rather than the Standard Industrial Classification system, so a direct comparison between industries identified by NIOSH and those here is challenging.

⁸² Bureau of Labor Statistics, Hours-based fatal injury rates by industry, occupation, and selected demographic characteristics, (2022),

<https://www.bls.gov/iif/fatal-injuries-tables/fatal-occupational-injuries-hours-based-rates-2022.xlsx>.

NIOSH's analysis and identifying new industries for HOs. Below is a table explaining the industries that we identified through our illustrative analysis:

Industry	Industry Code ⁸³	Fatal Injury Rate ⁸⁴	Notes
All workers		3.7	
Drinking places (alcoholic beverages)	722400	13.7	NIOSH declined to recommend in 2002 because deaths were primarily due to assaults.
Animal food, grain and oilseed milling	3111, 3112	10.2	
Nonmetallic mineral product manufacturing	327	9.8	
Gasoline stations	447000	9.7	NIOSH declined to recommend in 2002 because deaths were primarily due to assaults.
Investigation and security services	561600	8.2	NIOSH declined to recommend in 2002 because deaths were primarily due to assaults.

3. Implement 2011 Proposals

In 2011, the WHD issued a proposed rule that was primarily meant to revise the DOL's regulations regarding agricultural occupations.⁸⁵ However, it included two proposed additions to the nonagricultural regulations. One was a new HO that would prohibit the use of electronic devices,

⁸³ Industry data are based on the North American Industry Classification System (NAICS), 2017.

⁸⁴ Per the Bureau of Labor Statistics: The rate represents the number of fatal occupational injuries per 100,000 FTE workers and was calculated as:

$(N/EH) \times 200,000,000$ where

N = the number of fatal work injuries

EH = total hours worked by all employees during the calendar year

200,000,000 = base for 100,000 equivalent full-time workers (working 40 hours per week, 50 weeks per year)

Fatal injury rates rely on the census figures from the Census of Fatal Occupational Injuries (CFOI) and the employment from the CPS. CPS is a sample of households that is designed to represent the civilian noninstitutional population of the United States. Sampling errors occur in the CPS because observations are made on a sample, not on the entire population. The margin of error (MOE) is a measure of dispersion around the estimated fatal injury rate, expressed at the 95% confidence level. For more on confidence intervals, see <https://www.bls.gov/iif/additional-resources/reliability-of-estimates.htm>. While the MOE measures the variance in the employment calculations, small fatal injury counts can vary substantially from year to year. See <https://www.bls.gov/iif/overview/dangerous-jobs.htm> for more information.

⁸⁵ 2011 Proposed Rule.

including communication devices, while operating or assisting in the operation of power-driven equipment, including motor vehicles.⁸⁶ Unfortunately, this proposed regulation was spiked with the rest of the 2011 effort when the DOL withdrew its proposed rule in summer 2012.⁸⁷ The other proposed HO addition was one that would have banned minors from working in farm-product raw materials wholesale trade industries due to the high rates of accidents and deaths (including due to, among other hazards, grain entrapments and risky encounters with animals).⁸⁸ The WHD should reissue its proposal to protect young workers from the ever-increasing hazard of distracted driving and from deadly jobs related to raw materials wholesaling.⁸⁹

As part of its 2011 proposed rule preamble, the WHD requested comments on (but did not propose regulatory language for) whether it should create an HOA “that would limit the exposure of young hired farm workers to extreme temperatures and/or arduous conditions.”⁹⁰ Given the increased prevalence of extreme heat and the fact that indoor workers and outdoor workers alike are subjected to challenging workplace conditions, the WHD should consider creating an HO containing environmental protections for young workers in nonagricultural occupations as well.

The Occupational Safety and Health Administration (OSHA) is currently in a regulatory process to set heat standards for all workplaces.⁹¹ Nonetheless, an HOA for young workers could be an appropriate step for the WHD to take. First, OSHA is notorious for its slow regulatory process, due both to the agency’s limited resources and cumbersome procedures imposed on it by Congress.⁹² Additionally, young workers may require more protective measures than OSHA sets for workers generally.⁹³ For example, the OSHA standard could set a temperature threshold based on the conditions that an average adult worker could sustain, but the WHD may need to adjust the threshold, in consultation with OSHA and NIOSH, considering the different physiology of child workers.

All three of these proposals would be well-within the WHD’s authority to implement and would be similar to past exercises of the HO power. For example, an HO prohibiting distracted driving would be a continuation of the WHD’s regulation of when and how young workers should be permitted to drive.⁹⁴ An HO prohibiting child labor in wholesale trade industries altogether would align with the WHD’s history of determining that some industries are just too risky, except in very specific job activities.⁹⁵ And a heat HO would be roughly analogous with current HO 6, which limits children’s employment in jobs requiring exposure to radioactive substances and ionizing radiations, because the heat HO would similarly protect young workers against ambient exposure to a dangerous element.

⁸⁶ *Id.* at 54849.

⁸⁷ 2012 Withdrawal.

⁸⁸ 2011 Proposed Rule at 54846.

⁸⁹ Between 2012 and 2022, there was an average of 12.3 annual fatalities in farm product raw material merchant wholesaler occupations among all workers. U.S. Bureau of Labor Statistics, Census of Fatal Occupational Injuries, (Accessed: Aug. 20, 2024), <https://data.bls.gov/cgi-bin/dsrv?fw>.

⁹⁰ 2011 Proposed Rule at 54865.

⁹¹ OSHA Regulatory Agenda: Heat Illness in Outdoor and Indoor Work Settings RIN 1218-AD39, (Fall 2023), <https://www.reginfo.gov/public/do/eAgendaViewRule?publd=202310&RIN=1218-AD39>.

⁹² Senate Hearing 112-725, Time Takes its Toll: Delays in OSHA’s Standard-Setting Process and the Impact on Worker Safety, (Apr. 19, 2012), <https://www.govinfo.gov/content/pkg/CHRG-112shrg73974/html/CHRG-112shrg73974.htm>.

⁹³ As the 2011 Proposed Rule explained, “young workers are not ‘little adults’ but human beings at their own unique stage of development.” 2011 Proposed Rule at 54850.

⁹⁴ See Order 2, 29 C.F.R. § 570.52(b) (detailing conditions under which 17-year-olds would be permitted to drive).

⁹⁵ See, e.g., Order 3, 29 C.F.R. § 570.53 (prohibiting young employment in all coal mining occupations besides a few very specific, isolated job tasks).

V. CONCLUSION

The WHD should use the ample statutory authority that it possesses to better protect young workers from hazardous occupations, by fully implementing NIOSH's 2002 recommendations, including those to revise existing HOs, create new HOs, and close exemptions in certain HOs. Additionally, the WHD should create new HOs based on updated workplace injury data and hazards that have emerged since NIOSH conducted its analyses.

Regulatory Options for Safer Agricultural Child Labor



October 2024

Strengthening hazardous occupation orders to protect young workers in agricultural occupations

I. INTRODUCTION

Elevated rates of child labor violations,¹ injuries,² and chronic school absenteeism³ underscore the need for protections to prevent youth employment from having negative effects on children’s health and well-being. Unfortunately, state governments around the country are taking steps to eliminate such protections just as they are most urgently needed.⁴

Fortunately, the Wage and Hour Division (WHD) of the United States Department of Labor (DOL) has a robust and long-standing authority to, on a nationwide basis, prohibit employment of some children in the economy’s most dangerous occupations. The Fair Labor Standards Act (FLSA) empowers the Secretary of Labor to issue hazardous occupation in agriculture orders (HOAs) to raise the allowable age for certain agricultural occupations to 16.⁵ The WHD has not issued substantive revisions to its HOA regulations, which contain several exemptions for student-learners and other vocational training programs, since 1970.⁶

The WHD issued a proposed rule in 2011 that would have made several long-awaited changes to the HOAs to better protect child workers and, importantly, bring protections for child workers in agriculture closer to parity with those afforded to children working in nonagricultural occupations.⁷ These proposals included several recommendations from the National Institute of Occupational Safety and Health (NIOSH), which conducted a comprehensive review of workplace safety data to make recommendations to the DOL in 2002.⁸ However, the WHD withdrew its proposed rule in 2012 amid fierce industry backlash.⁹ The HOAs have remained unchanged and worryingly inadequate since.

¹ Department of Labor, *Increases in Child Labor Violations, Young Workers’ Injuries Prompts Enhanced Outreach, Strong Enforcement by US Department of Labor*, (Jul. 29, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220729>.

² *Id.*; Jeff Mulhollem, *Study Reveals Agriculture-Related Injuries More Numerous than Previously Known*, USDA, (Sept. 19, 2022), <https://www.nifa.usda.gov/about-nifa/blogs/study-reveals-agriculture-related-injuries-more-numerous-previous-y-known>; Patrick Terpstra, *More kids are getting hurt in American workplaces*, Scripps News, (Jul. 24, 2024), <https://scrippsnews.com/stories/more-kids-are-getting-hurt-in-american-workplaces/>; OSHA, *US Labor Department’s OSHA working with agriculture community*, (Sept. 16, 2013), <https://www.osha.gov/news/newsreleases/national/09162013-0>.

³ The White House, *FACT SHEET: Biden-Harris Administration Announces New Actions and Resources for Increasing Student Attendance and Engagement as Part of the White House Every Day Counts Summit*, (May 15, 2024),

<https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/15/fact-sheet-biden-harris-administration-announces-new-actions-and-resources-for-increasing-student-attendance-and-engagement-as-part-of-the-white-house-every-day-counts-summit>.

⁴ Nina Mast, *Child labor remains a key state legislative issue in 2024*, Economic Policy Institute, (Feb. 7, 2024), <https://www.epi.org/blog/child-labor-remains-a-key-state-legislative-issue-in-2024-state-lawmakers-must-seize-opportunities-to-strengthen-standards-resist-ongoing-attacks-on-child-labor-laws/>.

⁵ 29 U.S.C. § 213(c)(2).

⁶ Department of Labor, *Part 1500–Child Labor Regulations, Orders, and Statements of Interpretation*, 35 Fed. Reg. 221, (Jan. 7, 1970).

⁷ U.S. Department of Labor, “Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations–Civil Money Penalties,” 76 Fed. Reg. 54836, (Sept. 2, 2011) (hereinafter “2011 Proposed Rule”).

⁸ National Institute for Occupational Safety and Health, *NIOSH Recommendations to the U.S. Department of Labor for Changes to Hazardous Orders*, (May 3, 2002), <https://www.sonlight.com/media/uploads/niosh.pdf> (hereinafter “NIOSH Report”).

⁹ U.S. Department of Labor, “Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations–Civil Money Penalties,” 77 Fed. Reg. 31549, (May 29, 2012) (hereinafter “2012 Withdrawal”).

This memorandum proposes that the WHD revive its efforts to prevent oppressive child labor by conducting a notice-and-comment rulemaking process to:

1. revise existing HOAs, according to NIOSH recommendations and prior WHD proposals;
2. narrow and eliminate certain exemptions from the HOAs; and
3. create new HOAs to provide new protections to child workers.

II. JUSTIFICATION

The WHD should re-propose and finalize many of the regulatory updates contained in its withdrawn 2011 proposed rule and implement other changes to HOAs because agricultural work remains extremely dangerous, especially for young workers; the regulations meant to protect young agricultural workers have not been revised in more than 50 years; new public awareness of the crushing reality of youth agricultural work may ease the political case for reform; and state-level rollbacks mean that more children than ever rely on federal minimum standards for protections from workplace hazards.

Agricultural workers face some of the most dangerous conditions of any workers in the United States. These workers operate and maintain dangerous machinery, are likely to be exposed to environmental hazards like extreme heat, and face other elevated risks associated with the industry.¹⁰ As a result, the rate of work-related deaths for agricultural workers is roughly seven times the national average for all workers.¹¹ Agriculture is especially dangerous for child workers: according to the DOL's estimates, a disproportionate share of work-related fatalities among children were in agriculture.¹²

Accurate data are hard to come by, but estimates for the number of minors employed on American farms range from 148,000 to 500,000.¹³ And the risk of death in agricultural occupations is significant for young workers: according to one study, agriculture has a fatality rate of 21.3 per 100,000 workers aged 15 to 24, compared to 3.6 per 100,000 across all industries.¹⁴ Relatedly, U.S. Bureau of Labor

¹⁰ Mariana Portela de-Assis, Health problems in agricultural workers occupationally exposed to pesticides, *Rev Bras Med Trab.* 2020 Jul-Sep; 18(3): 352–363, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7879472/>.

¹¹ Linda Geist, Farming: The most dangerous job in the U.S., University of Missouri, (Sept. 8, 2022), <https://extension.missouri.edu/news/farming-the-most-dangerous-job-in-the-us>.

¹² Government Accountability Office, Working Children: Federal Injury Data and Compliance Strategies Could Be Strengthened, (Nov. 2018), <https://www.gao.gov/assets/gao-19-26.pdf> (“Although agriculture employs a small percentage of working children, DOL data indicate that from 2003 to 2016, the year for which the most recent data are available, over half of the 452 work-related fatalities among children were in agriculture.”)

¹³ National Farm Worker Ministry, Children in the Fields, (Accessed: Aug. 8, 2024), <https://nfwm.org/farm-workers/farm-worker-issues/children-in-the-fields/>; Kenny Torrella, *A 12-year-old might've grown your food. In many states, that's perfectly legal.*, *Vox*, (Jun. 16, 2023), <https://www.vox.com/future-perfect/2023/6/16/23762593/child-labor-laws-republicans-agriculture-farm-care-act>; The number of minors that would be affected by the proposals in this memorandum is likely far smaller because the FLSA restricts the hazardous work activities of minors under 16 years of age and because the FLSA includes a substantial parental exemption from the HOAs for children employed by their parents on a farm operated or owned by such parent. The WHD estimated that there were fewer than 56,000 hired farm workers under the age of 16 in 2006. Even at this smaller number, this implicates far too many children vulnerable to injury and death and is deserving of prioritization by the Department. 2011 Proposed Rule at 54843.

¹⁴ *Id.*

Statistics (BLS) data reveal that agricultural workers 15- to 17-years-old are 44.8 times more likely to be fatally injured when compared to all other industries.¹⁵ There is ample research documenting the physical, environmental, and social hazards of agricultural work at a young age.¹⁶ Child workers are also more susceptible than adults to certain health-related risks of working in agriculture, such as pesticide exposure.¹⁷

The burden of unsafe agricultural work falls disproportionately on workers of color. According to one 2018 survey, approximately 77 percent of farmworkers identify as Hispanic, with about 61 percent reporting that they were of Mexican descent.¹⁸ That trend extends to minors working in agriculture.¹⁹ These workers face unique challenges and additional workplace exploitation vulnerabilities, including those related to fear of immigration enforcement: many Latino child farmworkers are unaccompanied migrants, and others come from mixed status households, where one or more family members is undocumented.²⁰

In large part due to racism and classism entrenched in our laws and society,²¹ the primary (and some of the only) regulations that provide basic protections to young hired workers in agriculture are weak and incredibly out of date. To begin with, the FLSA offers fewer authorities to the DOL to protect young workers in agricultural occupations than in nonagricultural work. For example, subject to several exceptions, the FLSA allows children to be employed in most jobs at age 16, whereas children can be employed in agricultural occupations beginning at age 12 with parental consent (and even as young as 10 in some cases, due to statutory exceptions).²² And the FLSA's parental exemption in agriculture is far broader than that in nonagricultural settings, permitting work at any age.²³ One of the only authorities that DOL has to protect young hired farmworkers – that which allows the WHD to

¹⁵ National Children's Center, 2018 Fact Sheet: Childhood Agricultural Injuries in the U.S., (2018), <https://www.marshfieldresearch.org/Media/Default/NFMC/PDFs/2018%20Child%20Ag%20Injury%20Factsheetdf.pdf>.

¹⁶ Taylor Arnold, Understanding Latinx Child Farmworkers' Reasons for Working: A Mixed Methods Approach, *J Adolesc Res.* 2023 Nov; 38(6): 1142–1176, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10794015/>. (citing several studies).

¹⁷ National Pesticide Information Center, Pesticide Safety for Youth in Agriculture, (Accessed: Aug. 8, 2024), <http://npic.orst.edu/health/youthag.html>.

¹⁸ MHP Salud, There are over 2 million farmworkers in America., (Accessed: Aug. 8, 2024), <https://mhpsalud.org/who-we-serve/farmworkers-in-the-united-states/>.

¹⁹ See, e.g., Center for Worker Health, Safety and Injury Characteristics of Youth Farmworkers Working in North Carolina Agriculture, (Aug. 8, 2024), <https://cdn.atriumhealth.org/-/media/wakeforest/school/files/centers-and-institutes/worker-health/policy-brief-8-youth-study--safety-anf-injury-youth-farmworkers.pdf> (citing a study in North Carolina that found that 90 percent of surveyed youth farmworkers were Latino or Hispanic).

²⁰ MHP Salud, There are over 2 million farmworkers in America., (Accessed: Aug. 8, 2024), <https://mhpsalud.org/who-we-serve/farmworkers-in-the-united-states/>.

²¹ Kenny Torrella, *A 12-year-old might've grown your food. In many states, that's perfectly legal.*, *Vox*, (Jun. 16, 2023), <https://www.vox.com/future-perfect/2023/6/16/23762593/child-labor-laws-republicans-agriculture-farm-care-act>; Farmworker Justice Blog, Agricultural Exceptionalism: A History of Discrimination against Farmworkers in Labor Laws Results in Poverty for Farmworkers, (Accessed: Aug 8, 2024), <https://www.farmworkerjustice.org/blog-post/agricultural-exceptionalism-a-history-of-discrimination-against-farmworkers-in-labor-laws-results-in-poverty-for-farmworkers/>; Rebecca Dixon, On Addressing the Racist Exclusions of Farmworkers, Domestic Workers and Tipped Workers from the Fair Labor Standards Act, National Employment Law Project, (May 3, 2021), <https://s27147.pcdn.co/insights-research/testimony-from-excluded-to-essential-tracing-the-racist-exclusion-of-farmworkers-domestic-workers-and-tipped-workers-from-the-fair-labor-standards-act/>.

²² Compare 29 U.S.C. § 203(l) with 29 U.S.C. § 213(c)(2)

²³ 29 U.S.C. § 213(c)(1)(A).

limit workers' under 16 work in hazardous occupations²⁴ – is underutilized, given the hazards that young agricultural workers regularly face. In fact, the regulations issued under this authority have not been updated in over 50 years.²⁵

As detailed in the next section, the WHD most recently tried to issue updated HOA regulations in 2011, based on NIOSH's recommendations.²⁶ The WHD unfortunately withdrew that proposal in 2012 amid fierce industry backlash.²⁷

Prior to the past few years, the primary purpose of state legislation had been to regulate above the federal minimums established under the FLSA.²⁸ State efforts in the 2020s, however, have sought to drop these restrictions below federal minimums.²⁹ Of course, such state laws legitimately apply to the very small proportion of minors that are not covered by the FLSA, either individually or due to their employer's small size.³⁰ But the more prevalent practical result of these conflicting standards is confusion for employers and employees about how to comply with the relevant child labor protections and increases in violations of federal child labor laws. As a result, the federal HOAs now have a more profound impact on the workforce and must be revised to be clear and easily applied to reduce confusion and ensure that the statutory requirements are given full effect.

In addition to implementing NIOSH's recommended changes to the scope of certain existing HOAs and recommended additional HOAs, the WHD should examine whether its HOAs that include exemptions for student-learner and other categories of workers under 16 should be revised to ensure that child labor regulations offer bright line rules that minimize employer confusion. EPI has documented a trend of weakened once-stronger state standards for youth employment in hazardous employment in both agricultural and nonagricultural occupations.³¹

III. CURRENT STATE

Although the FLSA permits children as young as 12 – and even younger in some circumstances – to work on farms with parental consent, the FLSA empowers the DOL to issue orders prohibiting employment for workers under 16 in occupations that it finds are “particularly hazardous.”³² Importantly, the HOAs issued under this authority do not apply to an employee that is “employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person” (referred to as the “parental exemption”).³³

²⁴ 29 U.S.C. §§ 213(c)(2), 213(c)(4)(a).

²⁵ Department of Labor, Part 1500–Child Labor Regulations, Orders, and Statements of Interpretation, 35 Fed. Reg. 221, (Jan. 7, 1970).

²⁶ 2011 Proposed Rule; NIOSH Report.

²⁷ 2012 Withdrawal.

²⁸ Lauren Kaori Gurley, *America is divided over major efforts to rewrite child labor laws*, Washington Post, (Mar. 31, 2024), <https://www.washingtonpost.com/business/2024/03/31/us-child-labor-laws-state-bills/>.

²⁹ *Id.*

³⁰ An employer is covered by the FLSA if it does \$500,000 in business or sales annually. 29 U.S.C. § 203(s)(1)(A).

³¹ See Economic Policy Institute, Child Labor, (Accessed: Sept. 4, 2024), <https://www.epi.org/research/child-labor/>.

³² 29 U.S.C. § 213(c)(2).

³³ 29 U.S.C. § 213(c)(2).

Congress granted the HOA authority to DOL in 1966, and the DOL used that authority to issue an interim HOA in 1967, designating 16 hazardous occupations in agriculture.³⁴ After a series of consultations and evaluating its enforcement experience, the DOL in 1970 issued final regulations that defined 11 HOAs prohibiting employment, with some exemptions, for workers under 16 in hazardous occupations in agriculture.³⁵ For example, the HOAs contain prohibitions for young workers on activities like operating a tractor that has a power take-off threshold above a certain level and participating in certain timber operations.³⁶ The regulations have not been revised since 1970.³⁷

As mentioned, some HOAs are subject to exemptions, which date to the late 1960s. Besides the statutory parental exemption, at the regulatory level some HOAs permit student-learners who are enrolled in bona fide cooperative vocational programs, children who complete a formal training program on tractor operation coordinated by the Department of Agriculture's Federal Extension Service, and other young workers who are trained through related programs to operate tractors and other farm equipment.³⁸

The DOL began a lengthy regulatory process to update its HOA regulations in 1998, when it provided funding to NIOSH to conduct a review of available data and research to assess "workplace hazards and the adequacy of the current youth employment HOAs to address them."³⁹ NIOSH issued its report in 2002.⁴⁰ The report contained 11 recommendations to revise the current HOAs, as well as one recommendation to create a new HOA for agricultural work that requires a respirator.⁴¹ In addition, the NIOSH report made several recommendations to the DOL for revision and additions to the nonagricultural HOAs.⁴² While the DOL adopted many of NIOSH's recommendations for revising the nonagricultural HOAs in a regulatory process that included a 2004 final rule, a 2007 proposed rule and advanced notice of proposed rulemaking, and a 2010 final rule, it deferred consideration of NIOSH's recommendations for the HOAs "to keep the size and scope [of the rulemaking] manageable."⁴³

In September 2011, the WHD issued a proposed rule that incorporated almost all of NIOSH's recommendations for revising the HOAs (detailed in the next section).⁴⁴ While the 2010 nonagricultural rule faced little opposition (the proposed rule generated only 27 regulatory comments⁴⁵), the industry and political backlash to the 2011 proposed rule for agriculture was swift and fierce. The proposed rule received over 10,000 regulatory comments.⁴⁶ Rural lawmakers were

³⁴ 2011 Proposed Rule at 54839.

³⁵ *Id.*

³⁶ 29 C.F.R. § 570.71(a)(1),(5).

³⁷ Department of Labor, Part 1500–Child Labor Regulations, Orders, and Statements of Interpretation, 35 Fed. Reg. 221, (Jan. 7, 1970).

³⁸ 29 C.F.R. § 570.72.

³⁹ Department of Labor, Child Labor Regulations, Orders and Statements of Interpretation, 72 Fed. Reg. 19328, 19329, (Apr. 17, 2007), (hereinafter "2007 ANPRM").

⁴⁰ NIOSH Report.

⁴¹ *Id.* at 67-98.

⁴² *Id.* at 21-66.

⁴³ 2007 ANPRM at 19331.

⁴⁴ 2011 Proposed Rule.

⁴⁵ Wage and Hour Division, Docket Comments: Child Labor Regulations, Orders and Statements of Interpretation (NPRM), (Apr. 17, 2007), <https://www.regulations.gov/document/WHD-2007-0002-0001/comment>. Of course, WHD issued the proposed rule and closed the comment period in 2007 during the Bush administration, which helps explain why industry and conservatives were less motivated to mount a significant opposition.

⁴⁶ Wage and Hour Division, Docket Comments: Child Labor Regulations, Orders and Statements of Interpretation: Violations–Civil Money Penalties, (Sept. 2, 2011), <https://www.regulations.gov/document/WHD-2011-0001-0001/comment>.

vocal in their opposition to the proposed rule, often deploying hyperbole to assail the Obama administration's supposed attack on the family farm and the rural way of life.⁴⁷

The most controversial elements of the proposed rule were the WHD's efforts to codify the definition of the parental exemption to the HOAs and the WHD's proposed adoption of an HOA that would have prohibited hired workers under 16 from operating most "power-driven equipment."⁴⁸ With respect to the former, the WHD's proposed regulation sought only to codify a long-standing interpretation⁴⁹ that the parental exemption applied narrowly to situations where a parent (or person standing in a parent's place) owned or operated a farm and was the child's sole employer. The proposal was distorted by opponents and heightened an ongoing political controversy about a perceived lack of understanding on the part of the administration about the "rural way of life."⁵⁰ The parental exemption is not addressed in the proposals in this memorandum.

As to the latter, an HOA that would have prohibited hired farmworkers under 16 from operating "power-driven equipment," opponents likewise mischaracterized the likely impact of the regulatory provision.⁵¹ That said, NIOSH's comments on the proposed rule offered evidence-backed suggestions for how the WHD could narrow the HOA proposal without compromising its safety goals.⁵² NIOSH's 2011 recommendations for this HOA are included in the proposals below.

Due to the political backlash and presidential election year politics, the WHD withdrew the proposal to update the HOAs in Summer 2012, explaining that the "regulation [would] not be pursued for the duration of the Obama administration."⁵³ As a result of this failure and the more successful regulatory process in 2010 to update nonagricultural child labor provisions, as well as nearly a century of disparate statutory and regulatory treatment, the gap between protections for young agricultural and nonagricultural continues to widen.

⁴⁷ Amy Sherman, *Tom Rooney says feds want to ban kid farmers from using battery-powered screwdrivers and garden hoses*, Politifact, (Apr. 26, 2012), <https://www.politifact.com/factchecks/2012/apr/26/tom-rooney/tom-rooney-farming-kids-screwdrivers-hoses/>.

⁴⁸ 2011 Proposed Rule at 54865, 54855.

⁴⁹ 2011 Proposed Rule at 54841 (explaining that "application of the parental exemption in agriculture has been for over forty years limited to the employment of children exclusively by their parent(s) on a farm owned or operated by the parent(s) or person(s) standing in their place.").

⁵⁰ Office of Scott Desjarlais, *DesJarlais Applauds Decision by Department of Labor to Withdraw Rule Prohibiting Children From Working on Farms*, (Apr. 26, 2012),

<https://desjarlais.house.gov/2012/4/desjarlais-applauds-decision-by-department-of-labor-to-withdraw-rule>; Department of Labor, Labor Department Statement on Withdrawal of Proposed Rule Dealing with Children Who Work in Agricultural Vocations, (Apr. 26, 2012), <https://www.dol.gov/newsroom/releases/whd/whd20120426-0>.

⁵¹ Opponents argued that the regulation would have prevented kids from using battery-powered screwdrivers and flashlights on their parents' farms, omitting the fact of a parental exemption and that the WHD was clearly not going to (and explicitly declined an intention to) enforce the HOA in that manner. Amy Sherman, *Tom Rooney says feds want to ban kid farmers from using battery-powered screwdrivers and garden hoses*, Politifact, (Apr. 26, 2012), <https://www.politifact.com/factchecks/2012/apr/26/tom-rooney/tom-rooney-farming-kids-screwdrivers-hoses/>.

⁵² NIOSH, Comments of the National Institute for Occupational Safety and Health on the Department of Labor Wage and Hour Division Notice of Proposed Rulemaking and Request for Comments Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties 5-7 (Nov. 28, 2011), <https://www.regulations.gov/comment/WHd-2011-0001-4503> (hereinafter "NIOSH Comment").

⁵³ Department of Labor, Labor Department Statement on Withdrawal of Proposed Rule Dealing with Children Who Work in Agricultural Vocations, (Apr. 26, 2012), <https://www.dol.gov/newsroom/releases/whd/whd20120426-0>.

IV. PROPOSED ACTION

The WHD should proceed, through notice-and-comment rulemaking, to update the HOAs, which have not been revised since 1970.⁵⁴

The FLSA prohibits “oppressive child labor” and engaging in commerce connected to “oppressive child labor.”⁵⁵ Subject to several exceptions, the minimum age for children working in agriculture is 12, with parental consent.⁵⁶ However, the DOL is empowered to raise the allowable age to 16 for occupations which the “Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen.”⁵⁷ These HOAs do not apply when an “employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.”⁵⁸

The DOL maintains a list of 11 HOAs at 29 C.F.R. Part 570 Subpart E-1.

The proposals are summarized in the table below, with more detail available in the sections that follow.

Provision	Recommendation	Source of recommendation
HOA 1, Tractors	<ul style="list-style-type: none"> Expand scope (remove PTO threshold) Require ROPS for student-learners Require driver’s license 	2011 Proposed Rule; NIOSH Comment; NIOSH Report
HOA 2, Power-driven machinery	<ul style="list-style-type: none"> Expand scope Consolidate with HOAs 3 and 7 	2011 Proposed Rule; NIOSH Comment; NIOSH Report
HOA 4, Work with certain animals	<ul style="list-style-type: none"> Expand scope Eliminate student-learner exemption 	2011 Proposed Rule; NIOSH Comment; NIOSH Report
HOA 5, Timber operations	<ul style="list-style-type: none"> Expand scope (remove diameter threshold) Eliminate student-learner exemption 	2011 Proposed Rule; NIOSH Report
HOA 6, Ladders and other heights	<ul style="list-style-type: none"> Expand scope (remove height threshold) 	2011 Proposed Rule; NIOSH Report

⁵⁴ The DOL did reorganize its child labor regulations in 1971. Department of Labor, Part 570–Child Labor Regulations, Orders, and Statements of Interpretation, 36 Fed. Reg. 25155 (Dec. 29, 1971), https://archives.federalregister.gov/issue_slice/1971/12/29/25152-25158.pdf#page=5.

⁵⁵ 29 U.S.C. § 212(a),(c).

⁵⁶ 29 U.S.C. § 213(c)(1)

⁵⁷ 29 U.S.C. § 213(c)(2).

⁵⁸ *Id.*

	<ul style="list-style-type: none"> Eliminate student-learner exemption 	
HOA 8, Confined spaces and fumes	<ul style="list-style-type: none"> Bifurcate and expand scope 	2011 Proposed Rule; NIOSH Report
HOA 9, Toxic chemicals	<ul style="list-style-type: none"> Expand scope Align with EPA definitions 	2011 Proposed Rule; NIOSH Report
Student-learner exemption	<ul style="list-style-type: none"> Add requirements for exemption qualification 	2011 Proposed Rule
Other exemptions	<ul style="list-style-type: none"> Eliminate 	2011 Proposed Rule
New HOA, Extreme temperatures	<ul style="list-style-type: none"> Protect children from extreme conditions 	2011 Proposed Rule
New HOA, Tobacco production and curing	<ul style="list-style-type: none"> Protect children from nicotine poisoning 	2011 Proposed Rule
New HOA, Respiratory protection	<ul style="list-style-type: none"> Protect children from ill-fitting protective equipment 	NIOSH Report
New HOA, Corn detasseling	<ul style="list-style-type: none"> Protect children from lacerations 	NIOSH Comment
New HOA, Welding	<ul style="list-style-type: none"> Protect children from welding-related injuries 	NIOSH Comment

A. Revise existing hazardous occupation in agriculture orders

The WHD should consider implementing revisions to its existing HOAs to account for new knowledge about occupational hazards and the fact that the HOA regulations are out of date. While a more limited regulatory revision could focus just on priorities like HOA 1 (tractors), HOA 6 (ladders and heights), HOA 8 (grain entrapments), and tobacco curing and production, the following HOAs are in need of revision:

- HOA 1, Tractors:**⁵⁹ The WHD should update HOA 1, “Operating a Tractor Over 20 PTO Horsepower or Connecting or Disconnecting an Implement or Any of Its Parts To or from Such a Tractor.” The 2011 proposed rule sought to revise this HOA to eliminate the 20 power takeoff (PTO) horsepower threshold, require rollover protection structure for workers under 16

⁵⁹ 2011 Proposed Rule at 54852.

operating within the exemption for student-learners, and consolidate a prohibition on riding as a passenger into HOA 1. In addition to these three changes recommended by NIOSH, the new HOA 1 would have required workers operating tractors and other farm machinery on public roads to carry a valid driver's license.⁶⁰ Finally, the proposed rule would have added new requirements for student-learners operating under the HOA 1 exemption for those workers, including a prohibition on the use of communications devices during operation of tractors.⁶¹ This proposal is crucial to child safety, as more than half of all farm-related deaths are a result of tractor rollover, with one-in-ten tractor operators experiencing a rollover in their lifetime.⁶²

- **HOA 2, Power-driven machinery:**⁶³ The WHD should update HOA 2, “Operating or Assisting To Operate (Including Starting, Stopping, Adjusting, Feeding, or any Other Activity Involving Physical Contact Associated With the Operation) Several Named Pieces of Power-Driven Machinery.” The 2011 proposed rule sought to expand this HOA (and combine it with current HOA 3 and HOA 7) to adopt “general restrictions on the operation of power-driven machinery consistent with those applied to nonagricultural employment.”⁶⁴ The rule would have prevented operating “power-driven equipment,” which included “all machines, equipment, implements, vehicles, and/or devices operated by any power source other than human hand or foot power, except for office machines and agricultural tractors.”⁶⁵ NIOSH’s comment on the 2011 proposed rule made recommendations to narrow the scope of this proposal without sacrificing the safety goals of the revision, which DOL should pursue instead of its original 2011 proposal. Specifically, it suggested that WHD narrow its definition of “power-driven equipment” to “equipment operated by a power source other than human power, that is designed for: 1) the movement or transportation of people, goods, or materials; 2) the cutting, shaping, forming, surfacing, nailing, stapling, stitching, fastening, punching, or otherwise assembling, pressing, or printing of materials; or 3) excavation or demolition operations.”⁶⁶ NIOSH also recommended a fourth component, agricultural and gardening machinery.⁶⁷
- **HOA 4, Work with certain animals.**⁶⁸ The WHD should update HOA 4, “Working on a Farm in a Yard, Pen, or Stall Occupied by a: Bull, Boar, or Stud Horse Maintained for Breeding Purposes; or Sow With Suckling Pigs, or Cow With Newborn Calf (With Umbilical Cord Present).” The 2011 proposed rule aimed to make the list of prohibited acts and situations more specific, as well as expand the applicability of the HOA to work in poultry catching and cooping, as well as animal husbandry, which are excluded from the HOA as written.⁶⁹ Additionally, the proposed rule recommended eliminating the student-learner exemption from this HOA.⁷⁰ NIOSH’s 2011 comments on the proposed rule recommended that the proposed HOA remove language that permits case-by-case consideration of the likelihood of unpredictable animal

⁶⁰ 2011 Proposed Rule at 54852; NIOSH endorsed this proposal in their 2011 comments. NIOSH Comment at 4.

⁶¹ *Id.*

⁶² Linda Geist, Farming: The most dangerous job in the U.S., University of Missouri, (Sept. 8, 2022), <https://extension.missouri.edu/news/farming-the-most-dangerous-job-in-the-us>; see also Mary-Rose Abraham, *Tractor Rollovers Kill Dozens on Farms Each Year — and a Prevention Program Is at Risk*, (Dec. 11, 2023), <https://civileats.com/2023/12/11/tractor-rollovers-kill-dozens-on-farms-each-year-and-a-prevention-program-is-at-risk/> (describing tractors as a leading cause of death for farmworkers)

⁶³ 2011 Proposed Rule at 54855.

⁶⁴ 2011 Proposed Rule at 54857.

⁶⁵ *Id.* at 54856.

⁶⁶ NIOSH Comment at 5.

⁶⁷ *Id.*

⁶⁸ 2011 Proposed Rule at 54858.

⁶⁹ *Id.* at 54859.

⁷⁰ *Id.* at 54860.

behavior.⁷¹ A new proposal should incorporate this recommendation.

- **HOA 5, Timber operations.**⁷² The WHD should update HOA 5, “Felling, Bucking, Skidding, Loading, or Unloading Timber With Butt Diameter of More Than Six Inches.” The 2011 proposed rule would have removed the six inch threshold from this HOA because, as NIOSH explained,⁷³ “there is no evidence that working with timber with a butt diameter of six inches or less is any safer than working with large timber.”⁷⁴ Additionally, the proposed rule recommended eliminating the student-learner exemption from this HOA.⁷⁵ The fatal injury rate for logging workers is extremely high compared to other industries.⁷⁶
- **HOA 6, Ladders and other heights.**⁷⁷ The WHD should update HOA 6, “Working From a Ladder or Scaffold (Painting, Repairing, or Building Structures, Pruning Trees, Picking Fruit, etc.) at a Height of Over 20 Feet.” The 2011 proposed rule would have reduced the allowable maximum height for children workers at elevation from 20 to 6 feet. It would have also created a new HOA to align prohibitions on construction and excavation work to standards found in the nonagricultural HOs.⁷⁸ Additionally, the proposed rule recommended eliminating the student-learner exemption from this HOA.⁷⁹ OSHA’s enforcement data is replete with examples of young workers being injured in falls from unsafe heights and BLS’s census of fatal occupational injuries ranks roofing as having one of the highest fatal injury rates.⁸⁰
- **HOA 8, Confined spaces and fumes.**⁸¹ The WHD should update HOA 8, “Working Inside a Fruit, Forage, or Grain Storage Designed To Retain an Oxygen Deficient or Toxic Atmosphere; an Upright Silo Within Two Weeks After Silage Has Been Added or When a Top Unloading Device Is in Operating Position; a Manure Pit; or a Horizontal Silo While Operating a Tractor for Packing Purposes.” At NIOSH’s urging, the 2011 proposed rule would have bifurcated this HOA to separately ban all work inside fruit, forage, or grain⁸² storage (silos or bins) and to ban all work in manure pits.
- **HOA 9, Toxic chemicals.**⁸³ The WHD should update HOA 9, “Handling or Applying (Including Cleaning or Decontaminating Equipment, Disposal or Return of Empty Containers, or Serving as a Flagman for Aircraft Applying) Agricultural Chemicals Classified Under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135 et seq.) as Category I of Toxicity,

⁷¹ NIOSH Comment at 8-9.

⁷² 2011 Proposed Rule at 54860.

⁷³ *Id.*

⁷⁴ *Id.* at 54860.

⁷⁵ *Id.*

⁷⁶ Bureau of Labor Statistics, Hours-based fatal injury rates by industry, occupation, and selected demographic characteristics, (2022),

<https://www.bls.gov/iif/fatal-injuries-tables/fatal-occupational-injuries-hours-based-rates-2022.xlsx>.

⁷⁷ 2011 Proposed Rule at 54860.

⁷⁸ *Id.*

⁷⁹ *Id.* at 54861.

⁸⁰ OSHA Enforcement Data, (Accessed: Aug. 19, 2024), https://enforcedata.dol.gov/views/data_summary.php; Bureau of Labor Statistics, Hours-based fatal injury rates by industry, occupation, and selected demographic characteristics, (2022),

<https://www.bls.gov/iif/fatal-injuries-tables/fatal-occupational-injuries-hours-based-rates-2022.xlsx>.

⁸¹ 2011 Proposed Rule at 54862.

⁸² Recent research reveals upticks in grain entrapment injuries and fatalities. Joelle Orem, *Purdue Study: Grain Entrapments Rise to Highest Level in a Decade*, AGWeb, (Jul. 11, 2023),

<https://www.agweb.com/news/crops/crop-production/purdue-study-grain-entrapments-rise-highest-level-decade>.

⁸³ *Id.* at 54863.

Identified by the Word ‘Poison’ and the ‘Skull and Crossbones’ on the Label; or Category II of Toxicity, Identified by the Word ‘Warning’ on the Label.” The 2011 proposed rule incorporated NIOSH’s recommendation to expand this HOA to align with the Environmental Protection Agency’s regulatory definition of “pesticide handler.”⁸⁴

B. Narrow and eliminate training exemptions for certain hazardous occupation in agriculture orders

The current regulations permit several categories of child workers to work in occupations covered by most of the HOAs:⁸⁵ student-learners enrolled in a cooperative vocational program, tractor operators that completed a formal training program coordinated by the U.S. Department of Agriculture’s Federal Extension Service, and tractor operators and operators of other machines who had completed similar training requirements.⁸⁶ The regulations that established the current exemptions explicitly stated that they would be reviewed and reevaluated within two years of their issuance in 1970, but that review never occurred and the exemptions have remained in place unchanged.

The 2011 proposed rule sought to (1) eliminate the tractor training program exemptions, (2) eliminate the student-learned exemption from HOAs 3-6, and (3) revise the requirements for the remaining student-learner exemptions (in HOAs 1 and 2). The Department explained its decision to eliminate the tractor and machine exemptions, writing that the certification requirements were “not sufficiently extensive and thorough to ensure the safety of young hired farm workers.”⁸⁷ The proposed rule also eliminated the student-learner exemption from several HOAs.⁸⁸ Finally, the Department’s proposed revisions to the remaining student-learner exemption required minors to be “enrolled in an ongoing vocational education training program in agriculture operated by a state or local educational authority, or in a substantially similar program conducted by a private school.”⁸⁹ In addition to the concurrent enrollment requirement, the minor would be required to complete 90 hours (equivalent to roughly one semester) of “systematic school instruction in agricultural education at or above the eighth grade level.”⁹⁰

The WHD should consider implementing the proposed rule’s changes, which were not the source of the political controversy that brought down the 2011 rulemaking process.

C. Create new hazardous occupation in agriculture orders to protect young agricultural workers from evolving hazards

NIOSH and the WHD have already identified new potential HOAs that would deliver crucial protections to children working in agriculture. The WHD could propose the following HOAs:

⁸⁴ *Id.*

⁸⁵ According to 29 C.F.R. § 570.72, the current student-learner exemption applies to current HOAs 1-6 and the other exemptions apply to current HOAs 1 and 2.

⁸⁶ See 29 C.F.R. § 570.72.

⁸⁷ 2011 Proposed Rule at 54850.

⁸⁸ *Id.*

⁸⁹ 2011 Proposed Rule at 54851.

⁹⁰ *Id.* at 54852.

- **Extreme temperatures:** As part of the 2011 proposed rule preamble, the WHD requested comments on (but did not propose regulatory language for) whether it should create an HOA “that would limit the exposure of young hired farm workers to extreme temperatures and/or arduous conditions.” Considering that workers under 16 may not have the maturity and judgment to recognize the symptoms of heat stress, identify adverse conditions, or to take preventative action like hydrating themselves, the WHD sought comment on whether it should do any or all of the following: prohibit work in agricultural occupations when temperatures exceed or drop below a certain level; require that hours in direct sun be limited; require shade, water, or certain breaks; and regulate the payment of piece rates to young farmers if they improperly incentivize prolonged exposure to potentially harmful conditions.⁹¹ In addition to the federal Occupational Safety and Health Administration’s (OSHA) ongoing regulatory effort,⁹² the WHD could look to state schemes designed to protect workers from heat. California, for example, has an outdoor heat illness prevention standard that requires employers to develop a written heat illness prevention plan; train all employees and supervisors; and provide water, rest, and shade if temperature exceeds various thresholds.⁹³
- **Tobacco production and curing:** the 2011 proposed rule sought to create a new HOA that would have prohibited the employment of young workers in tobacco production and curing so as to decrease the prevalence of green tobacco sickness (acute nicotine poisoning).⁹⁴ Exposure to wet tobacco during harvesting and processing leads to nicotine absorption that contributes to a host of symptoms, including headache, dizziness, nausea, vomiting, itching, rashes, abdominal cramps, prostration, difficulty breathing, and occasionally fluctuations in blood pressure or heart rate.⁹⁵
- **Occupations requiring respiratory protection:** The regulatory process that ended in the 2012 withdrawal of the proposed rule sought to implement almost all of NIOSH’s 2002 recommendations for revisions to the HOAs. One that it didn’t adopt, and that the WHD should consider implementing, is a new HOA that prohibits young workers from performing any work that requires the use of respiratory protection. As NIOSH explained: “[t]he use of respiratory protective devices implies the presence of hazardous atmospheric conditions. Effective use of

⁹¹ In the limited research available regarding this proposal, NIOSH found that piece rate pay resulted in “increased risk taking and injuries, poor health status, enhanced risk for musculoskeletal disorders, premature aging, higher levels of depressions, and complaints of sleep disorders.” NIOSH Comment at 15.

⁹² The Occupational Safety and Health Administration (OSHA) is currently in a regulatory process to set heat standards for all workplaces. Nonetheless, an HOA for young workers could be an appropriate step for the WHD to take. First, OSHA is notorious for its slow regulatory process, due both to the agency’s limited resources and cumbersome procedures imposed on it by Congress. Additionally, young workers in agriculture may require more protective measures than OSHA sets for workers generally. For example, the OSHA standard could set a temperature threshold based on the conditions that an average adult worker could sustain, but the WHD may need to adjust the threshold considering the different physiology of young workers. OSHA, Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings Rulemaking, (Accessed: Aug. 8, 2024), <https://www.osha.gov/heat-exposure/rulemaking>; OSHA Regulatory Agenda: Heat Illness in Outdoor and Indoor Work Settings RIN 1218-AD39, (Fall 2023), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=1218-AD39>; Senate Hearing 112-725, Time Takes its Toll: Delays in OSHA’s Standard-Setting Process and the Impact on Worker Safety, (Apr. 19, 2012), <https://www.govinfo.gov/content/pkg/CHRG-112shrg73974/html/CHRG-112shrg73974.htm>; As the 2011 Proposed Rule explained, “young workers are not ‘little adults’ but human beings at their own unique stage of development.” 2011 Proposed Rule at 54850.

⁹³ California Department of Industrial Relations, Cal/OSHA Reminds Employers to Protect Workers from High Heat, (Jun. 3, 2024), <https://www.dir.ca.gov/DIRNews/2024/2024-40.html>.

⁹⁴ 2011 Proposed Rule at 54864.

⁹⁵ *Id.*

respirators is dependent on proper fit and usage. Young workers may have difficulty with respirator fit due to their smaller physical size. In order to ensure proper use of respirators, workers should be extensively trained. Because youth may have increased susceptibility to toxins, ... exposing young workers to hazardous atmospheric conditions where respiratory protection would be required poses unnecessary risk.”

- **Corn detasseling:** In its comments to the 2011 proposed rule, NIOSH recommended that the WHD consider creating a new HOA that would prohibit young hired farmworkers from performing corn detasseling, which involves using sharp knives to cross-breed varieties of corn.⁹⁶ This is a relatively common task completed by teenagers on U.S. farms, but it poses serious risks of laceration injuries, pesticide exposure illness, and heat exhaustion.⁹⁷
- **Welding:** As a complement to its recommendation for a nonagricultural HO on welding, NIOSH suggested a parallel HOA in its comments to the WHD’s 2011 proposed rule. According to NIOSH, welding creates potentially fatal hazards for welders and nearby non-welders.⁹⁸
- **New HOAs based on updated data:** In consultation with NIOSH, the WHD could evaluate current workplace practices and injury data to assess whether the agency should issue HOAs in addition to the ones listed here.

V. CONCLUSION

The WHD should update its regulations to better protect young agricultural workers, including by revising existing HOAs; narrowing and eliminating certain training exemptions to existing HOAs; and creating new HOAs for dangerous tasks.

⁹⁶ NIOSH Comment at 15.

⁹⁷ Id.; see also OSHA enforcement data detailing several teenage corn detassellers being hospitalized for heat exhaustion in 2019. OSHA Enforcement Data, (Accessed: Aug. 19, 2024), https://enforcedata.dol.gov/views/data_summary.php.

⁹⁸ Id. at 16.

Safer Hours for Child Labor



October 2024

Ensuring that long and overnight hours do not interfere with children's success and well-being

I. INTRODUCTION

Elevated rates of child labor violations,¹ injuries,² and chronic school absenteeism³ underscore the need for protections to prevent youth employment from having negative effects on children's health and well-being. Unfortunately, state governments around the country are taking steps to eliminate such protections just as they are most urgently needed.⁴ Despite evidence that sleep deprivation and overwork impose significant harms on kids, many states are expanding the hours and number of days for which children are allowed to be scheduled.

Fortunately, the Wage and Hour Division (WHD) of the United States Department of Labor (DOL) has robust and long-standing authorities to, on a nationwide basis, prohibit employment of certain children working under dangerous conditions, including for long hours, overnight, and for long weeks. The Fair Labor Standards Act (FLSA) empowers the Secretary of Labor to issue regulations imposing restrictions on the hours and conditions of 14- and 15-year-olds working in nonagricultural occupations; hazardous occupation orders (HOs) banning certain nonagricultural occupations for 16- and 17-year-old workers; and hazardous occupation in agriculture orders (HOAs) banning certain agricultural occupations for workers under 16.

The regulations meant to protect child workers have not been updated substantially since 2010; most are far older. The WHD should consider incorporating what experts know about the risks of long hours and overwork for child workers into their regulatory scheme.

This memorandum proposes that the WHD begin a notice-and-comment rulemaking process to:

1. revise its regulations at 29 C.F.R. § 570.35 to require one day off per week and 30-minute rest breaks before working more than 5 consecutive hours for 14- and 15-year-old workers in nonagricultural occupations;
2. issue an HO prohibiting overnight hours for 16- and 17-year-old nonagricultural workers; and
3. issue an HOA prohibiting overnight hours for agricultural workers under 16.

¹ Department of Labor, Increases in Child Labor Violations, Young Workers' Injuries Prompts Enhanced Outreach, Strong Enforcement by US Department of Labor, (Jul. 29, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220729>.

² *Id*; Patrick Terpstra, *More kids are getting hurt in American workplaces*, Scripps News, (Jul. 24, 2024), <https://scrippsnews.com/stories/more-kids-are-getting-hurt-in-american-workplaces/>.

³ The White House, FACT SHEET: Biden-Harris Administration Announces New Actions and Resources for Increasing Student Attendance and Engagement as Part of the White House Every Day Counts Summit, (May 15, 2024),

<https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/15/fact-sheet-biden-harris-administration-announces-new-actions-and-resources-for-increasing-student-attendance-and-engagement-as-part-of-the-white-house-every-day-counts-summit>.

⁴ Nina Mast, *Child labor remains a key state legislative issue in 2024*, Economic Policy Institute, (Feb. 7, 2024), <https://www.epi.org/blog/child-labor-remains-a-key-state-legislative-issue-in-2024-state-lawmakers-must-seize-opportunities-to-strengthen-standards-resist-ongoing-attacks-on-child-labor-laws/>.

II. JUSTIFICATION

The WHD should take regulatory action to limit the number of hours and days per week that child workers can work in various settings, ensure that some children are entitled to a rest break, and prohibit overnight work where possible.

Workplace injuries, illnesses, and child labor violations involving minors have increased dramatically in recent years.⁵ An analysis of U.S. Bureau of Labor Statistics survey data revealed that injuries nearly doubled in frequency between 2011 and 2020.⁶ This increase coincided with a surge in documented violations of federal labor laws and regulations.⁷ As the Economic Policy Institute (EPI) explained in a recent report, the DOL has taken significant actions against prominent child labor violators, including Hyundai-Kia, a meatpacking sanitation subcontractor that services JBS, Cargill, and Tyson, and various McDonald's franchises.⁸ The surge in violations has occurred economy-wide, with all child labor violations increasing almost four-fold between 2015 and 2022.⁹

Recent investigations and media reports reveal that child workers are too often engaged in work for long shifts and even overnight. For example, the meat sanitation service Packers Sanitation Services Incorporated was fined \$1.5 million for violations related to employing minors illegally, including for long overnight hours.¹⁰ A 2013 Human Rights Watch investigation interviewed children working on tobacco farms for up to 12 hours per day who reported being very fatigued and exhausted.¹¹ During peak harvest season, child agricultural workers may start work as early as 4 a.m. and work for 14 hours per day.¹²

Long and overnight working hours for children is one driver of poor health, safety, well-being, and academic performance (and, by extension, future earnings and well-being). Long and late hours create sleep deprivation that takes a toll on children's ability to focus and engage in the classroom. (Unlike adults who work late or night shifts, children do not generally have the option to sleep during the day, as they are legally required to attend school.) The New York Times documented that one teacher in rural Virginia created a napping closet in her classroom for the teens that she knew were working the night shift and another teacher kept track of her students' work schedules at Tyson and

⁵ Department of Labor, Increases in Child Labor Violations, Young Workers' Injuries Prompts Enhanced Outreach, Strong Enforcement by US Department of Labor, (Jul. 29, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220729>.

⁶ Patrick Terpstra, *More kids are getting hurt in American workplaces*, Scripps News, (Jul. 24, 2024), <https://scrippsnews.com/stories/more-kids-are-getting-hurt-in-american-workplaces/>.

⁷ Department of Labor, Increases in Child Labor Violations, Young Workers' Injuries Prompts Enhanced Outreach, Strong Enforcement by US Department of Labor, (Jul. 29, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220729>.

⁸ Jennifer Scherer & Nina Mast, *Child labor laws are under attack in states across the country*, (Dec. 21, 2023), <https://www.epi.org/publication/child-labor-laws-under-attack/>.

⁹ *Id.*

¹⁰ Department of Labor, *More Than 100 Children Illegally Employed in Hazardous Jobs, Federal Investigation Finds; Food Sanitation Contractor Pays \$1.5M in Penalties*, (Feb. 17, 2023), <https://www.dol.gov/newsroom/releases/whd/whd20230217-1>.

¹¹ Human Rights Watch, *Teens of the Tobacco Fields*, (Dec. 9, 2015), <https://www.hrw.org/report/2015/12/09/teens-tobacco-fields/child-labor-united-states-tobacco-farming>.

¹² Human Rights Watch, *Backgrounder: Child Labor in Agriculture*, (Accessed: Aug. 7, 2024), <https://www.hrw.org/legacy/backgrounder/crp/back0610.htm>.

Perdue to better understand when they'd be too exhausted to learn.¹³ Long work hours lead to injuries for child workers. One study found that weekly working hours was one of three variables that had a statistically significant relationship to injuries.¹⁴ A 2004 international study found significant connections between weekly hours worked and work-related illness, injury, and school absences.¹⁵ This connection should not come as a surprise, as experts have long understood that teenagers need more sleep than adults (8 to 10 hours per day) to maintain their mental health, physical health, attention, and overall quality of life.¹⁶ Long hours for children in agriculture are especially dangerous, as prolonged exposure to agriculture-specific hazards like extreme temperature, repetitive motion stress, and pesticides can harm workers.¹⁷ Recent research found that intensive work outside of school is a risk factor for poor grades and dropping out,¹⁸ which can have lifelong consequences, as workers without a high school degree are more likely to earn less and be jobless.¹⁹ Agricultural child workers drop out of high school at a rate four times the national average.²⁰ Furthermore, there is also ample evidence connecting long adult working hours with injury and illness, and no reason to think that the same would not be true with children.²¹

In addition to sleep deprivation and its consequences, overnight hours specifically can pose other hazards to child workers distinct from those presented by mere long hours. Working overnight hours, for example, often requires minors to drive or otherwise travel to their worksite. Driving at night is more dangerous than during the day.²² Transportation incidents are the leading cause of work-related death in the United States, and teens are more likely to die in a car crash than older Americans.²³

¹³ Hannah Dreier, *The Kids on the Night Shift*, New York Times Magazine, (Sept. 18, 2023), <https://www.nytimes.com/2023/09/18/magazine/child-labor-dangerous-jobs.html>.

¹⁴ Layde P., Nordstrom D., Stueland D., and Wittman L. 1996. A population-based case control study of agricultural injuries in children. *Inj. Prev.* 1996 Sep; 2(3):192-6.

¹⁵ L. Guarcello, S. Lyon & F. Rosati, *Impact of Working Time on Children's Health*, (Sept. 2004), <https://webapps.ilo.org/ipecinfo/product/download.do?type=document&id=5585>.

¹⁶ Cleveland Clinic, *How Much Sleep Kids Need: Recommended Hours by Age*, (Jun. 4, 2024), <https://health.clevelandclinic.org/recommended-amount-of-sleep-for-children>.

¹⁷ Kenny Torrella, *A 12-year-old might've grown your food. In many states, that's perfectly legal.*, Vox, (Jun. 16, 2023), <https://www.vox.com/future-perfect/2023/6/16/23762593/child-labor-laws-republicans-agriculture-farm-care-act>; Hong Xiao, et. al, *Agricultural work and chronic musculoskeletal pain among Latino farm workers: the MICASA Study*, *Am J Ind Med.* 2013 Feb; 56(2): 216–225, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3593628/>; American Academy of Pediatrics, *Policy Statement: Pesticide Exposure in Children*, (Dec. 1, 2012), <https://publications.aap.org/pediatrics/article/130/6/e1757/30399/Pesticide-Exposure-in-Children?autologincheck=redirected>.

¹⁸ Jeremy Staff, et. al, *Is Adolescent Employment Still a Risk Factor for High School Dropout?*, (Sept. 20, 2019), <https://onlinelibrary.wiley.com/doi/10.1111/jora.12533>.

¹⁹ Bureau of Labor Statistics, *Education pays, 2022*, (May 2023), <https://www.bls.gov/careeroutlook/2023/data-on-display/education-pays.htm>.

²⁰ Sophie Hayssen, *Child Labor in the US: Despite Laws, Kids Work in Agriculture, Fast Food, Industry*, (Mar. 13, 2023), <https://www.teenvogue.com/story/child-labor-us-how-common>.

²¹ L. Guarcello, S. Lyon & F. Rosati, *Impact of Working Time on Children's Health*, (Sept. 2004), <https://webapps.ilo.org/ipecinfo/product/download.do?type=document&id=5585>.

²² National Safety Council, *Driving at Night*, (Accessed: Aug. 7, 2024), <https://www.nsc.org/road/safety-topics/driving-at-night>.

²³ Sean Finn, *Driving Teens Down Iowas Low Road*, *Common Good Iowa*, (Apr. 30, 2024), <https://www.commongoodiowa.org/blog/2024/04/30/driving-teens-down-iowas-low-road>.

Overnight hours are less likely to be properly supervised,²⁴ which raises the risk of injury,²⁵ decreases the likelihood that enforcement efforts will detect child labor violations,²⁶ and may heighten the risk of physical²⁷ and sexual assault.²⁸ The specific hazards of overnight work has led the International Labor Organization (ILO) to repeatedly urge its members to prohibit night work for most children.²⁹

Working without a weekly day of rest poses similar challenges to young workers. As explained above, child labor can be physically and mentally demanding. A day off promotes rest, recovery, and the opportunity to engage in recreation that is essential for the healthy development of children and adolescents.³⁰ It can also promote connection with family and friends, which is essential to development.³¹ For these reasons and more, the ILO has also urged member countries to ensure that most workers have a mandated day free from work.³²

Given the clear connections between overwork and poor outcomes for child workers, the federal restrictions placed on youth hours are insufficient. The only restriction on the number of hours or days per week that a child in an agricultural occupation can work, for example, is that they must not work during school hours.³³ Currently, there are no federal restrictions on late or overnight work for 16- and 17-year-old workers in nonagricultural occupations. Finally, the current regulations that define allowable hours for 14- and 15-year-old workers in nonagricultural occupations have no requirements for child workers to have non-work days or rest breaks during longer shifts.³⁴

²⁴ As a necessity to have access to machinery and spaces that are off or empty for clearing, janitorial and sanitation services specifically employ children overnight, when there are fewer workers around that could report unsafe practices or conditions. See, e.g., Department of Labor, US Department of Labor Seeks Injunction to Stop Use of ‘Oppressive Child Labor’ by Fayette Janitorial Service at Meat Processing Facilities, (Feb. 21, 2024), <https://www.dol.gov/newsroom/releases/whd/whd20240221-0>.

²⁵ Hannah Dreier, *The Kids on the Night Shift*, New York Times Magazine, (Sept. 18, 2023), <https://www.nytimes.com/2023/09/18/magazine/child-labor-dangerous-jobs.html> (describing the severity of a child’s injuries being in part due to the time it took for someone to hear his screams).

²⁶ Tarra Boggs, *When and Why Are OSHA Inspections Conducted?*, (Apr. 21, 2022), <https://www.industrialcompliancesafety.com/isnetworld/when-and-why-are-osh-inspections-conducted/> (explaining that OSHA inspections usually happen during normal work hours); the vast majority of other workplace inspections happen during the day and not overnight.

²⁷ Deborah Berkowitz, *Behind the Arches: How McDonald’s Fails to Protect Workers From Workplace Violence*, National Employment Law Project, (May 22, 2019), https://www.nelp.org/insights-research/behind-the-arches-how-mcdonalds-fails-to-protect-workers-from-workplace-violence/#_ednref26 (explaining that violent incidents are more likely to occur during late-night hours than other times of day).

²⁸ Sasha Khokha, *Working Alone, at Night, Janitors Risk Sexual Violence*, KQED, (Jun. 23, 2015), <https://www.kqed.org/news/10568193/working-alone-at-night-janitors-risk-sexual-violence>.

²⁹ International Labor Organization, *Eighth Meeting of the SRM TWG*, Aug. 10, 2023), <https://www.ilo.org/media/104256/download>.

³⁰ Caitlyn McKay, *The psychological benefits of participation in leisure pursuits for adolescents*, (Spring 2012), https://scholars.unh.edu/cgi/viewcontent.cgi?params=/context/honors/article/1025&path_info=The_psychological_benefits_of_participation_in_leisure_pursuits_for_adolescents_McKay.pdf; Jeremy Staff, et. al, *Work and Leisure in Adolescence*, (Accessed: Aug. 7, 2024), http://users.soc.umn.edu/~uggen/Staff_Mortimer_Uggen_Handbook_04.pdf.

³¹ Cécile Fanton d’Andon, *Child Labor and Psychosocial Wellbeing: Findings from Ethiopia*, *Int J Environ Res Public Health*. 2022 Jul; 19(13): 7938, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9265878/>.

³² International Labour Organization, C106 - Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106), https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100_ILO_CODE:C106:NO; International Labour Organization, C014 - Weekly Rest (Industry) Convention, 1921 (No. 14), https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100_ILO_CODE:C014:NO

³³ 29 U.S.C. § 213(c)(1).

³⁴ 29 C.F.R. § 570.35.

At the same time as risks to working children have increased, several state governments have moved to weaken their child labor standards. Citing labor shortages in a tight labor market, certain states have introduced and enacted legislation to reduce restrictions on the types of jobs, and hours and conditions thereof, that children are permitted to work.³⁵ Between 2021 and 2024, legislators in at least 13 states introduced or enacted legislation designed to extend permissible work hours for child laborers.³⁶ A proposed bill in New Hampshire, for example, would have eliminated virtually all restrictions on the number of hours employers can schedule youths under 16 to work during a school day or week.³⁷ In Ohio, legislators have made moves to permit scheduling children under 16-years-old to work past 7 p.m. during the school year if a parent or guardian gives approval.³⁸ The controversial child labor reforms enacted in Iowa permit 16- and 17-year-olds to be scheduled for as many hours as an adult, allow children under 16 to be scheduled until 9 p.m. during the school year, and allow children under 16 to be scheduled until 11 p.m. outside of the school year.³⁹ In 2024, Indiana enacted a law that, among other things, removes all restrictions on hours worked for 16- and 17-year-olds and removes restrictions placed on employers that work children overnight.⁴⁰ In 2024, Florida enacted legislation that extends permissible hours for 16- and 17-year-olds and removes all hours restrictions for 16- and 17-year-old homeschooled children.⁴¹ Legislators in Louisiana (led by the owner of several Smoothie King franchises) removed mandated lunch breaks for child workers.⁴²

These state-level rollbacks help explain the need for federal action on the proposals in this memorandum for at least two reasons. First, as more states eliminate child labor regulations, the federal minimum standards apply to more and more children. As a result, the WHD should reevaluate whether its regulations are sufficient to protect child workers. Second, changes to state laws that are inconsistent with federal regulations have already caused confusion among employers.⁴³ Stronger national standards would displace the current patchwork of low-road state rules, yielding a more uniform regime that reduces confusion.

III. CURRENT STATE

Due to the FLSA's design, the current regulations (or lack thereof) governing allowable work hours for child workers vary by age and occupation: one regime applies to 14- and 15-year-old child workers

³⁵ Jennifer Scherer & Nina Mast, Child labor laws are under attack in states across the country, (Dec. 21, 2023), <https://www.epi.org/publication/child-labor-laws-under-attack/>.

³⁶ Economic Policy Institute, Child Labor, (Accessed: Aug. 7, 2024), <https://www.epi.org/research/child-labor/>.

³⁷ New Hampshire House Bill 1519 (2024); New Hampshire law already is laxer than federal minimums by letting children work until 9pm (rather than federal 7pm) during the school week.

³⁸ Ohio Senate Bill 30 (2023).

³⁹ Iowa SF 542 (2023).

⁴⁰ Indiana House Bill 1093 (2024).

⁴¹ Florida House Bill 49 (2024).

⁴² James Finn, *Louisiana lawmakers vote to remove lunch breaks for child workers, cut unemployment benefits*, NOLA, (Apr. 18, 2024),

https://www.nola.com/news/politics/legislature/la-lawmakers-vote-to-remove-lunch-breaks-for-child-workers/article_ef234692-fd9e-11ee-99f5-771c7366107a.html; Louisiana House Bill 156 (2024).

⁴³ Ethan Humble, *'It's confusing': Iowa restaurant owner fined for child labor violations despite following state law*, KCCI, (Jun. 13, 2024),

<https://www.kcci.com/article/iowa-restaurant-owners-confused-frustrated-over-discrepancies-in-federal-and-state-child-labor-laws/61103129>.

outside of agriculture; another to 16- and 17-year-old child workers outside of agriculture; and a final to child workers in agricultural occupations.

For 14- and 15-year-olds in certain nonagricultural occupations, the DOL has issued regulations effectuating the FLSA's directive that the work schedules of children under 16 be confined "to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being."⁴⁴ Those regulations, known as "Reg. 3," limit these children to working "(1) Outside of school hours; (2) Not more than 40 hours in any 1 week when school is not in session; (3) Not more than 18 hours in any 1 week when school is in session; (4) Not more than 8 hours in any 1 day when school is not in session; (5) Not more than 3 hours in any 1 day when school is in session, including Fridays; (6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m."⁴⁵ Although the WHD has, over time, incorporated long-held interpretations of terms like "when school is in session" and "week" into the supporting regulatory language, the basic contours of Reg. 3's hours restrictions have not been changed since they were first issued in 1939.⁴⁶

There are currently no restrictions about when 16- and 17-year-old workers in nonagricultural occupations may be scheduled to work. The primary statutory authority for protecting these child workers is that which allows the Secretary of Labor to declare occupations as "particularly hazardous ... or detrimental to their health or well-being."⁴⁷ As discussed below, the DOL in the early 1990s rebuffed a request from young workers and their teachers to use this authority to protect young workers from long and overnight hours by declaring occupations requiring such hours to be "detrimental to their health and well-being."⁴⁸ The DOL should reverse its position on using this authority, at least with regard to overnight work, which presents hazards analogous to the Department's other hazardous occupation orders.

For child workers in agriculture, there are currently no restrictions on the hours or days they may work, except that the FLSA requires that they be employed only "outside of school hours for the school district where such employee is living while he is so employed."⁴⁹ The primary statutory authority available to DOL to regulate the working conditions of children working in agriculture only allows the agency to impose restrictions on the activities of workers under 16.⁵⁰ Those regulations have not been revised since 1970.

IV. PROPOSED ACTION

The WHD should consider promulgating, through notice-and-comment, regulations to restrict the permissible hours of child workers in various occupations.

⁴⁴ 29 U.S.C. § 203(l).

⁴⁵ 29 C.F.R. § 570.35.

⁴⁶ Department of Labor, Child Labor Regulations, Orders and Statements of Interpretation, 75 Fed. Reg. 28404, 28423 (May 20, 2010).

⁴⁷ 29 U.S.C. § 203(l).

⁴⁸ The agency's position was upheld in court. *Schmidt v. Reich*, 835 F. Supp. 435, 442 (N.D. Ill. 1993).

⁴⁹ 29 U.S.C. § 213(c)(1).

⁵⁰ 29 U.S.C. § 213(c)(2).

The FLSA prohibits “oppressive child labor” and engaging in commerce connected to “oppressive child labor.”⁵¹ The definition of “oppressive child labor” varies according to the age and occupation of the child, as explained below. The proposals are summarized in the below table, with more detail available in the sections that follow.

Workers	Time of year	Current	After Proposals
Non-Ag 14/15	School Days	→outside school hours →18 hrs/week or less →3 hrs/day or less →7a-7p ⁵²	→outside school hours →18 hrs/week or less →3 hrs/day or less →7a-7p ⁵³ →6 days/week or less →30-minute rest break after five hours of work
	Non-School Days	→40 hrs/week or less →8 hrs/day or less →7a-9p ⁵⁴	→40 hrs/week or less →8 hrs/day or less →7a-9p ⁵⁵ →6 days/week or less →30-minute rest break after five hours of work
Non-Ag 16/17	School Days	No restrictions	→no overnight work
	Non-School Days	No restrictions	→no overnight work
Ag <16	School Days	→outside school hours	→outside school hours →no overnight work
	Non-School Days	No restrictions	→no overnight work
Ag 16/17	School Days	No restrictions	No change ⁵⁶
	Non-School Days	No restrictions	No change ⁵⁷

A. Nonagricultural workers ages 14 and 15

⁵¹ 29 U.S.C. § 212(a),(c).

⁵² This is technically during the school year, not just school days.

⁵³ This is technically during the school year, not just school days.

⁵⁴ This is technically just during the summer, not on all non-school days.

⁵⁵ This is technically just during the summer, not on all non-school days.

⁵⁶ None permitted by statute.

⁵⁷ None permitted by statute.

The WHD should require at least one day of rest per week and mandatory rest breaks for nonagricultural workers ages 14 and 15.

1. Statutory authority

The FLSA permits the DOL to identify nonagricultural occupations in which 14- and 15-year-olds can work, “if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.”⁵⁸ Under this authority, the WHD maintains regulations at 29 C.F.R § 570.35 which confine permissible hours for these workers to:

- (1) Outside of school hours;
- (2) Not more than 40 hours in any 1 week when school is not in session;
- (3) Not more than 18 hours in any 1 week when school is in session;
- (4) Not more than 8 hours in any 1 day when school is not in session;
- (5) Not more than 3 hours in any 1 day when school is in session, including Fridays;
- (6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.

The regulations go on to define “[s]chool hours” as “the hours that the local public school district where the minor resides while employed is in session during the regularly scheduled school year.”⁵⁹

2. Action

The WHD should consider amending 29 C.F.R. § 570.35(a) to prohibit 14- and 15-year-old nonagricultural workers from working more than 6 days per week and to require that 14- and 15-year-old workers be given a 30-minute break before working more than 5 hours at a time. These changes have a basis in actions already taken in some states in recognition of the mental and physical demands that overwork places on children. For example, Alaska, Arkansas, Florida, Louisiana, and Oklahoma, among others, had 6-day-per-week limits on workers under age 16 as of June 2024.⁶⁰ And a majority of states already require employers to give minor workers (and in many states, all workers) rest breaks after working for a set number of consecutive hours.⁶¹

B. Nonagricultural workers ages 16 and 17

The WHD should issue a new hazardous occupation order to prohibit overnight work for 16- and 17-year-olds in all nonagricultural occupations. Alternatively, the WHD should prohibit overnight work in a select number of fields.

1. Statutory authority

⁵⁸ 29 U.S.C. § 203(l).

⁵⁹ 29 C.F.R. § 570.35(b).

⁶⁰ Department of Labor, Selected State Child Labor Standards Affecting Minors Under 18 in Non-farm Employment as of June 13, 2024, (Accessed: Aug. 7, 2024), <https://www.dol.gov/agencies/whd/state/child-labor>.

⁶¹ See., e.g., Michigan Compiled Laws 409.112; Kentucky Statutes 339.270; see also Paycor, Lunch Break Laws by State, (Mar. 1, 2022), <https://www.paycor.com/resource-center/articles/lunch-break-laws-by-state/>.

Unlike for nonagricultural workers ages 14 and 15, the FLSA does not explicitly contemplate hours regulations for workers ages 16 and 17. Instead, the FLSA permits the Secretary of Labor to prohibit the employment of 16- and 17-year-olds in “any occupation which [she] shall find and by order declare to be particularly hazardous” or “detrimental to [their] health or well-being.”⁶² The WHD currently maintains 17 HOs that restrict the nonagricultural employment of 16- and 17-year-old workers.⁶³ They were most recently revised in 2010.⁶⁴

2. Action

The WHD should issue a new HO for 16- and 17-year-olds in nonagricultural occupations that declares laboring overnight to be “particularly hazardous” and “detrimental to [the] health or well-being” of the workers. Some states already have similar restrictions. For example, before it repealed all hours restrictions for 16- and 17-year-old workers in 2024, Indiana’s child labor code prohibited those workers from beginning their workday before 6 a.m.⁶⁵

The WHD would be well within its statutory authority to conclude that working overnight is both “particularly hazardous” to the developing brains and bodies of 16- and 17-year-olds working in nonagricultural occupations and “detrimental to [their] health or well-being” because of the impacts that such work has on rest, health, and schooling.⁶⁶

It is true that the FLSA explicitly directs the DOL to implement hours and condition restrictions on 14- and 15-year-olds in 29 U.S.C. § 203(l), but does not do so in §203(l)(2) for 16- and 17-year-olds. Yet it is possible to read significance into that discrepancy without precluding the current proposal.

Prohibiting overnight shifts is different in kind from the hours restrictions authorized for 14- and 15-year-olds. The latter provide detailed hours limitations per day (e.g., 3) and per week (e.g., 18), which differ according to whether school is in session.⁶⁷ This comprehensive regime is designed to ensure that children have ample time for homework and time with family and friends. The FLSA’s HO authority would likely prove unable to support such an elaborate regulatory regime; it is difficult to prove, for example, that exceeding aggregate weekly work limits necessarily pose a “hazard” (or do so with “particular[ity]”). And so it is only the FLSA’s express grant at § 203(l) regarding 14- and 15-year-olds that allows the DOL to get so prescriptive.⁶⁸

⁶² 29 U.S.C. § 203(l)(2).

⁶³ 29 C.F.R. Part 570 Subpart E. Several of the HOs include exceptions for minors employed as “student-learners” and apprentices.

⁶⁴ Department of Labor, Child Labor Regulations, Orders and Statements of Interpretation, 75 Fed. Reg. 28404, 28423 (May 20, 2010).

⁶⁵ IC 22-2-18.1-18 repealed effective January 1, 2025.

<https://iga.in.gov/pdf-documents/123/2024/house/bills/HB1093/HB1093.06.ENRS.pdf>. The child labor code also prohibited scheduling these minors for more than 9 hours per day, more than 40 hours during a school week, more than 48 hours during a non-school week, and more than 6 days per week. These restrictions were more lax than those that Indiana applies to 14-15 year-olds, which align to the federal minimums at 29 C.F.R. § 570.35.

⁶⁶ *Id.*

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⁶⁸ *Id.* (“The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.”)

By contrast, overnight shifts for school age workers pose predictable and specific hazards, especially as relates to sleep deprivation, that resemble the hazards addressed by existing HOs and HOAs. Because such workers must attend school during the day by law, they cannot make up for sleep deficits during the day (as adult night workers can). This lack of sleep is not only detrimental for youth development, but it also makes the overnight work itself more dangerous (as well as non-work tasks like driving to school the next day). Working overnight hours also may require minors to drive or otherwise travel to their worksite, and driving at night is more dangerous than during the day.⁶⁹ Overnight hours are also less likely to be properly supervised,⁷⁰ which raises the risk of injury,⁷¹ decreases the likelihood that enforcement efforts will detect child labor violations,⁷² and may heighten the risk of physical⁷³ and sexual assault.⁷⁴ These dangers are akin to the types of hazards DOL has already prohibited under its HO and HOA authorities, like working on a roof or driving for work with passengers in a vehicle.

Taking this action would be appropriate notwithstanding the agency's past position on a related subject that was upheld by a federal district court in 1993.⁷⁵ In response to a Congressman's constituent inquiry, the Secretary of Labor at the time wrote in a letter that, because the FLSA expressly authorized the DOL to regulate the hours of 14- and 15-year-olds (to prevent interference with their schooling) and was silent as to regulating the hours that 16- and 17-year-olds work, the FLSA only permitted the DOL to regulate the hours of the former.⁷⁶ Two teachers and several high school students brought suit against the DOL asking the court to invalidate the DOL's written interpretation of the FLSA and issue an injunction requiring the DOL to begin rulemaking on hours restrictions for 16- and 17-year-olds.⁷⁷ The court rejected the injunction request on procedural grounds,⁷⁸ and found that the agency proffered a "permissible" interpretation of the statute under the now-defunct *Chevron* doctrine.⁷⁹

⁶⁹ National Safety Council, *Driving at Night*, (Accessed: Aug. 7, 2024), <https://www.nsc.org/road/safety-topics/driving-at-night>.

⁷⁰ As a necessity to have access to machinery and spaces that are off or empty for clearing, janitorial and sanitation services specifically employ children overnight, when there are fewer workers around that could report unsafe practices or conditions. See, e.g., Department of Labor, *US Department of Labor Seeks Injunction to Stop Use of 'Oppressive Child Labor' by Fayette Janitorial Service at Meat Processing Facilities*, (Feb. 21, 2024), <https://www.dol.gov/newsroom/releases/whd/whd20240221-0>.

⁷¹ Hannah Dreier, *The Kids on the Night Shift*, *New York Times Magazine*, (Sept. 18, 2023), <https://www.nytimes.com/2023/09/18/magazine/child-labor-dangerous-jobs.html> (describing the severity of a child's injuries being in part due to the time it took for someone to hear his screams).

⁷² Tarra Boggs, *When and Why Are OSHA Inspections Conducted?*, (Apr. 21, 2022), <https://www.industrialcompliancesafety.com/isnetworld/when-and-why-are-osha-inspections-conducted/> (explaining that OSHA inspections usually happen during normal work hours); the vast majority of other workplace inspections happen during the day and not overnight.

⁷³ Deborah Berkowitz, *Behind the Arches: How McDonald's Fails to Protect Workers From Workplace Violence*, *National Employment Law Project*, (May 22, 2019), https://www.nelp.org/insights-research/behind-the-arches-how-mcdonalds-fails-to-protect-workers-from-workplace-violence/#_ednref26 (explaining that violent incidents are more likely to occur during late-night hours than other times of day).

⁷⁴ Sasha Khokha, *Working Alone, at Night, Janitors Risk Sexual Violence*, *KQED*, (Jun. 23, 2015), <https://www.kqed.org/news/10568193/working-alone-at-night-janitors-risk-sexual-violence>.

⁷⁵ *Schmidt v. Reich*, 835 F. Supp. 435, 441 (N.D. Ill. 1993)

⁷⁶ *Schmidt v. Reich*, 835 F. Supp. 435, 441 (N.D. Ill. 1993).

⁷⁷ *Id.*

⁷⁸ The plaintiffs had not filed a rulemaking petition with the agency before filing the case, so they had not exhausted their administrative remedies. *Id.*

⁷⁹ *Id.*

As a threshold matter, agencies are entitled to change their positions, so long as they explicitly display awareness that they changed positions and “show that there are good reasons for the new policy.”⁸⁰ And in this case, the DOL should. The court’s opinion, which as a district court decision creates no binding precedent, attempts to defend and expound upon the DOL’s original position, but in so doing reveals that interpretation’s unworkability: its logic (i.e., that a “hazardous occupation” cannot be defined by the presence of “special conditions”) would call into question the lawfulness of a host of longstanding HOs and HOAs⁸¹ and leave the HO regime open for abuse.⁸² The DOL would be on firmer footing to proffer an interpretation of the FLSA’s provisions that is better in line with the statutory text and purpose and the long regulatory history of the agency, as this memorandum suggests.

An alternative to an HO that imposes a blanket restriction on overnight work for all industries would be to identify specific industries and occupations where injuries are relatively more likely to occur at night. For example, a review of the Occupational Safety and Health Administration’s incident reporting data from the first half of 2023 indicates that the following occupations had the highest rates of reportable incidents that occurred overnight⁸³ (of course, this is for all workers, not just for young workers):

- General Freight Trucking, Long-Distance, Less Than Truckload
- Professional Employer Organizations

⁸⁰ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (1999).

⁸¹ The court’s reading of “occupation” does not square with the agency’s long standing practice, dating back to the hazardous occupation regime’s enactment. The court reasoned that the statutory term “occupation” referred to the “type of job and the dangers inherent in that job, not to the special conditions or hours an employer might impose.” *Schmidt*, 835 F. Supp. at 443. As support, the court referred to the first sentence of 29 U.S.C. § 203(l), which prohibits employment of children under 16-years-old except when employed by a parent “in an occupation other than manufacturing or mining.” This, the court argued, indicates “that manufacturing and mining are examples of occupations,” and so the hours of a particular job are not similarly examples of occupations because they are not types of jobs. Yet the agency’s HOs and HOAs are replete with examples of DOL prohibiting occupations only to the extent that certain – to adopt the court’s term – “special conditions” are present. For example, the very first HO (issued in 1939) prohibits, among other things, minors from working in occupations “requiring the performance of any duties in the same workroom in which rim-fire cartridges are primed.” 29 C.F.R. § 570.51(a)(2)(iii). HO 16 prohibits working in “roofing operations” — which indeed sounds like an “occupation” in the court’s “manufacturing and mining” sense of the word — but also any work “on or about a roof,” which would seem to merely prohibit certain tasks (or “special conditions”) associated with a wide range of jobs. The same goes for HOAs: they ban occupations based on the job conditions they require, like “[d]riving a bus, truck, or automobile when transporting passengers” or working inside a manure pit. 29 C.F.R. § 570.71(a)(7); 29 C.F.R. § 570.71(a)(8)(iii). By the *Schmidt* court’s logic, then, a host of longstanding HOs and HOAs are unlawful — a conclusion suggestive of the court’s error.

⁸² If the WHD were to only ban occupations by their formal name (e.g., “janitor” or “roofer”) rather than their activities or conditions (e.g., “occupations that require cleaning dangerous machinery” or “occupations that require work above a certain height”), the regulations would not be able to give full effect to the statutory directive to prohibit “particularly hazardous” work. On the one hand, such a narrow definition of “occupation” could result in HOs being under-inclusive, as employers could easily misclassify workers into nominally new occupations, while maintaining dangerous conditions. On the other hand, it could result in over-inclusive regulations if the WHD is not able to target within formal occupation titles only to those job activities that are actually “particularly hazardous.”

⁸³ Occupational Safety and Health Administration, Injury Tracking Application Case Detail Data, (2023), <https://www.osha.gov/Establishment-Specific-Injury-and-Illness-Data>. The data included in this file includes the first half of the 2023 calendar year. Incidents were filtered to only those incidents for which an incident time was known and for which the employer submitted a 2022 NAICS code for the occupation. Occupations were eliminated from the list if they had fewer than 50 total incidents and if they were manufacturing occupations (which are prohibited for child workers already). “Overnight” was defined as occurring after 10 p.m. and before 6 a.m. Working analysis on file with author.

- Finfish Fishing
- Carpet and Rug Mills
- Other Urban Transit Systems
- Industrial Building Construction
- Commercial Bakeries
- Commuter Rail Systems
- Dairy Product (except Dried or Canned) Merchant Wholesalers
- Copper Rolling, Drawing, Extruding, and Alloying
- Specialty Canning
- Couriers and Express Delivery Services
- Iron Foundries
- General Line Grocery Merchant Wholesalers
- Postal Service
- Steel Wire Drawing
- Poultry Processing
- Fruit and Vegetable Canning
- Limousine Service
- General Warehousing and Storage
- Rendering and Meat Byproduct Processing
- Paperboard Mills
- Specialized Freight (except Used Goods) Trucking, Local
- Refrigerated Warehousing and Storage

C. Agricultural workers under 16

The WHD should issue a new HOA to prohibit overnight work for agricultural workers below the age of 16.

1. Statutory authority

Children working in agriculture are not permitted to be scheduled to work during school hours.⁸⁴ Subject to several exceptions that permit younger children to work under certain conditions, the FLSA prohibits employment of children younger than 14 in most agricultural occupations (12, with parental consent).⁸⁵ The DOL is empowered to raise the age to 16 for occupations which the “Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen.”⁸⁶ These HOAs do not apply when an “employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.”⁸⁷ The DOL maintains a list of 11 HOAs at 29 C.F.R. Subpart E-1. The orders list a range of conditions and work activities that make occupations unacceptable for children aged 14 to 15. The DOL has not issued a new HOA, nor has it substantially revised existing ones, since 1970.⁸⁸

⁸⁴ 29 U.S.C. § 213(c)(1).

⁸⁵ 29 U.S.C. § 213(c)(1)(C).

⁸⁶ 29 U.S.C. § 213(c)(2).

⁸⁷ *Id.*

⁸⁸ The DOL did reorganize its child labor regulations in 1971. Department of Labor, Part 570–Child Labor Regulations, Orders, and Statements of Interpretation, 36 Fed. Reg. 25155 (Dec. 29, 1971), https://archives.federalregister.gov/issue_slice/1971/12/29/25152-25158.pdf#page=5.

2. Action

The WHD should issue a new HOA for workers under 16 in agriculture declaring that occupations requiring these workers to labor overnight are “particularly hazardous.”

The WHD action would be well within the scope of the agency’s statutory authority to regulate occupations that are “particularly hazardous” for children under 16. As explained above, long working hours in agriculture can subject children to hazards like sleep deprivation, exhaustion, and prolonged exposure to environmental hazards like heat and pesticides. These “particular[] hazard[s]” can cause illness, injury, and poor scholastic performance, which can harm a child’s well-being.

In fact, the DOL has already drawn the conclusion that other kinds of restrictions on hours are necessary to protect workers under 16. By promulgating the hours restrictions for 14- and 15-year-old nonagricultural workers in Reg. 3, the DOL implicitly acknowledged that such limitations are necessary to ensure that employment will “not interfere with their schooling and ... health and well-being.”⁸⁹ The fact that the FLSA directs the DOL to protect workers under 16 in agriculture through a different mechanism than for nonagricultural workers does not preclude DOL from reaching the eminently reasonable conclusion that exposure to overnight work is “particularly hazardous” to these child workers.

Instituting a ban on overnight work would also not upset the tiered system⁹⁰ of protections established under FLSA (demanded by Southern legislators largely for racist and classist reasons⁹¹) that provides weaker protections for agricultural workers than for nonagricultural workers. Even if hours and day restrictions on both sets of workers were identical, 14- and 15-year-olds in nonagricultural occupations are limited only to those occupations expressly allowed by the DOL elsewhere in Reg. 3, whereas workers under 16 in agricultural occupations are allowed to work in any setting besides those expressly prohibited through HOAs.⁹²

Finally, for many of the same reasons outlined in the previous section,⁹³ the fact that the FLSA explicitly disallows work during school hours for agricultural workers under 16 does not preclude the DOL from separately finding overnight hours to be “particularly hazardous” and therefore prohibit them under an HOA. The HOA proposed here is, again, different in kind from a regulation that details hours restrictions to protect, say, the school day. The FLSA directly empowers the DOL to issue HOAs that identify, and prohibit occupations that require exposure to, specific dangers. In this case, that danger is overnight work because of its particular effects on the health and well-being of minors, including sleep deprivation, assault, and increased risk for injury and fatality. This is consistent with the historical practice of DOL’s issuance of HOAs. 29 C.F.R. § 570.71(a)(3), for example, prohibits children from working in any occupation that requires exposure to particular machines like trenchers, earth movers, and chainsaws. §570.71(a)(4) identifies as hazardous any occupation that requires working in a farm, pen, or stall occupied by large animals “maintained for breeding purposes.” Clearly, these HOAs that date back to the early years of FLSA’s enactment were concerned with banning

⁸⁹ 29 U.S.C. § 203(l).

⁹⁰ *Schmidt v. Reich*, 835 F. Supp. 435, 444 (N.D. Ill. 1993) (explaining how Congress had the National Recovery Act’s “tiered system of regulating child labor” in mind when it enacted the FLSA).

⁹¹ Rebecca Dixon, *From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act*, (May 3, 2021), <https://www.nelp.org/app/uploads/2021/05/NELP-Testimony-FLSA-May-2021.pdf>.

⁹² Compare 29 U.S.C. § 203 and 29 U.S.C. § 213(c)(2).

⁹³ See Section IV(B)(2).

occupations based on the particular dangers they require exposure to, rather than the name of the occupations themselves.

V. CONCLUSION

The WHD should require one day off per week and 30 minute breaks for nonagricultural 14- and 15-year-old workers and prohibit overnight work for nonagricultural 16- and 17-year-old and agricultural workers under 16.

Appendix: State and Federal Child Labor Laws



October 2024

Mapping the intersection between state and federal child labor protections

I. OVERVIEW

The Fair Labor Standards Act (FLSA) sets minimum requirements, above which states may establish additional protections for child labor.¹ However, especially recently, some states have enacted legislation that allows children to work in occupations, during hours, and under certain conditions that federal law does not allow. Of course, such state laws legitimately apply to the very small proportion of minors that are not covered by the FLSA, either individually or due to their employer's small size.² But the more prevalent practical result of these conflicting standards is confusion for employers and employees about how to comply with the relevant child labor protections, and increases in violations of federal child labor laws.

This appendix reviews child labor laws in eight select states where lawmakers sought to rollback protections in 2023 or 2024 and identifies areas where state laws conflict with federal regulations by explicitly offering weaker protections. The states examined in this appendix are: Florida, Idaho, Indiana, Iowa, Kentucky, Minnesota, Mississippi, West Virginia. The appendix also identifies how state laws would conflict with the revisions to federal regulations recommended in this report.

II. RECOMMENDATIONS SUMMARY

Report proposals	
Hours	<ul style="list-style-type: none"> • 14/15 nonagricultural: require one day off per week and a 30-minute rest break after 5 hours of work • 16/17 nonagricultural: prohibit overnight hours • <16 agricultural: prohibit overnight hours
Hazardous Work	<ul style="list-style-type: none"> • Expand existing hazardous occupation orders • Eliminate student-learner and apprenticeship exemptions for several hazardous occupation orders • Create new hazardous occupation orders

¹ 29 U.S.C. § 218(a) (explaining that “no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter.”)

² An employer is covered by the FLSA if it does \$500,000 in business or sales annually. 29 U.S.C. § 203(s)(1)(A).

III. SUMMARY STATE TABLE

	Conflicts with current federal regulations	Conflicts with report proposals
Hours	ID, IA, MN, MS	FL, ID, IN, IA, KY, MN, MS, WV
Hazardous Work	IA, MN, WV	FL, IA, MN, WV

IV. DETAILED STATE TABLE

State	Conflicts with current federal regulations ³	Conflicts with report proposals
Florida ⁴	<p>HOURS:</p> <ul style="list-style-type: none"> No conflict. <p>HAZARDOUS WORK:</p> <ul style="list-style-type: none"> No conflict.⁵ 	<p>HOURS:</p> <ul style="list-style-type: none"> Revised federal regulations would prohibit overnight hours for nonagricultural 16/17-year-old workers and agricultural 14/15-year-old workers, regardless of whether the minor attends school the following day.⁶ <p>HAZARDOUS WORK:</p> <ul style="list-style-type: none"> Revised federal regulations would further decrease the number of hazardous occupations in which nonagricultural 16/17-year-old workers could work in a

³ Where a state’s statutes are silent on an issue, this table lists that area as “no conflict,” which is perhaps a generous interpretation of the legislature’s decision not to enact standards stricter than the federal minimums.

⁴ Florida enacted House Bill 49/Senate Bill 1596 (2024) (allows employers to schedule 16-17 year-olds more than 6 days in a row and exempts home- and virtual-school students from child labor laws).

⁵ Florida Statutes § 450.061(2) aligns its student-learner exemptions to current federal hazardous order exemptions (and in some cases is more protective, as it provides a student-learner exception for working on electrical apparatuses, which is not covered under the federal hazardous occupation orders).

⁶ Florida Statutes § 450.081(2) prohibits 16/17-year-old from working before 6:30am or after 11pm when school is scheduled the following day.

<p>Idaho</p>	<p>HOURS:</p> <ul style="list-style-type: none"> 14/15-year-old workers permitted to be scheduled up to 54 hours per week and 9 hours per day. No days off required.⁷ Federal regulations permit no more than 40 hours in non-school weeks and 8 hours in non-school days.⁸ <p>HAZARDOUS WORK:</p> <ul style="list-style-type: none"> No conflict.⁹ 	<p>student-learner or apprentice capacity.</p> <p>HOURS:</p> <ul style="list-style-type: none"> Revised federal regulations would require one day off per week and a 30-minute rest break after 5 hours of consecutive work for nonagricultural 14/15-year-old workers and prohibit overnight hours for nonagricultural 16/17-year-old workers and agricultural <16-year-old workers. <p>HAZARDOUS WORK:</p> <ul style="list-style-type: none"> No conflict.¹⁰
	<p>Indiana¹¹</p>	<p>HOURS:</p> <ul style="list-style-type: none"> No conflict.¹² <p>HAZARDOUS WORK:</p> <ul style="list-style-type: none"> No conflict.¹³

⁷ Idaho Code § 44-1304.

⁸ 29 C.F.R. § 570.35.

⁹ The Idaho statutes do not specify hazardous occupations, implicitly importing federal orders. However, Idaho Code § 44-1301 does confusingly identify prohibited occupations for minors under 14 years of age, despite virtually all nonagricultural employment being prohibited for such workers at the federal level. *Compare* Idaho Code 44-1301 and 29 U.S.C. § 203(l) (prohibiting nonagricultural employment for children under 16, or 14 (in specific occupations enumerated by the Department of Labor)).

¹⁰ The Idaho statutes do not specify hazardous occupations, implicitly importing federal orders.

¹¹ Indiana enacted several child labor rollbacks in 2023 and 2024, including House Bill 1093 (eliminates hazardous work protections for 16-17 year-olds working on farms); House Bill 1093 (extends hours for minors 14-15 between June 1 and Labor Day and eliminates certain night work restrictions; eliminates all hours restrictions for minors 16-17).

¹² Indiana follows current federal minimums for nonagricultural 14/15-year-old workers and current federal regulations do not impose hours requirements on other minor workers. See IN Code § 22-2-18.1-17; IN Code § 22-2-18.1-16 (exempting workers in “farm labor” from hours restrictions).

¹³ IN Code § 22-2-18.1-23 (2023) adopts the federal hazardous occupation orders.

¹⁴ Beginning in 2025, Indiana will eliminate all hours protections for 16- and 17-year-old workers. See Indiana House Bill 1093 (2024), <https://iga.in.gov/pdf-documents/123/2024/house/bills/HB1093/HB1093.06.ENRS.pdf>.

<p>Iowa¹⁵</p>	<p>HOURS:</p> <ul style="list-style-type: none"> 14/15-year-old workers permitted to be scheduled until 9pm during school year, 11pm during summer. 30-min break after 5 hours working. No days off required.¹⁶ Federal regulations permit 7pm and 9pm during the school year and summer, respectively, for nonagricultural 14/15-year-old workers.¹⁷ <p>HAZARDOUS WORK:</p> <ul style="list-style-type: none"> 14-year-old workers permitted to work in laundering.¹⁸ 15-year-old workers permitted to perform light assembly work.¹⁹ Federal regulations do not permit such work.²⁰ Laxer student-learner and apprenticeship requirements than federal regulations, including by allowing student-learners and apprentices to work in hazardous occupations that do not qualify for a federal exemption.²¹ 	<p>HOURS:</p> <ul style="list-style-type: none"> Revised federal regulations would require one day off per week for nonagricultural 14/15-year-old workers and prohibit overnight hours for nonagricultural 16/17-year-old workers and agricultural <16-year-old workers. <p>HAZARDOUS WORK:</p> <ul style="list-style-type: none"> Same conflicts. Revised federal regulations would further decrease the number of hazardous occupations in which nonagricultural 16/17-year-old workers could work in a student-learner or apprentice capacity.
	<p>Kentucky</p>	<p>HOURS:</p> <ul style="list-style-type: none"> No conflict. <p>HAZARDOUS WORK:</p> <ul style="list-style-type: none"> No conflict.

¹⁵ The Department of Labor sent letters to Iowa lawmakers warning them that strict compliance with SF 542, enacted in 2023, would put Iowa employers in violation of federal law. See Department of Labor letter to The Honorable Nate Boulton, (Aug. 24, 2023), <https://www.senate.iowa.gov/democrats/wp-content/uploads/2023/08/DOL-Letter-082423.pdf>.

¹⁶ Iowa Code § 92.7 (2024).

¹⁷ 29 C.F.R. § 570.35.

¹⁸ Iowa Code § 92.6A(4).

¹⁹ Iowa Code § 92.5 (2024).

²⁰ 29 C.F.R. § 570.34.

²¹ Iowa Code § 92.8A (2024).

²² KRS § 339.230 empowers the “commissioner of workplace standards” to promulgate child labor regulations that are “more restrictive than those promulgated by the United States Secretary of Labor under provisions of the Fair Labor Standards Act and its amendments but in no event may he or she make them less restrictive, provided, however, these regulations shall have no effect on the definition of “gainful occupation” under KRS 339.210.”

Minnesota	<p>HOURS:</p> <ul style="list-style-type: none"> 14/15-year-old permitted to work between 7am and 9pm on “any day.”²³ Federal regulations permit 14/15-year-old nonagricultural work until 9pm only on non-school days.²⁴ <p>HAZARDOUS WORK:</p> <ul style="list-style-type: none"> State law empowers the state Department of Labor to list hazardous occupations for child workers,²⁵ and the Department does so for children under 16 and 18.²⁶ However, federal regulations only permit employers to hire children under 16 to work in specifically enumerated occupations,²⁷ and the state Department of Labor’s list for children under 18 does not include all federally prohibited occupations, nor does it reference the federal hazardous occupation orders.²⁸ 	<p>HOURS:</p> <ul style="list-style-type: none"> Revised federal regulations would require one day off per week and a 30-minute rest break after 5 hours of consecutive work for nonagricultural 14/15-year-old workers and prohibit overnight hours for nonagricultural 16/17-year-old workers and agricultural <16-year-old workers. <p>HAZARDOUS WORK:</p> <ul style="list-style-type: none"> Revised federal regulations would expand several hazardous occupation orders, pushing Minnesota’s hazardous occupation list further into conflict with federal minimums.
	Mississippi	<p>HOURS:</p> <ul style="list-style-type: none"> Only restricts work hours for 14/15-year-old in specific industries to 44 hours per week, 8 hours per day, and not overnight.²⁹ Federal hours restrictions are more strict and apply to all nonagricultural 14/15-year-old child labor.³⁰

²³ Minnesota Statutes § 181A.04(4).

²⁴ 29 C.F.R. § 570.35.

²⁵ Minnesota Statutes § 181A.09(2).

²⁶ Minnesota Department of Labor and Industry, Prohibited Work for Workers Under Age 16, (Accessed: Aug. 16, 2024), <https://www.dli.mn.gov/business/employment-practices/prohibited-work-workers-under-age-16>;

Minnesota Department of Labor and Industry, Prohibited Work for Workers Under Age 18, (Accessed: Aug. 16, 2024), <https://www.dli.mn.gov/business/employment-practices/prohibited-work-workers-under-age-18>.

²⁷ See 29 C.F.R. § 570.34.

²⁸ Minnesota Department of Labor and Industry, Prohibited Work for Workers Under Age 18, (Accessed: Aug. 16, 2024), <https://www.dli.mn.gov/business/employment-practices/prohibited-work-workers-under-age-18>.

²⁹ Miss. Code Ann. § 71-1-21.

³⁰ 29 C.F.R. § 570.35.

West Virginia³₃	<p>HAZARDOUS WORK:</p> <ul style="list-style-type: none"> No conflict.³¹ 	<p>HAZARDOUS WORK:</p> <ul style="list-style-type: none"> No conflict.³²
	<p>HOURS:</p> <ul style="list-style-type: none"> No conflict.³⁴ <p>HAZARDOUS WORK:</p> <ul style="list-style-type: none"> Permits 16/17-year-old workers enrolled in a “Youth Apprenticeship Program” to work with machinery covered by all hazardous occupations.³⁵ Federal regulations allow student-learners and apprentices to work only in certain hazardous occupations. 	<p>HOURS:</p> <ul style="list-style-type: none"> Revised federal regulations would require one day off per week and a 30-minute rest break after 5 hours of consecutive work for nonagricultural 14/15-year-old workers and prohibit overnight hours for nonagricultural 16/17-year-old workers and agricultural <16-year-old workers. <p>HAZARDOUS WORK:</p> <ul style="list-style-type: none"> Revised federal regulations would further decrease the number of hazardous occupations in which nonagricultural 16/17-year-old workers could work in a student-learner or apprentice capacity.

³¹ The Mississippi statutes do not specify hazardous occupations, implicitly importing federal orders. However, Miss. Code Ann. § 71-1-17 does confusingly identify prohibited occupations for minors under 14 years of age, despite virtually all nonagricultural employment being prohibited for such workers at the federal level. *Compare* Miss. Code Ann. § 71-1-17 and 29 U.S.C. § 203(l) (prohibiting nonagricultural employment for children under 16, or 14, in specific occupations enumerated by the Department of Labor).

³² The Mississippi statutes do not specify hazardous occupations, implicitly importing federal orders.

³³ West Virginia enacted House Bill 5162 (2024) (expands hazardous work for 16-17 year-olds through youth apprenticeship program).

³⁴ WV Code § 21-6-7 follows federal hours restrictions for 14/15-year-old workers, except that they are required to have a 30-minute break after 5 consecutive hours of work.

³⁵ House Bill 5162 (2024).