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

As proposed on October 29, 2021; if adopted, to be effective following the close of rulemaking.~~Adopted on November 9, 2020, 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), the Equal Pay for Equal Work Act of 2019 ("EPEWA," C.R.S. Title 8, Article 5), the Agricultural Labor Rights and Responsibilities Act of 2021, Colorado Senate Bill 21-87 ("ALRRA"), 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, -206(3)(c)(II); § 8-4-111; § 8-5-203; §§ 8-6-105, -106, -108, -117; §§ 8-13.3-403(9), -407(6), -408(1)-(2), -409, -410; § 8-13.5-204(1)(b); 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, 13.5, 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. All Division Rules are available to the public at www.coloradolaborlaw.gov. Where these Rules have provisions different from or contrary to any incorporated or referenced material, the provisions of these Rules govern so long as they are consistent with Colorado statutory and constitutional provisions.

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, Rule 4.3.

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, whistleblower, key service provider, or other protected party 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, (A) Article 13.3, "Employee" and "Employer" have the same meaning as in C.R.S. §§ 8-13.3-402(4),(5); and (B) Article 5, "Employee" and "Employer" have the same meaning as in C.R.S. §§ 8-5-101(4),(5). As used in these rules, the term "Employee" includes an agricultural employee as defined in C.R.S. § 8-2-206(1)(b) and an agricultural worker as defined in C.R.S. § 8-13.5-201(3), and the term "Employer" includes an agricultural employer as defined in C.R.S. § 8-2-206(1)(c), except as otherwise provided.

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~~.~~, and/or that the Division has received and declined to investigate a Complaint for purposes of C.R.S. §§ 8-2-206(3)(c)(II), 8-13.3-411(4)(d), or 8-13.5-204(1)(b).

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.~~ In "retaliation" or "interference" claims or investigations, the following definitions apply:

2.11.1 "Protected activity" means, as to any right under these Rules or any statute or rule to which these Rules apply, either:

(A) asserting, seeking, or exercising any right or remedy;

(B) opposing a possible or perceived violation;

(C) participating in a formal or informal investigation, hearing, complaint, or other

process or proceeding that relates to any possible or perceived violation, or that relates to any relevant claim, right, or rule; or

(D) engaging in any other activity authorized or protected thereby.

With respect to rights under PHEW, "protected activity" is further defined in Rule 5 herein.

2.11.2 "Retaliation" means, and is synonymous with, discrimination based on or for protected activity, and it encompasses any act (whether an affirmative act, an omission, or a statement) that is intended to, and could, deter a reasonable person from engaging in, or impose consequences for, protected activity. Examples of retaliation include:

(A) using the assertion or exercise of any right protected by these Rules, or any statute or rule to which these Rules apply, as a negative factor in any employment action;

(B) acts that may not affect employment status but that may dissuade, deter, or interfere with engaging in protected activity, such as acts prohibited by Rule 4.8.2 of the Wage Protection Rules (7 CCR 1103-7), or acts that interfere or threaten to interfere with the receipt of public benefits.

2.11.3 "Interference" means any act (whether an affirmative act, an omission, or a statement) that, regardless of intent, interferes with any protected activity or any right under these Rules or any statute or rule to which these Rules apply, including any act that deters any protected activity. Examples of acts that may constitute interference include:

(A) failing to authorize the exercise of a right, imposing stricter conditions upon exercising a right (e.g., as to documentation or notice) than the applicable statute or rule permits, or altering employment conditions, rules, or procedures to limit coverage;

(B) failing to effectively provide a required notice or notification as to an employee's rights;

(C) inducing or attempting to induce an employee, worker, whistleblower, key service provider, or other protected party to prospectively waive a right;

(D) imposing consequences (whether or not employment-related) for or discouraging the exercise of any such right, such as by counting paid sick leave taken by an employee pursuant to HFWA as an absence that may lead to negative consequences;

(E) "access interference" with an agricultural employee's rights to reasonable access (as defined by C.R.S. § 8-13.5-202 and the Agricultural Labor Conditions Rules, 7 CCR 1103-15, Rule 4) to visitors at employer-provided housing, to employee residence access and egress, to key service providers, or to required transportation; except an agricultural employer may apply generally applicable hazard or safety protocols to work site visitors.

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.

2.16 Under the ALRRA and PHEW, a "whistleblower" is defined as follows, and need not have personally experienced the relevant violation:

(A) under the ALRRA, an agricultural employee "with knowledge of an alleged violation of Part 2 [of Article 13.5 of C.R.S. Title 8] or the agricultural worker's representative" (as defined in C.R.S. § 8-13.5-201(4)); and

(B) under PHEW, a worker with knowledge of an alleged violation of Article 14.4 of C.R.S. Title 8 or the "worker's representative" (as defined in C.R.S. § 8-14.4-107).

2.17 Under the ALRRA, the definitions of the following parties apply.

2.17.1 "Agricultural employee" and "agricultural worker," as to rights and responsibilities under C.R.S. § 8-2-206 of the ALRRA, identically mean a person employed by an agricultural employer. As to other rights and responsibilities under the ALRRA, "agricultural employee" and "agricultural worker" identically mean an employee engaged in any service or activity included in 29 U.S.C. § 203(f) or 26 U.S.C. § 3121(g).

2.17.2 "Agricultural employer," as to rights and responsibilities under the ALRRA, means a person engaged in any service or activity included in 29 U.S.C. § 203(f) or 26 U.S.C. §3121(g) who either (1) contracts with any person who recruits, solicits, hires, employs, furnishes, or transports agricultural employees, or (2) regularly engages the services of one or more agricultural employees. Under C.R.S. § 8-3-104(1)(b) of the ALRRA, "[t]he meaning of 'agricultural employer' must be liberally construed for the protection of persons providing services to an employer."

2.17.3 "Other protected party," as to rights and responsibilities under the ALRRA, means a person who has, or is perceived as having, any of the following relationships protected against retaliation by C.R.S. § 8-2-206 of the ALRRA:

(A) a "familial . . . relationship" with an agricultural employee (C.R.S. § 8-2-206(3)(c)), which encompasses (1) a spousal relationship (including a common-law marriage, civil union, or domestic partner), (2) any of the following relationships by blood, marriage, or adoption: parent, grandparent, son, daughter, grandson, granddaughter, brother, sister, stepparent, stepbrother, stepsister, stepson, stepdaughter, uncle, aunt, niece, nephew, or cousin (*i.e.*, a "relative" as defined by C.R.S. § 26-6-102(32)), or (3) another person with whom the employee similarly "has a significant personal bond . . . regardless of biological or legal relationship" (C.R.S. § 8-13.3-503(11)(e)), such as a longtime household member.

(B) a "workplace relationship" with an agricultural employee (C.R.S. § 8-2-206(3)(c)), which encompasses any person with whom the employee has interacted repeatedly in the scope of their employment, regardless of the person's employer or employment status.

(C) a "person with whom the agricultural employee exchanges care or support" (C.R.S. § 8-2-206(3)(c)), which encompasses any relationship in which the employee or the person, outside of their scope of employment, provides care or support to the other with (1) health, family care, transportation, or similarly important personal needs, or (2) any other needs that the individual lacks capacity to perform on their own, such as hygiene, financial or similar paperwork, or home tasks (basic cleaning, shopping, cooking, maintenance, etc.).

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 "C.R.S. § 8-4-113(1)(b)" is replaced with "C.R.S. § 8-1-140(2)"; and

(C) for Claims under PHEW and the ALRRA, references to "employers" or "employees" shall include "principals" and "workers," respectively, as defined by PHEW and these Rules, and "agricultural employers" and "agricultural employees," respectively, as defined by the ALRRA and these Rules.

3.2 Complaint filings.

3.2.1 An employee ~~or~~, worker, whistleblower, key service provider, or other protected party 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 90~~30~~ days of receipt of a Complaint (or within 90~~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 Complaint is subject to C.R.S. §§ 8-14.4-105(2)(b), 8-2-206(3)(c)(II), 8-13.3-411(4)(d), 8-13.5-204(1)(b) and the Division declines to exercise its discretion to investigate the Complaint. Under this Rule 3.3.3, a Complaint is considered received when the Complainant has provided all information and documents needed to process the Complaint, as requested in the Division Complaint form or by a Division investigator.

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 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, HFWA, or the ALRRA:

(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 that the Complainant has exhausted administrative remedies if required to do so.

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 occurred. The Respondent must explain which, if any, allegations it disputes. Any evidence probative of a relevant issue may be submitted or considered. If an agricultural employer takes an "adverse action" (as defined in C.R.S. § 8-2-206(1)(a)) against an agricultural employee within 90 days of protected activity, under C.R.S. § 8-2-206(3)(b), that creates a rebuttable presumption of retaliation, shifting the burden of proof to the Respondent to offer any such rebuttal.

(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 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 and orders, 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) the greater of actual damages or ten thousand dollars for each violation of the ALRRA, as stated in C.R.S. §§ 8-2-206 and 8-13.5-204, and/or

(~~4~~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, and/or otherwise redress direct or indirect consequences of violations, as authorized by the statute(s) under which the Complaint was filed and statutes on Division

investigative and enforcement authority, including but not limited to C.R.S. Title 8, Article 1, § 8-2-206(3)(c)(I), Articles ~~and~~ 4-6, and § 8-13.5-204(1)(b), (2)(a)(I); and/or~~.~~

(D) for any award under C.R.S. § 8-13.5-204 of the ALRRA, the Division's determination must order that any amounts recovered by a whistleblower or key service provider pursuant to the award must be distributed to agricultural workers affected by the violation who can be located, insofar as such disbursement is economically feasible.

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 Poster requirements. 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). All agricultural employers must post a notice of agricultural employees' rights under Part 2 of Article 13.5 of Title 8, C.R.S., as required by C.R.S. § 8-13.5-202.

4.1.1 The poster(s) 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; and~~.~~

(D) for those covered by the ALRRA, all rights under Part 2 of Article 13.5 of Title 8, C.R.S., and rules issued pursuant to and as implementation of those provisions, including: (1) § 202 of Part 2 (access to key service providers, visitors, and employee residences); (2) § 203 of Part 2 (protections from heat illness and injury; restrictions on short-handled hoe and other short-handled tool use; and for hand-weeding/thinning, additional rest as well as gloves and knee pads); and (3) § 204 of Part 2 (procedures and remedies for enforcement of Part 2 rights); and (4) the Agricultural Labor Conditions Rules, 7 CCR 1103-15.

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) to satisfy the poster requirements of both HFWA and PHEW. Agricultural employers may use an up-to-date "Agricultural Labor Rights and Responsibilities Poster" published by the Division or, at any time such a poster is unavailable, an up-to-date version of an Interpretive Notice and Formal Opinion on agricultural labor rights and responsibilities published by the Division, to satisfy the poster requirements of the ALRRA. Employers and principals may comply by using another poster that contains all substantive information in the "Colorado Workplace Public Health Rights Poster," and if applicable, in an "Agricultural Labor Rights and Responsibilities Poster," and otherwise satisfies all statutory and rule requirements.

4.1.3 The poster(s) 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, and in all places where notices concerning the rights and safety of employees or workers are customarily posted — such as in break rooms, on employee bulletin boards, and/or adjacent to time clocks, department entrances, and/or facility entrances. In addition:

(A) Agricultural employers must post an "Agricultural Labor Rights and Responsibilities Poster" or equivalent posting at any employer-provided housing, and must post it electronically, including by e-mail and on an intranet or internet site, if the agricultural employer customarily communicates with agricultural employees by these means.

(B)~~4.1.4~~If the work site or other conditions make a physical posting of the "Colorado Workplace Public Health Rights Poster" 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 Notice and Guidance Requirements. ~~A written HFWA notice shall be provided to each employee, in addition to the poster requirement.~~

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

(A)~~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.

(B)~~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) 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.

(C)~~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:

(1~~A~~) in hard copies given to each employee; or

(2~~B~~) in electronic form, if the employee --

(a~~1~~) can easily access the documents electronically, and

(b~~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.

4.2.2 Under C.R.S. § 8-14.4-109 of the ALRRA, during a public health emergency, a principal engaged in agricultural employment (as defined in C.R.S. § 8-13.5-201(2)) must also provide resources to agricultural employees as follows.

(A) Employers must "provide informational and educational materials through posters and pamphlets written in English and Spanish and any other relevant languages [...as defined in Rule 4.3, that (1)] lists the contact information for the migrant farm worker division of Colorado Legal Services, or its successor organization, where a worker may receive free and confidential legal services; and [...(2)] informs the workers regarding federal and state guidance concerning [...the] public health emergency."

(B) These materials must be provided "in employer-provided housing, work sites, and other places where the principal usually posts information for the workers[.]" If materials are damaged or removed, they must be replaced within 48 hours of damage or removal.

(C) An employer may comply with these requirements by providing a copy (including an electronic copy, if the employer customarily communicates to the employees in this form) of up-to-date guidance recommended by the Occupational Safety and Health Administration (OSHA) as to workplace conditions in a public health emergency (as of the publication of these rules, available at https://www.osha.gov/coronavirus/safework) and guidance by the Colorado Department of Public Health and Environment (CDPHE) that is (a) related to the public health emergency; and (b) relevant to agricultural employees (as of publication of these rules, available at https://covid19.colorado.gov/guidance-for-the-agriculture-industry).

(D) Employers must also "provide training to workers concerning safety precautions and protections during [...the] public health emergency." an employer may comply with these requirements by training workers in accordance with federal OSHA recommendations or CDPHE recommendations applicable to agriculture.

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) is available in multiple languages. The "Agricultural Labor Rights and Responsibilities Poster" will also be made 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, and ALRRA, C.R.S. § 8-13.5-202, have applied since each statute took effect on July 11, 2020, ~~and~~ July 14, 2020, and June 25, 2021, 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 under PHEW

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.