COLORADO
Department of Labor and Employment

Division of Labor Standards and Statistics
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STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY, AND FINDINGS

Direct Investigation Rules, 7 CCR 1103-8 (2021), as adopted November 9, 2020.

I. BASIS: The Director ("Director") of the Division of Labor Standards and Statistics ("Division") has authority to adopt rules and regulations on wage-and-hour and workplace conditions, under the authority listed in Part II, which is incorporated into Part I as well.

II. SPECIFIC STATUTORY AUTHORITY: The Director is authorized to adopt rules and regulations to enforce, execute, implement, apply, and interpret Articles 1, 2, 4-6, 12, 13.3, and 14.4 of C.R.S. Title 8, and all rules, regulations, investigations, and proceedings thereunder, by the Administrative Procedure Act, C.R.S. § 24-4-103, and provisions of the above-listed Articles, including but not limited to: C.R.S. §§ 8-1-101, -103, -107, -108, -111, -130; 8-2-130; 8-4-111; 8-5-203; 8-6-102, -104, -105, -106, -108, -109, -111, -116, -117; 8-12-115; 8-13.3-403, -407, -408, -409, -410; and 8-14.4-103, -105, -108.

III. FINDINGS, JUSTIFICATIONS, AND REASONS FOR ADOPTION. Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds as follows: **(A)** demonstrated need exists for these rules, as detailed in the findings in Part IV, which are incorporated into this finding as well; **(B)** proper statutory authority exists for the rules, as detailed in the list of statutory authority in Part II, which is incorporated into this finding as well; **(C)** to the extent practicable, the rules are clearly stated so that their meaning will be understood by any party required to comply; **(D)** the rules do not conflict with other provisions of law; and **(E)** any duplicating or overlapping has been minimized and is explained by the Division.

IV. SPECIFIC FINDINGS FOR ADOPTION.

(A) Broad Purpose of Various Amendments[1]

Until recently, the overwhelming majority of Division investigations were of unpaid wages, requiring only a monetary award to the claimant, plus possible penalties and fines. However, the Division now investigates a much broader range of labor standards laws, and more often investigates systemic issues, due mainly to a half-dozen legislative enactments since mid-2019, including three with effective dates from July 11, 2020, to January 1, 2021.[2] Many provisions of such new laws task the Division with labor standards enforcement that is not limited to ordering wages paid, *e.g.*: investigating circumstances of and motivations for employee terminations, to determine whether they constituted unlawful retaliation or interference with rights;[3] ordering reinstatement of such workers found to be unlawfully terminated;[4] awarding lost pay for such unlawful terminations, which may require estimating future

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[1] These amendments described were adopted when the Division adopted temporary rules for the Direct Investigation Rules on September 29, 2020. These amendments are being adopted here permanently.

[2] Healthy Families and Workplaces Act ("HFWA"), S.B. 20-205, C.R.S. §§ 8-13.3-401 et seq. (enacted and effective July 14, 2020) (requiring employers to provide paid sick days; prohibiting interference with or retaliation for exercising HFWA rights; and requiring employers to provide written notice of HFWA rights); Public Health Emergency Whistleblowing Act ("PHEW"), H.B. 20-1415, C.R.S. §§ 8-14.4-101 et seq. (enacted and effective July 11, 2020) (requiring employers to allow employee use of personal protective equipment in certain circumstances; prohibiting retaliation for such PPE use or for certain whistleblowing related to a public health emergency; and requiring employers to provide written notice of PHEW rights); Equal Pay for Equal Work Act, S.B. 19-085, C.R.S. §§ 8-5-101 et seq. (enacted May 22, 2019, effective January 1, 2021) (requiring certain content for job postings, notification to employees of job openings, and record-keeping related to compensation); Chance to Compete Act, H.B. 19-1025, C.R.S. § 8-2-130 (enacted May 28, 2019, and effective August 2, 2019) (barring certain inquiries into the criminal histories of job applicants).

[3] *E.g.*, HFWA, C.R.S. § 8-13.3-407; PHEW, C.R.S. § 8-14.4-105.

[4] *E.g.*, HFWA, C.R.S. § 8-13.3-407; PHEW, C.R.S. § 8-14.4-105.

lost earnings;[5] issuing compliance orders to modify workplace policies that unlawfully restrict, or to adopt policies comporting with, statutory rights;[6] ordering changes to job postings with unlawful content;[7] and mandating posters and written notice to employees and workers of these and other rights.[8] Various new statutes grant authority to issue such orders,[9] and such authority pre-existed in the C.R.S. Title 8, Article 1, provisions granting investigation and enforcement powers to the Division.[10] But because the narrower prior scope of Division work rarely implicated such powers, prior versions of these and other Division rules did not detail procedures, rights, and responsibilities as to such powers.

Accordingly, the words "Wage and Hour" are deleted from the title of these rules, and many of the below-detailed specific amendments conform these rules to the broader scope of labor standards law that now provides a basis for Division investigations, determinations, and orders.

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[5] *E.g.*, HFWA, C.R.S. § 8-13.3-407; PHEW, C.R.S. § 8-14.4-105.

[6] *E.g.*, HFWA, C.R.S. § 8-13.3-403 to -409 (mandating certain contents for paid leave policies; disallowing policies that diminish, interfere with, or retaliate based on the exercise of HFWA rights; and requiring issuance of notice to employees and certain record-keeping policies); PHEW, (disallowing policies against, and non-disclosure policies restricting, certain worker expressions of concern as to a public health emergency; and mandating that workers be permitted to use personal protective equipment of their choosing in certain circumstances); Equal Pay for Equal Work Act, C.R.S. §§ 8-5-201, -202 (mandating certain contents for job postings; and requiring certain record-keeping policies).

[7] *E.g.*, Equal Pay for Equal Work Act, C.R.S. § 8-5-201 (mandating certain contents for job postings); Chance to Compete Act, C.R.S. § 8-2-130 (barring most job postings from inquiring about applicants' criminal records).

[8] *E.g.*, HWFA, C.R.S. § 8-13.3-408 (requiring both posters and written notice to employees of HWFA rights; authorizing fines for violations); PHEW, C.R.S. § 8-14.4-103 (requiring posting of PHEW rights; authorizing fines for violations).

[9] *E.g.*, HWFA, C.R.S. §§ 8-13.3-410, -411 (410, Division "may coordinate implementation and enforcement of this part 4 and adopt rules as necessary for such purposes"; 411, "(1) The director and the division have jurisdiction over the enforcement of this part 4 and may exercise all powers granted under article 1 of this title 8 to enforce this part 4. (2) The division may enforce the requirements of this part 4. (3) Pursuant to section 8-1-130, any findings, awards, or orders issued by the director with respect to enforcement of this part 4 constitute final agency action."); PHEW, 8-14.4-105, -108 (105, "Enforcement by the division"; 108, "The division may promulgate rules necessary to implement this article 14.4").

[10] *E.g.*, C.R.S. §§ 8-1-107(2) (Division "duty and the power to … (b) Inquire into and supervise the enforcement, with respect to relations between employer and employee, of … all other laws protecting the life, health, and safety of employees in employments and places of employment; … [and] (p) Adopt reasonable and proper rules and regulations relative to the exercise of [these] powers and … to govern the proceedings of the division and to regulate the manner of investigations and hearings"); 8-1-108(3) ("All orders of the division shall be valid and in force and prima facie reasonable and lawful until they are found otherwise in an action brought for that purpose, pursuant to the provisions of this article...."); 8-1-111 (Division "vested with the power and jurisdiction to have such supervision of every employment and place of employment … as may be necessary adequately to ascertain and determine the conditions under which the employees labor, and the manner and extent of the obedience by the employer to all laws and all lawful orders requiring such employment and places of employment to be safe, and requiring the protection of the life, health, and safety of every employee … , and to enforce all provisions of law relating thereto," and "vested with power and jurisdiction to administer all provisions of this article with respect to the relations between employer and employee and to do all other acts and things convenient and necessary to accomplish the purposes of this article"); 8-4-111(1),(6) ("[Division]duty … to inquire diligently for any violation of this article, and to institute the actions for penalties or fines provided for in this article … [it] may deem proper, and to enforce generally the provisions of this article"; and "right of the division to pursue any action available with respect to an employee … identified as a result of a wage complaint or … an employer in the absence of a wage complaint"); 8-6-104 to -106 (104, "It is unlawful to employ workers in any occupation … under conditions of labor detrimental to their health or morals"; 105, "[Division] duty … to inquire … into the conditions of labor surrounding … employees in any occupation … if the [Division] … has reason to believe that said conditions of labor are detrimental to the health or morals of said employees"; 106, "[Division] shall determine … standards of conditions of labor … not detrimental to health or morals for workers").

(B) Rules 1.1, 1.4, 2.2, 2.3, 2.9 & 3.1.3: Incorporating Recent Enactments and Developments[11]

Rule 1.4 is amended to incorporate the broader range of Articles in C.R.S. Title 8 that the Division may investigate (which Articles include all 2019 and 2020 statutory amendments to Title 8 detailed in Part (4)(A) above), along with key Division rules promulgated under those Articles. Rule 1.1 is amended to list the key specific statutory sections within those Articles granting rulemaking, investigation, enforcement, and other related authority applicable to these Rules. In accord with those changes to Rules 1.1 and 1.4, Rule 2.9 is amended to clarify and define "labor standards law" to include the same range of labor laws, and Rule 3.1.3 is amended to include additional relevant types of labor standards violations under that full range of labor standards law. These amendments are necessary to ensure that these Rules reflect the authority and statutory mandate of the Division's Direct Investigations Unit to investigate alleged violations of, enforce, and otherwise implement labor standards law. Rule 2.2 and 2.3 are amended to incorporate all definitions of those covered -- as "employees" and "employers," or as non-employee "workers" and the non-employer "principals" who retain them -- under applicable labor standards law, including but not limited to the laws detailed in Part (4)(A) above, several of which adopted new definitions of those terms, as listed in Rule 2.2 and Rule 2.3.

(C) Rules 3.13 & 6.14: Investigation Termination; Investigation or Appeal Sequencing[12]

Rules 3.13 and 6.14 are amended to state expressly two aspects of procedural discretion: that the Division may terminate an investigation at any time prior to issuing a final determination, without prejudice (Rule 3.13); and that an investigation, determination, or appeal may be sequenced (*e.g.*, bifurcated) into stages, so as to yield one or more phases and/or decisions (Rule 6.14).

These are matters as to which the Division already had discretion, since no statute or rule disallows terminating an investigation, or disallows sequencing proceedings as appropriate. The Division believes that such aspects of its discretion now have increased relevance due to the newly broadened range of Division investigations: not just ordering wages, but also, where appropriate, issuing compliance orders to change policies, ordering reinstatement of employees or workers, and other forms of relief (detailed in Part (4)(A) above). The more complex or multi-faceted an investigation is, the more value there is in (A) terminating it part-way through if it becomes clear that there is no violation, or a readily correctable one, and (B) sequencing it to allow certain threshold matters to be examined first.

(D) Rule 4.1: Preliminary Findings[13]

The wording in Rule 4.1 is amended in various parts to indicate that, as detailed in Part (4)(A) above, remedies for Division Investigations may include not only wages, along with penalties and/or fines under Colorado wage law, but also other remedies authorized by other labor standards law. Rule 4.1.3 is also amended to delete "proof of payment of some or all of the identified wages that appear to be owed, or some combination of both." Per already-adopted rule amendments earlier this year, a Notice of Preliminary Finding is no longer a written demand, and thus no proof of payment is required.

Rule 4.1 is further amended to provide that a Notice of Preliminary Findings ("NPF") "may," rather than "shall," be sent to an employer. The NPF rule has applied since only late spring 2020;[14] from these initial months of experience, the Division now finds that in many cases, the NPF stage, which commonly can take 1-2 months,

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[13] These amendments described were adopted when the Division adopted temporary rules for the Direct Investigation Rules on September 29, 2020. These amendments are being adopted here permanently.

[14] The Direct Investigations program began operations in late 2019, but began issuing determinations once investigations were concluded only as of May 2020.

has not proven useful or necessary for providing notice and opportunity to submit evidence and arguments, nor for changing case outcomes. The NPF stage thus has proven not worth the burden on the employer, or the significant delay that backlogs Division dockets. The Division thus finds that NPFs should not be required in *all* cases, and that negative repercussions of delays imposed by an NPF mandate have been significantly increased by new laws.

As detailed in Part (4)(A) above, new workplace health and safety laws -- most notably, on paid sick leave, whistleblowing, and PPE-use -- charge the Division with ordering new remedies, including but not limited to reinstating individuals terminated unlawfully, and issuing compliance orders to reform unlawful policies. Where an employment policy violates a legislative mandate to protect workplace health and safety, delaying a remedy by months risks letting a workplace health and safety threat continue.[15] Where retaliation or interference costs a worker their livelihood, delaying a remedy by months (*e.g.*, reinstatement and lost pay) risks letting an unlawful termination cause irreparable harm, such as when a worker cannot pay rent or provide basic family necessities, or when prolonged unemployment harms re-employment odds. Such harms from delay are significant, and thus unwarranted unless genuinely necessary. And as just noted, the NPF mandate has proven *not* necessary.

Sending draft findings is neither required by statute nor generally mandated in administrative proceedings, so there is no legal need to impose it where not useful. However, the Division believes NPFs do have value as a non-mandatory tool, available for cases where they may assist employers or the Division. For example, in certain cases, the Division may see a realistic prospect for an employer to redress a violation and/or offer a settlement upon being notified of proposed findings. In others, the Division, after investigation, may see value in sharing proposed findings and/or soliciting more input from the employer before reaching a final determination -- akin to a court, after a trial but before entering a final judgment, soliciting further submissions or scheduling another hearing. Thus, the Division is not eliminating the NPF stage, but instead making it discretionary, changing "shall" to "may," with other technical edits to conform to that change (including deleting Rule 4.2, which already made fines-only NPFs optional), and otherwise leaving unchanged the nature and contents of an NPF.[16]

(E) Rule 5: Determination[17]

Rule 5.1.3 is amended to delete the following: "If a Notice of Assessment names an employee who is owed wages or penalties, the division will make all reasonable efforts to send a copy of the Citation and that Notice of Assessment to the named employee." Direct Investigations typically do not arise from individual worker complaints mandated to be investigated, but rather are prompted by discretionary and strategic Division initiatives, and commonly span dozens or hundreds of workers, or more. While unpaid wage determinations require sending each employee a *payment*, that does not necessarily require sending each employee *case documents*, which can yield burden and delay. However, there are cases in which sending each worker a copy of the Citation and Notice of Assessment will be useful. Accordingly, the Division finds that this step should be discretionary, rather than mandatory.

Rule 5.1.4 is amended to indicate that an employer may be sent a Notice of Assessment (NOA) inclusive of all owed wages, penalties, fines, and/or other remedies assessed upon the employer. This clarifies that an inclusive NOA may indicate totals due for all employees in one document. Previous rules implied that employers will receive separate NOAs for each affected employee, which could prove burdensome and confusing in cases with dozens or hundreds of affected employees, without adding any greater clarity than having the same information appear in a single NOA covering all employees.

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[15] *E.g.*, *Mazurkiewicz v. Nw. Mem. Hosp.*, No. 2020 L 3511 (Ill., Cook Cnty. Ct., Sept. 15, 2020) (in case of termination for sending email about inadequate workplace PPE, noting the the state "has a clearly mandated public policy of stopping the spread of COVID-19 and protecting the health and safety of its citizens, and that public policy is clearly implicated by the use of facemasks by ... workers," and a complaint about inadequate workplace PPE "relates to the spread of COVID-19 within her … work environment and therefore … has 'an impact on the general welfare of … citizens as a whole'").

[16] An NPF still will be issued in all cases with Notices of Investigation sent *before* the September 21st effective date of this rule in the temporary Direct Investigations rules adopted as of that date.

[17] These amendments described were adopted when the Division adopted temporary rules for the Direct Investigation Rules on September 29, 2020. These amendments are being adopted here permanently.

Rule 5.1.7 is amended to provide that the Division may reduce penalties and waive fines if payment is made within 14 days of a Citation's issuance and there was a prior written demand. Because the Direct Investigation rules were amended in May of 2020 to provide that the Citation, and not the Notice of Preliminary Findings, constitutes the Division's written demand to the employer, this amendment is necessary to make Rule 5.1.7 conform to the Division's May 2020 amendment.

(F) Rule 6.1.1: Appeal[18]

Rule 6.1.1 is amended to include "or other grounds" for an appeal — to make clear that while an employer can appeal by arguing that there was clear error in a determination, they also can appeal by arguing any other grounds on which they wish to base an appeal. This does not imply that all appeal grounds will be accepted as valid, only that the Division does not intend for any particular standard of review to limit the grounds that an employer may argue on appeal.

(G) Rules 6.1.3 and 6.2: Division Direct Investigations as a Party

Non-substantive changes to Rules 6.1.3 and 6.2 clarify that the Division is a party to any appeal under the Rules, and all required notices and disclosures must be provided to the Division's Direct Investigations team.

(H) Rule 9: Discrimination and Reprisal Prohibited[19]

Rule 9 is amended to include, given the new laws detailed in Part (4)(A) above, the broader range of retaliation, interference, and/or discrimination prohibitions applicable to direct investigations.

V. EFFECTIVE DATE. These rules take effect on January 1, 2021.

Scott Moss
Director
Division of Labor Standards and Statistics
Colorado Department of Labor and Employment

November 9, 2020
Date

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