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# REAPING THE REWARDS OF HARD WORK: ELIMINATING THE NEW MEXICO MINIMUM WAGE ACT'S EXEMPTION FOR WORKERS PAID ON A PIECEWORK, FLAT RATE, AND COMMISSION BASIS

Jackie Munro-Vahey\*

## ABSTRACT

*The federal Fair Labor Standards Act (“FLSA”) of 1938 created minimum wage, maximum hours, and overtime protections for the first time in United States history. One of the core principles of the FLSA was that states could also pass their own wage and hour laws, provided they were more protective of workers than the federal Act. In 2023, however, New Mexico is the only state where workers paid on a piecework, flat rate, and commission basis are exempt from the basic wage and hour protections of the federal Act because of a less protective state law. So, for example, medical transcribers paid by the lines they transcribe can work as quickly as they are able but still fail to earn the minimum wage. Delivery drivers paid by the packages they deliver and miles they drive can work over forty-hour weeks without overtime compensation. Because these practices comply with New Mexico law, impacted workers are discouraged from suing. Further, the class of impacted workers is diffuse and lacks the bargaining power to advocate for better protections. This lack of lawsuits and class cohesion only further silences these workers’ stories of underpayment.*

*The exemption is reminiscent of the Lochner era, when freedom to contract away what are today seen as basic wage and hour protections was seen as a fundamental right. It also leads to absurd results: an exempted worker can be made to wait idly on the job for up to twenty hours a week without compensation for that time. Ultimately, the choice to deny certain workers protections because of their manner of payment is an arbitrary*

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*one. This Comment argues that this exemption from the New Mexico Minimum Wage Act (“MWA”) is contrary to legislative intent and public policy, is preempted by federal law, and is unconstitutional under the New Mexico Constitution’s Equal Protection Clause. The New Mexico Legislature or the courts should eliminate the exemption to ensure that these workers receive the protections they deserve.*

## INTRODUCTION

Rita is a medical transcriber for a primary care doctor in Santa Fe. She accompanies the doctor to his appointments, writing down everything he and his patients say. She then spends time each evening editing her notes to make sense of complex medical terminology. She signed an agreement with her employer to receive a fixed amount of money for each line she transcribes. Under New Mexico law, Rita qualifies as a pieceworker, so she is not guaranteed the minimum wage for her work. Even though she works as fast as she can, her pieceworker status means she can make as little as \$5 per hour, well below the state minimum wage of \$12 per hour. Similarly, some hotel room cleaners, artisans,<sup>1</sup> and satellite installers<sup>2</sup> are not guaranteed the minimum wage.

Jaime is a delivery driver for FedEx in Las Cruces. She arrives to work at seven o’clock each morning and often works twelve to fourteen hours delivering packages, completing related tasks, and waiting for work to complete. She signed an agreement with her employer to receive a fixed amount of money for each package she delivers and mile she drives. Under New Mexico law, Jaime qualifies as a pieceworker, so she is not paid for the time she spends waiting, including waiting to receive her packages every morning and waiting mid-day so she can deliver some packages in a specific time window. Even though she often works sixty hours per week, Jaime’s pieceworker status means she does not qualify for overtime pay.<sup>3</sup>

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1. This anecdote about a medical transcriber and the examples of hotel room cleaners and artisans are based on discussions with attorneys who have advised clients or heard of other attorneys doing so at the New Mexico Center on Law and Poverty and New Mexico Legal Aid. Zoom Interview with Stephanie Welch, Workers’ Rights Director, and Felipe Guevara, Workers Rights’ Attorney, N.M. Center on Law and Poverty (Aug. 29, 2022); Telephone Interview with Cassie M. Fleming, Attorney, N.M. Legal Aid (Oct. 13, 2022). These workers chose not to bring claims because of the legality of their employers’ conduct. *Id.*

2. In *Tapia v. DIRECTV, Inc.*, the court considered the case of a satellite installer who “[was] paid on a per-task basis for satisfactorily completing a DIRECTV-approved satellite installation” and “routinely subjected to an effective wage rate less than the applicable minimum wage.” No. CV 14-939 JCH/GBW, 2016 WL 9777179, at \*2–3 (D.N.M. June 22, 2016). While the satellite installer brought his claim under the FLSA, *id.* at \*3, this case illustrates that a satellite installer paid on a piecework basis in New Mexico was paid less than the minimum wage.

3. Jaime was the plaintiff in *Armijo v. FedEx Ground Package Systems, Inc.*, in which the court held that since she was paid by the delivery and mile and spent seven hours per week “in a combination of unproductive waiting time and integral but not explicitly compensated post-delivery administrative activities,” she was a pieceworker ineligible for overtime compensation. 405 F. Supp. 3d 1267, 1278, 1283–84 (D.N.M. 2019). Certain details of her story have been fictionalized for storytelling purposes. The opinion does not mention in what city Jaime worked, how long she worked each day, or how many hours she worked each week, though her claim specifically sought overtime compensation. Further, I have simplified her contract terms for this anecdote. *Cf. Casias v. Distrib. Mgmt. Corp., Inc.*, No. CV 11-00874

Similarly, some truck drivers,<sup>4</sup> pipe layers,<sup>5</sup> auto collision repairmen,<sup>6</sup> and satellite installers<sup>7</sup> do not qualify for overtime pay.

Under New Mexico law, “salespersons or employees compensated upon piecework, flat rate schedules or commission basis” are exempt from the New Mexico Minimum Wage Act’s (“MWA”) minimum wage and overtime protections.<sup>8</sup> Piecework pay is “a set amount paid for each unit produced or task completed.”<sup>9</sup> Flat rate schedule pay is unique to the automobile repair field and involves assigning tasks a standardized number of hours and then multiplying that number by a flat pay rate based on a worker’s qualifications.<sup>10</sup> Commission pay is an amount paid based on sales made, usually calculated as a percentage.<sup>11</sup>

All three of these pay models theoretically promote efficiency, rewarding workers’ hard work with competitive pay and rewarding employers with predictable budgets and maximum production.<sup>12</sup> While it is possible to argue that these workers’

MV/RHS, 2013 WL 12091857, at \*5–6 (D.N.M. Mar. 27, 2013) (holding that a delivery driver who earned “a predetermined fixed wage for each individual customer pick-up and delivery” was a pieceworker so theoretically ineligible for overtime compensation, but that wait time in excess of twenty hours of week raised a genuine issue of material fact sufficient to deny the motion for summary judgment). Workers seeking overtime pay typically bring claims under state and federal law simultaneously, inviting federal courts to interpret the MWA and clarify the distinctions between the MWA and the FLSA.

4. See *Corman v. JWS of N.M., Inc.*, 356 F. Supp. 3d 1148, 1156, 1200 (D.N.M. 2018) (holding that truck drivers in the oil industry who were paid a percentage of the customer’s “transportation charge” were paid on a commission basis so ineligible for overtime compensation). The court clarified in *Armijo* that distinguishing between piecework and commission pay systems was unnecessary under New Mexico law, since the practical effect of the two classifications is identical. 405 F. Supp. 3d at 1279 (“[M]aking meticulous distinctions between the terms ‘piecework,’ ‘flat rate,’ and ‘commission’ is largely unnecessary to determine whether the MWA exception applies.”). Therefore, throughout this article, I will reference *Corman* when writing about workers paid on a piecework *or* commission basis.

5. See *Key v. Butch’s Rat Hole & Anchor Serv., Inc.*, No. CIV 17-1171 RB/KRS, 2018 WL 4222392, at \*1, 4, 5 (D.N.M. Sept. 5, 2018) (holding that a pipe layer paid a piece rate for laying pipe and hourly payments that kicked in if and when the job exceeded estimated bid hours who received 15-22% of his wages from hourly pay raised a genuine issue of material fact about piecework status and hence overtime compensation sufficient to deny the motion for summary judgment). Even though the court never reached a holding on whether the pipe layer was in fact paid on piecework basis, this case nevertheless demonstrates how an employer used the MWA exemption to justify refusal to pay a pipe layer overtime compensation.

6. See *Olivo v. Crawford Chevrolet, Inc.*, No. CV 10-782 BB/LFG, 2012 WL 12897385, at \*1 (D.N.M. Jan. 12, 2012) (holding that an auto collision repairman who was paid on a flat rate basis was a pieceworker and ineligible for overtime compensation).

7. See *supra* note 2. Again, while the satellite installer brought his claim under the FLSA, this case illustrates that a satellite installer paid on a piecework basis in New Mexico was not paid overtime.

8. N.M. STAT. ANN. § 50-4-21(C)(4) (2021).

9. N.M. DEP’T OF WORKFORCE SOLS., INVESTIGATIONS MANUAL: LAB. RELS. DIV. 103 (Nov. 12, 2019), [https://www.dws.state.nm.us/Portals/0/DM/LaborRelations/LRD\\_Manual\\_Final\\_11-14-19.pdf?ver=2020-02-03-170003-853](https://www.dws.state.nm.us/Portals/0/DM/LaborRelations/LRD_Manual_Final_11-14-19.pdf?ver=2020-02-03-170003-853) [https://perma.cc/9WQF-MLAM] [hereinafter INVESTIGATIONS MANUAL] (citing *Casias v. Distrib. Mgmt. Corp., Inc.*, No. CV 11-00874 MV/RHS, 2013 WL 12091857, at \*5 (D.N.M. Mar. 27, 2013)).

10. *Id.* at 105 (citations omitted) (citing *Burch v. Foy*, 1957-NMSC-017, ¶ 4, 62 N.M. 219, 308 P.2d 199).

11. *Id.* at 104.

12. See generally Indeed Editorial Team, *Advantages and Disadvantages of Piece Rate Pay*, INDEED (June 8, 2021) <https://www.indeed.com/career-advice/pay-salary/piece-rate> (explaining that piece-rate pay encourages worker efficiency and productivity and helps employers with cost control and increases

increased control over their earnings means they do not require the typical protections afforded by contemporary labor law, this argument is based on a false premise. First, employers using these pay models in New Mexico do not necessarily provide opportunities for their workers to earn more by working harder.<sup>13</sup> Instead, they often take advantage of a loophole in state law to pay their workers less. Second, employers who do provide opportunities for their workers to earn more by working harder generally operate in industries with seasonal fluctuation in workload, like sales.<sup>14</sup> These workers should still be entitled to basic protections with alterations to avoid overburdening employers when they work especially long weeks during peak season.<sup>15</sup>

This critique of the MWA is only reinforced by looking beyond New Mexico's borders. New Mexico's is the only state law in the country to exempt this class of workers from minimum wage and overtime protections.<sup>16</sup> Even with protections, pieceworkers are especially vulnerable to being paid less than the minimum wage. The experience of the Florida tomato pickers paid on a piecework basis who founded the Coalition of Immokalee Workers is instructive. Tomato pickers are paid so little per piece that they often earn sub-poverty wages, and they are sometimes forced to work against their will without pay at all.<sup>17</sup>

Another instructive group is crowd workers—workers who perform discreet tasks on the internet and are paid by the number of tasks they complete.<sup>18</sup>

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production) [<https://perma.cc/LX2H-7QA9>]. The motivations are similar for workers paid on a flat rate basis, who are paid the same amount per task, no matter how long it takes them, and workers paid on a commission basis, who earn a percentage of sales.

13. See, e.g., *Armijo v. FedEx Ground Package Sys., Inc.*, 405 F. Supp. 3d 1267, 1270–72 (D.N.M. 2019) (describing a delivery driver's contract terms in detail, including that she received "payments based on: the numbers of stops and packages picked up and delivered . . . [and] the number of miles driven" as she "service[d] a single route" without mention of opportunities to complete more work if she worked harder).

14. A theoretical example of this is a car salesman paid on a commission basis. See *Hearing on H.R. 3935 Before the Special Subcomm. on Lab. of the Comm. on Educ. and Lab.*, 87th Cong. 16, 41 (1961) (statement of Hon. Arthur J. Goldberg, Sec. of Lab.) (noting employers' desire "that overtime is not paid on peaks" for workers paid on a commission basis, likely specifically employers of auto salesman as noted in a question by Roman C. Pucinski, Member, Special Subcommittee on Labor).

15. The car salesman paid on a commission basis, *supra* note 14, is guaranteed basic protections with alterations under the FLSA. See 29 U.S.C. § 207(i).

16. See *infra* notes 53–57 and accompanying text.

17. See *Farmworker Facts & Figures*, COALITION OF IMMOKALEE WORKERS, <https://ciw-online.org/farmworker-facts-figures/> [<https://perma.cc/X64E-G8SL>]. These workers ought to be guaranteed the minimum wage under the FLSA, assuming they work more than thirteen weeks per year. 29 U.S.C. § 213(a)(6)(C) (only exempting agricultural workers paid on a piecework basis from minimum wage and overtime protections if they "[have] been employed in agriculture less than thirteen weeks during the preceding calendar year," among other requirements). They also ought to be guaranteed the minimum wage under Florida law, since it is coextensive with the FLSA. *Florida – Workers' Rights*, FARMWORKER JUSTICE, <https://www.farmworkerjustice.org/florida/> [<https://perma.cc/XK2P-WXZC>].

18. See Janine Berg, *Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*, 37 COMP. LAB. L. & POL'Y J. 543, 543 (2016) ("There are six principal categories of tasks that appear on micro-task platforms: (1) information finding, such as looking for information on the web; (2) verification and validation, such as identifying whether a tweeter is a real person; (3) interpretation and analysis, consisting of tasks that categorize or classify products; (4) content creation, such as summarizing a document or transcribing an audio recording; (5) completing surveys,

These workers are typically classified as independent contractors so they are exempt from protections, even if they rely on crowd work entirely for their earnings and have no control over those earnings, factors that typically point to classification as an employee.<sup>19</sup> If courts transition to classifying crowd workers as covered employees,<sup>20</sup> New Mexico's unique exemption would continue to allow crowd workers in the state to be paid less than the minimum wage.

Turning to the issue of overtime protections, New Mexico's exemption has the effect of denying overtime pay to delivery drivers paid on a piecework basis,<sup>21</sup> even though they regularly work over forty hours per week. Delivery drivers in many other states have successfully argued that they are employees, not independent contractors, so are entitled to protections including overtime pay.<sup>22</sup>

In this Comment, I explain how New Mexico's exemption for workers paid on a piecework, flat rate, and commission basis<sup>23</sup> is contrary to both the intent of the Congress that wrote the federal Fair Labor Standards Act ("FLSA") and the public policies behind wage and hour law. The exemption also suffers from two constitutional defects: it is preempted by federal law and unconstitutional under the New Mexico Constitution's Equal Protection Clause.<sup>24</sup> The New Mexico Legislature or the courts should eliminate the exemption, guaranteeing these workers the minimum wage and overtime protections they deserve.

The first Part of this Comment details the relevant provisions of the federal FLSA and the New Mexico MWA. The FLSA is important context for understanding the MWA because it was passed in 1938 to create a national minimum standard for minimum wage, maximum hours, and overtime compensation.<sup>25</sup> The MWA was passed in 1955 to achieve similar goals to the FLSA,<sup>26</sup> though the contemporary

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many of which are academic; and (6) content access, usually accessing another website in order to consume content.").

19. See *id.* at 544, 574.

20. An exemplary case is *Otey vs. CrowdFlower, Inc.*, in which a group of workers in California who worked for the crowd work company CrowdFlower reached a settlement for compensation owed because they had been paid on a piecework basis, classified as independent contractors, and earned less than the minimum wage. See No. 12-cv-05524-JST, 2015 WL 4076620 (N.D. Cal. July 2, 2015).

21. See *Armijo v. FedEx Ground Package Sys., Inc.*, 405 F. Supp. 3d 1267, 1283-84 (D.N.M. 2019) (holding that a delivery driver who spent seven hours per week "in a combination of unproductive waiting time and integral but not explicitly compensated post-delivery administrative activities" was a pieceworker so ineligible for overtime compensation); see also *Casias v. Distrib. Mgmt. Corp., Inc.*, No. CV 11-00874 MV/RHS, 2013 WL 12091857, at \*5-6 (D.N.M. Mar. 27, 2013) (holding that a delivery driver who earned "a predetermined fixed wage for each individual customer pick-up and delivery" was a pieceworker so theoretically ineligible for overtime compensation, but that wait time in excess of twenty hours per week raised a genuine issue of material fact sufficient to deny the motion for summary judgment).

22. See *Armijo*, 405 F. Supp. 3d at 1284-85 (detailing exemplary cases from other jurisdictions, including *Slayman v. FedEx Ground Package Sys, Inc.*, 765 F.3d 1033 (9th Cir. 2014)).

23. N.M. STAT. ANN. § 50-4-21(C)(4) (2021).

24. N.M. CONST. art. II, § 18.

25. See Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (current version at 29 U.S.C. § 201-19).

26. Compare An Act to Prescribe a Minimum Wage for Employees and to Provide for the Enforcement of Such Provisions, and Providing a Penalty for the Violations Thereof, 1955 N.M. Laws 459, 459 (current version at N.M. STAT. ANN. § 50-4-19 (1955)) (Section 1 is the "Declaration of State

Acts' provisions regarding workers paid on a piecework, flat rate, and commission basis are vastly different.<sup>27</sup>

The second Part of this Comment is divided into three Sections. In the first Section, I explain how the MWA's exemption is contrary to the legislative intent behind the FLSA to specifically include these types of workers in its protections. Further, the MWA's exemption is contrary to the public policies the FLSA has come to stand for. The exemption promotes a "race to the bottom" by incentivizing employers to produce goods and services cheaply by exploiting a diffuse group of New Mexico workers who lack the cohesion and bargaining power to advocate for better protections. If the exemption were not in place, these workers would qualify as covered employees under New Mexico law.<sup>28</sup> Fortunately, the legislative history of the MWA suggests that the removal of the exemption would be consistent with the section's evolution over time.

In the second Section, I explain that the MWA's exemption is preempted by the FLSA as less protective of workers. While the FLSA is traditionally interpreted to theoretically preempt state laws that are less protective *on their face*, such as state laws mandating a lower minimum wage than the federal minimum wage,<sup>29</sup> I argue that the MWA's exemption is less protective *in effect* and therefore should similarly be preempted. This would, at the very least, entitle the previously exempted workers to the federal minimum wage and overtime protections.<sup>30</sup>

In the third and final Section, I explain how the MWA's exemption is unconstitutional under the Equal Protection Clause of the New Mexico Constitution.<sup>31</sup> The exemption would fail the courts' "modern articulation" of the rational review test.<sup>32</sup> Moreover, a very similar provision of the MWA was declared unconstitutional under the even more deferential standard of conventional rational

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Public Policy"), with Fair Labor Standards Act of 1938, ch. 676, § 2, 52 Stat. 1060, 1060 (current version at 29 U.S.C. § 201-19) (Section 2 is the "Finding and Declaration of Policy").

27. Compare 29 U.S.C. § 213(a)(6)(C) (exempting a clearly defined class of hand-harvest agricultural pieceworkers from minimum wage and overtime protections), and 29 U.S.C. § 207(i) (exempting workers paid on a commission basis from overtime protections if their "regular rate" is at least one and half times the minimum wage and at least half of their compensation comes from commissions), with § N.M. STAT. ANN. 50-4-21(C)(4) (2021) (exempting workers paid on a piecework, flat rate, and commission basis from minimum wage and overtime protections).

28. Under New Mexico law, courts apply the economic reality test to determine whether a worker is economically dependent on his employer, so an employee, rather than truly in business for himself, so an independent contractor. See *Casias v. Distrib. Mgmt. Corp., Inc.*, No. CV 11-00874 MV/RHS, 2014 WL 12710236, at \*10 (D.N.M. Mar. 31, 2014) (detailing the six-factor test). See discussion *infra* Section III.A.iii for the application of this test to Rita and Jaime.

29. See Daniel V. Dorris, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251, 1251 (2009) (explaining that the FLSA "permits states to set more stringent wage-and-hour laws").

30. 29 U.S.C. § 206(a)(1)(C) (stating that the federal minimum wage is \$7.25 per hour); 29 U.S.C. § 207(a)(2)(C) (explaining that employers must compensate workers one and a half times their "regular rate" for hours worked over forty in a week).

31. N.M. CONST. art. II, § 18.

32. See *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, 378 P.3d 13 (explaining and applying the "modern articulation" of rational review).

review in 1957.<sup>33</sup> Therefore, the exempted workers should be guaranteed the higher state minimum wage.<sup>34</sup>

In the final Part, I suggest how, if the exemption is removed, the MWA should be slightly amended for workers paid on a commission basis to account for seasonal fluctuations in workload where appropriate. Upon removal, medical transcribers like Rita, delivery drivers like Jaime, hotel room cleaners, artisans, truck drivers, pipe layers, auto collision repairmen, and satellite installers throughout the state would receive the minimum wage and overtime protections they deserve.<sup>35</sup>

## I. THE PROVISIONS OF THE FEDERAL FAIR LABOR STANDARDS ACT AND THE NEW MEXICO MINIMUM WAGE ACT

The FLSA was passed by Congress in 1938 to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”<sup>36</sup> The FLSA applies to all workers in the United States<sup>37</sup> who are not explicitly exempted from coverage.<sup>38</sup> Exemptions from the FLSA’s protections are strictly and narrowly construed to protect workers’ rights.<sup>39</sup>

33. *Burch v. Foy*, 1957-NMSC-017, ¶ 16, 62 N.M. 219, 308 P.2d 199.

34. N.M. STAT. ANN. § 50-4-22(A)(5) (2021) (stating that New Mexico’s minimum wage is \$12 per hour).

35. The examples of medical transcribers, hotel room cleaners, and artisans are based on discussions with attorneys who have advised clients or heard of other attorneys doing so at the New Mexico Center on Law and Poverty and New Mexico Legal Aid. Zoom Interview with Stephanie Welch and Felipe Guevara, *supra* note 1; Telephone Interview with Cassie M. Fleming, *supra* note 1. For the other examples, see *Armijo v. FedEx Ground Package Sys., Inc.*, 405 F. Supp. 3d 1267, 1283–84 (D.N.M. 2019) (holding that Jaime the delivery driver was a pieceworker so ineligible for overtime compensation); *Corman v. JWS of N.M., Inc.*, 356 F. Supp. 3d 1148, 1156, 1200 (D.N.M. 2018) (holding that truck drivers in the oil industry were paid on a commission basis so ineligible for overtime compensation); *Key v. Butch’s Rat Hole & Anchor Serv., Inc.*, No. CIV 17-1171 RB/KRS, 2018 WL 4222392, at \*1, 4, 5 (D.N.M. Sept. 5, 2018) (holding that a pipe layer paid on both a piecework and hourly basis raised a genuine issue of material fact about piecework status and hence overtime compensation sufficient to deny the motion for summary judgment); *Olivo v. Crawford Chevrolet, Inc.*, No. CV 10-782 BB/LFG, 2012 WL 12897385, at \*1 (D.N.M. Jan. 12, 2012) (holding that an auto collision repairman who was paid on a flat rate basis was a pieceworker and ineligible for overtime compensation); *Tapia v. DIRECTV, Inc.*, No. CV 14-939 JCH/GBW, 2016 WL 9777179, at \*2–3 (D.N.M. June 22, 2016) (considering the case of a satellite installer who “[was] paid on a per-task basis for satisfactorily completing a DIRECTV-approved satellite installation[.]” “routinely subjected to an effective wage rate less than the applicable minimum wage[.]” and “not paid overtime”).

36. Fair Labor Standards Act of 1938, ch. 676, § 2, 52 Stat. 1060, 1060 (current version at 29 U.S.C. § 201–19) (Section 2 is the “Finding and Declaration of Policy”).

37. The FLSA applies to workers engaged in interstate commerce. This requirement can be met in two ways. “Enterprise coverage” under the FLSA includes businesses with yearly sales of at least \$500,000 as well as hospitals, medical facilities, schools and preschools, and government agencies. “Individual coverage” under the FLSA includes workers who do not meet the “enterprise coverage” requirements but their work “regularly involves” interstate commerce. This second category includes domestic workers. *Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)*, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/agencies/whd/fact-sheets/14-flsa-coverage> [<https://perma.cc/XR5V-2KYD>] (last updated July 2009).

38. See 29 U.S.C. § 213 (detailing exemptions from minimum wage and maximum hour requirements).

39. See *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).



Until 1955, the FLSA was the principal labor law governing workers in New Mexico. In 1955, the State Legislature passed the MWA to achieve substantively similar goals as the FLSA.<sup>40</sup> The MWA applies to all workers in the state unless a worker is exempted as not included in the definition of “employee.”<sup>41</sup> Just like exemptions from the FLSA, exemptions from the MWA’s protections are strictly and narrowly construed to protect workers’ rights.<sup>42</sup>

Both the FLSA and MWA contain provisions regarding workers paid on a piecework and commission basis.<sup>43</sup> The MWA additionally contains provisions regarding workers paid on a flat rate basis.<sup>44</sup> This method of payment is not common for workers in New Mexico,<sup>45</sup> so this Comment will not focus on it specifically. Instead, this Comment will focus on workers paid on a piecework basis, as this is the method of payment most commonly litigated<sup>46</sup> and critiqued by attorneys.<sup>47</sup>

The FLSA and MWA’s protections for workers paid on a piecework and commission basis are vastly different. Under the FLSA, the only workers paid on a piecework basis exempt from minimum wage and overtime protections are a clearly defined class of hand-harvest, seasonal agricultural workers.<sup>48</sup> In contrast, under the MWA, all workers paid on a piecework basis are exempt from the definition of “employee” and therefore minimum wage and overtime protections.<sup>49</sup> Under the

40. *Compare* An Act to Prescribe a Minimum Wage for Employees and to Provide for the Enforcement of Such Provisions, and Providing a Penalty for the Violations Thereof, 1955 N.M. Laws 459, 459 (current version at N.M. STAT. ANN. § 50-4-19 (1955)) (Section 1 is the “Declaration of State Public Policy”), *with* Fair Labor Standards Act of 1938, ch. 676, § 2, 52 Stat. 1060, 1060 (current version at 29 U.S.C. § 201–19) (Section 2 is the “Finding and Declaration of Policy”).

41. N.M. STAT. ANN. § 50-4-21(C) (2021).

42. *See* *Armijo v. FedEx Ground Package Sys., Inc.*, 405 F. Supp. 3d 1267, 1274 (D.N.M. 2019).

43. 29 U.S.C. § 213(a)(6)(C) (exempting a clearly defined class of hand-harvest agricultural pieceworkers from minimum wage and overtime protections); 29 U.S.C. § 207(i) (exempting workers paid on a commission basis from overtime protections if their “regular rate” is at least one and half times the minimum wage and at least half of their compensation comes from commissions); N.M. STAT. ANN. § 50-4-21(C)(4) (2021) (exempting workers paid on a piecework and commission basis from minimum wage and overtime protections).

44. § 50-4-21(C)(4) (exempting workers paid on a flat rate basis from minimum wage and overtime protections). As explained in the Introduction, flat rate schedule pay is unique to the automobile repair field and involves assigning tasks a standardized number of hours and then multiplying that number by a flat pay rate based on a worker’s qualifications. INVESTIGATIONS MANUAL, *supra* note 9, at 105 (citing *Burch v. Foy*, 1957-NMSC-017, ¶ 4, 62 N.M. 219, 308 P.2d 199; other citations omitted).

45. The only three cases interpreting the terms “flat rate schedules” hold that a fixed day rate is not a flat rate, and therefore employees paid a fixed day rate are still considered “employees.” *See* *Davis v. Steward Energy II, LLC*, No. 20-966 KG/JHR, slip op. at 6 (D.N.M. May 14, 2021); *Martinez v. FedEx Ground Package Sys., Inc.*, No. 20-1052 SCY/LF, slip op. at 5 (D.N.M. Mar. 17, 2021); *Kerr v. Allred Oilfield Serv., LLC*, No. 2:20-cv-00477-WJ-SMV, slip op. at 3 (D.N.M. Sept. 24, 2020).

46. *See, e.g., Armijo*, 405 F. Supp. 3d at 1283–84 (holding that a delivery driver was a pieceworker so ineligible for overtime compensation).

47. This is based on discussions with attorneys who have advised clients or heard of other attorneys doing so at the New Mexico Center on Law and Poverty and New Mexico Legal Aid. Zoom Interview with Stephanie Welch and Felipe Guevara, *supra* note 1; Telephone Interview with Cassie M. Fleming, *supra* note 1.

48. 29 U.S.C. § 213(a)(6)(C).

49. N.M. STAT. ANN. § 50-4-21(C)(4) (2021). The only limitation on the MWA’s categorical exemption for pieceworkers was passed in 1967, which likely limited the piecework exemption for agricultural workers to the clearly defined class of hand-harvest, seasonal agricultural workers paid by the

FLSA, workers paid on a commission basis are exempt from overtime protection only if their typical hourly pay exceeds one and a half times the minimum wage.<sup>50</sup> These workers are never exempt from minimum wage protection.<sup>51</sup> Under the MWA, however, all workers paid on a commission basis are exempt from minimum wage and overtime protections.<sup>52</sup>

No other state completely exempts workers paid on piecework, flat rate, and commission basis from these protections.<sup>53</sup> Workers paid on a piecework basis are guaranteed the minimum wage and overtime in every other state,<sup>54</sup> except for the clearly defined class of hand-harvest, seasonal agricultural workers exempt at the federal level.<sup>55</sup> Only two states have exemptions for auto mechanics paid on a flat rate basis<sup>56</sup> and only four states have exemptions for workers paid on a commission basis.<sup>57</sup> In sum, New Mexico stands alone in denying the exempted group of workers these basic wage and hour protections.

piece that are exempt from the FLSA. 1967 N.M. Laws 1090, 1091–92 (current version at N.M. STAT. ANN. § 50-4-21 (2021) (replacing the

blanket exemption for agricultural workers with several enumerated, specific exemptions, including a piecework exemption). This is because the amendment specifically articulated what agricultural workers were exempt, and this language would be erroneous if interpreted otherwise. This interpretation is urged and followed by attorneys at the New Mexico Center on Law and Poverty and New Mexico Legal Aid. Zoom Interview with Stephanie Welch and Felipe Guevara, *supra* note 1; Telephone Interview with Ismael Camacho, Attorney, N.M. Legal Aid (Nov. 2, 2022).

50. 29 U.S.C. § 207(i).

51. *See id.*

52. N.M. STAT. ANN. § 50-4-21(C)(4) (2021).

53. *See* *Corman v. JWS of N.M., Inc.*, 356 F. Supp. 3d 1148, 1206 (D.N.M. 2018) (“No states have comparable statutes.”); *Armijo v. FedEx Ground Package Sys., Inc.*, 405 F. Supp. 3d 1267, 1285 (D.N.M. 2019) (“Even Alaska, however, does not broadly exclude any and all employees who are compensated on a piecework, flat rate, or commission basis. New Mexico appears to stand alone in this regard.”).

54. In reaching this conclusion, I looked at the regulatory and statutory schemes of all forty-nine other states and included in my search the synonym “piece rate.” Other states’ regulations and statutes mention piecework for several other reasons aside from exempting these workers from protections, including making it clear that these workers do in fact qualify for protections. The following regulations and statutes are exemplary. *See* ME. REV. STAT. ANN. tit. 26 § 593 (2004) (detailing posting of specifications for textile piece rate work); N.J. STAT. ANN. § 34:11-56a1 (West 2020) (defining wages as including money earned on a piecework basis and describing piecework as not qualifying as seasonal employment); WASH. ADMIN. CODE § 296-126-021 (2023) (“Where employees are paid on a commission or piecework basis . . . [t]he total wages paid for such period shall be computed on the hours worked in that period resulting in no less than the applicable minimum wage rate.”).

55. 29 U.S.C. § 213(a)(6)(C).

56. In reaching this conclusion, I looked at the regulatory and statutory schemes of all forty-nine other states for mention of “flat rate” but did not include synonyms such as “flag rate” or “fee basis.” These two exemptions for auto mechanics are only from overtime, not minimum wage protections. N.D. ADMIN. CODE 46-02-07-02 (2022) (exempting “[m]echanics paid on a commission basis off a flat rate schedule” from overtime); ALASKA STAT. ANN. § 23.10.060 (2019) (exempting mechanics paid on a flat rate basis from overtime if their regular rate is at least twice the minimum wage).

57. In reaching this conclusion, I looked at the regulatory and statutory schemes of all forty-nine other states. Two of these states exempt workers paid on a commission basis from overtime protections only. MONT. CODE ANN. § 39-3-406 (2019) (mirroring the FLSA but creating exceptions for (1) “a salesperson, parts person or mechanic paid on commission or contract basis” and (2) a “salesperson . . . selling advertising for a radio or television station”); CONN. GEN. STAT. ANN. § 31-76i (2022) (exempting those who work more than 54 hours per week and deliver dairy or bakery products). Two of these states exempt workers paid on a commission basis from both minimum wage and overtime protections. ALASKA

## II. ELIMINATING NEW MEXICO'S EXEMPTION FOR WORKERS PAID ON A PIECEWORK, FLAT RATE, AND COMMISSION BASIS

In this Part, I detail three reasons why the exemption from the MWA should be eliminated: it is contrary to legislative intent and public policy, preempted by the FLSA, and is unconstitutional under the New Mexico Constitution's Equal Protection Clause.

### A. New Mexico's Exemption is Contrary to Legislative Intent and Public Policy

To begin, the MWA's exemption<sup>58</sup> is contrary to Congress's intent behind the FLSA and the FLSA's public policy provision. The exemption is reminiscent of the *Lochner* era<sup>59</sup> and an anomaly in contemporary jurisprudence on the distinction between employees and independent contractors.<sup>60</sup> In short, before considering the constitutional arguments, it is important to note that the exemption is out of line with the purpose and spirit of the larger legislative history and scheme of which it is a part. Fortunately, New Mexico legislative history suggests that the removal of the exemption by the Legislature would be consistent with the section's evolution over time.<sup>61</sup>

#### i. Legislative History of the Federal Fair Labor Standards Act

The legislative history of the FLSA makes clear that New Mexico's exemption encourages employers to behave in a way that the FLSA's original authors hoped to discourage. Further, New Mexico's exemption follows the model of the FLSA's questionable exemption for a clearly defined class of hand-harvest, seasonal agricultural workers<sup>62</sup> rather than its sounder limited exemption for workers paid on a commission basis.<sup>63</sup>

The FLSA was the last major piece of New Deal legislation enacted in response to the economic upheaval of the Great Depression, which many believed was caused by the income disparity between the economic elite and workers.<sup>64</sup> The

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STAT. ANN. § 23.10.055 (2019) (exempting individuals "employed on a straight commission basis"); ME. REV. STAT. ANN. tit. 26, § 663 (2021) (exempting "[t]hose employees whose earnings are derived in whole or in part from sales commissions and whose hours and places of employment are not substantially controlled by the employer").

58. N.M. STAT. ANN. § 50-4-21(C)(4) (2021).

59. See *Lochner v. New York*, 198 U.S. 45, 57–58 (1905) (holding that New York's regulation of working hours was an impermissible infringement on the right to contract embodied in the liberty component of the Due Process Clause and not within a state's police powers), *overruled by* *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

60. See *Casias v. Distrib. Mgmt. Corp., Inc.*, No. CV 11-00874 MV/RHS, 2014 WL 12710236, at \*10 (D.N.M. Mar. 31, 2014) (detailing the six-factor economic reality test used to distinguish between employees and independent contractors).

61. See discussion *infra* Section III.A.iv.

62. 29 U.S.C. § 213(a)(6)(C).

63. 29 U.S.C. § 207(i).

64. See Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 *HAMLIN L. REV.* 649, 649 (1989).

Act was crafted in direct response to President Roosevelt's call to action in a 1934 speech:

One third of our population, the overwhelming majority of which is in agriculture or industry, is ill-nourished, ill-clad, and ill-housed. . . . Our Nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied men and women a fair day's pay for a fair day's work. . . . We have promised it. We cannot stand still.<sup>65</sup>

Congress responded by creating wage and hour protections for the first time in 1938 through the FLSA.<sup>66</sup>

At the time the FLSA was passed, the Act did not exempt pieceworkers from its protections.<sup>67</sup> The piecework pay structure was most common for those assembling products, such as clothing and children's toys, at home for big businesses.<sup>68</sup> This practice was referred to as industrial homework or sweatshop work.<sup>69</sup> Congress expressed fear that exempting workers paid on a piecework basis from FLSA protections would encourage employers to pay more of their workers on a piecework basis.<sup>70</sup> So, pieceworkers as a category were not exempt.

In contrast, agricultural workers were exempt from the Act's protections when the FLSA was passed.<sup>71</sup> Important for this analysis, this blanket exemption was limited in several ways in 1966, but it continued to exempt a clearly defined class of hand-harvest, seasonal agricultural workers paid on a piecework basis.<sup>72</sup> There seems to have been multiple reasons for the initial blanket exemption.<sup>73</sup> Agricultural

65. *Id.* at 649–650 (citing S.REP. NO. 884, 75th Cong., 1st Sess. 1–3 (1937)); *see also* Autumn L. Canny, *Lost in A Loophole: The Fair Labor Standards Act's Exemption of Agricultural Workers from Overtime Compensation Protection*, 10 DRAKE J. AGRIC. L. 355, 357 (2005).

66. *See* Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (current version at 29 U.S.C. § 201–19).

67. *Id.* § 13 (the exemptions section includes no mention of an exemption for pieceworkers of any kind).

68. *See* Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORNELL L. REV. 557, 573–80 (2019).

69. *See id.*

70. *See id.*

71. Fair Labor Standards Act of 1938 § 13(a)(6) (“The provisions of sections 6 and 7 shall not apply with respect to . . . any employee employed in agriculture.”).

72. Fair Labor Standards Act, Pub. L. No. 89-601, sec. 203, §§ 13(a)(6), (b), 80 Stat. 833, 833–34 (1966) (limiting the exemption for agricultural workers); *see also* 29 U.S.C. § 213(a)(6)(C) (exempting agricultural workers from minimum wage and overtime protections if “such employee . . . is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, . . . commutes daily from his permanent residence to the farm on which he is so employed, and . . . has been employed in agriculture less than thirteen weeks during the preceding calendar year [,and] if such employee . . . is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, . . . is employed on the same farm as his parent or person standing in the place of his parent, and . . . is paid at the same piece rate as employees over age sixteen are paid on the same farm”).

73. *See* Anderson, *supra* note 64, at 656.

workers were less organized than their industrial counterparts and the agricultural lobby was powerful in Congress.<sup>74</sup> Additionally, Southern members of Congress would not tolerate legislation that extended minimum wage protection to their farmworkers.<sup>75</sup> Congresswoman Alma Adams from North Carolina recently described how the agricultural exemption was rooted in histories of racism and slavery in her introduction to a 2021 hearing on the FLSA:

Following the abolition of slavery, Black Americans, the majority of whom live in the south, were concentrated in agricultural and domestic jobs with little to no pay in order to preserve the profitable retirement that had been built on the backs of slaves. By the time President Franklin D. Roosevelt proposed what would become the FLSA, he knew that certain lawmakers who held the levers of power in Congress were committed to denying Black workers the wage protections that could lead to their economic and social freedom.

Roosevelt acquiesced to the demands of these lawmakers by excluding specific occupations that were overrepresented by Black workers from labor protections.<sup>76</sup>

The continued exclusion of the clearly defined class of hand-harvest, seasonal agricultural workers has been justified as a mechanism to maximize production during the short harvest season of certain crops.<sup>77</sup> So, while industrial homework pieceworkers were guaranteed the minimum wage and overtime protections, largely Black agricultural workers and domestic workers, including agricultural pieceworkers, were not.<sup>78</sup>

Turning to workers paid on a commission basis, most of these workers were exempt from protections under the FLSA when it was passed under the general exemption for retail workers.<sup>79</sup> However, in 1961 Congress amended the Act to apply to retail workers to increase workers' purchasing power and improve the overall

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74. *Id.*

75. *Id.* at 656–57.

76. *Hearing on Fair Labor Standards Before the H. Educ. and Lab. Subcomm. on Workforce Prots.*, 117th Cong. (2021).

77. *See* Anderson, *supra* note 64, at 663.

78. Fair Labor Standards Act of 1938, ch. 676, §§ 2, 13(a)(6), 52 Stat. 1060, 1060, 1067 (current version at 29 U.S.C. § 201–19) (not mentioning domestic workers in Section 2, the “Finding and Declaration of Public Policy,” as affecting commerce) (“The provisions of sections 6 and 7 shall not apply with respect to . . . any employee employed in agriculture.”).

79. *See id.* § 13(a)(2) (explaining that retail workers working in intrastate commerce were exempt from the Act’s protections). In 1961, “[l]ess than 250,000 employees in retail trade [were then] protected by the minimum wage and overtime provisions of the act.” THE U.S. DEPARTMENT OF LABOR, 87TH CONG., A COMPILATION OF ECONOMIC DATA ON INDUSTRIES AFFECTED BY H.R. 3935 AND OTHER BILLS TO AMEND THE FAIR LABOR STANDARDS ACT 1 (Comm. Print 1961). At least 2,741,000 retail employees were exempted from those protections. THE U.S. DEPARTMENT OF LABOR at 5. Considering the high ratio of exempted to protected retail employees, it follows that most workers paid on a commission basis were likely exempt from the Act’s protections.

economy.<sup>80</sup> Industry was concerned about workers paid on a commission basis being subject to the overtime provisions of the Act because of the fluctuations in workload typical to commission work.<sup>81</sup> If workers paid on a commission basis worked over forty hours per week during their busy times of year, paying them time and a half when they were at their most profitable would be challenging for employers.<sup>82</sup> The final version of the amendment exempted workers paid on a commission basis from overtime protection only if their hourly rate exceeded one and a half times the minimum wage.<sup>83</sup>

The legislative history of the FLSA's exemptions is a useful lens through which to view the MWA's current exemption. First, workers paid on a piecework basis have never been categorically exempt from the FLSA because of a simple reason: Congress was concerned this would encourage employers to take advantage of the exemption to underpay their workers. In New Mexico, this is precisely what the exemption from the MWA has done: employers are encouraged to take advantage of it to underpay their workers in several industries, including medical transcription, hospitality, artisan production, package delivery, truck driving, pipe laying, auto repair, and satellite installation.<sup>84</sup>

Second, the only surviving exemption for workers paid on a piecework basis at the federal level is justified as a method to maximize *production* in agriculture. This is illuminating when compared to the limited exemption for commission workers, which is justified as a necessary accommodation for the *seasonal* nature of sales work. Both of these classes of workers seek to maximize *production* in jobs in which the workload fluctuates *seasonally*, but the story of these two groups of workers is told in divergent ways. Agricultural pieceworkers are not even guaranteed the minimum wage as they seek to maximize production, without evidence that a minimum wage guarantee would dissuade hard work. Commission workers are more logically precluded from earning outsized overtime pay in their most productive seasons of the year. New Mexico should align its wage and hours laws with the ethos behind the logically limited exemption for workers paid on a commission basis without falling prey to the idea that a minimum wage guarantee somehow discourages hard work.

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80. See *Hearing on H.R. 3935 Before the Special Subcomm. on Lab. of the Comm. on Educ. and Lab.*, 87th Cong. 8 (1961) (statement of Hon. Arthur J. Goldberg, Sec. of Lab.) (quoting President Kennedy as saying that poverty “undermine[s] the general prosperity for the Nation which rests upon consumer purchasing power”).

81. See *id.* at 16–17 (noting employers’ desire “that overtime is not paid on peaks” and responding that “[o]bviously, if we did not give sympathetic consideration to this, then if we accumulated in 1 week all the incentive payments that were earned over a period, even though the payment is made just in 1 week, the overtime impact of that would be too great”).

82. S. REP. NO. 115, at 267 (1961) (“Third, many high commission employees work long hours during peak periods. To require the payment of overtime on such high commissions would result in fantastic payments during periods of heavy selling.”).

83. Fair Labor Standards Act, Pub. L. No. 87-30, sec. 6, § 7(a), 75 Stat. 69, 70 (1961) (explaining that an employer has not violated the “maximum hours” section of the Act if “the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6”).

84. See *supra* note 35 for the authority supporting each of these examples.

Lastly, the only surviving exemption for workers paid on a piecework basis at the federal level is steeped in histories of racism. While there is no evidence of racist motivations for the MWA's exemption, removal of the exemption would distinguish New Mexico's law from this shameful history.

*ii. Public Policy Provisions of the Federal Fair Labor Standards Act and New Mexico Minimum Wage Act*

The FLSA begins with a declaration of Congressional findings and policy.<sup>85</sup> A close reading of federal courts' interpretations of this provision suggests that the MWA's exemption is contrary to the public policies the federal Act aimed to promote.

The FLSA's public policy provision states, in pertinent part:

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions *detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers* . . . (3) constitutes an *unfair method of competition in commerce* . . .<sup>86</sup>

When the MWA was passed in 1955, the legislature included a public policy provision with substantial similarities to the federal provision:

It is declared to be the policy of this act (1) to establish minimum wage and overtime compensation standards for all workers at levels consistent with their *health, efficiency and general well-being*, and (2) to safeguard existing minimum wage and overtime compensation standards which are *adequate to maintain the health, efficiency and general well-being of workers* against the *unfair competition* of wage and hours standards which do not provide adequate standards of living.<sup>87</sup>

In short, the MWA's provision borrows heavily from the FLSA's provision, amending the language to be even more specific to the issues of minimum wage and overtime compensation.

No court interpreting the MWA has substantively analyzed the Act's public policy provision.<sup>88</sup> But when the MWA and FLSA have similar provisions, courts treat federal law interpreting the analogous provisions as persuasive.<sup>89</sup> Because of this similarity, federal cases interpreting the FLSA's public policy provision are persuasive authority regarding the MWA's public policy provision.

85. 29 U.S.C. § 202.

86. *Id.* (emphasis added).

87. N.M. STAT. ANN. § 50-4-19 (1955) (emphasis added).

88. This claim is based on thorough research of New Mexico cases citing to the MWA. I was unable to find any cases that analyzed the language of the Act's "Declaration of state public policy," *id.*

89. *Segura v. J.W. Drilling, Inc.*, 2015-NMCA-085, ¶ 9, 355 P.3d 845, 848 ("Although several New Mexico cases refer to federal law as persuasive authority in interpreting the MWA, in those cases the MWA and the FLSA had similar provisions."). This is especially true when there is no binding authority interpreting the MWA provision. *See INVESTIGATIONS MANUAL*, *supra* note 9, at iii.

Federal cases have interpreted the FLSA's public policy provision to stand for several specific policies. First, the FLSA was enacted to establish minimum labor standards<sup>90</sup> in an effort to eliminate substandard working conditions, specifically low wages and long working hours.<sup>91</sup> The Act was intended to encourage employers to spread work among a greater number of workers, rather than to encourage employees to work longer hours to earn overtime wages.<sup>92</sup> Second, the FLSA has a remedial and humanitarian purpose:<sup>93</sup> the maintenance of a minimum standard of living necessary for workers' health and well-being.<sup>94</sup> Third, as the FLSA was passed in pursuance of Congress's Commerce Clause power, the Act aimed to keep goods produced using substandard working conditions out of interstate commerce<sup>95</sup> in order to avoid a "race to the bottom" as employers compete to produce cheap goods.<sup>96</sup> Fourth, the public policy provision has often been invoked in courts' analysis of why certain categories of workers should be classified as employees rather than independent contractors, and therefore guaranteed minimum wage and overtime protections.<sup>97</sup> Last, courts invoke the public policy provision to describe the Act as a countermeasure to the exploitation of unorganized labor, or workers who otherwise lack the bargaining power to negotiate their own wage and hour protections.<sup>98</sup>

The MWA's exemption is contrary to federal courts' interpretation of the FLSA's public policy provision as embodied in all these policy statements. First, workers paid on a piecework basis in New Mexico have alleged that they are paid below the minimum wage in medical transcription, hospitality, artisan production, and satellite installation.<sup>99</sup> Workers paid on a piecework basis in New Mexico have also alleged that they are not paid overtime for their long working hours in package delivery, truck driving, pipe laying, auto repair, and satellite installation.<sup>100</sup> By enabling employers to underpay workers, the exemption seems to discourage employers from spreading work among a greater number of workers. Second, the exemption goes against the Act's "remedial and humanitarian" purpose to maintain a minimum standard of living by failing to require just compensation. Third, the exemption encourages employers to "race to the bottom" by giving them an opportunity to pay their workers less than is otherwise required by law. Fourth, I will discuss the distinction between employees and independent contractors as it relates to exempted workers later in this Part, but for now it is important to note that under New Mexico law,<sup>101</sup> courts would categorize pieceworkers as employees. Finally, as

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90. *E.g.*, *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

91. *E.g.*, *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 800–01 (D.C. Cir. 1983).

92. *E.g.*, *Marshall v. Hamburg Shirt Corp.*, 577 F.2d 444, 446 (8th Cir. 1978).

93. *E.g.*, *Walling v. Sw. Greyhound Lines*, 65 F. Supp. 52, 55 (W.D. Mo. 1946).

94. *E.g.*, *Bumpus v. Cont'l Baking Co.*, 124 F.2d 549, 551–52 (6th Cir. 1941).

95. *See, e.g.*, *Walling v. Peoples Packing Co.*, 132 F.2d 236, 240 (10th Cir. 1942).

96. *See, e.g.*, *U.S. v. Darby*, 312 U.S. 100, 109–10 (1941).

97. *See, e.g.*, *Usery v. Pilgrim Equip. Co., Inc.*, 527 F.2d 1308, 1310–11 (5th Cir. 1976) (considering female operators of laundry pickup stations).

98. *See, e.g.*, *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706–07 (1945).

99. *See supra* notes 1 and 2 for the authority supporting each of these examples.

100. *See supra* notes 3–7 for the authority supporting each of these examples.

101. Under New Mexico law, courts apply the economic reality test to determine whether a worker is economically dependent on his employer, so an employee, rather than truly in business for himself, so an



the class of workers subject to the MWA's exemption is diffuse, they epitomize the sort of unorganized group the FLSA was meant to protect. Because the MWA allows workers like Rita the medical transcriber to earn less than the minimum wage and workers like Jaime the delivery driver to go without overtime compensation,<sup>102</sup> they are discouraged from bringing suit seeking just wages. Instead, their stories are silenced, which only further prevents this group from organizing to advocate for a change in the law.

*iii. Case Law: Legislative Intent and Public Policy in Practice*

The MWA exemption's incompatibility with the legislative intent and public policy behind the FLSA is better understood when placed in the context of case law. The exemption is reminiscent of the *Lochner* era<sup>103</sup> that was effectively ended by the FLSA's passage in 1938. Consequently, the exemption is incompatible with contemporary jurisprudence on the distinction between employees and independent contractors,<sup>104</sup> an analysis that is vital to ensuring that workers qualify for the protections they statutorily deserve.

In the landmark case of *Lochner v. New York*, decided by the United States Supreme Court in 1905, a bakery owner was convicted of a misdemeanor for employing his bakers for more than sixty hours per week, contrary to New York state labor law.<sup>105</sup> The Court held that New York's regulation of working hours was an impermissible infringement on the right to contract embodied in the liberty component of the Due Process Clause and not within a state's police powers.<sup>106</sup> It is interesting to note that bakeries at the time of *Lochner* followed two models: union bakers worked in 10-hour shifts, while non-union bakers worked in much longer shifts and slept at the bakery.<sup>107</sup> By striking down New York's law, the Supreme Court privileged the right to contract over enforcing a labor law that prevented bakers from being made to sleep on the job and away from home.

Although the bakers at the time of *Lochner* were paid for their time spent sleeping, the case is representative of an economic era where freedom to contract was favored over protection of a workers' non-working personal time, including time spent sleeping. This is similar to the MWA's exemption, which privileges freedom to contract over protection of a worker's unproductive, unpaid time spent on the job

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independent contractor. See *Casias v. Distrib. Mgmt. Corp., Inc.*, No. CV 11-00874 MV/RHS, 2014 WL 12710236, at \*10 (D.N.M. Mar. 31, 2014) (detailing the six-factor test). See discussion *infra* Section III.A.iii for the application of this test to Rita and Jaime.

102. This is also true for the hotel room cleaners, artisans, truck driver, pipe layer, auto collision repairman, and satellite installer discussed throughout this Comment. See *supra* note 35 for the authority supporting each of these examples.

103. See *Lochner v. New York*, 198 U.S. 45, 57–58 (1905) (holding that New York's regulation of working hours was an impermissible infringement on the right to contract embodied in the liberty component of the Due Process Clause and not within a state's police powers), *overruled by* *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

104. See *Casias*, 2013 WL 12091857, at \*10 (detailing the six-factor economic reality test used to distinguish between employees and independent contractors).

105. *Lochner*, 198 U.S. at 46.

106. See *id.* at 57–58.

107. See Richard A. Epstein, *The Regulatory Hour: The History, Law and Economics of Minimum Wage and Maximum Hours Legislation*, 12 N.Y.U. J.L. & LIBERTY 477, 501 (2019).

waiting for work to accomplish. While the Supreme Court came to reject the right to contract as fundamental<sup>108</sup> and Congress passed the FLSA thirty-three years later in 1938, the MWA's exemption is more in line with a *Lochner* era understanding of workers' rights than the FLSA's.

Today, courts interpreting the FLSA and many states' wage and hour laws, including the MWA, use the economic reality test to determine whether a worker is an employee, and therefore guaranteed statutory protections, or an independent contractor and consequently exempt.<sup>109</sup> Courts interpreting New Mexico law do not apply this test to determine whether a worker paid on a piecework, flat rate, or commission basis qualifies as an employee, as these workers are *categorically* exempt from being considered employees.<sup>110</sup> This effectively categorizes these workers as independent contractors. It is worth considering if exempted workers would in fact qualify as employees under the economic reality test if the exemption was not in place.

Since the test was incorporated into New Mexico law,<sup>111</sup> it has only been applied to the MWA two times.<sup>112</sup> Because of the lack of cases, the New Mexico Department of Workforce Solutions *Investigations Manual* counsels consulting federal case law as persuasive authority on the application of the economic reality test in New Mexico.<sup>113</sup> In applying the test, courts consider six factors, none of which is dispositive:

(1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer's business.<sup>114</sup>

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108. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392–93 (1937) (distinguishing *Lochner*, 198 U.S. 45); *Ferguson*, 372 U.S. at 730 (overruling *Lochner*, 198 U.S. 45).

109. See Publisher's Editorial Staff, *Independent Contractor Status Under the Fair Labor Standards Act*, 43 No. 24 THE LAWYER'S BRIEF (Dec. 31, 2013) (explaining that all courts use the economic reality test under the FLSA); Vincent Cheng, *A Jigsaw of Worker Classifications*, TRIAL 20, 24 (Sept. 2018) (“[s]tate law violations. . . [i]n the wage-and-hour context, for example, some courts have adopted some version of the economic reality test while others have adopted some version of the common law test.”); see also *Baker v. Flint Engineering & Constr. Co.*, 137 F.3d 1436 (D.N.M. 1998) (applying the economic reality test under the FLSA); *Garcia v. Am. Furniture Co.*, 1984-NMCA-090, 101 N.M. 785, 689 P.2d 934 (incorporating the economic reality test into New Mexico law and applying it); *Doe Dancer I v. La Fuente, Inc.*, 481 P.3d 860 (Nev. 2021) (applying the economic reality test under Nevada law).

110. See, e.g., *Armijo v. FedEx Ground Package Sys., Inc.*, 405 F. Supp. 3d 1267 (D.N.M. 2019) (not using the economic reality test in its analysis).

111. *Garcia*, 1984-NMCA-090, ¶ 17, 689 P.2d at 938.

112. *Id.* ¶ 18, 689 P.2d at 938 (holding that the plaintiff softball team coach and manager was not an employee under the economic reality test without articulating the six factors); *Casias v. Distrib. Mgmt. Corp., Inc.*, No. CV 11-00874 MV/RHS, 2014 WL 12710236, at \*10, 17 (D.N.M. Mar. 31, 2014) (explaining that the six-factor economic reality test was the applicable law but ultimately holding that there was insufficient “common evidence” for the putative class to actually apply the test).

113. INVESTIGATIONS MANUAL, *supra* note 9, at 79.

114. *Casias*, 2013 WL 12091857, at \*10.

Courts consider the totality of the circumstances to determine whether the worker is “economically dependent on the business to which he renders service, or is, as a matter of economic fact, in business for himself.”<sup>115</sup>

One Tenth Circuit case applying the economic reality test cited favorably by the Department of Workforce Solutions *Investigations Manual* is *Dole v. Snell*.<sup>116</sup> In *Dole*, a cake decorator at a bakery who was paid by the number of cakes she decorated worked fifty to sixty hours per week and sought to be classified as an employee to receive FLSA protections.<sup>117</sup>

The court applied the test and held that the cake decorator qualified as an employee rather than an independent contractor.<sup>118</sup> Analyzing factor one, control, the court reasoned that the cake decorator’s schedule was controlled by her employer, pointing to classification as an employee.<sup>119</sup> Rita and Jaime’s schedules are similarly respectively set by their employing doctor and delivery company, also pointing to employee status. Analyzing factor two, opportunity for profit or loss, the court stated that “toiling for money on a piecework basis is more like wages than an opportunity for ‘profit.’”<sup>120</sup> The court noted that the decorator had no control over any of the factors impacting the business’s profit, again pointing to classification as an employee.<sup>121</sup> Neither Rita nor Jaime have control over the factors impacting their employers’ profits, suggesting they are also employees. Analyzing factor three, investment in the business, the court explained that the decorator’s purchasing of minimal supplies did not dissuade the court from finding her to be an employee.<sup>122</sup> So, any minimal supplies that Rita or Jaime purchase would not dissuade the court from classifying them as employees either.

Analyzing factor four, permanence of the working relationship, the court stated that the decorator’s four-year tenure with the bakery suggested she was an employee.<sup>123</sup> If Rita and Jaime stayed at their jobs for several years, this would point toward classification as employees. Analyzing factor five, the degree of skill required to perform the work, the court noted that the fact that the decorator was hired without previous experience and developed her skills on the job suggested that she was an employee.<sup>124</sup> Similarly, if Rita and Jaime were hired without previous experience in medical transcription or package delivery, this would point toward employee status. Analyzing factor six, the extent to which the work is an integral part of the alleged employer’s business, the court reasoned that custom cake decorations were integral to the bakery’s business and again suggested that the decorator was an employee.<sup>125</sup> Delivering packages is certainly essential to a package delivery company. An

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115. *Id.*

116. INVESTIGATIONS MANUAL, *supra* note 9, at 79 n.175 (discussing *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989)).

117. *See Dole*, 875 F.2d at 803–04.

118. *Id.* at 812.

119. *See id.* at 808.

120. *Id.* at 809.

121. *See id.* at 809–10.

122. *See id.* at 810.

123. *See id.* at 811.

124. *See id.*

125. *See id.*

argument can also be made that medical transcription is essential to a medical practice. Considering all of these factors, the court in *Dole* held that the decorator was an employee instead of an independent contractor.<sup>126</sup> A court would similarly hold that Rita and Jaime are employees. This analysis illuminates that, but for the MWA's exemption, most of the exempted workers would qualify as employees rather than independent contractors under the contemporary jurisprudence.

*iv. Legislative History of the New Mexico Minimum Wage Act*

The legislative history of the MWA suggests that the removal of the exemption would be consistent with the section's evolution over time.

The earliest clue to the exemption's purpose is a 1958 Attorney General opinion.<sup>127</sup> In response to an inquiry from a state representative from Rio Arriba County, the Attorney General confirmed that workers separating mica who were paid on a piecework basis were exempt from the MWA's protections.<sup>128</sup> Prior to World War II, the U.S. Geological Survey prepared for a possible wartime shortage of important minerals, including mica, by conducting various studies, including in northern New Mexico.<sup>129</sup> In 1956, likely in response to this government activity, mica development and mining reached an unprecedented peak in the northern part of the state, including Rio Arriba County in particular.<sup>130</sup> Poor working conditions are endemic in mica mining globally today.<sup>131</sup> While it is impossible to causally connect the mica industry and the inclusion of the exemption in the MWA in 1955, the Attorney General opinion is the only evidence on how the exemption was used by employers before 2011.<sup>132</sup>

The MWA's exemptions from the definition of "employee" and therefore minimum wage and overtime protections have been amended eleven times since the Act's original passage in 1955.<sup>133</sup> The majority of those amendments brought the MWA in line with the FLSA or made the law slightly more protective than the federal Act.<sup>134</sup> One of those amendments clarified the language of the MWA without

126. *See id.* at 812.

127. N.M. Att'y Gen., No. 58-204 (Oct. 8, 1958) (advisory letter to Mr. Matias L. Chacon, State Representative, Rio Arriba County, Espanola, New Mexico).

128. *See id.*

129. *See* S.H. GLASSMIRE, JR., ECONOMIC AND ENGINEERING ASPECTS OF MICA AND ASSOCIATED MINERALS OF CERTAIN AREAS IN NORTH CENTRAL NEW MEXICO 3 (New Mexico Economic Development Commission, 1956).

130. *See id.*

131. *See Eliminating Child Labor in Mica-Producing Communities and Promoting Responsible Mica Sourcing in Madagascar and Globally (MICA)*, U.S. DEPARTMENT OF LABOR, [https://www.dol.gov/agencies/ilab/eliminating-child-labor-mica-producing-communities-and-promoting-responsible-mica#:~:text=The%20majority%20of%20mica%20mining,often%20face%20chronic%20food%20insecurity\[https://perma.cc/FXA9-AW3S\]](https://www.dol.gov/agencies/ilab/eliminating-child-labor-mica-producing-communities-and-promoting-responsible-mica#:~:text=The%20majority%20of%20mica%20mining,often%20face%20chronic%20food%20insecurity[https://perma.cc/FXA9-AW3S]).

132. *See* *Olivo v. Crawford Chevrolet Inc.*, 799 F. Supp. 2d 1237, 1242 (D.N.M. 2011) (holding that an auto collision repairman who was paid on a flat rate basis had raised a genuine issue of material fact regarding his piecework status sufficient to deny the motion for summary judgment).

133. *See infra* notes 135, 139–45, 147–48 and accompanying text. Each note discusses one amendment, except note 145, which discusses two amendments.

134. *Compare, e.g.*, 1967 N.M. Laws 1090, 1091–92 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (replacing the blanket exemption from minimum wage and overtime protections for agricultural

substantively altering its meaning.<sup>135</sup> Only four of those amendments made the MWA less protective than the FLSA.<sup>136</sup> Two of these less protective amendments were subsequently removed<sup>137</sup> and the two that remain are preempted by the FLSA as explained later in this Comment.<sup>138</sup>

Most amendments to the definition of “employee” in the MWA brought the state Act in line with or made it slightly more protective than the FLSA. This evidences a legislative trend toward adherence to the FLSA and increasing protections for workers. These amendments were a limitation on the agricultural worker exemption in 1967,<sup>139</sup> the addition of an exemption for seasonal workers at youth camps or retreats in 1975,<sup>140</sup> the removal of an exemption for “persons employed by ambulance services” in 2007,<sup>141</sup> a limitation on the exemption for state and local employees in 2008,<sup>142</sup> the removal of the domestic service worker

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workers in the MWA with several enumerated, specific exemptions), *with* Fair Labor Standards Act, Pub. L. No. 89-601, sec. 203, § 13(a)(6), 80 Stat. 833, 833–34 (1966) (detailing the amendments to the agricultural worker exemption from minimum wage and overtime protections in the FLSA one year earlier).

135. *See* 1971 N.M. Laws 792, 793 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (clarifying the exemption for volunteers of educational, charitable, religious and nonprofit organizations).

136. *See, e.g.*, 1977 N.M. Laws 708, 711 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (adding an exemption for employees of charitable, religious or nonprofit organizations that reside on the premises of group homes at (12)). No comparable provision exists in the FLSA.

137. *See infra* notes 145–46 and accompanying text.

138. *See* discussion *infra* Section III.B.

139. *Compare* 1967 N.M. Laws 1090, 1091–92 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (replacing the blanket exemption from minimum wage and overtime protections for agricultural workers in the MWA with several enumerated, specific exemptions), *with* Fair Labor Standards Act, Pub. L. No. 89-601, sec. 203, § 13(a)(6), 80 Stat. 833, 833–34 (1966) (detailing the amendments to the agricultural worker exemption from minimum wage and overtime protections in the FLSA one year earlier). One of the exempted classes of agricultural workers introduced in this amendment is the clearly defined class of hand-harvest, seasonal agricultural workers mentioned throughout this Comment. Advocates for limiting the MWA’s piecework exemption point to this amendment as evidence that the exemption should not apply to *all* agricultural workers paid by the piece, but *only* those explicitly mentioned in the MWA. Otherwise, the amendment would be redundant and irrelevant. Zoom Interview with Stephanie Welch and Felipe Guevara, *supra* note 1; Telephone Interview with Ismael Camacho, *supra* note 49.

140. *Compare* 1975 N.M. Laws 274, 275–276 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (adding the exemption into the MWA mentioned in the main text at (10)), *with* Fair Labor Standards Act, Pub. L. No. 89-601, sec. 201, § 13(a)(6), 80 Stat. 833, 833 (1966) (adding a similar exemption into the FLSA nine years earlier).

141. *Compare* 2007 N.M. Laws 1309 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (removing the exemption from the MWA mentioned in the main text without making a note of doing so), *with* Fair Labor Standards Act, Pub. L. No. 93-259, sec. 6, § 7, 88 Stat. 60, 60 (1974) (adding minimum wage and overtime requirements into the FLSA for firefighters employed by the government, unique to their schedules, thirty-three years earlier). There are no provisions specific to private ambulance services in the FLSA, so those workers are entitled to minimum wage and overtime protections.

142. *Compare* 2008 N.M. Laws 20, 21 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (guaranteeing state employees minimum wage but not overtime protections under the MWA), *with* 29 U.S.C. § 207(k) (detailing overtime rules for firefighters and law enforcement personnel under the FLSA, who are guaranteed the minimum wage), *and* Fair Labor Standards Act, Pub. L. No. 93-259, sec. 6, § 7, 88 Stat. 60, 60 (1974) (adding minimum wage and overtime requirements for firefighters and law enforcement personnel under the FLSA if they are employed by the government, unique to their schedules, thirty-four years earlier). Because state employees are not necessarily regulated by the FLSA, I instead

exemption in 2019,<sup>143</sup> and the removal of an exemption for workers under eighteen years old who were not students or graduates of secondary school in 2021.<sup>144</sup>

Only two of the four amendments to the definition of “employee” in the MWA that made the law less protective than the FLSA are still in effect. This evidences less legislative will for breaking with the federal Act and decreasing protections for workers. An exemption for workers under eighteen years old who were not students or graduates of secondary school was added in 1979 and amended in 2019,<sup>145</sup> but as noted above, has subsequently been removed to make the MWA slightly more protective than the FLSA.<sup>146</sup> The only two less protective amendments that are still in effect are for employees of charitable, religious, or nonprofit

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compare here to firefighters and law enforcement personnel at the federal level. Current protections for both are substantively similar.

143. *Compare* 2019 N.M. Laws 2759, 2759 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (noting the removal of the exemption from the MWA mentioned in the main text), *with* Fair Labor Standards Act, Pub. L. No. 93-259, sec. 7, § 2(a), 88 Stat. 62, 62 (1974) (adding “Congress further finds that the employment of persons in domestic service in households affects commerce” to the policy provision, bringing domestic workers into the FLSA forty five years earlier).

144. *Compare* 2021 N.M. Laws 316, 316 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (noting the removal of the exemptions from the MWA mentioned in the main text), *with Fair Labor Standards Act Advisor*, U.S. DEPARTMENT OF LABOR, [https://webapps.dol.gov/elaws/whd/flsa/docs/ymwplink.asp?\\_ga=2.265138959.1290286814.1669677922-2046349569.1662665600](https://webapps.dol.gov/elaws/whd/flsa/docs/ymwplink.asp?_ga=2.265138959.1290286814.1669677922-2046349569.1662665600) (stating that youth are entitled to minimum wage protections under the FLSA, subject to a probationary period) [<https://perma.cc/G5RM-BVK3>]. The 2021 amendment to the MWA is slightly more protective than the FLSA. The FLSA also guarantees this group protections but requires a ninety-day probationary period for workers under twenty years old, during which they need only make \$4.25 per hour. This is not required under the MWA. According to Ismael Camacho, attorney at New Mexico Legal Aid, many of the agricultural workers in New Mexico who are exempt from minimum wage and overtime protections as members of the clearly defined class referred to throughout this Comment are students working during their summer breaks who are less skilled than agricultural workers who work year-round. Telephone Interview with Ismael Camacho, *supra* note 49. Considering the legislature’s intent to extend minimum wage and overtime protections to students, as evidenced by this amendment, there may be an argument to eliminate even this clearly defined exemption for agricultural workers under New Mexico law.

145. *Compare* 1979 N.M. Laws 946, 947 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (adding exemptions to the MWA mentioned in the main text at (8) and (9)), *and* 2019 N.M. Laws 874, 874 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (“providing a separate minimum wage for employed secondary school students” under the MWA, but not those who were not students or graduates of secondary school), *with* Fair Labor Standards Act, Pub. L. No. 93-259, sec. 24, § 14(b)(1)(A), 88 Stat. 69, 70 (1974) (amending the student exemption in the FLSA to give the Secretary of Labor the power to limit the student minimum wage to 85% of the prevailing minimum wage), *and Fair Labor Standards Act Advisor*, *supra* note 144 (stating that youth are currently entitled to minimum wage protections, subject to a probationary period, under the FLSA). In short, the FLSA guaranteed students 85% of the minimum wage in 1974, but in 1979 the MWA was amended to not guarantee workers under 18 the minimum wage. The MWA was amended again in 2019 to guarantee a special lower minimum wage for students only, while the FLSA guaranteed students the federal minimum wage.

146. *See* 2021 N.M. Laws 316, 316 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (noting the removal of the exemptions from the MWA mentioned in the main text); *see also supra* note 144 for a discussion of how the 2021 amendment made the MWA slightly more protective than the FLSA for students.

organizations that reside on the premises of group homes<sup>147</sup> and food processing workers.<sup>148</sup>

In conclusion, based on the legislative history of this section of the MWA, an amendment to remove the exemption for workers paid on a piecework, flat rate, and commission basis would be consistent with the section's evolution over time.<sup>149</sup> This would bring the MWA in line with legislative intent behind the FLSA, the Act's public policy provision, and contemporary jurisprudence on the distinction between employees and independent contractors.

### **B. New Mexico's Exemption is Preempted by the Federal Fair Labor Standards Act**

In addition to being contrary to legislative intent and public policy, the MWA's exemption<sup>150</sup> is preempted by the FLSA because it is, in effect, less protective of workers. This means that, at minimum, these workers are "caught" by the safety net of the FLSA's minimum wage and overtime protections.<sup>151</sup>

#### *i. New Mexico's Exemption is Susceptible to Preemption by the Federal Fair Labor Standards Act*

The FLSA states, in pertinent part:

No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage *higher* than the minimum wage established under this chapter or a maximum work week *lower* than the maximum workweek established under this chapter.<sup>152</sup>

Put simply, this clause allows states to enact wage and hour laws that are more protective of workers than the FLSA.<sup>153</sup> The FLSA does not preempt these more protective state laws.<sup>154</sup> Courts have consistently interpreted the clause to also

147. 1977 N.M. Laws 708, 711 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (adding the exemption to the MWA mentioned in the main text at (12)). No comparable provision exists in the FLSA.

148. 2007 N.M. Laws 1309, 1313 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (adding the exemption to the MWA mentioned in the main text at (13)). No comparable provision exists in the FLSA.

149. It is appropriate to point out here that New Mexico courts, like many jurisdictions, seek to interpret statutory language in line with legislative intent. Specifically, the fact that the New Mexico legislature passed a law contrary to many other jurisdictions is seen as evidence that the legislature acted intentionally. Courts have interpreted the exemption from the MWA as intentional under this line of reasoning. *See Armijo v. FedEx Ground Package Sys., Inc.*, 405 F. Supp. 3d 1267, 1285 (D.N.M. 2019); *Corman v. JWS of N.M., Inc.*, 356 F. Supp. 3d 1148, 1206–07 (D.N.M. 2018). However, my exhaustive inquiry for evidence of that intent has come up empty handed.

150. N.M. STAT. ANN. § 50-4-21(C)(4) (2021).

151. 29 U.S.C. § 206(a)(1)(C) (stating that the federal minimum wage is \$7.25 per hour); 29 U.S.C. § 207(a)(2)(C) (explaining that employers must compensate workers one and a half times their "regular rate" for hours worked over forty in a week).

152. 29 U.S.C. § 218(a) (emphasis added).

153. *See Dorris*, *supra* note 29, at 1251.

154. *See, e.g., DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 589 F. Supp. 2d 1026, 1031 (E.D. Wis. 2008) (stating that because "Wisconsin wage and hour laws . . . are not less generous than those of the

prohibit states from enacting wage and hour laws that are less protective of workers than the FLSA.<sup>155</sup> Therefore, the FLSA ought to preempt these less protective state laws. I say *ought* rather than *does*, as the cases stating this principle suggest it as the logical opposite of the FLSA's failure to preempt more protective state laws.<sup>156</sup> I was unable to find any case in which a state law was struck down as preempted by the FLSA because it was less protective of workers.

To better understand how this portion of the FLSA works, it is useful to consider the concept of preemption more generally. Preemption has its constitutional basis in the Supremacy Clause<sup>157</sup> and can be either express<sup>158</sup> or implied.<sup>159</sup> Here, the FLSA does not expressly preempt state law because the excerpted clause invites states to pass laws that are more protective for workers. So, any preemption of a state law by the FLSA would necessarily be implied. Implied preemption occurs in three ways: field preemption,<sup>160</sup> conflict preemption,<sup>161</sup> and impeding federal objective preemption.<sup>162</sup> Here, field preemption does not apply because the federal government does not occupy the field of wage and hour law, just as it does not expressly preempt state wage and hour law. Conflict preemption also does not apply because it would be possible to comply with a less protective state law and the more protective FLSA simultaneously. Under impeding federal objective preemption, however, a less protective state law could impede the FLSA's objective to guarantee a minimum standard of living for workers by establishing minimum wage and overtime protections.<sup>163</sup>

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FLSA, it seems clear that the FLSA does not displace the state law"); *Manliguez v. Joseph*, 226 F. Supp. 2d 377, 388–89 (E.D.N.Y. 2002) (holding that plaintiff made a valid claim under New York law for overtime compensation as a domestic worker, even though the FLSA did not afford domestic workers overtime protections).

155. See, e.g., *DeKeyser*, 589 F. Supp. 2d at 1031 (“[I]t is clear that the FLSA would preempt only state laws that mandated lower minimum wages or longer maximum workweeks.”); *Barrus v. Dick’s Sporting Goods, Inc.*, 732 F. Supp. 2d 243, 257 (W.D.N.Y. 2010) (citing *DeKeyser*, 589 F. Supp. 2d 1026, for the same proposition quoted here); *Morales v. Showell Farms, Inc.*, 910 F. Supp. 244, 248 (M.D.N.C. 1995) (“[T]he FLSA does not completely pre-empt state laws but only pre-empts them to the extent that they are less generous than the FLSA.”).

156. See, e.g., *DeKeyser*, 589 F. Supp. 2d at 1031 (“Given this express statement of Congress’ intent not to displace state laws granting workers higher minimum wages or a shorter maximum workweek, it is clear that the FLSA would preempt only state laws that mandated lower minimum wages or longer maximum workweeks.”).

157. U.S. CONST. art. 6, cl. 2.

158. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (“State action may be foreclosed by express language in a congressional enactment.”).

159. See *Arizona v. U.S.*, 567 U.S. 387, 399 (2012) (explaining that preemption can be “express” and that “[s]tate law must also give way to federal law in at least two other circumstances”).

160. See *id.* (“[T]he States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.”).

161. See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (“Since no irreconcilable conflict with the federal regulation requires a conclusion that [Section] 792 [of California’s Agricultural Code] was displaced, we turn to the question whether Congress has nevertheless ordained that the state regulation shall yield.”).

162. See *Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 220–21 (1983) (“[S]tate law is preempted if it ‘stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.’”) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

163. See generally discussion *supra* Sections III.A.i–ii.



As a threshold matter, it is necessary to consider if the FLSA, per its plain language, only preempts state laws *explicitly* regulating *minimum wages and maximum hours*. The most common preemption claims under the FLSA, which occur when a claimant brings both state and federal wage and hour claims simultaneously,<sup>164</sup> show that this is not the case. These cases fall into three categories.<sup>165</sup> First, if a state law provides greater protections to the claimant than the FLSA and the necessary enforcement mechanisms to exercise those greater rights, courts hold that the state laws regarding enforcement are not preempted.<sup>166</sup> Second, if a state law is silent on wage and hour protections but provides for alternative enforcement mechanisms for FLSA rights, courts hold that the state laws regarding enforcement are preempted.<sup>167</sup> Third, if a state law provides the same protections to the claimant as the FLSA but alternative enforcement mechanisms to exercise those rights, courts are split on whether the state laws regarding enforcement are preempted.<sup>168</sup> In short, state laws *creating enforcement mechanisms* to exercise greater rights for workers have been upheld by courts. This is true even though these laws do not *explicitly* regulate *minimum wages and maximum hours*. In sum, there is no indication that the FLSA preempts only state laws directly related to minimum wages and maximum hours but instead can preempt any state law that impedes the FLSA's objective. This dynamic interpretation of the statutory language<sup>169</sup> acknowledges that the original drafters of the FLSA may not have foreseen states' more creative methods for reducing worker protections.

*ii. The New Mexico Minimum Wage Act is, in Effect, Less Protective of Exempted Workers than the Federal Fair Labor Standards Act*

The MWA's exemption does not, on its face, require a lower minimum wage or longer maximum work week than the FLSA for workers paid on a piecework, flat rate, and commission basis. However, it has the practical effect of doing so. In turn, the exemption is preempted. This is true even though New Mexico's minimum wage is higher than the federal minimum wage and its maximum work week is the same as federal law<sup>170</sup> and is therefore not preempted wholesale.

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164. Dorris, *supra* note 29, at 1252.

165. *Id.*

166. *Id.* at 1261–62.

167. *Id.* at 1263.

168. *Id.* at 1262–63.

169. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480 (1978) (“As society changes, adapts to the statute, and generates new variations of the problem which gave rise to the statute, the unanticipated gaps and ambiguities proliferate. In such circumstances, it seems sensible that ‘the quest is not properly for the sense originally intended by the statute, [or] for the sense sought originally to be put into it, but rather for the sense which can be quarried out of it in the light of the new situation.’”) (quoting Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950)).

170. Compare N.M. STAT. ANN. § 50-4-22(A)(5) (2021) (stating that New Mexico's minimum wage is \$12 per hour), and N.M. STAT. ANN. § 50-4-22(D) (2021) (“An employee shall not be required to work more than forty hours in any week of seven days.”), with 29 U.S.C. § 206(a)(1)(C) (stating that the federal minimum wage is \$7.25 per hour), and 29 U.S.C. § 207(a)(1) (“[N]o employer shall employ any of his employees . . . for a workweek longer than forty hours.”).

This is most obvious in the case of workers paid on a piecework basis, like Rita and Jaime,<sup>171</sup> and those paid on flat rate schedules. The FLSA does not exempt workers paid on a piecework basis from the minimum wage or overtime except for the same clearly defined class of hand-harvest, seasonal agricultural workers that is also exempt under New Mexico law.<sup>172</sup> And, the FLSA does not include provisions regarding workers paid on a flat rate basis, so they are guaranteed the minimum wage and overtime protections of the Act without exception. Under the FLSA, employers must pay workers paid on a piecework or flat rate basis a “regular rate” of at least the federal minimum wage of \$7.25 per hour<sup>173</sup> and, if they work more than forty hours in a workweek, must pay an hourly rate no less than one and a half times their regular rate for those additional hours.<sup>174</sup> The regular rate is calculated by dividing a worker’s total pay by the hours worked in any given week.<sup>175</sup> Under the MWA, however, workers paid on a piecework and flat rate basis are not guaranteed New Mexico’s minimum wage of \$12 per hour<sup>176</sup> and, if they work more than forty hours in a workweek, employers are not required to pay them an hourly rate no less than one and a half times their regular rate for those additional hours.<sup>177</sup> The result is that workers paid on a piecework or flat rate basis can make *less* than the federal minimum wage and work *longer* than the federal maximum workweek without commensurate pay. In effect, the MWA’s wage and hour laws for workers paid on a piecework and flat rate basis are less protective than the FLSA.

Next, workers paid on a commission basis are also less protected under the MWA than the FLSA. The FLSA does not exempt workers paid by commission from the minimum wage.<sup>178</sup> The FLSA only exempts commission workers from overtime protection if their regular rate of pay exceeds one and a half times the minimum

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171. The analysis would be similar for the hotel room cleaners, artisans, truck driver, pipe layer, auto collision repairman, and satellite installer discussed throughout this Comment. *See supra* note 35 for the authority supporting each of these examples.

172. *Compare* 29 U.S.C. § 213(a)(6)(C) (exempting agricultural pieceworkers “if such employee . . . is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, . . . commutes daily from his permanent residence to the farm on which he is so employed, and . . . has been employed in agriculture less than thirteen weeks during the preceding calendar year”), *with* N.M. STAT. ANN. § 50-4-21(C)(8)(c) (2021) (exempting agricultural pieceworkers if “the employee . . . is employed as a hand-harvest laborer and is paid on a piece-rate basis in an operation that has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment; . . . commutes daily from the employee’s permanent residence to the farm on which the employee is so employed; and . . . has been employed in agriculture less than thirteen weeks during the preceding calendar year”).

173. 29 U.S.C. § 206(a)(1)(C).

174. 29 U.S.C. § 207(a)(2)(C).

175. *See* 29 C.F.R. § 778.109 (2022) (referring to all workers); 29 C.F.R. § 778.111 (2022) (referring specifically to pieceworkers).

176. N.M. STAT. ANN. § 50-4-22(A)(5) (2021) (stating the minimum wage); N.M. STAT. ANN. § 50-4-21(C)(4) (2021) (exempting these workers).

177. N.M. STAT. ANN. § 50-4-22(D) (2021) (explaining overtime compensation calculation); § 50-4-21(C)(4) (exempting these workers).

178. *See* 29 U.S.C. § 213 (the list of exemptions from minimum wage protections contains no mention of workers paid on a commission basis).

wage.<sup>179</sup> Further, to be classified as paid on a commission basis under the FLSA, more than half of a worker's pay must come from commissions and they must be employed by a retail or service establishment.<sup>180</sup> Consequently, under the FLSA, employers must pay workers paid on a commission basis a "regular rate" of at least the federal minimum wage of \$7.25 per hour<sup>181</sup> and, if they work more than forty hours in a workweek, must pay an hourly rate no less than one and a half times their regular rate for those additional hours.<sup>182</sup> Alternately, workers paid by commission who make \$10.88 per hour or more are exempt from overtime protections.<sup>183</sup> The regular rate is calculated in the same manner as it is for workers paid on a piecework or flat rate basis.<sup>184</sup> Under the MWA, workers paid on a commission basis are not guaranteed New Mexico's minimum wage of \$12 per hour<sup>185</sup> and, if they work more than forty hours in a workweek, employers are not required to pay them an hourly rate no less than one and a half times of their regular rate for those additional hours.<sup>186</sup> Workers paid on a commission basis under New Mexico law need not make \$18 per hour in order to be exempt from overtime protections.<sup>187</sup> Further, while there is no bright line rule regarding classification as paid by commission under the MWA, case law suggests that any amount of pay from commissions that exceeds a *de minimis* amount qualifies a worker as paid on a commission basis.<sup>188</sup> The result is that workers paid by commission can make *less* than the federal minimum wage and work *longer* than the federal maximum workweek without commensurate pay. The MWA's wage and hour laws for those paid on a commission basis are also, in effect, less protective than the FLSA.

*iii. Weaker Protections in Practice: Pieceworkers Under the Federal Fair Labor Standards Act Versus Under the New Mexico Minimum Wage Act*

The weaker protections for these workers under the MWA than the FLSA can be further understood by looking at the time workers paid on a piecework basis often spend waiting for pieces of work or accomplishing auxiliary tasks. Under the FLSA, a worker's time spent "engaged to wait"<sup>189</sup> or doing auxiliary tasks that are

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179. 29 U.S.C. § 207(i).

180. *Id.* Further, there are many tests used to determine if a worker is paid by commission at the federal level, though New Mexico courts do not necessarily distinguish between piecework and commission pay bases so consequently have not chosen a test. *See supra* note 4, explaining that under New Mexico law, the practical effect of the two classifications is identical.

181. 29 U.S.C. § 206(a)(1)(C).

182. 29 U.S.C. § 207(a)(2)(C).

183. *See* § 207(i).

184. *See* 29 C.F.R. § 778.109 (2022) (referring to all workers, including workers paid on a commission basis).

185. N.M. STAT. ANN. § 50-4-22(A)(5) (2021) (stating the minimum wage); N.M. STAT. ANN. § 50-4-21(C)(4) (2021) (exempting these workers).

186. N.M. STAT. ANN. § 50-4-22(D) (2021) (explaining overtime compensation calculation); § 50-4-21(C)(4) (exempting these workers).

187. *See* § 50-4-21(C)(4) (no mention of a minimum rate required to exempt a worker paid on a commission basis from protections).

188. *See* *Corman v. JWS of N.M., Inc.*, 356 F. Supp. 3d 1148, 1207 (D.N.M. 2018).

189. *See* 29 C.F.R. § 785.15 (2022) (describing "engaged to wait"); *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944) (establishing the concept of "engaged to wait"); *see generally* 29 C.F.R. § 785.14

“an integral part of a principal activity”<sup>190</sup> counts as work hours, including toward overtime compensation. In practice, this means that any of a worker’s time not paid on a piecework basis requires an employer to raise the piece rate to ensure that the calculated “regular rate” is above the minimum wage. However, under the MWA, case law suggests that a worker can be “engaged to wait” for up to twenty hours a week without compensation<sup>191</sup> and need not be paid for auxiliary tasks if they are categorized as *de minimis*.<sup>192</sup> Without a minimum wage requirement, the employer has no incentive to raise the worker’s rate to compensate for this time.

Under the FLSA, a worker is “engaged to wait” if the time spent waiting is unpredictable and of a short duration, the worker is “unable to use the time effectively for his own purposes,” and waiting is integral to the job, even if the employee is technically allowed to leave the work site during this time.<sup>193</sup> This time is considered “on duty” and compensable.<sup>194</sup> A worker is “waiting to be engaged” if told in advance that he may leave the job, so he can “use the time effectively for his own purposes.”<sup>195</sup> This time is considered “off duty” and not compensable.<sup>196</sup> For pieceworkers in particular, an employer and worker may agree that piecework compensation also covers time spent “engaged to wait.”<sup>197</sup> This agreement may be evidenced by a “mutual understanding” between the employee and the worker that “need not be in writing, but rather, may be inferred from the parties’ conduct.”<sup>198</sup> Further, any auxiliary tasks that are “an integral part of a principal activity,” such as tasks required to prepare to complete a piece of work, are compensable.<sup>199</sup>

In contrast, the federal court for the District of New Mexico, the only court to consider the MWA exemption, has decided cases involving wait time<sup>200</sup> and

(2022) (describing the difference between “engaged to wait” and “waiting to be engaged”); 29 C.F.R. § 785.16 (2022) (describing “waiting to be engaged”).

190. See 29 C.F.R. § 785.24 (2022) (describing a “principal activity” and “an integral part of a principal activity”).

191. See *Olivo v. Crawford Chevrolet, Inc.*, No. CV 10-782 BB/LFG, 2012 WL 12897385, at \*1 (D.N.M. Jan. 12, 2012) (holding that an auto collision repairman who was paid on a flat rate basis was a pieceworker and ineligible for overtime compensation, even though he waited for work without compensation for ten to twenty hours each week).

192. *Corman*, 356 F. Supp. 3d at 1156, 1200, 1204–1205 (holding that truck drivers in the oil industry who were paid a percentage of the customer’s “transportation charge” were paid on a commission basis so ineligible for overtime compensation, even though they received a *de minimis* amount of hourly compensation for “yard time”).

193. § 785.15.

194. See *id.*; see also 29 C.F.R. § 778.318 (2022) (“Some agreements provide for payment only for the hours spent in productive work; the work hours spent in waiting time, time spent in travel on the employer’s behalf or similar nonproductive time are not made compensable and in some cases are neither counted nor compensated. Payment pursuant to such an agreement will not comply with the Act; such nonproductive working hours must be counted and paid for.”).

195. 29 C.F.R. § 785.16 (2022).

196. See *id.*

197. 29 C.F.R. § 778.318(c).

198. U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter FLSA2020-17 at 2–3 (Nov. 30, 2020).

199. 29 C.F.R. § 785.2 (2022).

200. See, e.g., *Olivo v. Crawford Chevrolet, Inc.*, No. CV 10-782 BB/LFG, 2012 WL 12897385, at \*1 (D.N.M. Jan. 12, 2012) (holding that an auto collision repairman who was paid on a flat rate basis was a pieceworker and ineligible for overtime compensation, even though he spent 10–20 hours per week waiting for work without pay).

auxiliary tasks<sup>201</sup> in a manner much less protective of workers than these federal standards. In *Armijo v. FedEx Ground Package System Inc.*, the plaintiff Jaime, first referenced in the Introduction to this Comment, was a delivery driver who worked long hours and was paid on a piecework basis.<sup>202</sup> Jaime claimed she was misclassified as an independent contractor and instead should have been classified as an employee per the economic reality test.<sup>203</sup> The remedy she sought was overtime compensation: one and half times her regular rate for her hours worked over forty in a week.<sup>204</sup>

Distilling the analysis from previous unreported cases,<sup>205</sup> the court in *Armijo* reasoned that a worker can be made to wait on the job for up to twenty hours a week before being disqualified from classification as a pieceworker and by default an independent contractor.<sup>206</sup> Further, the court noted that as long as any time spent on unpaid tasks would make up a *de minimis* percentage of the worker's pay if paid at the current minimum wage rate, this should have no impact on the worker's classification as a pieceworker.<sup>207</sup> In Jaime's case, the court held that spending seven hours per week "in a combination of unproductive waiting time and integral but not explicitly paid post-delivery administrative activities [was] simply not enough to raise a material issue for trial."<sup>208</sup> The court further explained that if Jaime had been paid for those seven hours at the minimum wage rate, it would have made up only 2.63% of her pay.<sup>209</sup> While the court's analysis focused on pieceworkers, the court also held that the distinction between those paid on a piecework and commission basis did not need to be analyzed, since both types of workers were equally exempt.<sup>210</sup>

The New Mexico Department of Workforce Solutions *Investigations Manual* offers a contrary interpretation of wait time for workers paid on a piecework basis, stating that:

If a piece-rate worker is required to wait at the jobsite until piece rate jobs become available, then that worker is likely not exempt.

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201. See, e.g., *Armijo v. FedEx Ground Package Sys., Inc.*, 405 F. Supp. 3d 1267, 1283–84 (D.N.M. 2019) (holding that a delivery driver who spent seven hours per week "in a combination of unproductive waiting time and integral but not explicitly compensated post-delivery administrative activities" was a pieceworker so ineligible for overtime compensation).

202. See *id.* at 1284.

203. See *id.* at 1269–70, 1272.

204. See *id.* at 1270; see also N.M. STAT. ANN. § 50-4-22(D) (2021) (explaining how to calculate overtime compensation).

205. See *Armijo*, 405 F. Supp. 3d at 1274–1284 (citing *Tapia v. DIRECTV, Inc.*, No. CV 14-939 JCH/GBW, 2016 WL 9777179 (D.N.M. June 22, 2016); *Casias v. Distrib. Mgmt. Corp., Inc.*, No. CV 11-00874 MV/RHS, 2013 WL 12091857 (D.N.M. Mar. 27, 2013); *Corman v. JWS of N.M., Inc.*, 356 F. Supp. 3d 1148 (D.N.M. 2018); *Key v. Butch's Rat Hole & Anchor Serv., Inc.*, No. CIV 17-1171 RB/KRS, 2018 WL 4222392 (D.N.M. Sept. 5, 2018); *Olivo v. Crawford Chevrolet Inc.*, 799 F. Supp. 2d 1237 (D.N.M. 2011); *Olivo*, 2012 WL 12897385).

206. See *Armijo*, 405 F. Supp. 3d at 1283–84.

207. *Id.* at 1284.

208. *Id.* at 1283–84.

209. *Id.* at 1284.

210. *Id.* at 1279 (rejecting the extensive analysis in *Corman*, 356 F. Supp. 3d 1148, focused on distinguishing between these two types of workers).

This is because the wait time confers a benefit to the employer, because the employer will have workers available to perform work when a customer or job arrives.<sup>211</sup>

The *Manual* does not qualify the above rule, suggesting that *any* amount of time spent waiting would disqualify a worker from being classified as a pieceworker. But the analysis and holding in *Armijo* suggests that this bright line, worker-friendly rule does not reflect how pieceworkers are treated by courts interpreting New Mexico law.

The court's interpretation of the MWA is less protective than federal law in three key respects. First, the court considers any amount of wait time under twenty hours per week as irrelevant to a worker's classification as a pieceworker.<sup>212</sup> This is less protective than the federal standard, under which any amount of time that is considered "engaged to wait" rather than "waiting to be engaged" is work time and compensable.<sup>213</sup> Second, the MWA does not require that an employer and worker reach a mutual understanding that piecework compensation also covers time spent "engaged to wait."<sup>214</sup> The court's consideration of any amount of time less than twenty hours per week as irrelevant to a worker's classification as a pieceworker effectively treats this understanding as implicit. Third, if time spent working on "auxiliary tasks" only amounts to a *de minimis* amount of a worker's overall pay, the court considers this irrelevant to the analysis.<sup>215</sup> This is less protective than the federal standard, under which all time at work is compensable, as long as it is spent doing tasks that are "an integral part of a principal activity."<sup>216</sup>

A court applying federal law would analyze Jaime's case as follows.<sup>217</sup> To begin, Jaime would be classified as an employee using the economic reality test, as described earlier in this Comment.<sup>218</sup> Consequently, she would *de facto* qualify for the overtime wages she sought. Still, there are several nuances to consider. First, Jaime's time spent waiting would be considered engaged to wait and therefore compensable. This is because the wait time was relatively brief, Jaime was unable to use it effectively for her own purposes, and waiting was integral to her job. Second, absent a written agreement regarding Jaime's wait time, a court would have to consider if Jaime and her employer had a mutual understanding that her piecework compensation also covered it. If the parties did not have a mutual understanding, any of Jaime's time spent waiting would need to be paid at least at the minimum wage.

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211. INVESTIGATIONS MANUAL, *supra* note 9, at 103 (interpreting *Casias v. Distrib. Mgmt. Corp., Inc.*, No. CV 11-00874 MV/RHS, 2013 WL 12091857, at \*6 (D.N.M. Mar. 27, 2013) and *Olivo v. Crawford Chevrolet Inc.*, 799 F. Supp. 2d 1237, 1242 (D.N.M. 2011)).

212. *See Armijo*, 405 F. Supp. 3d at 1283–84.

213. 29 C.F.R. § 785.15 (2022); 29 C.F.R. § 778.318 (2022).

214. The MWA makes no mention of a "mutual understanding." Under the FLSA, a "mutual understanding" is required for piecework compensation to cover time spent "engaged to wait." *See* U.S. Dep't of Labor, Wage & Hour Div., *supra* note 198, at 2–3.

215. *Armijo*, 405 F. Supp. 3d at 1284.

216. 29 C.F.R. § 785.2 (2022).

217. This same analysis would apply to the medical transcribers, hotel room cleaners, artisans, truck drivers, pipe layers, auto collision repairmen, and satellite installers discussed throughout this Comment. *See supra* note 35 for the authority supporting each of these examples.

218. *See* discussion *supra* Section III.A.iii.

If the parties did have a mutual understanding, the time spent waiting would still be considered compensable toward calculating Jaime's regular rate and total hours for overtime purposes. Third, Jaime's time spent doing post-delivery administrative activities, or auxiliary tasks, would be compensable since these activities are an integral part of her principal activity: making deliveries. Under federal law, Jaime would have received the relief she sought.

In conclusion, while New Mexico's exemption for workers paid on a piecework, flat rate, and commission basis does not, on its face, require a lower minimum wage or longer maximum work week than the FLSA for these workers, it has the *practical effect* of doing so. The exemption is preempted. Preemption would mean that these workers would earn at least the federal minimum wage<sup>219</sup> for their work hours, including time spent engaged to wait and completing auxiliary tasks, and be subject to the FLSA's overtime protections.<sup>220</sup> However, in the Section that follows, I detail how this preempted law ought to be eliminated altogether, allowing these workers to earn at least New Mexico's higher minimum wage.<sup>221</sup>

### C. New Mexico's Exemption is Unconstitutional Under the State Constitution's Equal Protection Clause

In addition to being preempted by the FLSA, the MWA's exemption<sup>222</sup> is unconstitutional under the New Mexico Constitution's Equal Protection Clause.<sup>223</sup> This means that the exception should be eliminated, qualifying these workers for the same minimum wage and overtime protections as employees under New Mexico law.<sup>224</sup>

#### i. *New Mexico's Exemption is Unconstitutional Using the Court's Current Test: The "Modern Articulation" of Rational Review*

The Equal Protection Clause of the New Mexico Constitution states that "No person shall . . . be denied equal protection of the laws."<sup>225</sup> Just like the federal Constitution's Equal Protection Clause, New Mexico's Clause is "essentially a mandate that similarly situated individuals be treated alike, absent a sufficient reason to justify the disparate treatment."<sup>226</sup>

New Mexico state courts determine the level of scrutiny to apply to a law challenged under the Equal Protection Clause based on the group discriminated

219. 29 U.S.C. § 206(a)(1)(C) (stating that the federal minimum wage is \$7.25 per hour).

220. 29 U.S.C. § 207(a)(2)(C) (explaining that employers must compensate workers one and a half times their "regular rate" for hours worked over forty in a week).

221. N.M. STAT. ANN. § 50-4-22(A)(5) (2021) (stating that New Mexico's minimum wage is \$12 per hour).

222. N.M. STAT. ANN. § 50-4-21(C)(4) (2021).

223. N.M. CONST. art. II, § 18.

224. § 50-4-22(A)(5) (stating that New Mexico's minimum wage is \$12 per hour); N.M. STAT. ANN. § 50-4-22(D) (2021) ("An employee shall not be required to work more than forty hours in any week of seven days, unless the employee is paid one and one-half times the employee's regular hourly rate of pay for all hours worked in excess of forty hours.").

225. N.M. CONST. art. II, § 18.

226. *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 9, 378 P.3d 13, 19.

against or the rights infringed.<sup>227</sup> Strict scrutiny applies to laws that discriminate against suspect classifications, including race, immigration status, and nationality, or impact constitutionally protected rights.<sup>228</sup> Intermediate scrutiny applies to laws that discriminate against sensitive classes, including gender and illegitimacy, or impact important but not constitutionally protected rights.<sup>229</sup> Rational review applies to laws that do not discriminate against a suspect or sensitive class or impact a constitutionally protected or important right.<sup>230</sup> Social and economic legislation is typically subject to rational review.<sup>231</sup> The disparate treatment of workers paid on a piecework, flat rate, and commission basis would be subject to rational review because the impacted individuals are not members of a suspect or sensitive class and the benefits conferred by the MWA are not constitutionally protected or important rights.<sup>232</sup>

Under the federal rational review standard, a law is unconstitutional if it is not rationally related to a legitimate government purpose.<sup>233</sup> New Mexico courts, however, have rejected federal courts' "rubber stamp" and "toothless" approach to rational review that finds constitutional any law "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification" without requiring evidence or empirical data.<sup>234</sup> Instead, New Mexico's "modern articulation" of rational review requires the "[demonstration] that the classification created by the legislation is not supported by a firm legal rationale or evidence in the record."<sup>235</sup> This more rigorous test reflects the courts' "constitutional duty to protect

227. *See id.* ¶ 23, 378 P.3d at 24.

228. *State v. Ortiz*, 2021-NMSC-029, ¶ 28, 498 P.3d 264, 273; *see also Rodriguez*, 2016-NMSC-029, ¶ 23, 378 P.3d at 24.

229. *Ortiz*, 2021-NMSC-029, ¶ 28, 498 P.3d at 273; *see also Rodriguez*, 2016-NMSC-029, ¶ 23, 378 P.3d at 24.

230. *Rodriguez*, 2016-NMSC-029, ¶ 23, 378 P.3d at 24.

231. *Id.*

232. *Cf. id.* ¶ 24, 378 P.3d at 24 (explaining that farmworkers were not a suspect or sensitive class and that workers' compensation was not a fundamental or important right in deciding to apply rational review).

233. *See id.* ¶ 23, 378 P.3d at 24.

234. *Id.* ¶¶ 26–27, 378 P.3d at 25.

235. *Id.* ¶ 25, 378 P.3d at 25 (citing *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 32, 125 N.M. 721, 965 P.2d 305; *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 24, 137 N.M. 734, 114 P.3d 1050). As explained in *Trujillo*, New Mexico courts adopted the "modern articulation" of the rational review test in an effort to "subsume" rational review with bite as articulated in cases such as *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). 1998-NMSC-031, ¶ 32, 965 P.2d at 314. *Trujillo* explicitly overruled *Corn v. N.M. Educators Fed. Credit Union*, 1994-NMCA-161, 119 N.M. 199, 889 P.2d 234, and *Alvarez v. Chavez*, 1994-NMCA-133, 118 N.M. 732, 886 P.2d 461, two New Mexico Court of Appeals cases that established rational review with bite as a separate and distinct test from rational review. 1998-NMSC-031, ¶ 32, 965 P.2d at 314. Thus, the "modern articulation" functions much as the bite test does but applies to all laws subject to rational review under New Mexico law, not just those that evidence prejudice. The test was further honed in *Wagner*, 2005-NMSC-016, ¶ 24, 114 P.3d at 1059, notably applied in *Rodriguez*, 2016-NMSC-029, 378 P.3d 13, and reaffirmed in *Citizens for Fair Rates & the Environment v. N.M. Public Regulation Commission*, 2022-NMSC-010, ¶ 40, 503 P.3d 1138, 1153–1154 (with regards to substantive due process) and *State v. Ortiz*, 2021-NMSC-029, ¶¶ 32–34, 498 P.3d 264, 274 (with regards to equal protection). It is worth noting here that the court's adoption of the "modern articulation" of rational review has been critiqued. Justice Nakamura stated in her dissent to *Rodriguez* that "[a]fter *Wagner*, the 'modern articulation' of rational basis review was buried for some years. Since that decision, this Court has employed rational basis review without reference to this heightened standard



discrete groups of New Mexicans from arbitrary discrimination by political majorities and powerful special interests,”<sup>236</sup> a duty the courts take seriously.

The landmark 2016 New Mexico Supreme Court case *Rodriguez v. Brand West Dairy* found the exclusion of certain farmworkers from the Workers’ Compensation Act unconstitutional under the Equal Protection Clause using the “modern articulation” of rational review.<sup>237</sup> In *Rodriguez*, two farmworkers who were injured on the job were ineligible for workers’ compensation benefits because they were “farm and ranch laborers” and consequently exempt from the Act’s protections.<sup>238</sup>

The court in *Rodriguez* first asked the threshold question for equal protection analysis: did the farmworker exemption result in dissimilar treatment of similarly situated individuals?<sup>239</sup> In concluding that it did, the court considered the Act’s purpose, history, and language.<sup>240</sup> The court observed that the Act’s three enumerated purposes<sup>241</sup> seemed to equally balance the interests of employers and employees.<sup>242</sup> However, the distinction between these farmworkers and other workers was not essential to forwarding these purposes and the distinction unduly benefited a certain subset of employers who could claim more exemptions than others: farmers.<sup>243</sup> Next, the court noted that farmworkers had historically been excluded from the Act’s protections since its passage.<sup>244</sup> At the time of the decision, all private employers with three or more employees were required to comply with the Act, with the only remaining exemptions being for farmworkers and domestic servants.<sup>245</sup>

Finally, the court distilled precedent to determine the specific meaning of the exemption’s language.<sup>246</sup> The farmworker exemption had been interpreted by courts to only apply to those whose “primary responsibility [was] performed on the

both in analyzing federal *and* state constitutional claims.” 2016-NMSC-029, ¶ 88, 378 P.3d at 42 (Nakamura, J., dissenting). Further, Justice Nakamura explained that “[u]nder New Mexico’s interstitial approach to determining state constitutional claims that have federal analogues (such as equal protection), this Court departs from the federal constitutional analysis *only* if the federal analysis is flawed or undeveloped or if there are characteristics distinctive to New Mexico that warrant a different constitutional analysis.” *Id.* ¶ 90, 378 P.3d at 43 (Nakamura, J., dissenting). Justice Nakamura pointed out that neither of these conditions were satisfied regarding equal protection analysis. *Id.* ¶ 90, 378 P.3d at 43 (Nakamura, J., dissenting).

236. *Rodriguez*, 2016-NMSC-029, ¶ 27, 378 P.3d at 25.

237. *See id.* ¶ 31, 378 P.3d at 27.

238. *Id.* ¶¶ 3–6, 378 P.3d at 19–20.

239. *Id.* ¶ 11, 378 P.3d at 20.

240. *See id.* ¶¶ 12–21, 378 P.3d at 20–23.

241. *Id.* ¶ 12, 378 P.3d at 20 (listing the three purposes as “. . . (1) maximizing the limited recovery available to injured workers, in order to keep them and their families at least minimally financially secure; (2) minimizing costs to employers; and (3) ensuring a quick and efficient system”).

242. *Id.*

243. *Id.* ¶ 17, 378 P.3d at 22.

244. *Id.* ¶ 14, 378 P.3d at 21.

245. *Id.* This is reminiscent of the FLSA’s longest lasting exemptions for agricultural and domestic workers, evidence of institutional racism as explained previously in this Comment. *See* discussion *supra* Section III.A.i.

246. *See id.* ¶¶ 15–16, 378 P.3d at 21–22.

farming premises and was an essential part of cultivation of the crop.”<sup>247</sup> Consequently, a farmer could be exempt from providing coverage for his workers in the field but not for his workers packaging and processing his product.<sup>248</sup> And, that same fieldworker would not be covered for an injury incurred during packaging and processing if his main duty was to work in the field.<sup>249</sup> Considering this creation of two categories of workers based on “no unique characteristic” in regards to the purposes of the Act, set against a history of exclusion, the court held that the exemption resulted in dissimilar treatment of similarly situated individuals.<sup>250</sup>

In applying the “modern articulation” of rational review, the court first noted that if a law is “grossly over- or under-inclusive,” it is not rational and amounts to arbitrary discrimination.<sup>251</sup> The court then concluded that there was “neither evidence in the record nor firm legal rationale” supporting a “rational relationship” between the farmworker exemption and any of the state’s five proposed purposes for the exemption.<sup>252</sup>

First, the court rejected the otherwise valid purpose of reducing employer costs as invalid in this case because it was accomplished through an arbitrary distinction.<sup>253</sup> Second, the court also rejected the exemption’s purpose in avoiding the “unique” administrative challenges of administering workers’ compensation to migratory, seasonal farmworkers as vastly underinclusive, since workers in many other industries were migratory and seasonal but also covered.<sup>254</sup> Further, it was vastly overinclusive, since not all farmworkers were migratory or seasonal.<sup>255</sup> Third, the court reasoned that the federal regulation of agricultural prices did not justify the exemption because most competing agricultural producers from other states, subject to the same federal regulations, were required to hold workers’ compensation insurance for their farmworkers.<sup>256</sup> Fourth, relatedly, the court stated that because most small farms were already exempt from workers’ compensation under another exemption, this exemption did not serve the purpose of protecting small farmers in the state.<sup>257</sup> Fifth and finally, the court explained that the exemption led farmworkers to necessarily pursue tort claims against their employers and that a negligence instead of no-fault standard was disadvantageous to the excluded workers, so not a valid purpose for the exemption.<sup>258</sup> Finding no “evidence in the record nor firm legal rationale” for the exemption, the court held that it failed the “modern articulation” of rational review and was unconstitutional under the New Mexico Constitution’s Equal Protection Clause.<sup>259</sup>

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247. *Id.* ¶ 16, 378 P.3d at 22.

248. *Id.*

249. *Id.* ¶ 15, 378 P.3d at 21–22.

250. *See id.* ¶¶ 17, 22–23, 378 P.3d at 22, 24.

251. *Id.* ¶ 29, 378 P.3d at 26.

252. *Id.* ¶ 31, 378 P.3d at 27.

253. *Id.* ¶¶ 32–35, 378 P.3d at 27–28.

254. *Id.* ¶¶ 36–38, 378 P.3d at 29–30.

255. *Id.* ¶ 39, 378 P.3d at 30.

256. *Id.* ¶¶ 41–42, 378 P.3d at 30–31.

257. *Id.* ¶ 43, 378 P.3d at 31.

258. *Id.* ¶ 44, 378 P.3d at 31–32.

259. *Id.* ¶ 31, 378 P.3d at 27.

A court would hold similarly as it did in *Rodriguez* and find the MWA's exemption unconstitutional using the "modern articulation" of rational review. I will follow the *Rodriguez* court's reasoning as a guide in analyzing the MWA's exemption. The arguments would undoubtedly be different in an actual case about the MWA, whether it be about a medical transcriber like Rita, a delivery driver like Jaime, or a hotel room cleaner, artisan, truck driver, pipe layer, auto collision repairman, satellite installer,<sup>260</sup> or any other kind of worker.

As a threshold matter, the MWA's exemption results in dissimilar treatment of similarly situated individuals. The Act's purpose is to establish and safeguard wage and hour standards that promote workers' "health, efficiency and general well-being" from the unfair competition and lower standard of living created by lower wage and hour standards.<sup>261</sup> Just like the distinction between workers in *Rodriguez*, which was contrary to the Workers' Compensation Act's purpose, the distinction between workers paid on a piecework, flat rate, and commission basis from other workers is directly contrary to the MWA's purpose. The distinction actually *promotes* unfair competition by allowing workers paid using one of the enumerated methods to be paid less than other workers completing the same task who are paid hourly. In paying these workers less, they are afforded a lower standard of living. Next, like the long history of the exemption in *Rodriguez*, the exemption from the MWA has been a part of the Act since its inception,<sup>262</sup> despite the elimination of several other exemptions over time.<sup>263</sup> Lastly, similar to the language of the exemption in *Rodriguez*, the exemption from the MWA creates two categories of workers, those paid using one of the enumerated methods and those that are not, based on "no unique characteristic"<sup>264</sup> in relation to the Act's purpose.

The exemption from the MWA also fails the "modern articulation" of rational review: there is likely "neither evidence in the record nor firm legal rationale" supporting a "rational relationship" between the exemption from the MWA and any "legitimate government purpose."<sup>265</sup> While the contents of a trial record and prospective counter arguments are of course speculative at this point, it is worth noting that there is no evidence in the legislative record that substantiates the exemption.<sup>266</sup> Following the guidance of the *Rodriguez* court, a court in this case would consider cost savings to employers a generally valid purpose, but not so when accomplished through an arbitrary distinction between workers. Further, if the purpose of the exemption were to be considered avoiding excessive wages during "high season" in jobs with seasonal fluctuation, the court would critique the law as both vastly over- and under-inclusive. Many of the workers paid on a piecework, flat

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260. See *supra* note 35 for the authority supporting each of these examples.

261. N.M. STAT. ANN. § 50-4-19 (1955).

262. See An Act to Prescribe a Minimum Wage for Employees and to Provide for the Enforcement of Such Provisions, and Providing a Penalty for the Violations Thereof, 1955 N.M. Laws 459, 460 (current version at N.M. STAT. ANN. § 50-4-21 (2021)).

263. See *supra* notes 141, 143, and 144. These eliminations occurred between 2007 and 2021.

264. *Rodriguez*, 2016-NMSC-029, ¶ 17, 378 P.3d at 22.

265. *Id.* ¶ 31, 378 P.3d at 27.

266. Although courts note that the legislature made a choice to enact a broad exemption, they do not provide further evidence of intent. See, e.g., *Corman v. JWS of N.M., Inc.*, 356 F. Supp. 3d 1148, 1207 (D.N.M. 2018).

rate, and commission basis do not work in jobs with seasonal fluctuation in workload.<sup>267</sup> Further, some workers in seasonal jobs are not paid using any of the enumerated methods.<sup>268</sup> A court in this case would likely also point out that, since no other states' laws contain a similar exemption,<sup>269</sup> the exemption cannot be justified as a means of making New Mexico employers' products competitive. In sum, a court would find the exemption unconstitutional under the New Mexico Constitution's Equal Protection Clause using the "modern articulation" of rational review.

*ii. New Mexico's Exemption is Unconstitutional Using the Court's Previous Test: Conventional Rational Review*

The exemption is also unconstitutional under the more deferential conventional rational review test that New Mexico courts used in the past<sup>270</sup> and federal courts still use today<sup>271</sup> to analyze social and economic legislation that does not evidence prejudice. Under conventional rational review, a law is unconstitutional if it is not rationally related to a legitimate government purpose.<sup>272</sup> Unlike the "modern articulation" of the test, a law is constitutional under the conventional test "if there is any *reasonably conceivable* state of facts that could provide a rational basis for the classification."<sup>273</sup>

A very similar exemption from the MWA was found unconstitutional under the New Mexico Constitution's Equal Protection Clause using conventional rational review in 1957. In *Burch v. Foy*, a variety store owner was required to pay his employees \$.75 per hour, the minimum wage for "employees."<sup>274</sup> However, nearby drug stores were required to pay their employees only \$.50 per hour because drug

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267. Seasonal fluctuation in workload is not mentioned in any of the cases analyzing the exemption. *See, e.g.,* *Olivo v. Crawford Chevrolet, Inc.*, No. CV 10-782 BB/LFG, 2012 WL 12897385, at \*1 (D.N.M. Jan. 12, 2012) (holding that an auto collision repairman who was paid on a flat rate basis was a pieceworker and ineligible for overtime compensation without discussion of seasonal fluctuation in workload).

268. For example, "seasonal employees of an employer obtaining and holding a valid certificate" have a separate and distinct exemption from the Act's protections, N.M. STAT. ANN. § 50-4-21(C)(7) (2021), suggesting that they are not necessarily paid on a piecework, flat rate, or commission basis.

269. *See supra* notes 53–57 and accompanying text.

270. *See, e.g.,* *Alvarez v. Chavez*, 1994-NMCA-133, ¶ 10, 118 N.M. 732, 886 P.2d 461 ("The traditional rational-basis standard applies minimal scrutiny to legislation, requiring only that a classification drawn by a statute be rationally related to a legitimate state interest."), *overruled by* *Trujillo v. City of Albuquerque*, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305. *See supra* note 235 for a discussion of *Trujillo's* overruling of *Alvarez* and the impact on rational review analysis. Further, if the court were to reject the "modern articulation" of rational review in the future and revert to the conventional test, the analysis described in this Sub-Section would be applicable. *See supra* note 235 for a discussion of the critique of the court's adoption of the "modern articulation" of rational review.

271. *See, e.g.,* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 442–47 (1985) (stating that "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest" but ultimately applying rational review with bite because the challenged law evidenced prejudice).

272. *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 23, 378 P.3d 13, 24.

273. *Id.* ¶ 26, 378 P.3d at 25 (emphasis added).

274. 1957-NMSC-017, ¶¶ 2, 6, 62 N.M. 219, 308 P.2d 199 (citing the version of the Act then in effect).

store employees were “service employees” and subject to a lower minimum wage.<sup>275</sup> This was true even though the variety store and drug stores sold “substantially the same type of merchandise.”<sup>276</sup> The court stated that “[i]f persons under the same circumstances and conditions are treated differently, there is arbitrary discrimination.”<sup>277</sup> The court then noted that the employees of the two stores were subject to different minimum wages solely based on the type of store they worked at, which gave the drug stores a competitive advantage over the variety store.<sup>278</sup> While the court did not explicitly use the language of conventional rational review, their reasoning suggests that the distinction between employees of the two stores was not rationally related to any legitimate government purpose under “any *reasonably conceivable* state of facts.”<sup>279</sup> The court therefore held that the inclusion of drug stores employees in the definition of service employee in the MWA was unconstitutional.<sup>280</sup>

A court would hold similarly to the *Burch* court regarding the MWA exemption using conventional rational review. Like the portion of the MWA contested in *Burch*, which created two different minimum wages, the exemption from the MWA for workers paid on a piecework, flat rate, and commission basis effectively does the same: the minimum wage for exempted workers is \$0 and the minimum wage for all other workers is \$12.<sup>281</sup> Like the variety and drug stores in *Burch*, it is easy to imagine two competing delivery companies, for example, doing substantially similar work. A driver for one company is paid by the package and mile, like Jaime,<sup>282</sup> while the driver for the other is paid by the hour. Just like in *Burch*, a court would find that this is arbitrary discrimination. Further, a court would find that this arbitrary discrimination, like in *Burch*, gives a competitive advantage to the company that pays its workers less. Reminiscent of the analysis in *Rodriguez*, this disparate payment is contrary to the declared purpose of the MWA, which aims to avoid unfair competition created by lower wage and hour standards. Similar to the exemption analyzed in *Burch*, the exemption from the MWA does not seem to be rationally related to any legitimate government purpose under “any *reasonably conceivable* state of facts” and a court would find it unconstitutional under the New Mexico Constitution’s Equal Protection Clause.

While *Burch* is over sixty years old and the analysis is admittedly not as rigorous as that used by today’s New Mexico Supreme Court, the case is still good law. Importantly, the distinction in the MWA that the court declared unconstitutional

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275. *Id.*

276. *Id.* ¶ 3, 308 P.2d at 200.

277. *Id.* ¶ 10, 308 P.2d at 202.

278. *See id.* ¶ 11, 308 P.2d at 202.

279. *Rodriguez*, 2016-NMSC-029, ¶ 26, 378 P.3d at 25 (emphasis added).

280. *See Burch*, 1957-NMSC-017, ¶ 16, 308 P.2d at 203. The service employee exemption was not actually removed from the Minimum Wage Act until 1973, 16 years after *Burch* was decided. 1973 N.M. Laws 1906, 1906 (current version at N.M. STAT. ANN. § 50-4-21 (2021)) (removing section (C) defining “service employees,” and moving the definition of “employee” from section (D) to section (C)).

281. N.M. STAT. ANN. § 50-4-22(A)(5) (2021) (stating that New Mexico’s minimum wage is \$12 per hour).

282. This same analysis would apply to the medical transcribers, hotel room cleaners, artisans, truck drivers, pipe layers, auto collision repairmen, and satellite installers discussed throughout this Comment. *See supra* note 35 for the authority supporting each of these examples.

in *Burch* would also be declared unconstitutional today using the “modern articulation” of rational review, since that test is even less deferential to the legislature’s intent. In conclusion, the MWA’s exemption is unconstitutional under either the “modern articulation” of rational review or the more deferential conventional rational review test. The exemption should be eliminated so the impacted workers qualify as employees and are guaranteed New Mexico’s minimum wage and overtime protections.

### CONCLUSION

The MWA stands alone in denying workers like Rita the medical transcriber, Jaime the delivery driver, and countless others employed as hotel room cleaners, artisans, truck drivers, pipe layers, auto collision repairmen, and satellite installers minimum wage and overtime protections.<sup>283</sup> Since the Act’s passage in 1955, the exemption for workers paid on a piecework, flat rate, and commission basis<sup>284</sup> has encouraged employers to undercompensate workers, directly conflicting with the legislative intent behind the FLSA. Further, the class of workers subject to the MWA’s exemption is diffuse, epitomizing the sort of unorganized group that labor laws like the FLSA and MWA claim to be their public policy to protect. The legislative history of the MWA suggests that a removal attempt in the New Mexico Legislature would be consistent with the section’s evolution over time. In the courts, the exemption should be held preempted by the FLSA because it is, in effect, less protective of workers. This would guarantee these workers the minimum wage and overtime protections required by the FLSA. Further, the exemption should also be held unconstitutional under the New Mexico Constitution’s Equal Protection Clause.<sup>285</sup> Finding the exemption unconstitutional would guarantee workers the higher New Mexico minimum wage required by the MWA.

Whether the exemption is removed in the New Mexico Legislature or in the courts, the MWA would benefit from several complementary amendments. First, legislators should adopt a provision, mirroring the FLSA, to preclude workers paid on a commission basis from receiving overtime pay if they are paid a regular rate of at least one and half times the state minimum wage.<sup>286</sup> Second, legislators should adopt a provision, again mirroring the FLSA, that requires that more than half of a worker’s pay come from commissions and they be employed by a retail or service establishment to be classified as paid on a commission basis.<sup>287</sup> These additional provisions would guarantee workers basic protections without overburdening employers in industries with seasonal fluctuation in workload.

Workers paid on a piecework, flat rate, and commission basis are usually rewarded for their hard work with competitive pay. However, in New Mexico, employers instead are the ones rewarded with the opportunity to underpay their workers. By eliminating the exemption from the MWA, these workers will gain the essential protections they deserve.

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283. See *supra* note 35 for the authority supporting each of these examples.

284. N.M. STAT. ANN. § 50-4-21(C)(4) (2021).

285. N.M. CONST. art. II, § 18.

286. 29 U.S.C. § 207(i).

287. *Id.*