COLORADO
Department of
Labor and Employment

Division of Labor Standards and Statistics
633 17th Street, Denver, CO 80202-2107
303-318-8441 | www.ColoradoLaborLaw.gov | www.LeyesLaboralesDeColorado.gov

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

Wage Protection Rules, 7 CCR 1103-7 (2024), as adopted February 9, 2024.

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 parts 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. §§ 8-5-101 et seq.; 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 ("JAFA"), 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

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 new 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

A technical change is made to Rules 2.4 and 2.5, to the description of who issues or reviews Division decisions, in order to more accurately reflect that Division staff authorized by statute to issue and review decisions may be in varied job titles, *i.e.*, not necessarily staff formally in a "compliance investigator" or "hearing officer" titles (e.g., investigative work may be performed by staff in higher-level titles, such as program managers or policy advisors).[2] Parallel changes are made to Rules 4.1 and 5.1.1.

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 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 clarification that other Division-issued documents constituting a written demand —

[1] *See* C.R.S. § 8-5-103 (authorizing the Division to create a mediation process for pay disparity complaints).
[2] *E.g.*, C.R.S. §§ 8-4-111(1)(a)(II); 8-1-113 (Division discretion as to whom to assign and delegate work).

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 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 amendment aims to clarify that the Division has 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.[3]

Rule 3.5.2(A) has required, for employees with varying pay rates, to use 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 amended 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 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 EPEWA, at C.R.S. § 8-5-103(1)(a)(II). New Rule 4.9 describes the procedures and conditions for the Division's new mediation process. Thus, the Rule 4 name as amended is more appropriate and captures the full breadth of Rule 4's newly broadened subject matter.

The amendment to Rule 4.4 clarifies 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 amendment promotes consistency with the cross-reference to Rule 2.8 and its definition of "correct address." The 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 amendment to Rule 4.7 clarifies 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.[4] The 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 amended 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), amendments to Rule 4.8 broaden its application to other types of labor complaints beyond the

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[3] *See* C.R.S. § 8-6-101(3) (allowing local governments to adopt minimum wages provisions to enforce the same).

[4] *E.g.*, the 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 JAFA, C.R.S. § 8-2-131.

Division's traditional wage-and-hour work. The amendments to Rule 4.8.2(B) better reflect that the quoted language 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 to only acts expressly listed in C.R.S. § 8-4-120. [5]

New 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 EPEWA (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

The 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 still incorporated by reference into other rules[6]), 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, adopted 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.*, EPEWA).

F. Rule 7: Attorney Fees and Costs

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,[7] so the Division anticipates a similar need in attorney fee and costs proceedings in its continued enforcement of wage law under SB161, which allows such awards for certain wage claims.[8] Rule 7.3 is simplified, as appeal provisions and the manner of service of Division issuances are covered elsewhere in these Rules.

G. Rule 8: Administrative Liens and Levies

The amendment to Rule 8.1 clarifies a previous statement in Rule 8.1, and explains 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; rather, 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.[9] Thus, the amended 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 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).

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[5] *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.

[6] *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.

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

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

[9] C.R.S. § 8-4-113(4)(a).

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

The 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 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 and are in a jointly owned or shared account. The amendment also expressly conforms Rule 8.2.4 with C.R.S. § 8-4-113(4)(b)(II) in that this amended 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."[10] Rule 8.2.4 previously contained the phrase "as of the date of the lien" — which could have been misinterpreted as the issuance date, not the receipt date. Thus, this amendment better prevents that misinterpretation, and ensures that Rule 8.2.4 is consistent with C.R.S. § 8-4-113(4)(b)(II).

The amendment to Rule 8.3 changes no substance, but clarifies the sentence explaining the scope of reasons for which a party may file an opposition to a notice of administrative lien and levy. This 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 amended 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

SB231 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, new 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 adopted amendments

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

V. EFFECTIVE DATE. These rules take effect April 1, 2024.

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

February 9, 2024
Date

[10] C.R.S. § 8-4-113(4)(b)(II).