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

Labor Peace Act and Industrial Relations Rules ("LPIR Rules"), 7 CCR 1101-1 (2023)
(formerly the "Rules of Procedure to the Colorado Labor Peace Act and Industrial Relations Act," 7 CCR 1101-1),
as adopted May 11, 2023.

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

II. SPECIFIC STATUTORY AUTHORITY: These rules are issued under the authority, and as implementation and enforcement of Colorado Revised Statutes ("C.R.S.") Title 8, Articles 1 and 3 (2023), the "Labor Peace Act" ("LPA") and the "Industrial Relations Act" ("IRA") respectively, and are intended to be consistent with the rulemaking requirements of the State Administrative Procedures Act, § 24-4-103. These rules are promulgated pursuant to express authority including, but not limited to C.R.S. §§ 8-1-103(3), -107(2)(p); 8-3-105, -110(6), -111(3), -113(4).

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. The Director finds as follows:

A. Overview and Summary of Changes to Colorado Labor Relations Law.

Enacted in 1915, the Industrial Relations Act ("IRA") determined and defined the relations between employer and employee, provided for safe workplace conditions and compensation for accidental injury, and empowered the Industrial Commission to interpose its supervisory authority and to intervene in labor disputes. (Chs. 179 and 180, 1915 Colo. Sess. Laws 515, 562.) In 1969, the General Assembly created the Division of Labor and transferred the authority of the Industrial Commission in labor relations to the Division Director with the ultimate abolishment of the Industrial Commission in 1986. (Ch. 201, 1969 Colo. Sess. Laws 567; Ch. 64, 1986 Colo. Sess. Laws 463.)[1]

Enacted in 1943, the Labor Peace Act ("LPA") addressed employment relations and collective bargaining as matters of statewide concern in furtherance of the state's public policy to protect and promote the interrelated interests of the employee, the employer, and the public.[2] Coexisting in C.R.S. Title 8, the IRA is considered the statutory foundation governing all labor disputes, while the LPA details provisions for the regulation of private sector labor relations.[3]

In 1965, the LPA was amended to expand the definition of "employer" to include authorities operating mass transit systems.[4] In 1969, the authority to implement provisions of the LPA was transferred from the Industrial Commission to the Division of Labor[5]— in 2016, the Division of Labor was reorganized as the Division of Labor Standards and Statistics ("DLSS" or the "Division").[6]

DLSS continues to implement and enforce the LPA, which covers employees of authorities operating mass transit systems (*e.g.*, RTD) and certain private sector employees not covered by the federal National Labor Relations Act ("NLRA"). In 2021, in the Agricultural Labor Rights and Responsibilities Act (ALRRA), S.B. 21-087, the LPA was

[1] *See Martin v. Montezuma-Cortez School District, RE-1*, 841 P.2d 237 (Colo. 1992) for history of the Industrial Relations Act.

[2] *See* C.R.S. § 8-3-102 (Legislative declaration).

[3] *See Martin*, 841 P.2d at 252.

[4] Amending "The Labor Peace Act", Ch. 209, 1965 Colo. Sess. Laws 810.

[5] Concerning the Administrative Reorganization of the Industrial Commission of Colorado, and Providing for a Division of Labor and a Division of the State Compensation Insurance Fund in the Department of Labor and Employment, and Providing for the Powers, Duties, and Functions of Said Commission and Divisions, Ch. 201, 1969 Colo. Sess. Laws 567.

[6] Concerning the Administrative Reorganization of the Industrial Commission of Colorado, and Providing for a Division of Labor and a Division of the State Compensation Insurance Fund in the Department of Labor and Employment, and Providing for the Powers, Duties, and Functions of Said Commission and Divisions, Ch. 131, 2016 Colo. Sess. Laws 375.

further amended to expand the definition of "employer" to include agricultural employers with one or more employees and the definition of "employee" to include "farm and ranch labor," by deleting that language as an exception to the definition. This expansion of the LPA bestowed rights and responsibilities on the agricultural industry including but not limited to: (1) employee rights to engage in (or refrain from) certain protected activities (*i.e.*, organizing and joining labor organizations (unions)), to collectively bargain with employers about terms and conditions of employment, and to engage in lawful concerted activity; and (2) petitioning for and participating in secret ballot elections to determine whether a labor organization will be certified (or decertified) as the exclusive representative of agricultural employees and to decide whether the labor organization will be authorized to negotiate an all-union agreement with the employer (or revoke authorization).

The predecessor to these rules, the "Rules of Procedure to the Colorado Labor Peace Act and Industrial Relations Act," were adopted when Division authority over labor relations was largely preempted by federal law, mainly by the NLRA under National Labor Relations Board ("NLRB") jurisdiction. But Colorado recently has enacted three laws expanding Division labor relations jurisdiction into sectors exempted from federal law. In addition to the ALRRA for private sector agriculture, the General Assembly also recently enacted two labor relations laws for the public sector: the Colorado Partnership for Quality Jobs and Services Act and the Collective Bargaining by County Employees Act. While enacting provisions separate from the IRA and LPA, both new public sector labor relations statutes required Division rulemaking to enforce and implement their provisions — which, like the LPA, authorize elections as to employee organizations, unfair labor practice complaints and investigations, etc. Accordingly, the Division has been, and at this time continues to be, promulgating rules with provisions paralleling or incorporating the IRA and LPA Rules — calling further attention to the need to update those rules.

These rules, now renamed the "Labor Peace and Industrial Relations ('LPIR') Rules," are a revised rule set aiming to improve the clarity, usefulness, and organization of the prior rules, while covering the same subject matter: delineating election processes and procedures; adjudicating unfair labor practices; facilitating mediation or arbitration of labor disputes; and clarifying statutory interpretation on ambiguous or insufficiently specified matters. Because of the extent of the textual modifications and the name change, no line-by-line redline can sufficiently show all changes, so the entire prior rule set is redlined in strikethrough, accompanied by the new rule text as well as this Statement of Basis providing further elaboration on these rule changes.

B. Rule 1: Statement of Purpose and Authority.

Rule 1 outlines the general purpose for the LPIR Rules and cites Division authority to enforce, interpret, apply, and administer IRA and LPA provisions. It incorporates the statutes by reference, excludes later amendments, applies earlier versions in prior years, instructs on how to obtain copies, and addresses conflicts with other laws and separability.

C. Rule 2: Definitions and Clarifications.

Rule 2 (formerly Rule 1) defines and clarifies key terms separately and jointly for the two statutes. The prior version is modified to remove four definitions, relocate one definition, and add seven new definitions. Because the terms "accretion" and "successor agreement" do not appear in the LPA, the Division removed these definitions and provided their functional equivalents in Rules 5.1.1(C) and 5.1.2(A). The Division also removed the definitions of "email" and "executive director" as unnecessary. Computation of time as defined in former Rule 1.8 was revised and relocated to Rule 4. Substantive changes for three of the five definitions retained[7] and the seven new definitions are detailed below.

1. **Rule 2.1:** "All-union agreement" is revised to state the LPA definition for ease of reference.

2. **Rule 2.2:** "Authorized representative" is a new definition recognizing any party's right to operate through authorized representatives, as the LPA contemplates[8] and consistent with other long-standing Division rules on who is an authorized representative for purposes of Division filings or proceedings.[9]

3. **Rule 2.3:** "Collective bargaining agreement" ("CBA") is a term used throughout the LPA, but is not defined. This revised definition was borrowed from the Collective Bargaining by County Employees Act, C.R.S. §

[7] No substantive changes were made to Rules 2.6, "Division," or 2.10, "Mail."

[8] *See* C.R.S. § 8-3-107(4) ("Questions concerning the selection of collective bargaining units may be raised by petition of any employee or his employer or the representative of either of them.").

[9] *E.g.,* Wage Protection Rules, 7 C.C.R. 1103-7, Rule 2.2 (defining "authorized representative").

8-3.3-102(3), and the Colorado Partnership for Quality Jobs and Services Act, C.R.S. § 24-50-1102(12) (defining "Partnership agreement"), and added to clarify the nature of a CBA.

4. Rule 2.4: "Collective bargaining unit" is a term defined by the LPA. This revised definition refers to the statute and clarifies that "bargaining unit" is a shorthand term for the same phrase.

5. Rule 2.5: "Director" is a term defined identically by the IRA and LPA. This revised definition incorporates the statutory definitions and clarifies that under existing statutory authority, the Director may select designees or agents to perform delegable functions assigned to the Director.[10]

6. Rule 2.7: "Employee" is a term defined by the IRA and the LPA. This new definition recites the IRA and LPA definitions of "employee," including the recent addition of agricultural workers under the ALRRA,[11] which includes agricultural workers of a marijuana licensee as prescribed in the Colorado Marijuana Code.[12] The new definition also clarifies the meaning of several terms within the definition of "employee." The rule makes explicit that the interpretation of the terms "non-executive" and "non-supervisory" is guided by the meaning and application of those terms as defined in the NLRA[13] and applied by the National Labor Relations Board.[14] These definitions also largely track the definitions for equivalent terms under recently enacted Colorado labor relations statutes.[15] Similarly, this rule makes explicit that evaluation of whether a worker acts as an "independent contractor" would follow the analysis for an "independent contractor" under the Colorado Wage Act,[16] which also applies to numerous other Colorado labor laws.[17]

7. Rule 2.8: "Employer" is a term defined by the IRA and LPA. This new definition restates the IRA and LPA definitions of "employer," including the recent ALRRA addition of agricultural employers.

8. Rule 2.9: "Exclusive representative" is a term used in the LPA but not specifically defined. This

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[10] C.R.S. §§ 8-1-103(1) ("the director shall appoint such deputies, experts, statisticians, accountants, inspectors, clerks, and other employees as are necessary to carry out the provisions of law and to perform the duties and exercise the powers conferred by law upon the division and the director"); 8-1-113(1) (for "purpose of making any investigation with regard to any employment or place of employment or other matter contemplated by the provisions of this article, the director . . . has the power to appoint temporarily . . . any deputy or any other competent person as an agent, whose duties shall be prescribed in such order.").

[11] C.R.S. §§ 8-3-104(1)(a) and 104(12)(a)(II)(B).

[12] C.R.S. § 44-10-105 outlines the criteria for an employee of a marijuana licensee to qualify as an "agricultural worker."

[13] NLRA § 2(11) defines "supervisor" as follows: "[T]he term 'supervisor' means any individual having authority . . . to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11). With respect to the 12 listed indicia, Section 2(11) is to be interpreted in the disjunctive and "the possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir 1949).

[14] "Managerial employees . . . 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'" *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682 (1980) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974)).

[15] *E.g.*, in COBCA: C.R.S. § 8-3.3-102(5) ("'Confidential employee' means a person . . . (a) Required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information that is used to contribute significantly to the development of the management positions; or (b) Employed as an attorney by the county and whose duties are to provide direct legal counsel regarding the application, interpretation, or enforcement of this article 3.3."), (14) ("'Executive employee' means an employee: (a) Whose primary duty is management of the entity . . . or of a customarily recognized department or subdivision . . . ; (b) Who customarily and regularly directs the work of two or more other employees; and (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight."), and (18) ("'Managerial employee' means any county employee who has significant responsibilities for formulating county policies and programs or administering an agency or department of an agency."); C.R.S. § 24-50-1102(2) (defining "confidential employee" similarly to COBCA, with duties tailored to the statute), (8) (defining "executive employee" identically to COBCA), and (10) (defining "managerial employee" similarly to COBCA).

[16] C.R.S. § 8-4-101(5) ("'Employee' means any person . . . performing labor or services for the benefit of an employer. . . . [R]elevant factors . . . include the degree of control the employer may or does exercise over the person and the degree to which the person performs work that is the primary work of the employer; except that an individual primarily free from control and direction in the performance of the service, both under his or her contract for the performance of service and in fact, and who is customarily engaged in an independent trade, occupation, profession, or business related to the service performed is not an 'employee'.").

[17] *E.g.*, C.R.S. §§ 8-14.4-101(5)(a) (defining "worker" to include "employee" as defined by Wage Act, § 8-4-101(5)); 8-13.3-402(4) (defining "employee" as per Wage Act, § 8-4-101(5)); 24-92-201(4) (relying in part on § 8-4-101(5) to define "employee").

new definition is derived from the standard meaning in this context, specifically C.R.S. § 8-3-107(1).

9. Rule 2.11: "Order" is a term defined by the IRA; this new definition is added to clarify that failure to comply with any applicable decision or direction may face fines under existing IRA authority.

10. Rule 2.12: The term "person" has an LPA definition but is used broadly in both statutes. The LPA definition[18] is incorporated and, though both categories fall within the extant statutory language, the rule makes explicit that "person" as defined by statute includes both "an employee" and "a labor organization," essential labor relations parties who are subject to the provisions of LPA and these rules.

D. Rule 3: Notices by Employers.

The Division revised and expanded this rule to require posting as well as distribution of notices by employers to ensure that all employees are reached, and to recognize that employees may work remotely or otherwise away from an employer's office or place of business. The prior rule mentioned only "posting," but with little enough specificity to leave unclear how it would apply to modern developments that post-date the writing of the prior rule, such as extensive remote work, and even electronic communications altogether (email, the internet, online portals, etc.). Rule 3.2 defines what it means to "post" a notice, to provide more concrete guidance on how employees should be notified of any relevant LPA matters before the Division.

E. Rule 4: Filing, Service, and Deadlines.

1. Rule 4.1: Division filings. Rule 4.1 was modified in part to follow the filing and service provisions in other Division rules and in part to facilitate ongoing shifts to electronic filing by the Division and other similar entities. The rule, however, also recognizes that the Division process is ongoing, and that at this time not everyone has electronic access, by providing that if the Division does not provide a form or "if a party cannot readily use such [electronic] means for filing," any other means of contacting the Division are acceptable, so long as the submission is, in fact, received by the Division.

2. Rule 4.2: Serving another party. Because the Division will often require parties engaged in Division elections, unfair labor practice proceedings, or other labor disputes to deliver copies of documents or filings to other interested parties, this rule identifies appropriate methods for serving the other parties, and clarifies that the Division does not require certain service formalities that court rules may require.

3. Rule 4.3: Computation of time. Rule 4.3 clarifies that calendar days will be used to calculate time under the LPA and IRA, following C.R.S. § 2-4-108.

4. Rule 4.4: Deadline extensions. Rule 4.4 clarifies the "good cause" considerations for granting a deadline extension, and requires the request to be submitted to the Division at least three days prior to the stated deadline.

F. Rule 5: Elections. This rule defines types of, and procedures for, Labor Peace Act elections. The substantive changes are as follows.

1. Rule 5.1: Types of Elections. Rule 5.1 was reorganized to identify two types of elections: (1) Collective Bargaining Unit ("CBU") elections; and (2) All-Union Agreement ("AUA") elections. The prior version of the rule identified four types of elections: (1) CBU elections; (2) election for approval of an AUA; (3) election to ratify an AUA; and (4) revocation of an AUA. As this list shows, the latter three of the four types of elections all addressed whether or not to have an AUA. Those three elections therefore are now treated more accurately as a single type of election, with each variation nested and addressed under Rule 5.1.2. The other major reorganization of this rule was moving the procedure for petitioning into Rule 5.2. Because the process of petitioning is consistent for all types of elections, this move eliminated unnecessary repetition in Rule 5. Except as identified below, this reorganization was not intended to affect the substance of Rule 5.

2. Rule 5.1.1: Collective Bargaining Unit Election. Rule 5.1.1 concerns the first type of election: selection and certification (or decertification) of an exclusive representative by employees of a particular bargaining unit.

Rule 5.1.1(A) clarifies the two-tiered vote threshold for a CBU election and the selection of an exclusive

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[18] C.R.S. § 8-4-101(16).

bargaining representative. The first tier is the "majority turnout" requirement, akin to a quorum requirement: a representation vote can pass only "if the majority of the employees . . . vote at the election," regardless of whether they vote "yes" or "no" on representation (§ 8-3-107(1)). The second tier is the "majority rules'" requirement that parallels traditional requirements of majority support: a collective bargaining unit is "selected by secret ballot . . . **by a majority vote** of the employees of one employer employed within the state **who vote at an election for the selection of such unit**[.]"[19] Thus, the LPA requires both majority turnout (the first tier) and majority support (the second tier). The two-tiered vote threshold follows LPA practice[20] and substitutes for the separate "showing of interest" requirement applicable under other federal or Colorado labor relations statutes, but not under the LPA.

Rule 5.1.1(C) is a new rule detailing the circumstances in which a unit can be clarified or modified. The rule permits the Division to clarify the unit for positions that should have already been included in the first instance, and thus whose inclusion would not truly add to or subtract from the unit. In contrast, a unit may only be modified — to add or subtract positions within the bargaining unit — by a secret ballot election as required by C.R.S. § 8-3-107.

3. **Rule 5.1.2: All-Union Agreements.** Rule 5.1.2 concerns elections for authorization by unit employees to include a union security clause in the CBA, defined as an All-Union Agreement (AUA) in the Labor Peace Act. The rule provides for elections for initial authorization, for the revocation of such authorization, and for authorization as to employees in the construction industry as provided for by C.R.S. § 8-3-109(3).

4. **Rule 5.2: Election Petitions.** Rule 5.2 provides that all types of union elections are initiated by petition, and details the requirements for such petitions. The rule defines who may file a petition, specifying that election petitions may be filed by a single employee, a group of employees, an employer, or any person or organization with permission from one or more employees to file a petition on their behalf, in Rule 5.2.2. For purposes of petition filing, a "representative" can be any person or entity so authorized by an employer or an employee[21] — in contrast to how a "representative" empowered to engage in collective bargaining must be a "person who is the duly authorized agent of a collective bargaining unit."[22]

5. **Rule 5.2.4: Presumptive bars to an election.** C.R.S. § 8-3-107 grants discretion to the Division to determine, after an election, whether another election of the same type among the same group of employees is or is not proper: "The fact that one election has been held shall not prevent the holding of another election among the same group of employees, if it appears to the director that sufficient reason therefor exists." Rule 5.2.4 delineates circumstances in which sufficient reason will be presumed to exist in the Division's exercise of this discretion afforded it by statute.

6. **Rule 5.3: Processing Election Petitions and Issuing Notice of Petition for Election.** Rule 5.3 outlines procedures for processing election petitions, including determining authority to conduct an election, seeking additional information from interested parties, holding pre-election conferences, issuing a petition notice, and requesting an initial poll list of eligible voters.

Rule 5.3.1 clarifies that the sufficiency of election petitions is an administrative determination not subject to appeal until election results are certified, consistent with the statutory and public policy objective of conducting efficient elections, and with Administrative Procedure Act and appellate limits on appealability of non-final or interim orders.

Rule 5.3.2(C) details the procedure for the Division to investigate which employees are eligible to vote in an election as contemplated by C.R.S. § 8-3-107(5).

Rule 5.3.3 is a new rule noting the longstanding applicability to labor relations matters of Division authority under C.R.S. § 8-1-117(1) to request information from employers.

7. **Rule 5.4: Challenges to Election, Collective Bargaining Unit, or Qualified Voters.** Rule 5.4 states the deadlines for filing objections to the election, the unit makeup (*i.e.*, positions within the unit), and the employees eligible to vote in the election as shown on the tentative poll list, which was required by the prior version of this rule (Rule

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[19] C.R.S. § 8-3-104(4).

[20] The Division's predecessor, the Industrial Commission, also followed the two-tiered approach. *E.g.,* 1962-64 Industrial Commission of Colorado Report (whether majority voted for representation is determined by majority "of the votes cast," not majority of *all eligible* voters — as might apply in a one-tiered process where voting determines both sufficiency of interest and majority preference).

[21] *E.g.*, C.R.S. § 8-3-107(4) (petition can be filed by "any employee or his employer or the representative of either of them").

[22] C.R.S. § 8-3-104(17).

6.1.7).[23] Any affected employees are required to notify the Division within one week after the posting and distribution of the notice of petition. Other parties are required to file position statements supporting their objections with the Division and serve all other parties, three business days prior to the pre-election conference. The Division finds that these deadlines and procedures effectuate LPA purposes by "providing a convenient, expeditious, and impartial tribunal"[24] to adjudicate labor rights by giving the parties and the Division adequate opportunity to consider any objections prior to the pre-election conference and, thus, allowing those objections to be addressed, if possible, at that conference.

8. Rule 5.5: Notice of Election and Qualified Voters. Rule 5.5 provides that the Division shall issue a Notice of Election along with the tentative poll list, and requires the employer to post and distribute such notice as described in Rule 3.

Rule 5.5.3 requires the employer (and optionally for other parties) to provide any updates to the tentative poll list to the Division, the labor organization, or any other interested party at least 72 hours prior to the time of the election. Under this rule, the Director may order parties to provide further information in order to finalize the poll list.

9. Rule 5.6: Conduct of Elections. Rule 5.6 prescribes the procedure for the conduct of elections and is substantially the same as the previous rule (Rule 6.2), except for the added requirement that notices and ballots will be in English and Spanish if any party or eligible voter credibly indicates a need for Spanish-language ballots.

Rule 5.6.6 clarifies the definition of "electioneering" to address public comments[25] which are also applicable to conduct of elections in LPIR. At the hearing on the proposed versions of these rules, the need for a clearer definition of "electioneering" was discussed, and the Division finds that more clarity in the definition of "electioneering" serves the interest of both (a) free speech (by minimizing the risk of unduly broad interpretations of what expression may be deemed unlawful "electioneering") and (b) fair elections (by more clearly defining specific conduct that may qualify as unlawful "electioneering"). The definition adopted was adapted from the only submitted written comment to propose specific text for a clarified definition; the Division finds it to be an appropriately narrow, fair definition serving both interests noted above.

10. Rule 5.7: Challenges to Ballots. Rule 5.7 details the Division's process to challenge ballots and resolve challenges. Challenges to any person's right to vote can be based on the grounds of either (1) identity (*i.e.*, whether they are or are not a person on the certified poll list) or (2) ineligibility due to job change or separation from employment (other than unlawful termination), as explained by C.R.S. § 8-3-107(5).[26] Challenged ballots shall be cast, but sequestered, and if the number of such ballots will not affect an election outcome, the Division need not resolve the challenge.

Rule 5.7.3 clarifies that a resolution regarding challenged ballots is an administrative determination not subject to appeal until election results are certified.

11. Rule 5.8: Counting of Ballots and Certification of Results. Rule 5.8 outlines the process to count ballots and certify election results. The rule allows a party to the election to file an appeal alleging fraud or error in election results, in writing, to the Director within one week of the certification (changed from the arguably less intuitive and more ambiguous "five days" in the prior rule). The Director's certification or modification of election results constitutes a final agency action subject to judicial review pursuant to C.R.S. § 24-4-106.

G. Rule 6: Unfair Labor Practices.

Prior rules' language may have led parties to view Division proceedings as judicial in nature. Preliminarily, because under authority that includes C.R.S. § 8-1-118, Division authority and discretion as to its proceedings supersedes the detailed hearing and other procedural requirements of the Administrative Procedure Act (APA), C.R.S. § 24-4-105, the

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[23] Labor Peace Act and Industrial Relations Act Rules, 7 C.C.R. 1101-01, Rule 6.1.7 (effective through July 1, 2023).

[24] C.R.S. § 8-3-102(e).

[25] *E.g.*, written comment by Arapahoe County Board of County Commissioners, submitted by Jeff Baker, 4/28/23, at 3, 6 (requesting further definition of the term "electioneering" and offering the basis for the incorporated definition); oral comment by David Ayraud, Deputy County Attorney, Larimer County, 4/18/23 (requesting further definition of "electioneering").

[26] *See Graham Furniture Co. v. Indus. Com. of Colo.*, 331 P.2d 507, 509-510 (Colo. 1958) ("We hold that under the wording of this statute, once the final polling list is certified it becomes final for the purpose of determining the eligibility of those entitled to vote. The matter thus could not again be raised at the time of the election.").

Division is not bound by such APA requirements.[27] The new rule clarifies that the Division will use administrative procedures in the first instance to resolve unfair labor practice complaints. C.R.S. § 8-3-110(1) does not require parties to use or exhaust Division administrative procedure before filing in court, but Rule 6.1 provides that the Division will not exercise jurisdiction over matters pursued in court.

Rule 6.3 describes the administrative investigation and initial determination of an unfair labor practice complaint. Rule 6.4.1 provides that to appeal, a party must request a hearing within 35 days of issuance of a determination; absent such a request, Rule 6.3.8 provides, the recommended findings of fact and conclusions of law in the determination, and any orders issued, will be the final agency action subject to judicial review. If a hearing is held, any decision issued thereafter will constitute the final agency action unless timely modified pursuant to C.R.S. § 8-3-110(9).

LPA hearings serve to provide: "a convenient, expeditious, and impartial tribunal" to adjudicate the rights and obligations of the public, the employee, and the employer;[28] a forum facilitating "fair, friendly, and mutually satisfactory employment relations"; and "suitable machinery for the peaceful adjustment of whatever legitimate controversies may arise."[29] In appropriate cases, the new rule clarifies that a *live* hearing with *real-time verbal* rather than *written* input may not be needed (a) for a fair hearing of a complaint, any responses to a complaint, and any points or input that a party may wish to offer in order to be heard, or (b) for the expeditious, fair, and accurate adjudication of an unfair labor practice complaint — consistent with other, pre-existing Division practice outside the labor relations context.[30]

H. Rule 7: Notices of Intent to Strike Required by the Labor Peace Act.

Rule 7 outlines the strike notice procedures following the statutory guidance in the LPA[31] and considering the jurisdictional limitations imposed by the NLRA. The rule, however, has been reformatted for greater clarity than the previous version (Rule 8). The substantive changes are as follows.

1. **Rule 7.1: NLRA-Covered Employees.** Rule 7.1 requires that bargaining units covered by the NLRA, and thus required to submit form F-7 to the Federal Mediation and Conciliation Service (FMCS) under the NLRA, also must submit the same notice to the Division, whereas previously, submitting this form was discretionary.

2. **Rule 7.2(B): Marijuana as an agricultural product for purposes of strike notices.** Rule 7.2 clarifies that marijuana is an agricultural product for purposes of provisions on strikes that could cause "destruction or serious deterioration" and therefore falls within the 30-day strike notice requirements of Section 113(2) of the LPA.

3. **Rule 7.3: Contents of Strike Notices.** Rule 7.3 specifies the content and procedure for strike notices. In contrast to the prior rule, this rule details more specific information that strike notices must include: (a) the name and contact information for each party to the labor dispute, (b) the date the CBA expires, (c) the status of negotiations, and (d) positions on amenability to mediation or arbitration. For a public authority strike, a strike notice also must include: (a) whether the strike interferes with preservation of public peace, health, and safety, (b) whether a strike or binding arbitration is preferred, and (c) if a strike is not allowed, what arbitration procedures or processes are preferred.

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[27] *See* Colorado Workers for Innovative and New Solutions v. Veitch, No. 2021CV32782 (Denver Dist. Ct. June 29, 2022) (holding that the Division's "organic statute," C.R.S. § 8-1-118, in expressly providing that the "director, or persons designated by him, shall *not* be bound by . . . *any* technical or formal rules of *procedure*, *other than* as provided in *this article* or by the *rules of the division* . . . *trumps* the application of the *APA*" section 105 hearing procedure) (emphasis added), *appeal docketed*, No. 2022CA001260 (Colo. App. August 1, 2022); Colorado Workers for Innovative and New Solutions v. Veitch, No. 21CV32852 (Denver Dist. Ct. June 17, 2022) (holding, under the Partnership Act, that "there is not any requirement that a formal adjudicatory proceeding is a procedural prerequisite to a final agency action" by the Division, and the hearing "procedures set forth in Section 24-4-105 are not applicable to the Partnership Act," where the agency promulgated a valid procedural rule departing from the APA) (citing *W. Colo. Motors, LLC v. Gen. Motors, LLC*, 441 P.3d 1068, 1077 (Colo. App. 2016)); C.R.S. § 24-4-107 ("[W]here there is a conflict between [the APA] and a specific statutory provision relating to a specific agency, such specific statutory provision shall control as to such agency."); *Marks v. Gessler*, 350 P.3d 883, 892 (Colo. App. 2013) (as a general rule, APA's "provisions apply to agency actions unless they conflict with a specific provision of the agency's statute or another statutory provision preempts the provisions of the APA").

[28] C.R.S. § 8-3-102(1)(e).

[29] C.R.S. § 8-3-102(1)(b).

[30] *E.g.,* Wage Protection Rules, 7 C.C.R. 1103-7, Rule 6.2 (wage and hour appeals may be heard on the pleadings rather than in a live hearing "if the hearing officer finds, based on pre-hearing submissions, that the appeal presents no issues warranting a live hearing").

[31] C.R.S. § 8-3-113(2)-(3).

4. **Rule 7.4: Employer Response to a Strike Notice.** Rule 7.4 requires that the employer provide a written response to the strike notice within five days. The prior rule did not so require, but an employer response to a strike notice was commonly provided, and if not provided voluntarily then commonly sought by the Division.

5. **Rule 7.5: Further Submissions and/or Proceedings on a Strike Notice.** Rule 7.5 allows the Director to request, allow, and order further information from the parties, or conduct further proceedings to resolve a dispute, detailing means and methods for the Director to fully investigate and explore remedies.

6. **Rule 7.6: Updates after Mediation or Other Non-Binding Dispute Resolution.** Rule 7.6 requires the parties to discuss alternative dispute resolution, such as mediation, and provide updates to the Director; it also facilitates voluntary consent to arbitration in the event that the parties remain at impasse.

7. **Rule 7.7 : Decisions on a Strike Notice as to a Public Authority.** Rule 7.7 expands on the previous rule (Rule 8.3) by outlining the statutory process for the Director's decision to allow or deny a strike involving a public authority as prescribed in C.R.S. § 8-3-113(3).

I. Rule 8: Intervention in Labor Disputes (Industrial Relations Act, C.R.S. § 8-1-125).

1. **Rule 8.1: Coverage of Intervention Rule.** Rule 8.1 details the employers subject to this rule, and clarifies that Rule 8 does not apply to employers or employees excluded from IRA coverage, such as those covered by another statute (*e.g.*, the NLRA, or the Partnership Act) governing strikes, lockouts, or similar labor stoppages.

2. **Rule 8.2: Requests for Intervention.** Rule 8.2 outlines the grounds for intervention, the process for requesting intervention, and filing responses to intervention requests. The rule defines when the Director may assert jurisdiction and provides more detail than the prior rule regarding the content and process to file a request for intervention.

3. **Rule 8.3: Decisions on Intervention.** Rule 8.3.1 describes the Director's process for considering whether to intervene, including the ability to meet with the parties and investigate "the extent to which the (labor) dispute affects the public interest."

Rule 8.3.2 is new and clarifies that "[j]urisdiction shall not be deemed to have been exercised until and unless a written decision to intervene is issued" by the Director. Without any such issuance exercising jurisdiction, neither the mere filing of a request for intervention nor any requests for information from the Director serve to confer jurisdiction.[32]

Rule 8.3.3, similar to prior rule Rule 9.1.5, reiterates that after a decision to exercise jurisdiction, the parties must maintain the status quo: the "relation of the employer and employee shall continue uninterrupted by the dispute or anything arising out of the dispute until a final determination," thus forbidding the altering of wages, hours, or other employment conditions, or directly or indirectly engaging in a lockout, strike, or suspension or discontinuance of work or employment as provided in C.R.S. § 8-1-125.[33]

Rule 8.3.4 allows investigations, hearings, and temporary orders during an intervention, before any final orders.

V. EFFECTIVE DATE. The LPIR Rules take effect July 1, 2023.

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

May 11, 2023
Date

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[32] *See Martin v. Montezuma-Cortez Sch. Dist. RE-1*, 841 P.2d 237, 248 (Colo. 1992) (only "once jurisdiction is taken" does the director have an obligation to "promote the voluntary arbitration, mediation, or conciliation of the dispute.").

[33] *See Martin*, 841 P.2d at 255.