

## DEPARTMENT OF LABOR AND EMPLOYMENT

### Division of Labor Standards and Statistics

#### Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving Rules ("Colorado WARNING Rules")

#### 7 CCR 1103-11

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As proposed on September 25, 2020; if adopted, to be effective January 1, 2021.

#### Rule 1. Statement of Purpose, Authority, and Construction

- 1.1 The general purpose of these Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving Rules ("WARNING Rules") is to exercise the authority of this Division to enforce and implement Colorado legislative enactments and accompanying rules protecting against retaliation for, or interference with, the exercise of protected rights, and requiring that employees and other workers receive various forms of notification of their rights, including but not limited to the Healthy Family and Workplaces Act of 2020 ("HFWA," C.R.S. Title 8, Article 13.3, Part 4), the Public Health Emergency Whistleblower Act of 2020 ("PHEW," C.R.S. Title 8, Article 14.4), amendments to the Colorado Wage Act (C.R.S. Title 8, Article 4), and rules promulgated under the foregoing statutes. These Rules are adopted pursuant to Division authority in C.R.S. §§ 8-1-103(3), -107(2), -111, -116, -117; § 8-2-130; § 8-4-111; § 8-5-203; §§ 8-6-105, -106, -108, -117; §§ 8-13.3-403(9), -407(6), -408(1)-(2), -409, -410; and §§ 8-14.4-103(2), -104, 105(4), -108. Every rule herein applies to all statutes and rules referenced in Rule 1.1, unless a specific rule states otherwise.
- 1.2 Incorporations by Reference. Articles 1, 4, 6, 13.3, and 14.4 of C.R.S. Title 8 (2021) are hereby incorporated by reference. Earlier versions of such laws may apply to events that occurred in prior years. Such incorporation excludes later amendments to or editions of the statutes. These statutes are available for public inspection at the Colorado Department of Labor and Employment, Division of Labor Standards & Statistics, 633 17th Street, Denver CO 80202. Copies may be obtained from the Division of Labor Standards & Statistics at a reasonable charge. These statutes can be accessed electronically from the website of the Colorado Secretary of State. Pursuant to C.R.S. § 24-4-103(12.5)(b), the agency shall provide certified copies of the statutes incorporated at cost upon request or shall provide the requestor with information on how to obtain a certified copy of the material incorporated by reference from the agency originally issuing the statutes. Where these Rules have provisions different from or contrary to any incorporated or referenced material, the provisions of these Rules govern.
- 1.3 Separability. These Rules are intended to remain in effect to the maximum extent possible. If any part (including any section, sentence, clause, phrase, word, or number) is held invalid, (A) the remainder of the Rules remain valid, and (B) if the provision is held not wholly invalid, but merely in need of narrowing, the provision should be retained in narrowed form.

#### Rule 2. Definitions and Clarifications

- 2.1 "Administrative Procedure" means the process used by the Division to investigate Complaints arising under any rule or statute cited in Rule 1.1.
- 2.2 "Authorized representative" means a person designated by a party to a Complaint to represent the party during the Division's administrative procedure. To designate an authorized representative, the party must comply with the requirements for authorizing a representative in the Wage Protection Act Rules, 7 CCR 1103-7.
- 2.3 "Complaint" or "Claim" interchangeably mean a Complaint or Claim alleging violation of any retaliation, interference, or notice requirements of any statute or rule cited in Rule 1.1.

- “Complainant” means an employee or worker with a Complaint or Claim.
- 2.4** “Certified copy” means a copy of a final Division decision (issued by a compliance investigator or hearing officer) signed by the Director of the Division, or his or her designee, certifying that the document is a true and accurate copy of the final decision. A certified copy must be requested in writing. A Division decision (issued by a compliance investigator or hearing officer) will not be certified unless: either **(1)** all appeal deadlines have passed and no appeal has been filed or **(2)** if an appeal was timely filed, the decision was not superseded on appeal. A certified copy will not be issued if a Complainant terminated a Complaint in accord with applicable statutes or rules.
- 2.5** “Correct address” can include, but is not limited to, an email address reported to the Division or posted on a party’s website, an address on file with the Colorado Secretary of State, the address of a registered agent on file with the Colorado Secretary of State, or an address provided to the Division by the party. A notice is deemed sent to a party when placed in the U.S. mail; sent by electronic means; or personally delivered to a party or a party’s representative, or a party’s correct address.
- 2.6** “Determination” means a decision issued by a compliance investigator upon the conclusion of an investigation. “Determination” includes: Citation and Notice of Assessment, Determination of Compliance, and Notice of Dismissal, if that Notice of Dismissal is issued after the Division initiated the administrative procedure. A notice that the Division declines to investigate a Complaint is not a Determination.
- 2.7** “Division” means the Division of Labor Standards and Statistics in the Colorado Department of Labor and Employment.
- 2.8** “Employee” and “Employer” have the same meaning as in C.R.S. §§ 8-4-101(5),(6), except as to rights or responsibilities under C.R.S. Title 8, Article 13.3, “Employee” and “Employer” have the same meaning as in C.R.S. §§ 8-13.3-402(4),(5).
- 2.9** “Notice of Right to Sue” means a notice from the Division stating that the Complainant has exhausted administrative remedies pursuant to C.R.S. § 8-14.4-105.
- 2.10** “Respondent” means an employer or principal that is alleged in a Complaint or Claim to have, or that is the subject of an investigation into whether they have, committed an unlawful practice.
- 2.11** “Retaliation” includes, and is synonymous with, discrimination based on or for protected activity.
- 2.12** “Wage Protection Act Rules” refer to the rules contained in 7 CCR 1103-7.
- 2.13** “Willful,” in Articles within C.R.S. Title 8 that this Division enforces or administers, has the same meaning as under the federal Fair Labor Standards Act, as used and defined in 29 U.S.C § 255(a) and 29 C.F.R. § 578.3(c).
- 2.14** “Worker” and “principal,” as to rights or responsibilities under C.R.S. Title 8, Article 14.4, have the same meaning as in C.R.S. §§ 8-14.4-101(3),(5).
- 2.15** Any other definitions set forth in statutes enforced through these Rules are hereby incorporated by reference, except where terms are defined differently in these Rules.

**Rule 3. Complaint, Investigation, and Appeal Procedures**

- 3.1** Wage Protection Act Rules 4.1 and 4.3-4.8, 7 CCR 1103-7, regarding investigation procedures and protections, are incorporated by reference, except that as incorporated:
- (A)** all references to “wage” or “wage and hour” Complaints, Claims, rights, responsibilities, or proceedings shall include other labor rights or responsibilities within these Rules;
  - (B)** in Rule 4.4.3 “§ 8-4-113(1)(b)” is replaced with “C.R.S. § 8-1-140(2)”; and

- (C)** for Claims under PHEW, references to “employers” or “employees” shall include “principals” and “workers,” respectively, as defined by PHEW and these Rules.

**3.2** Complaint filings.

**3.2.1** An employee or worker who wishes to file a Complaint shall use a Division-approved form(s) and shall include the Complainant’s signature, the Complainant’s contact information, the Respondent’s contact information, and basis for the Complaint. If the Division does not have an applicable form publicly posted when the Complainant intends to file, then a Complainant may file a Complaint in any form, by mail or electronic mail, with the Division, and the Division may later require the Complainant to complete the Division’s Complaint form, but the filing date will remain the date of the Complainant’s original filing.

**3.2.2** A Complainant shall respond in a timely manner to informational or investigatory requests by the Division. Failure to comply with this Rule may result in dismissal of the Complaint. If a Complaint is dismissed before a Notice of Complaint is sent to the Respondent due to failure to respond to a Division request for information, the Complaint may be reopened if the Complainant provides the requested information or documentation to the Division within 35 days of the request. A Complainant may be required to file a new Complaint if the response is received more than 35 days after the request.

**3.2.3** Anonymous complaints will be accepted, but will not be investigated using the Division’s administrative procedure, and will be investigated only at the discretion of the Division.

**3.3** Filing, service, and deadlines.

**3.3.1** A Complaint or appeal is considered “filed” with the Division when it is received by the Division via mail, fax, email, online submission, or personal delivery. Any Complaint, appeal, or termination received after 11:59pm Mountain Time is considered filed the next business day.

**3.3.2** Deadlines in these Rules may be extended for good cause. In considering whether good cause exists, under these Rules or applicable statutes allowing good-cause extensions of deadlines, the Division will determine whether the reason is substantial and reasonable, and must take into account all available information and circumstances pertaining to the specific Complaint.

**3.3.3** Within 30 days of receipt of a Complaint (or within 30 days of the effective date of these Rules, whichever is later), the Division will (A) assess whether it will exercise its discretion to investigate the Complaint, and (B) inform the Complainant of the decision, including sending the Complainant a Notice of Right to Sue if the Division declines to exercise its discretion to investigate the Complaint.

**3.3.4** In a Complaint investigation, the Division will send the Respondent a Notice of Complaint, along with any relevant supporting documentation submitted by the Complainant, via U.S. mail, electronic means, or personal delivery. A Respondent must respond within four weeks after a Complaint is sent to them, unless an extension is granted.

**3.3.5** Where a retaliation or interference Complaint or investigation governed by these Rules is filed or commenced, the Respondent shall comply with the federal “Preservation of records made or kept” rule, 29 C.F.R. § 1602.14, requiring that the Respondent “shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action.” For purposes of HFWA or PHEW retaliation or interference Claims, relevant “personnel records relevant” include but are not limited to:

- (A)** requests or statements by the individual that are claimed to be protected activity;

- (B) responses to, or analyses of, such request(s) or statement(s);
- (C) policies or decisions, formal or informal, that may apply to such request(s) or statements(s); and
- (D) to the extent relevant to the Complaint or investigation (e.g., if the possible violation includes disparate treatment based on protected activity), the contents of “personnel files” (as defined by C.R.S. § 8-2-129(c)) of the Complainant and “other[s] ... holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected” (29 C.F.R. § 1602.14).

**3.3.6** A Complainant may withdraw a Complaint at any time before issuance of a determination by notifying the Division in writing. Additionally, for a Complaint under PHEW:

- (A) whether or not a Complainant requests Complaint withdrawal or a Notice of Right to Sue, the Division may exercise its discretion to terminate an investigation at any time, in which case it will promptly send a Notice of Right to Sue; and
- (B) if a Determination has not been sent by 180 days after the date the Division notifies the Claimant of its decision to investigate, the Complainant may request a Notice of Right to Sue, and the Division will respond within 30 days by sending either **(1)** the determination or **(2)** a Notice of Right to Sue indicating that the Division has terminated the investigation and the Complainant has exhausted administrative remedies.

**3.4** Burdens of proof and production.

**3.4.1** Complaints of retaliation are analyzed as follows, with the preponderance of the evidence standard applying to all burdens of proof.

- (A) The Complainant has the burden of proving all elements of a Claim, including that unlawful retaliation, interference, or failure to provide notice occurred. The Respondent must explain which, if any, allegations it disputes. Any evidence probative of a relevant issue may be submitted or considered.
- (B) If the Complainant proves unlawful retaliation or discrimination was a motivating factor for the complained-of practice, then a violation is proven. However, if a violation is proven but the Respondent proves that the complained-of practice would have occurred for another lawful reason, then the Division shall not award reinstatement, back pay, or front pay as of the date the practice would have occurred.

**3.4.2** Complaints of interference or failure to provide any required notice are analyzed as follows, with the preponderance of the evidence standard applying to all burdens of proof.

- (A) The Complainant has the burden of proving all elements of a Claim, including that unlawful interference or failure to provide any required notice occurred. The Respondent must explain which, if any, allegations it disputes. Any evidence probative of a relevant issue may be submitted or considered.
- (B) If the Complainant meets its burden of proof, then a violation is proven. However, if a violation is proven but the Respondent proves that the complained-of practice would have occurred for another lawful reason, then the Division shall not award reinstatement, back pay, or front pay as of the date the practice would have occurred.

- (C) Interference with HFWA or PHEW rights has the same definition and scope as under the federal Family and Medical Leave Act statutory and rule provisions on interference, 29 U.S.C. § 2615(a)(1) and 29 C.F.R. § 825.220(b)-(d), except where any provisions of HFWA, PHEW, or these Rules expressly differ. Interference includes, but is not limited to, imposing stricter documentation, notice, or other conditions for exercising HFWA or PHEW rights than the statute permits.

**3.5** Determinations.

**3.5.1** Upon conclusion of the investigation of a Complaint, the Division will issue a determination. The Division shall notify the parties on the date the determination is issued by the Division's compliance investigator by sending (a) a copy of the determination; and (b) notice of the parties' termination and appeal rights.

**3.5.2** The date of "issuance" of the Division's determination is the date the Division's determination is "sent." Both the termination and appeal deadlines are calculated from the date the Division's determination is originally issued and sent to the parties.

**3.5.3** Determinations by the Division may include the following remedies, depending on which, if any, the Division's findings support:

- (A) monetary or other relief authorized by the statute(s) under which the Complaint was filed, including but not limited to, where applicable --
  - (1) any unpaid wages, penalties, and/or fines under C.R.S. Title 8, Article 4,
  - (2) if a violation of C.R.S. Title 8, Articles 13.3 (HFWA) or 14.4 (PHEW) cost an employee or worker a job or pay, back pay plus either reinstatement or (if reinstatement is infeasible) front pay for a reasonable period, and/or
  - (3) other fines or penalties authorized by statutes applicable to the Complaint;
- (B) fines or penalties authorized by the statutes on Division investigative and enforcement authority in C.R.S. Title 8, Articles 1 and 4; and/or
- (C) order(s) to cease non-compliance and/or effectuate compliance, as authorized by the statute(s) under which the Complaint was filed and statutes on Division investigative and enforcement authority in C.R.S. Title 8, Article 1, 4, and 6.

**3.6** The Division may exercise its discretion to have an investigation sequenced and/or divided into two or more stages on discrete questions of liability or relief (e.g., bifurcation), yielding two or more determinations and/or phases of the investigation.

**3.7** Appeals.

**3.7.1** Any party to a Claim or determination may appeal the Division's determination. The provisions governing appeals under Rule 6 of the Wage Protection Act Rules, 7 CCR 1103-7, as amended and modified (or, for direct investigations, Rule 6 of the Direct Investigation Rules, 7 CCR 1103-8, as amended and modified), shall apply to Claims or determinations under these Rules. Parties may not appeal the Division's discretionary decisions as to whether or not to investigate a Complaint.

**3.7.2** An appeal may, in the discretion of the hearing officer, be sequenced and/or divided into two or more stages on discrete questions of liability or relief (e.g., bifurcation), yielding two or more decisions and/or phases of the appeal.

**3.8** A certified copy of any citation, notice of assessment, or order imposing relief or remedies may be filed with the clerk of any court having jurisdiction over the parties at any time after the entry of

the order. Such a filing can be in a county or district court, and will thereby have the effect of a judgment from which execution may issue.

#### **Rule 4. Notice and Posting Rights and Responsibilities**

**4.1** A poster informing all employees and workers of their rights under HFWA and PHEW must be posted, displayed, or otherwise provided by employers and principals, as required by C.R.S. § 8-13.3-408 (HFWA), and C.R.S. § 8-14.4-103 (PHEW).

**4.1.1** The poster must specify:

- (A)** for those covered by HFWA, **(1)** the amount of paid sick leave to which employees are entitled, and **(2)** the terms of its use;
- (B)** for those covered by PHEW, **(1)** the right to raise reasonable concerns about workplace violations of government health or safety rules, or otherwise significant workplace health or safety threats, related to a public health emergency, and **(2)** the right to wear one's own personal protective equipment, such as a mask, faceguard, or gloves, if it provides a higher level of protection than already-provided equipment, is recommended by a governmental public health agency with jurisdiction over the workplace, and does not render the worker incapable of performing the job its duties;
- (C)** for those covered by either HFWA or PHEW, **(1)** that it is unlawful to retaliate for or interfere with HFWA or PHEW rights, and **(2)** that a complaint may be filed if retaliation, interference, or another denial of HFWA or PHEW rights occurs.

**4.1.2** Employers and principals may use the latest version of the "Colorado Workplace Public Health Rights Poster" (provided by the Division at [www.coloradolaborlaw.gov](http://www.coloradolaborlaw.gov)) to satisfy the poster requirements of both HFWA and PHEW. Employers and principals may comply by using another poster that contains all substantive information in the "Colorado Workplace Public Health Rights Poster" and otherwise satisfies all statutory and rule requirements.

**4.1.3** The poster shall be displayed in each establishment where employees or workers work, in a conspicuous location frequented by employees or workers where it may be easily read during the workday — such as in break rooms, on employee bulletin boards, and/or adjacent to time clocks, department entrances, and/or facility entrances.

**4.1.4** If the work site or other conditions make a physical posting impractical (including remote work, private residences employing only one worker, and certain entirely outdoor work sites lacking an indoor area), the employer or principal shall provide a copy of the poster to each employee or worker within their first month of work, including through (if information is customarily disseminated to the employees or workers through these means) either electronic communication or conspicuous posting in a web-based platform.

**4.2** A written HFWA notice shall be provided to each employee, in addition to the poster requirement.

**4.2.1** The written HFWA notice to each employee shall specify the same information specified in Rule 4.1.1 for those covered by HFWA.

**4.2.2** Employers may use the latest version of the "Colorado Workplace Public Health Rights Poster" (provided by the Division at [www.coloradolaborlaw.gov](http://www.coloradolaborlaw.gov)) to satisfy the written notice requirements of HFWA. Employers may comply by using another written notice that contains all substantive information in the "Colorado Workplace Public Health Rights Poster" and otherwise satisfies all statutory and rule requirements.

**4.2.3** Including the written HFWA notice among other employment-related documents (such as a handbook, a manual, or other written or posted policies) complies with this written

notice requirement, as long as the documents are provided either:

- (A) in hard copies given to each employee; or
- (B) in electronic form, if the employee --
  - (1) can easily access the documents electronically, and
  - (2) is provided actual notice that the documents contain information regarding their terms of employment, not just a link that fails to so notify the employee.

**4.3** Posters and notices required by these Rules shall be in English and any language that is the first language spoken by at least five percent of the employer's or principal's workforce. The "Colorado Workplace Public Health Rights Poster" (provided by the Division at [www.coloradolaborlaw.gov](http://www.coloradolaborlaw.gov)) is available in multiple languages. If an employer or principal needs the poster in a language not already provided, it has 30 days to procure a translation, and may ask the Division for a translation, which the Division will endeavor to provide if feasible.

**4.4** Employers or principals shall be deemed noncompliant if they attempt to minimize the effect of posters or notices required by statute or these Rules, such as by communicating positions contrary to, or discouraging the exercise of rights covered in, the required poster or notice.

**4.5** The poster and written notice rights and responsibilities of PHEW, C.R.S. § 8-14.4-103, and of HFWA, C.R.S. § 8-13.3-408, have applied since each statute took effect on July 11, 2020 and July 14, 2020, respectively, and will be interpreted in conformity with these Rules. Employers and principals will be deemed compliant if they executed required posting(s) and/or notice(s) within 30 days of the applicable statutory effective date.

**4.6** Violation of these poster or notice requirements may subject the violator to:

- (A) fines pursuant to C.R.S. § 8-1-140;
- (B) additional fines for willful violations pursuant to C.R.S. § 8-13.3-408(4); and/or
- (C) in the event that the violator also committed another violation of HFWA or PHEW, fines in the maximum amount available for that violation under HFWA (pursuant to C.R.S. §§ 8-4-111, 8-4-113, 8-13.3-407(5)) or PHEW (pursuant to C.R.S. § 8-14.4-105(3)).

## **Rule 5. Protected Activity**

**5.1** For the PHEW provision that raising a "concern about workplace violations of government health or safety rules, or about an otherwise significant workplace threat to health or safety, related to a public health emergency" is protected against retaliation if the worker's belief as to a violation or threat is, whether or not correct, was "reasonable" and "in good faith" (C.R.S. § 8-14.4-102(1)):

**5.1.1** relevant evidence includes a recommendation, research, guidance, or other information from or provided by a public health agency (federal, state, or local), a major medical association, a major industry-specific trade association, a major public health organization, or another similarly reliable source; and

**5.1.2** the worker, whether or not citing a specific rule or guideline, must state what action, condition, or situation they believe constitutes a qualifying violation of a rule regarding, or significant threat to, workplace health or safety.

**5.2** For protected use of a worker's own personal protective equipment ("PPE") under PHEW, the requirements of C.R.S. §§ 8-14.4-102(a)-(c) are conjunctive: PHEW protection for PPE use applies only if the PPE provides a higher level of protection as required by 102(a), is recommended by an applicable public health agency as required by 102(b), and does not render

the worker incapable of performing as required by 102(c).

- 5.2.1** For the C.R.S. § 8-14.4-102(3)(a) requirement that a worker's PPE "provides a higher level of protection than the equipment provided by the principal":
- (A) the provisions of Rule 5.1.1 as to relevant information apply;
  - (B) information may not be relied on if, before the worker either brought the PPE to work or communicated about the PPE with the principal, the information was repealed or otherwise repudiated by the person or entity who provided it, but information may still be relied on if, though no longer publicly published, it was not repealed or repudiated;
  - (C) if principal-provided PPE of the same type is either cleaned or replaced, the worker's own PPE must also be either cleaned or replaced; and
  - (D) the requirement is not met if the PPE is more protective of the worker yet less protective of others (e.g., a mask with a vent releasing air that, even if highly protective for the wearer, is less protective for others).
- 5.2.2** For the C.R.S. § 8-14.4-102(3)(b) requirement that PPE is "recommended by a federal, state, or local public health agency with jurisdiction over the worker's workplace," the provisions of Rule 5.2.1(B) as to relevant information apply.
- 5.2.3** Special cases as to the requirements of C.R.S. §§ 8-14.4-102(3)(a) (that the PPE "provides a higher level of protection than the equipment provided by the principal") and 8-14.4-102(3)(b) (that the PPE "is recommended by a federal, state, or local public health agency with jurisdiction over the worker's workplace").
- (A) If a principal provides a worker *no* face covering during **(1)** a public health emergency related to an airborne pathogen, or **(2)** a governmental public health recommendation of a face covering for those in the worker's occupation, then **(3)** a worker using their own face covering presumptively meets the C.R.S. §§ 8-14.4-102(3)(a)-(b) requirements ("higher level of protection" and "recommended"), without need for further evidence or inquiry, unless the principal proves that the worker's face covering is worse than none at all.
  - (B) If a principal **(1)** provides a form of PPE (e.g., a mask) that is compliant with all applicable recommendations by federal, state, and local public health agencies with jurisdiction over the workplace, and **(2)** procures that PPE from a provider it knows to provide reliable PPE (from experience prior to obtaining the particular item it is providing to a worker wishing to use their own PPE), then **(3)** a worker may use their own PPE of the same type (e.g., a different mask) only if it was obtained from a reliable provider, whether or not the principal's provider.
- 5.2.4** An unlawful decision to disallow a worker from wearing PPE that they are permitted to use under C.R.S. §§ 8-14.4-102(3)(a)-(c) is an adverse action, and may qualify as a constructive discharge if all of the following apply:
- (A) the principal fails to remedy the unlawful decision immediately;
  - (B) working without the PPE would increase a substantial threat to health or safety for any person; and
  - (C) the worker terminates the work for the principal because of unwillingness to work without the PPE.