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Labor and Employment

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STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY, AND FINDINGS

Wage Protection Rules, 7 CCR 1103-7 (2024), as proposed December 29, 2023; to be followed and replaced by a final Statement at the conclusion of the rulemaking process.

I. BASIS: The Director ("Director") of the Division of Labor Standards and Statistics ("Division") has the authority to adopt rules and regulations on wage-and-hour and workplace conditions, under authority listed in Part II, which is incorporated into Part I as well. These rules update the Wage Protection Rules, 7 CCR 1103-7, which implement the Colorado Wage Act ("CWA") as amended, including but not limited to the Wage Protection Act ("WPA"), C.R.S. § 8-4-101 et seq., Colorado Senate Bill 22-161 ("SB161"), and Colorado Senate Bill 23-231 ("SB231"); the Healthy Families and Workplaces Act ("HFWA"), C.R.S. § 8-13.3-401 et seq.; the Agricultural Labor Rights and Responsibilities Act ("ALRRA"), codified in relevant part at C.R.S. §§ 8-6-101.5, 8-6-120, and 8-13.5-201 et seq.; the Equal Pay for Equal Work Act (EPEWA), C.R.S. Title 8, Article 5 (C.R.S. §§ 8-5-101 et seq. (2024)); the Colorado Employment Opportunity Act, C.R.S. § 8-2-126; the Social Media and the Workplace Law, § 8-2-127; the Chance to Compete Act, C.R.S. § 8-2-130; and the Job Application Fairness Act, C.R.S. § 8-2-131.

II. SPECIFIC STATUTORY AUTHORITY: The Director is authorized to adopt and amend rules and regulations to enforce, execute, apply, and interpret Articles 1, 2, 4-6, 12, 13.3, and 13.5 of Title 8, C.R.S. (2023), and all rules, regulations, investigations, and other proceedings of any kind thereunder, by the Colorado Administrative Procedure Act ("Colorado APA"), C.R.S. § 24-4-103, and provisions of Articles 1, 2, 4-6, 12, 13.3, and 13.5.

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. Pursuant to C.R.S. § 24-4-103(6), the Director finds as follows.

A. Rule 1: Statement of Purpose and Authority

Proposed amendments to Rule 1.1 incorporate the EPEWA, and other laws the Division administers and enforces, so that the Division may apply the mediation procedures in proposed Rule 4.9, and other relevant provisions and definitions, to mediations conducted pursuant to these laws.[1] It is also amended non-substantively for technical clarifications, corrections, and formatting edits. Rule 1.2 is similarly updated to reflect additional authority now incorporated by reference into these Rules.

B. Rule 2: Definitions and Clarifications

Proposed amendments to Rule 2.8 amend the definition of a "correct address" (1) to make clear that it can apply to other parties than "employers," where Division proceedings implicate other parties; (2) to cover addresses actually used by a party; and (3) to note that it is a default definition, so other laws with different definitions may apply in certain cases.

Rule 2.11 as proposed is amended non-substantively to reflect that there is no current public health emergency (PHE) in effect, while preserving the definition in the event of a future PHE.

Rule 2.16 is amended with the proposed clarification that other Division-issued documents constituting a written demand — not just a Division Notice of Complaint — will trigger enhanced penalties under SB161, as this has proven to be a needed clarification after one year of enforcing this provision.

C. Rule 3: Filing a Wage Complaint

The proposed amendment to Rule 3.1.5 aims to clarify the statutory mandate requiring that the Division must accept a wage complaint claiming unpaid wages or compensation of up to $7,500 per employee, per C.R.S. § 8-4-111(2)(a)(I). This is a statutory mandate (to accept claims of up to $7,500), not a prohibition (on investigating larger sums) — but the Division has learned of confusion on this point. Accordingly, the proposed amendment aims to clarify that the Division has

[1] *See* C.R.S. § 8-5-103 (authorizing the Division to create a mediation process for pay disparity complaints).

discretion to investigate larger sums, based on either a complaint or the Division's statutory charge to investigate potential violations without the filing of a complaint.

Rule 3.2.2 is amended to address dual filings, which the Division deems prudent to clarify given the adoption of the Denver Civil Wage Theft Rules, and the possibility of other such local government adoptions in the future.[2]

Rule 3.5.2(A) has required, for employees with varying pay rates, using a 30 calendar day lookback to calculate pay rates for HFWA leave. The Division received stakeholder input that some employers may prefer a lookback duration consistent with their pay periods, which can vary: some employers use weeks, others months, others different periods entirely. The proposed rule lets employers elect a preferred measurement period, as long as it captures a continuous, recent period of roughly one month. It leaves 30 days as the default, since some employers may prefer to keep the 30-day lookback they already use. The rule also identifies how to calculate rates for newer employees with under 28-31 days of employment. Rule 3.5.2(B) also used a 30 calendar day calculation, so it is amended to allow the same employer option.

D. Rule 4: Investigation and Mediation

The proposed revision to the name of Rule 4 — from "Investigation" to "Investigation and Mediation" — reflects the addition of Division authority to facilitate mediation arising from a complaint filed with the Division, most notably under the Senate Bill 23-105 amendments to the Equal Pay for Equal Work Act, at C.R.S. § 8-5-103(1)(a)(II). Proposed Rule 4.9 describes the procedures and conditions for the Division's new mediation process. Thus, the proposed Rule 4 name is more appropriate and captures the full breadth of Rule 4's newly broadened subject matter.

In Rule 4.1, the use of the term "compliance investigators," to describe whom is assigned wage complaint work, was unnecessarily narrow; the Colorado Wage Act does not specify or limit whom may be assigned work on wage complaints;[3] to the contrary, various statutes grant the Division discretion as to whom to assign and delegate its work.[4] Accordingly, the proposed amendment eliminates the reference to "compliance investigators," because on a case-by-case basis, the Division may assign wage complaint work to different or multiple staff, *e.g.*, managers or policy advisors working in a more senior capacity on complaints or related matters.

The proposed amendment to Rule 4.4 seeks to clarify that, based on the definition of "correct address" expressed in Rule 2.8, an employer may have more than one qualifying address where to be sent a Notice of Complaint. Thus, this proposed amendment promotes consistency with the cross-reference to Rule 2.8 and its definition of "correct address." The proposed amendment to Rule 4.4.1 incorporates the cross-reference to Rule 2.8 and its definition of "correct address." The amendment also clarifies that a party has been properly served as long as it can be sufficiently proven that a Notice of Complaint was delivered to a correct address of (or otherwise received by) a party, regardless of whether the party accepted or refused to take possession of, or did or did not open, a properly delivered Notice of Complaint.

The proposed amendment to Rule 4.7 aims to clarify the role of anonymous evidence in investigations. Anonymous evidence has become more prevalent in Division work, in no small part because of the many recent laws charging the Division with investigating job postings and applications, because the identity of the individual who alerted the Division to a violative ad or posting is not relevant to the investigation.[5] The proposed amendment details that, in addition to providing that the Division may use anonymous evidence — while preserving the confidentiality of the source — as a reason for procuring additional evidence, the Division may rely on anonymous evidence — again, while preserving the confidentiality of the source — to establish an employer's liability for violating Colorado labor law, as long as the Division does not use the anonymous evidence to also establish the employer's liability *to the source* of the anonymous information. Further, the catchall condition described in (3) of new Rule 4.7 is meant to capture that the Division must assess on a case-by-case basis whether any other circumstances justify or merit the need for the Division to preserve the confidentiality of a source underlying anonymous evidence.

In conjunction with other changes to reflect the Division's broadened authority (*e.g.*, pay disparity investigations under EPEWA Part 1), proposed amendments to Rule 4.8 broaden its application to other types of labor complaints beyond the Division's traditional wage-and-hour work. The amendments to Rule 4.8.2(B) better reflect that the quoted language

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[2] *See* C.R.S. § 8-6-101(3) (allowing local governments to adopt minimum wages provisions to enforce the same).
[3] C.R.S. § 8-4-111(2)(a)(I).
[4] *E.g.*, C.R.S. §§ 8-4-111(1)(a)(II); 8-1-113.
[5] *E.g.*, the Equal Pay for Equal Work Act (EPEWA), C.R.S. Title 8, Article 5 (C.R.S. §§ 8-5-101 et seq. (2024)); the Chance to Compete Act, C.R.S. § 8-2-130; and the Job Application Fairness Act, C.R.S. § 8-2-131.

from C.R.S. § 8-4-120 is a basis for the overall Rule 4.8.2 bar against "discriminat[ing] or retaliat[ing] against a person for exercising labor rights," not a limitation that only acts expressly listed in C.R.S. § 8-4-120 support the rule.[6]

Proposed Rule 4.9 is added to describe mediation processes that the Division will use, such as for its statutory requirement to mediate pay disparity complaints under Part 1 of the Equal Pay for Equal Work Act (C.R.S. § 8-5-103). Explicit in Rule 4.9.3, these mediation rules are intended to preserve confidentiality throughout the mediation process in conformity with the Colorado Dispute Resolution Act (C.R.S. § 13-22-301, et seq.) and other applicable law.

E. Rule 6: Appeal

A proposed amendment to Rule 6.11 clarifies that hearing officer decisions will be sent to parties as required by applicable law. As the scope of coverage of these Wage Protection Rules, including Rule 6, expands (and because this rule is incorporated by reference into still other rules[7]), this change acknowledges that different statutes require different forms of service, so the selected method(s) of service identified in the rule must also meet any such statutory requirements. Similarly, proposed new Rule 6.12 clarifies the scope of application of Rule 6 appeal procedures to the extent allowable under the Colorado APA, given the expanded coverage of these Rules to other areas (*e.g.*, Equal Pay for Equal Work Act).

F. Rule 7: Attorney Fees and Costs

Proposed amendments in Rule 7 provide additional flexibility in the timeframe and sequencing of attorney fee and costs proceedings. This has proven necessary in the Division's experience handling these matters in retaliation claims,[8] so the Division anticipates a similar need in attorney fee and costs proceedings in its continued enforcement of wage law under Senate Bill 22-161, which allows such awards for certain wage claims.[9] Rule 7.3 is simplified, as appeal provisions and the manner of service of Division issuances is covered elsewhere in these Rules.

G. Rule 8: Administrative Liens and Levies

The proposed amendment to Rule 8.1 aims to correct a previous statement in Rule 8.1, and clarify that the Division may issue a notice of administrative lien and levy pursuant to an order for which an appeal is pending. The Division may exercise discretion to issue a notice of administrative lien and levy pursuant to an order that has been appealed, because an appeal of an order finding that an employer or other Division debtor owes wages, penalties, or fines does not automatically stay, suspend, or reverse the deadline for when the employer or other Division debtor must pay the wages, penalties, or fines determined to be due. This amendment recognizes that statutory language limiting Division authority to issue a notice of administrative lien and levy has never prohibited the Division from issuing such a notice pursuant to an order that is pending appeal. The statutory language provides that the Division may not exercise this authority only where an order has stayed or reversed the applicable deadline to pay wages, penalties, or fines determined to be due.[10] Thus, the proposed version of Rule 8.1 makes clear that unless an appeal has also produced an order that has stayed or reversed the applicable payment deadline, the fact that an order has been appealed itself does not alone prevent the Division from issuing a notice of administrative lien and levy pursuant to that order.

The proposed amendments to Rule 8.2.1 change no substance, but enhance the clarity and preciseness with which the Division describes the reasons and circumstances warranting when the Division shall grant an exemption to a party to which an administrative lien and levy has been issued and shall find that the assets subject to an administrative lien and levy are exempt from attachment, as expressed in C.R.S. § 8-4-113(4)(b)(III).

The proposed amendment to Rule 8.2.3 adds a definition of "natural person" that applies only to Rule 8.2.3 and clarifies that the Division's ability to grant a Division debtor who is terminally ill an exception from complying with an

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[6] *E.g.*, quoting the ALRRA's anti-retaliation provision (C.R.S. § 8-2-206(3)(a)) would equally support this overall rule:

> An agricultural employer shall not retaliate against any person, including an agricultural employee, asserting or seeking rights protected under article 3 or 6 of this title 8, part 2 of article 13.5 of this title 8, article 14.4 of this title 8, including complaining publicly or supporting an agricultural employee seeking or asserting rights, remedies, or penalties under those provisions of this title 8, or any other remedies available pursuant to law.

[7] *See, e.g.,* Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving Rules ("Colorado WARNING Rules"), 7 CCR 1103-11, Rule 3.7.1, incorporating appeal provisions in Wage Protection Rule 6.

[8] *See* Colorado WARNING Rules, 7 CCR 1103-11, Rule 3.9, incorporating Wage Protection Rule 7.

[9] *See* C.R.S. § 8-4-110(1)(b)(II) (providing for fee and cost awards by the Division in wage claims).

[10] C.R.S. § 8-4-113(4)(a).

administrative lien and levy applies only to a human — providing clearly that an entity cannot claim this exception.

The proposed amendment to Rule 8.2.4 changes no substance, but enhances the clarity and specificity of Division appeal policy for jointly owned or shared accounts pursuant to its authority in C.R.S. § 8-4-113(4)(b)(III). Specifically, this proposed amendment clarifies an employer's, other Division debtor's, or non-debtor's right to file an appeal based on assets that were identified in a notice of administrative lien and levy belong to a jointly owned or shared account. The amendment, as proposed, also expressly conforms Rule 8.2.4 with C.R.S. § 8-4-113(4)(b)(II) in that this proposed version of Rule 8.2.4 provides that the Division must evaluate a non-debtor account holder's net contributions to a joint account at the time the notice of administrative lien and levy was received by the person in possession, custody, or control of the assets in the joint account — because the administrative lien and levy applies against all assets described in the notice "at the time of, and within sixty days after, receipt of the notice."[11] Rule 8.2.4 currently contains the phrase "as of the date of the lien" — which could have been mis-interpreted as the issuance date, not the receipt date. Thus, this proposed amendment better prevents that mis-interpretation, and ensures that the proposed new Rule 8.2.4 is consistent with C.R.S. § 8-4-113(4)(b)(II).

The proposed amendment to Rule 8.3 changes no substance, but aims to clarify the sentence explaining the scope of reasons for which a party may file an opposition to a notice of administrative lien and levy. This proposed amendment makes it clearer that a party seeking to file an opposition may do so only for the reasons detailed in Rule 8.2 and not for reasons described in any orders and instructions provided by the Division and/or published by the Division on its website. This proposed version of Rule 8.3 emphasizes the distinction between the substantive "reasons" that may support a party's filing of an opposition to an administrative lien and levy — which are described in Rule 8.2 — and the procedural requirements with which the party must comply in filing their opposition — which may be described in Rule 8.3, orders and instructions provided by the Division, and/or in publications provided by the Division on its website.

H. Rule 9: Wage Theft Enforcement Fund

Senate Bill 23-231 amended the Colorado Wage Act to give the Division authority to use money in the Wage Theft Enforcement Fund to make payments to an employee for unpaid liabilities for wage law violations that an employer owed the employee pursuant to C.R.S. § 8-4-113(5). The Division may exercise this new authority upon its own initiative or pursuant to a request by an employee to make a payment from the fund. To implement this new authority, proposed Rule 9 sets forth procedures and criteria for employees to submit information and request payments; for the Division to review, evaluate, and resolve employee requests; and for the Division to exercise its own discretion to use the fund to make payments to employees for unpaid liabilities for wage law violations.

I. Other proposed amendments

The proposed rules also include various other technical or otherwise non-substantive changes where Division review found a need for clarifications or corrections.

V. EFFECTIVE DATE. If adopted, these rules take effect April 1, 2024, or as soon after as rulemaking completes.

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

December 29, 2023
Date

[11] C.R.S. § 8-4-113(4)(b)(II).