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

Wage Protection Rules, 7 CCR 1103-7 (2022), as adopted November 10, 2021

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 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 by the Wage Protection Act ("WPA"), C.R.S. § 8-4-101 *et seq.*, the Healthy Families and Workplaces Act ("HFWA"), C.R.S. § 8-13.3-401 *et seq*., and the Agricultural Labor Rights and Responsibilities Act, codified in relevant part at C.R.S. §§ 8-6-101.5, 8-6-120, and 8-13.5-201 *et seq*.

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, 13.3, and 13.5 of Title 8, C.R.S. (2021), and all rules, regulations, investigations, and other proceedings of any kind thereunder, by the Administrative Procedure Act, C.R.S. § 24-4-103, and provisions of Articles 1, 2, 4, 6, 13.3, and 13.5, including but not limited to §§ 8-1-101, 103, 107, 108, 111, 130; § 8-4-111; §§ 8-6-102, 104, 105, 106, 108, 109, 111, 116, 117, 120; § 8-12-115; §§ 8-13.3-401, 403-405, 407-411, 416; and § 8-13.5-202, 203, 204.

III. FINDINGS, JUSTIFICATIONS, AND REASONS FOR ADOPTION. Per 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. The Director's specific findings for adoption are as follows.

A. Rule 2.17: Vacation pay.

Under the Colorado Wage Act ("Wage Act"), C.R.S. § 8-4-101(14)(a)(III), vacation pay is a form of wages, and departing workers must be paid all unused vacation leave that they had accrued. But when, if ever, a departing employee's unused vacation could be deemed forfeited was under dispute for years in the courts. Then, on June 14, 2021, the Colorado Supreme Court in *Nieto v. Clark's Market, Inc.*, 2021 CO 48, issued a unanimous, strongly-worded decision affirming the validity of, and agreeing with, the Division's interpretation in Wage Protection Rule 2.17 that wage law "does not allow a forfeiture of *any* earned (accrued) vacation pay" in an employment policy or agreement, and thus that paying departing employees their earned, unused vacation pay is a guaranteed right that cannot be forfeited once vacation pay is accrued.[1] The Court worded that right broadly and categorically: while an employer need not offer vacation pay at all,

> when an employer chooses to provide it, such pay is no less protected than other wages or compensation and, thus, *cannot be forfeited* once earned. Accordingly, under the CWCA, *all vacation pay* that is earned and determinable must be paid at the end of the employment relationship, see §§ 8-4-101(14)(a)(III), -109(1)(a), C.R.S. (2020), and *any term* of an agreement that purports *to forfeit earned vacation pay is void*, see § 8-4-121, C.R.S. (2020).[2]

Nieto emphasized the relevance to vacation pay of the Wage Act being "a remedial statute" that "must be liberally construed to carry out its purpose," including "to protect employees from exploitation, fraud, and oppression."[3]

Yet though the Supreme Court now has clarified and directed that "all vacation pay" (*Nieto*, ¶ 3) is non-forfeitable and must be paid upon separation, no statute or rule defines what "all vacation pay" includes. That leaves unclear the treatment of categories with names like "annual leave," "paid time off," or "personal days." Unclear vacation pay protection has, to the detriment of both employers and employees, led to more litigated disputes on what is and is not protected vacation pay — plus far more disputes that (in the Division's experience fielding thousands of unpaid wage claims, employer inquiries, and employee inquiries annually) never go to court, yet leave employers and employees in contentious disagreements on what employers do and do not have to pay.

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[1] Wage Protection Rules, 7 CCR 1103-7, R. 2.17 (adopted in 2019; affirmed by *Nieto* in 2021) (emphasis added).
[2] *Nieto v. Clark's Market, Inc.*, 2021 CO 48, ¶ 3 (emphases added).
[3] *Id.* at ¶ 27.

The Division has researched how "vacation pay" is defined in the several other states with a similar vacation pay statute. *Every* such state that Division research found to have a similar statute, and to have addressed the issue, has applied the same distinction — which the Division finds to be sound, and consistent with *Nieto*.[4] Rule 2.17.1 now assures that Colorado will follow that consensus among the states, as follows:

(A) What *is not* "vacation" payable upon separation is leave that is *conditional*, usable only "upon occurrence of a qualifying event, such as a medical need, a caretaking requirement, bereavement, or a holiday" (Rule 2.17.1) — because an employee *does not* have a right to payout for time they are *not yet entitled to*, until and unless qualifying conditions occur. Thus, if a departing employee accrued 4 sick days usable only for qualifying health conditions, plus 6 vacation days, then they must be paid only the latter.

(B) What *is* "vacation" payable upon separation is leave that is "usable at the employee's *discretion*" (Rule 2.17.1, emphasis added) — because an employee *does* have a right to payout for time they are *already entitled to*, without awaiting further qualifying conditions. Thus, if an employee departs with 10 days of accrued paid time off, by any name, usable for both vacation and other needs (illness, etc.), under terms that would allow use of *all* such time for vacation, then they must be paid all such days.

This consensus among the states comports with controlling Colorado labor law. If paid time off is usable upon accrual, not conditional upon a further qualifying event, then employees may count on their right to that pay, because it is fully "earned and determinable" — the definition of "wages" that must be paid under the Wage Act (C.R.S. § 8-4-101(14)) and the *Nieto* directive that "all vacation pay that is earned and determinable must be paid." That "wages" definition looks not to the name an employer gives its compensation, but to its substance — consistent with the long-established, fundamental principle that labor rights and responsibilities base on economic realities, not formalities such as nomenclature.[5]

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[4] **California**: *Paton v. Advanced Micro Devices*, 197 Cal. App. 4th 1505, 1519 (Ct. App. 2011) (regardless of the "name [that] is given to the leave" at issue, what distinguishes paid "vacation time" from other other forms of paid time is whether the paid time "is conditioned upon the occurrence of a specific event or granted for a particular purpose. For example ... some employers offer paid time off for illness, bereavement, or other specific reasons. The employee's right to this type of leave vests when the reason for the leave arises, as when the employee falls ill or a family member dies ... [and] the employee is typically expected to use the leave for the identified purpose" — whereas "vacation time" is paid time off that "is not conditioned upon the occurrence of any event or condition."); Cal. Div. of Labor Stds. Enforcement, Opinion Letter Re: Labor Code § 233 (May 21, 2003).

Illinois: Ill. Admin. Code tit. 56, § 300.520(f)(3) ("The Department recognizes policies under which . . . the employer does not have separate arrangements for vacation and sick leave. Under the policy, employees earn a certain amount of 'paid time off' that they can use for any purpose, including vacation and sick leave. Because employees have an absolute right to take this time off (unlike traditional sick leave in which using sick leave is contingent upon illness), the Department will treat 'paid time off' as earned vacation days.")

Louisiana: *Davis v. St. Francisville Country Manor, L.L.C.*, 136 So. 3d 20, 24 (La. Ct. App. 2013) ("Any purported difference between 'paid days off' and 'vacation time with pay' is a distinction without substance and is simply a matter of semantics. The right to compensation vests as an eligible employee accrues the paid time off.").

Maryland: *Catapult Tech. v. Wolfe*, No. 997, 2007 Md. App. Lexis 165, at *15-16 (Ct. Spec. App. Aug. 20, 2007) ("universal leave" is earned wages, payable at separation).

Massachusetts: Mass. Att'y Gen'l, Fair Labor Div., Advisory #99/1 (to defeat a claim that the *entire* amount of paid time off is payable, employer must show it *designated* only a *specific portion* of annual leave for discretionary use as vacation) (https://www.mass.gov/files/documents/2016/08/rt/vacation-advisory.pdf)

Nebraska: *Fisher v. Payflex Systems USA*, 829 N.W.2d 703, 710-11 (Neb. 2013) ("Regardless of the label" the employer uses, "vacation pay" includes any leave that "is not conditioned upon an event, such as a holiday, an illness, or a funeral," and that an employee may use "for any personal reason without conditions").

North Carolina: N.C. Dep't of Labor, "Promised Wages Including Wage Benefits," (www.labor.nc.gov/workplace-rights/employee-rights-regarding-time-worked-and-wages-earned/promised-wages-including) ("'Wage benefits' are benefits such as, but not limited to, vacation pay (including PTO and PDO leave), sick leave, jury duty pay, and holiday pay. Once a promise is made ... the employer must pay all promised wages, including wage benefits, accruing to its employees based on any policy, agreement or practice that the employer has established.").

[5] *See Colo. Custom Maid, LLC v. Indus. Claim Appeals Office*, 2019 CO 43, ¶ 2, 441 P.3d 1005, 1007 (analyzing employment relationship by "the realities of [the employer's] relationship with its cleaners," not its formal characterization of the workers' status as independent contractors); *Dana's Housekeeping v. Butterfield,* 807 P.2d

Thus, if paid time off meets the "vacation pay" definition, then departing employees must be paid for it, regardless of what anyone calls it — consistent with realities of how employees may use vacation instead of other paid leave. They may use vacation, for example, to stay home when sick but lacking (or out of) sick days, or for any other reason they may prefer using vacation over sick days. Protecting such paid time off also serves a critical beneficial purpose of the Wage Act and the *Nieto* protection of vacation pay: letting employees choose to "bank" paid time off for future use, rather than feel compelled to use it all rapidly if they anticipate or fear their job ending.

Accordingly, Rule 2.17.1 aims to provide clarity by codifying the Division's interpretation, based on the *Nieto* mandate that "*all* vacation pay that is earned and determinable must be paid," which in turn affirmed the existing Rule 2.17 language that "does not allow a forfeiture of *any* earned (accrued) vacation pay" — all of which comports with the strong consensus among other states: Whatever it's called, if it's pay usable for vacation, then it's vacation pay, even if it's usable for non-vacation purposes too.

The Division considered relying on case-by-case decision-making to elaborate this distinction, rather than promulgating a rule. But case-by-case decision-making is an unpredictable, delayed, and less transparent way to provide clarity and enforcement as to a wage right and responsibility as frequently disputed, and with as difficult a recent history, as vacation pay. Awaiting rulings with no definition in any rule or statute would perpetuate the lack of clarity that proliferates disputes, as well as risk surprising employers aware of neither the implications of *Nieto* nor the consensus among other states that Colorado is following. Accordingly, to fulfill its duty of effective wage law application and enforcement, the Division finds that rulemaking to clarify and disclose its "vacation pay" definition is superior to the alternative of simply issuing case-by-case rulings applying that definition.

B. Rule 3.5.2: Rate of Pay and Number of Hours for Paid Leave Required by HFWA.

In 2020, the General Assembly passed the Healthy Families and Workplaces Act ("HFWA"), C.R.S. § 8-13.3-401 *et seq*., providing for accrual of paid leave for a range of health and safety needs.[6] Rule 3.5.2 is now amended to offer more detail on how to calculate the number of hours and pay rate for HFWA leave, based on the Division's experience since promulgating that Rule, and to clarify its application to various unusual situations — where an employee has: (a) a variable pay rate; (b) not yet worked for 30 days; (c) indeterminate shifts that are open-ended in length and end at a time dictated by business needs rather than at a set time; or (d) "on call" hours.

One "on-call" issue raised in comments did not, in the Division's view, require a rule change: when, due to taking leave, the employee is no longer assigned shifts from their on-call time — for example, if an employee is regularly scheduled for 20 hours a week, but also typically is requested or offered to add shifts from on-call time based on employer need, they may actually typically work 30 hours week. In such cases, the shift has "indeterminate length" (requiring application of Rule 3.5.2(C)) only if no answer is available from Rule 3.5.2(B), which provides answers for various situations when work hours lack or depart from, a set schedule:

> (B) The number of hours of paid HFWA leave an employee can take is the number of hours the employer reasonably anticipated they would have worked during the period of the leave, based on: (1) their regular schedule of hours actually worked; (2) or, if leave is during a period the employee was anticipated to depart from a regular schedule, then hours anticipated for that period; (3) or, if the number of hours the employee would have worked during the period cannot be reasonably anticipated, then their average hours worked during their most recent 30 calendar days of work. ...

Rule 3.5.2 also now clarifies that calculation of the HFWA rate of pay differs from calculation of the COMPS Rule 1.8 "regular rate of pay" in several respects: exclusion of bonuses as HFWA requires; use of a 30-day period as the basis for calculation instead of a single workweek; and for employees with variable rates, use of a weighted average (rather than an alternative method applicable only to overtime or other Rule 1.8 regular rate calculations). Calculation of an employee's rate of pay under Rule 3.5.2 may also be affected by related "regular rate" definition clarifications in Rule 1.8.3 of COMPS Order #38.

1218, 1221 (Colo. App. 1990) (refusing to "give determinative weight to the parties'... agreement" as to the nature of the parties' relationship, because "the way parties refer to themselves does not determine whether a claimant is an independent contractor or an employee"); *Jackson Cartage, Inc. v. Van Noy*, 738 P.2d 47, 48 (Colo. App. 1987) ("we are primarily concerned with what is done under the contract and not with what the contract says").

[6] For more detail, *see* Interpretive Notice & Formal Opinion ("INFO") #6B: Paid Leave under the Healthy Families and Workplaces Act ("HFWA"), as of Jan. 1, 2021.

C. Rule 3.5.7: Clarifying Applicability of Recordkeeping to All Forms of HFWA Leave.

An edit to Rule 3.5.7 clarifies that the employer obligation to provide HFWA leave records applies to leave taken under *either* C.R.S. § 8-13.3-403 (accrued leave) *or* 405 (public health emergency leave).

D. Rule 3.5.8: Test for Whether a CBA Provides "Equivalent or More Generous Leave" to HFWA.

An edit to Rule 3.5.8 clarifies when an employer is exempt from providing HFWA leave due to a CBA providing "equivalent or more generous leave," by cross-referencing Rule 3.5.4(A) governing "equivalent or more generous" paid time off policies, and making clear that a qualifying CBA must likewise meet these requirements as well as those in Rule 3.5.8. The Rule 3.5.4(A) requirements include: a written and distributed policy providing for leave in an amount of hours and with pay to satisfy HFWA and implementing rules, and for all the same purposes and under all the same conditions as provided by HFWA and implementing rules.

E. Rule 2.20: Signature Requirements.

Rule 2.20 now clarifies that when a "signature" is required on any document related to a claim or proceeding with the Division, an electronic signature, including a typed one, is sufficient. This clarification is within Division discretion to manage matters within its jurisdiction: the Wage Act has no specific signature requirement; the Colorado Uniform Electronic Transactions Act ("UETA") lets state agencies accept electronic signatures, C.R.S. § 24-71.3-118. Accepting electronic signatures reduces barriers to accessing Division services, respects parties' intent in submitting documents, and reduces the likelihood of disputes as to document formalities. The rule also recognizes the validity of signatures by representatives authorized to sign for filers.

V. EFFECTIVE DATE. These rules take effect January 1, 2022.

November 10, 2021

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

Date