



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

County Collective Bargaining Rules (“COBCA Rules”), 7 CCR 1103-16 (2023), 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, Article 3.3 (2023), the “Collective Bargaining by County Employees Act,” as well as the general labor law implementation and enforcement authority of C.R.S. Title 8, Articles 1 and 3 (2023), 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. §§ 8-1-118; 8-3.3-106, -108, -109, and -115(6)(b).

III. FINDINGS, JUSTIFICATIONS, AND REASONS FOR ADOPTION. Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds as follows: **(A)** demonstrated need exists for these rules, as detailed in the findings in Part IV, which are incorporated into this finding as well; **(B)** proper statutory authority exists for the rules, as detailed in the list of statutory authority in Part II, which is incorporated into this finding as well; **(C)** to the extent practicable, the rules are clearly stated so that their meaning will be understood by any party required to comply; **(D)** the rules do not conflict with other provisions of law; and **(E)** any duplicating or overlapping has been minimized and is explained by the Division.

IV. SPECIFIC FINDINGS FOR ADOPTION. Pursuant to C.R.S. § 24-4-103(6), the Director finds as follows.

A. Broad Purpose of Rules.

The “County Collective Bargaining Rules,” or “COBCA Rules,” is a new rule set implementing the requirements of the Collective Bargaining by County Employees Act (“COBCA” or “the Act”), [S.B. 22-230](#) (Ch. 260, sec. 2, § 8-3.3-101 et seq., 2022 Colo. Sess. Laws 1900, 1900–1920, enacted May 27, 2022 and effective July 1, 2023¹). COBCA requires Division rulemaking to create a regulatory framework consistent with the legislative declaration in COBCA:

- (a) “promot[ing] harmonious, peaceful, and cooperative relationships between counties and county employees”;
- (b) “recogniz[ing] the rights of county employees to join organizations of their own choosing, to be represented by those organizations, and to collectively bargain with their employer over wages, hours, and other terms and conditions of their employment thereby improv[ing] the delivery of public services”; and
- (c) recognizing that “collective bargaining for county employees is a matter of statewide concern that affects public safety and general welfare.”²

COBCA requires the Director to promulgate rules as deemed necessary for the Division’s enforcement, interpretation, application, and administration of COBCA. Division rulemaking is required under COBCA to establish administrative procedures for (1) designating appropriate bargaining units under C.R.S. § 8-3.3-110; (2) selecting, certifying, and decertifying exclusive representatives under C.R.S. §§ 8-3.3-108, -109, and -111; and (3) filing, hearing, and determining complaints of unfair labor practices under C.R.S. § 8-3.3-115.

The COBCA Rules detail procedures, rights, and responsibilities for those three key aspects of COBCA. First, as to appropriate bargaining units, these rules largely follow procedures COBCA details and make explicit certain overarching policy considerations that inform public sector bargaining unit determinations, in addition to the factors COBCA expressly outlines. Second, with respect to the certification and decertification of exclusive representatives, these rules detail how the Division will receive petitions, resolve bargaining unit disputes, evaluate showings of interest, conduct representation elections, and determine any disputes or other complications, such as runoff elections or ties, that may arise. Third, with respect to unfair labor practice complaints (which may be filed by county employees, their employee organizations, or a county), these rules detail how the Division will receive, investigate, and adjudicate complaints. Where appropriate, these rules follow the general labor law implementation and enforcement authority of the Industrial Relations Act and its implementing rules, providing consistency and transparency in Division labor relations processes.

¹ Except § 8-3.3-106, in COBCA § 2, and §§ 3-5, enabling Division rulemaking and program creation, effective July 1, 2022.

² Ch. 260, sec. 2, § 8-3.3-101 et seq., 2022 Colo. Sess. Laws 1900, § 1 (Legislative Declaration).

B. Rule 2: Definitions.

1. Rule 2.2: Definition of “bargaining unit” as used in C.R.S. § 8-3.3-102(1).

Rule 2.2 reiterates the definition of a “bargaining unit” set forth in C.R.S. § 8-3.3-102(1) for convenience of reference. Though the Division received some comments requesting additional clarification about categories of employees excluded from a bargaining unit,³ the Division finds that the terms “confidential employee,” “managerial employee,” “executive employee,” and “temporary, intermittent, or seasonal employees” are sufficiently defined by COBCA; follow similar definitions in the Colorado Partnership for Quality Jobs and Services Act;⁴ and are well-developed in other case law and administrative decisions, including under the federal National Labor Relations Act (“NLRA”), by the National Labor Relations Board (“NLRB”),⁵ and in public employee bargaining statutes in other jurisdictions,⁶ all of which may also provide guidance in situations where the facts support their application.

2. Rule 2.10: Definition of “employee organization” as used in C.R.S. § 8-3.3-102(12).

Rule 2.10 clarifies that the language of C.R.S. § 8-3.3-102(12), which uses the term “a nonprofit organization” in defining an employee organization, should be interpreted consistently with Colorado’s long-standing practice of allowing informal groups of employees to petition for certification as the exclusive representative of an appropriate bargaining unit. This rule also clarifies that “employee organization” is synonymous with “labor organization,” including with respect to the portions of the LPIR Rules incorporated into these rules.

3. Rule 2.13: Order.

Because the Division received a number of comments inquiring as to which orders, among the wide range of orders the Division may issue in the course of a labor relations dispute or election, qualify as appealable final orders, or otherwise would or would not be appealable,⁷ the Division added the definition of “order” from C.R.S. § 8-1-101(11), which also mirrors Rule 2.11 in the LPIR Rules, to further clarify that not every order is an appealable final order.

4. Rule 2.14: Definition of “organizations” as used in C.R.S. § 8-3.3-104(4).

The Division received comments from county commissioners on whether the C.R.S. § 8-3.3-104(4) regulation of deductions could interfere with a county’s ability to facilitate other voluntary deductions from employee paychecks, such as for charitable organizations. Rule 2.14 clarifies that § 104(4)’s regulation of deductions for exclusive representatives or related entities is limited to such entities, and does not apply in other situations such as charitable organization deductions

³ Written comment, 12/13/22, by: Daniel Perkins, Senior Assistant County Attorney, Arapahoe County Attorney’s Office; Olivia Lucas, Senior Assistant County Attorney, Boulder County Attorney’s Office; Daniel Tom, County Attorney, Chaffee County Attorney’s Office; Matthew Hoyt, County Attorney, Gunnison County Attorney’s Office; Jason Soronson, Assistant County Attorney, Jefferson County Attorney’s Office; M. Christina Floyd, County Attorney, Lake County Attorney’s Office; Sheryl Rogers, County Attorney, La Plata County Attorney’s Office; Bill Ressue, County Attorney Larimer County Attorney’s Office; Nina Atencio, Chief Deputy County Attorney, Mesa County Attorney’s Office; Amy Markwell, County Attorney, San Miguel County Attorney’s Office; Kenneth Fellman, Kissinger & Fellman for Yuma County Attorney’s Office, at 3 (requesting in point #7: “Clarification of vague terms. The rules should more specifically define terms/concepts such as . . . categories of employees that are excluded from being in a bargaining unit.”).

⁴ C.R.S. § 24-50-1102(2), (3), (8), and (10) (2022); *see also Colorado Workers for Innovative and New Solutions v. Veitch*, No. 2021CV32782 (Denver Dist. Ct. June 29, 2022) (unpublished) (applying FLSA regulatory guidance and out-of-state case law defining “executive employee” where the statutory language was identical to that in the Colorado Partnership Act).

⁵ Under NLRA § 2(11), “‘supervisor’ means any individual having authority, in the interest of the employer, 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). As to the 12 listed indicia, § 2(11) is interpreted in the disjunctive; “possession of any one of the authorities listed . . . places the employee invested with this authority in the supervisory class.” *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949). “Managerial employees are . . . those who ‘formulate and effectuate management policies by expressing and making operative the decisions of their employer.’” *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682, 100 S. Ct. 856, 862 (1980) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974)).

⁶ *E.g.*, Mass. Ann. Laws ch. 150E, § 1 (2022) (defining and excluding “managerial” and “confidential” employees from “employee” definition); 5 Ill. Comp. Stat. Ann. 315/3 (2022) (similarly defining and excluding “confidential” and “managerial” employees, as well as “short-term” employees); Ohio Rev. Code Ann. § 4117.01(C) (2022) (excluding 17 categories of employees from “public employee,” including “confidential,” “management level,” and “seasonal and casual” employees).

⁷ *E.g.*, written comment by Boulder County Attorney’s Office, submitted by Olivia Lucas, 4/28/23, at 2 (“We suggest that the Proposed Rules better clarify when certain Director/Division determinations can be appealed.”); written comment by Gunnison County Board of County Commissioners, submitted by Matthew R. Hoyt, 4/28/23, at 3 (same).

5. Rule 2.16: Posting.

Rule 2.16 defines what it means to post a notice, to provide employers more concrete guidance on how to notify employees of relevant COBCA matters. COBCA requires distribution without specifying means or forms,⁸ but the statutory language and overall structure confirm a purpose of ensuring that all potentially affected employees are reached — a purpose served by both distribution of individual notices and distribution to the workplace as a whole in the form of a posting. The Rule 2.16 definition of “post” also recognizes and addresses recent shifts in the modern workplace—*e.g.*, employees may work remotely or otherwise away from an employer’s office or place of business—by also requiring public posting on electronic fora used by the employer.

6. Rule 2.17: Showing of Interest.

Rule 2.17 follows COBCA in providing that a showing of interest signature may be submitted in a number of forms, including an electronic signature.⁹ Though the Division received a comment requesting “written signatures or reasonable facsimiles thereof for all occurrences that require[] a signature from employees,”¹⁰ because such a rule is contrary to statute, the Division declines to amend its proposed rule.

C. Rule 3: Filing, Service, and Deadlines.

1. Rule 3.1: Filing.

Rule 3.1 follows the filing and service provisions in other Division rules and facilitates the ongoing shifts to electronic filing by the Division and other similar entities. The rule, however, also recognizes that the Division’s shift to electronic filing 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 3.2: Serving another party.

Because the Division will often require parties engaged in Division election or unfair labor practice processes 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 some court rules may require.

3. Rule 3.3: Computation of time.

Rule 3.3 clarifies that calendar days will be used to calculate time under COBCA, following C.R.S. § 2-4-108.

D. Rule 4: Certification or Decertification of Exclusive Representative

1. Rule 4.1.5: Certification of voluntarily recognized organizations as bargaining representatives.

Rule 4.1.5 recognizes that if an employee organization is voluntarily recognized as required by C.R.S. § 8-3.3-108(a) and (b), then nothing in COBCA requires an employee organization to seek certification from the Division as the exclusive bargaining representative. But because the certification process conveys the full protections of the Act to an employee organization, including the election bars provided in C.R.S. § 8-3.3-111(2)-(3), voluntarily recognized employee organizations may wish to seek certification. Accordingly, COBCA provides a simplified procedure for certain voluntarily recognized employee organizations to obtain certification in C.R.S. § 8-3.3-108(2)(a)-(b).

2. Rule 4.4: Appropriate bargaining unit disputes under C.R.S. § 8-3.3-110.

Rule 4.4 explains how the Division will evaluate appropriate bargaining units. COBCA permits parties to consent to an appropriate unit, and COBCA expressly excuses the Division from ruling on the appropriateness of a bargaining unit (C.R.S. § 8-3.3-110(1)) where (A) the parties consent to the unit,¹¹ and (B) as of unit certification, the Division has no evidence the unit otherwise violates an express COBCA prohibition.¹² If the parties cannot agree, however, Rule 4.4.1

⁸ C.R.S. § 8-3.3-109.

⁹ C.R.S. § 8-3.3-102(22).

¹⁰ Written comment by Arapahoe County Board of County Commissioners, submitted by Jeff Baker, 4/28/23, at 4.

¹¹ *Compare NLRB v. Cardox Div. of Chemetron Corp.*, 699 F.2d 148, 153 (3d Cir. 1983) (“The Board can not simply defer to a voluntary agreement . . . by an employer and a union without making any assessment that the unit identified within the agreement is proper.”).

¹² *E.g.*, the unit does not contain any confidential or managerial employees, as the COBCA *definition* of a “bargaining unit” states that a bargaining unit cannot include such categories of employees. C.R.S. § 8-3.3-102(1).

explicitly incorporates the purposes of COBCA as part of the Division’s determination of the appropriate bargaining unit.

3. Rule 4.4.1: Deadline for notifying the Division of a bargaining unit dispute.

Rule 4.4.1 sets a 10-day deadline for parties or an intervenor to notify the Division of any bargaining unit dispute, following the 10-day deadline set for an intervenor petition under COBCA, § 8-3.3-109(2) and Rule 4.2.1.

4. Rule 4.4.2: Factors that may be considered when determining the appropriate bargaining unit.

Under COBCA, relevant factors in determining an appropriate bargaining unit include any “that are normally or traditionally taken into consideration in determining the appropriateness of bargaining units in the public sector.” C.R.S. § 8-3.3-110(2)(f). Given the variety of settings in which a bargaining unit may be proposed, and given that counties may have limited experience with collective bargaining, the Division declines to propose a highly detailed list of enumerated factors in these new rules. Nevertheless, the Division finds that there are three factors that parties may wish to highlight as appropriate to help guide the Division’s bargaining unit determination.¹³

Factor (A), community of interest and right to effective representation, reflects long-standing considerations in the field of public sector bargaining and bargaining units. “Community of interest” is a traditional, long-standing approach to unit determination,¹⁴ largely mirroring considerations already present in the enumerated factors of § 110 of COBCA.

Factor (B), efficiency of county operations, is a broad policy consideration intended to take into account a number of county-employer concerns. This factor was informed by stakeholder comments — particularly, county commissioners’ concerns about the prospect of bargaining with an unknown number of multiple exclusive representatives — and by the statutes and rules of other states with long histories of authorizing and regulating public employee bargaining.¹⁵ Certain other states, and Colorado’s own Partnership for Quality Jobs and Services Act, explicitly address this concern by structuring statewide bargaining units.¹⁶ As COBCA has no similar provisions, and expresses no such legislative intent, the rules neither require nor express a preference for any particular type or scope of unit.

Factor (C), promotion of harmonious, peaceful, and cooperative employment relations, is from the COBCA Legislative Declaration: “The general assembly hereby finds and declares that: (a) It is the purpose of this act to promote harmonious, peaceful, and cooperative relationships between counties and county employees in the state of Colorado.”¹⁷

5. Rule 4.4.3: Appropriate bargaining unit determinations.

Rule 4.4.3 incorporates an administrative procedure into the Division’s determination of the appropriate bargaining unit as provided by COBCA, C.R.S. § 8-3.3-109(3). In response to comments received,¹⁸ the Division made minor edits to

¹³ Other states with rights to public sector bargaining consider similar factors. Massachusetts, for example, statutorily delineates a very similar three factors. Mass. Ann. Laws ch. 150E, § 3 (2022) (“determination of appropriate bargaining units . . . shall be consistent with the purposes of providing for stable and continuing labor relations, giving due regard to such criteria as community of interest, efficiency of operations and effective dealings, and to safeguarding the rights of employees to effective representation.”).

¹⁴ Outside the public sector, “community of interest” has been an NLRB keystone for over 80 years. 3 NLRB Annual Report 174, 157 (1938) (“Self-organizations among employees is generally grounded in a community of interest in their occupations, and more particularly in their qualifications, experience, duties, wages, hours, and other working conditions. This community of interest may lead to organization along craft lines, along industrial lines, or in any other number of other forms representing adaptations to special circumstances. The . . . numerous and diverse forms which self-organization among employees can take . . . preclude the application of rigid rules to the determination of the unit appropriate . . .”). In the public sector, “community of interest” has similarly remained a touchstone. Mass. Ann. Laws ch. 150E, § 3 (2022); 80 Ill. Admin. Code R. tit. 80, § 1210.37; Ohio Rev. Code Ann. § 4117.06(b).

¹⁵ *E.g.*, Ohio Rev. Code Ann. § 4117.06 (2022) (state employment relations board must consider, among other factors, “the effect of over-fragmentation, the efficiency of operations of the public employer; [and] the administrative structure of the public employer”); 5 Ill. Comp. Stat. Ann. 315/9(b) (2022) (“The Board shall decide in each case, . . . to assure public employees the fullest freedom in exercising the rights guaranteed by this Act, a unit appropriate for . . . collective bargaining, based upon but not limited to such factors as: historical pattern of recognition; community of interest including employee skills and functions; *degree of functional integration*; interchangeability and contact among employees; *fragmentation of employee groups*; common supervision, wages, hours and other . . . conditions . . . ; and the desires of the employees. . . . [F]ragmentation shall not be the sole or predominant factor. . . .”) (emphasis added).

¹⁶ *E.g.*, Wis. Stat. Ann. § 111.825(1) (2022) (“[C]ollective bargaining units for employees in the classified service . . . are structured on a statewide basis with one collective bargaining unit for each of the following occupational groups.”). *See also* Colorado Partnership for Quality Jobs and Services Act, C.R.S. § 24-50-1105(1) (“There is a single partnership unit composed of all covered employees.”).

¹⁷ Ch. 260, sec. 2, § 8-3.3-101 *et seq.*, 2022 Colo. Sess. Laws 1900, 1900, § 1 (Legislative Declaration).

¹⁸ Written comment by AFSCME, 4/27/23, at 6 (suggesting 10-day deadline to object to bargaining unit composition); written comment by Arapahoe County Board of County Commissioners, submitted by Jeff Baker, 4/28/23, at 2 (noting there is “no process in the Proposed Rules for the Parties to submit evidence or argument on those factors or to otherwise challenge a decision by the Director” on bargaining

this rule and added Rule 4.4.1 to clarify the deadlines and circumstances in which position statements and responsive statements may be permitted or required.

6. Rule 4.4.4: Hearings in appropriate bargaining unit disputes.

Rule 4.4.4 clarifies that while COBCA § 110 requires the Division to consider a specified list of factors, the separate section (COBCA § 106) requiring factual and legal findings in Division decisions does not require specific findings on each factor considered.

7. Rule 4.4.5: An appropriate unit.

Rule 4.4.4 makes explicit that the Division will apply the traditional labor relations rule that the Division need not search for the single *most* appropriate unit, but instead must decide only if a proposed unit is *an* appropriate unit.¹⁹

8. Rule 4.4.6: Bargaining unit determination is not separately appealable.

Rule 4.4.5 follows COBCA and the general practice²⁰ of not permitting an appeal of the bargaining unit determination alone. Not only would such appeals unreasonably delay elections and certifications, but the legislature ultimately authorized the Director to make this administrative determination.²¹ Challenges to the bargaining unit determination may, however, be made post-certification, as part of an objection or appeal of the outcome of an election.

9. Rule 4.5.4: Sufficiency of showing of interest is not appealable.

Rule 4.5.4 follows COBCA,²² which codifies the general practice²³ of not permitting an appeal of the showing of interest determination, in part because any potential error as to a showing of interest determination is effectively mooted after an election that serves as the ultimately operative determination of the level of employee interest in representation.

10. Rule 4.6: Election Procedures.

Rule 4.6 as proposed was modified to clarify that the rules in this subsection regulate all representation elections, decertification as well as certification. The final rule also provides further guidance on the conduct of representation elections under COBCA. The Division received a number of comments requesting clarification, and more detail, as to (a) election procedures and (b) the extent to which the COBCA Rules follow, parallel, or depart from the LPIR Rules.²⁴ In

units); written comment by Board of County Commissioners of Mesa County, submitted by Andrea Tina Atencio, 4/28/23, at 2 (requesting, among other points, timelines for bargaining unit disputes, and removal of the intervenor language in Rule 4.4.2); written comment by Gunnison County Board of County Commissioners, submitted by Matthew R. Hoyt, 4/28/23, at 3 (same as Mesa County); written comment by Boulder County Attorney’s Office, submitted by Olivia Lucas, 4/28/23, at 1-2 (same).

¹⁹ *Morand Bros. Bev. Co.*, 91 N.L.R.B. 409, 418 (Sept. 25, 1950), *enforced in part*, 190 F.2d 576 (7th Cir. 1951) (NLRA includes “nothing . . . requir[ing] that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be ‘appropriate.’ It *must* be appropriate to ensure to employees, *in each case*, ‘the fullest freedom in exercising the rights guaranteed by this Act.’”) (emphasis in original) (quoting NLRA § 9(b)); Douglas L. Leslie, *Labor Bargaining Units*, 70 Va. L. Rev. 353 (1984). While the federal rule derives from the language of NLRA § 9(a), which requires only that a unit be “a unit appropriate for such purposes,” 29 U.S.C. § 159(a), no COBCA language expresses an opposite intent, *see* C.R.S. § 8-3.3-110.

²⁰ *See FedEx Freight, Inc. v. NLRB*, 839 F.3d 636, 637 (7th Cir. 2016) (bargaining unit determination subject to judicial review post-election); *Elec. Data Sys. Corp. v. NLRB*, 938 F.2d 570, 572 (5th Cir. 1991) (bargaining unit determination subject to judicial review post-certification in the context of an unfair labor practice charge, after the company refused to bargain with the certified Union); *NLRB v. Lerner Stores Corp.*, 506 F.2d 706, 707 (9th Cir. 1974) (bargaining unit determination subject to judicial review only post-certification and after company’s refusal to bargain).

²¹ C.R.S. § 8-3.3-110(1)(b) (“The director shall, upon receipt of a petition for a representation election, designate the appropriate bargaining unit for collective bargaining in accordance with this section. The designation must be determined by[.] . . . [i]f there is not agreement between the parties, an administrative determination of the director.”).

²² C.R.S. § 8-3.3-108(1)(b) (“The sufficiency of the showing of interest in a representation election for exclusive representation is an administrative determination . . . and is not subject to challenge by any person.”) (emphasis added).

²³ *See, e.g., Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974) (sufficiency of interest showing “not litigable”); *NLRB v. P.A.F. Equip. Co.*, 528 F.2d 286, 287 (10th Cir. 1976) (“The Board’s determination of whether to conduct an election is not subject to modification by a reviewing court.”); Nat’l Lab. Rel. Bd., *Casehandling Manual* (Part 2, Postelection challenge), § 11028.4 (2020) (citing *Gaylord Bag Co.*, 313 NLRB 306 (1993)) (“After an election has been held, the adequacy of the showing of interest is irrelevant.”).

²⁴ Written comment by Board of County Commissioners of Mesa County, submitted by Andrea Tina Atencio, 4/28/23, at 1 (suggesting more structure for representation elections); written comment by Gunnison County Board of County Commissioners, submitted by Matthew R. Hoyt, 4/28/23, at 2 (same); written comment by Boulder County Attorney’s Office, submitted by Olivia Lucas, 4/28/23, at 1 (same); written comment by Arapahoe County Board of County Commissioners, submitted by Jeff Baker, 4/28/23, at 1, n.1 (“Rule

response, the Division explicitly incorporated certain LPIR rules relevant to COBCA representation elections, though with the discretion to depart from those rules as needed. In addition, the Division declined to provide certain procedural details, such as specific timelines,²⁵ to assure that parties and the Division will have the flexibility to craft election procedures appropriate to each workplace on a case-by-case basis. The Division intends to provide further published guidance, beyond the specifics capable of being codified in rules.

11. Rule 4.6.1: List of employees in the bargaining unit.

Rule 4.6.1 incorporates the procedures of the LPIR Rules for obtaining the employee information necessary to create the voter list, or polling list, required to administer a certification or decertification election. By referencing C.R.S. § 8-3.3-109(4)(a) in subsection (A), the Division incorporates COBCA’s requirement that an employee may opt out of providing some or all of the information listed under that statutory subsection into these rules.

12. Rule 4.6.4: Procedures for representation elections.

Rule 4.6.4 incorporates a selection of LPIR’s election procedures, as appropriate, into the COBCA Rules to provide a more robust framework for the COBCA election process, as requested by a number of counties.²⁶ LPIR Rule 5.6.6, incorporated by reference, was revised to further clarify the definition of “electioneering,” as was also requested in public comments.²⁷ As mentioned above, because the procedures for representation elections may need to vary based on workplace conditions, the rule also provides the Division with the discretion to depart from the LPIR rules incorporated.

13. Rule 4.6.6: Tiebreakers.

Rule 4.6.6 provides a rule for tiebreakers to provide clarity in advance of any tie. These tiebreaker rules represent a preference for the status quo in the event of a tie and follow Colorado labor relations precedent.²⁸

14. Rule 4.6.7: Runoff Elections.

Rule 4.6.7 details the administrative procedure the Division will follow when more than one employee organization is on the ballot, as authorized by C.R.S. § 8-3.3-109(6)(b), which provides:

Within twenty-eight days after a secret ballot election in which no employee organization receives a majority of the ballots cast, the director shall conduct a runoff election between the two employee organizations receiving the largest number of ballots cast. The director shall certify the results of the election, and, if an employee organization receives a majority of the ballots cast, the director shall certify the employee organization as the exclusive representative of all county employees in the appropriate bargaining unit, subject to any valid objections to the conduct of the election filed in accordance with this article 3.3 and the rules of the director.

C.R.S. § 8-3.3-109(6)(b) (2022). The Division finds that the statutory language mandating that the director “shall conduct a runoff election between the two *employee organizations* receiving the largest number of ballots cast” limits the runoff to employee organizations, since the “no representation” choice could not have received a majority in this scenario. This comports with practice and statutory guidance from other states with long-standing public sector bargaining.²⁹

E. Rule 5: Unfair Labor Practices.

The Division received comments recommending the unfair labor practice (“ULP”) complaint process in Rule 5

4.6 appears to govern only the conduct of ‘representation elections’ . . . ignor[ing] the conduct of decertification elections”).

²⁵ *E.g.*, written comment by Mesa County Attorney’s Office, submitted by Andrea Tina Atencio, 4/28/23, at 1 (requesting a standard election template that includes timelines).

²⁶ *See* note 24.

²⁷ *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 a definition that provided a basis for the LPIR rule the Division adopted); oral comment by David Ayraud, Deputy County Attorney, Larimer County, 4/18/23 (requesting further definition of “electioneering”).

²⁸ *Graham Furniture Co. v. Indus. Com. of Colo.*, 331 P.2d 507, 509 (Colo. 1958) (“If the two [challenged and uncounted] ballots are against the Union as a bargaining unit it would result in a tie vote . . . and the Union would not have a majority as required by statute.”).

²⁹ Wisconsin, for example, limits runoffs to employee organizations, but imposes additional requirements implicit in COBCA, including that the employee organizations obtain, cumulatively, the majority of votes. Wis. Stat. Ann. § 111.83(5)(e) (2022) (if multiple employee organizations combined receive a majority, but no one organization does, then the election proceeds to a runoff “until one representative receives” the requisite majority). Conversely, where COBCA states that “employee organizations” will appear in runoffs, runoff language in an Illinois statute uses the phrase “the choices” to signal that runoff ballots may include a “no representation” choice. 5 Ill. Comp. Stat. Ann. 315/9(e) (2022) (“In any election where none of *the choices* on the ballot receives a majority, a runoff election shall be conducted between the 2 *choices* receiving the largest number of valid votes cast . . .”) (emphasis added).

more closely follow the LPIR Rules, particularly regarding ULP investigations and hearings.³⁰ The Division declined to do so. COBCA has different procedural requirements than other Colorado labor relations statutes, including with respect to the role of hearings in the ULP process. For example, the Labor Peace Act integrates a hearing into the initial investigation and determination stage of the ULP process. The Partnership Act partially draws from and cites the Labor Peace Act,³¹ but the Partnership Act also grants the Division rulemaking discretion as to procedural matters including, but not limited to, the role and timing of hearings. This increased discretion is reflected in its implementing rules, which do not require a hearing prior to the Division’s initial determination of a ULP complaint.³² Unlike the Partnership Act, COBCA does not cite to or reference the Labor Peace Act. As such, COBCA grants the Division broader rulemaking discretion than that provided in the Labor Peace Act (or the Partnership Act) as to procedural matters including, but not limited to, the role and timing of hearings, which the Division exercised in its drafting of Rule 5.

1. Rule 5.4.1: Default operability of Division determinations during administrative appeals and standard for stays.

Rule 5.4.1 expresses the default rule that a Division determination remains in full force and effect during administrative appeal, unless an appellant requests a stay. In determining whether to grant or deny the stay request, the Division applies the four-factor “traditional standard” for a stay adopted by *Romero v. City of Fountain*, 307 P.3d 120 (Colo. App. 2011). The four factors the Division considers are: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

F. Rule 6: Judicial Review.

Rule 6 outlines circumstances in which parties may seek judicial review in a Colorado District Court. A party may seek judicial review of any Division, Director, Hearing Officer, or ALJ decisions, final determinations, or orders that constitute “final agency action,” the category of administrative actions appealable under the APA and other administrative law.³³ “To be final, agency action must ‘(1) mark the consummation of the agency’s decision-making process and not be merely tentative or interlocutory in nature, and (2) constitute an action by which rights or obligations have been determined or from which legal consequences will flow.’”³⁴ In the COBCA context, such final decisions are generally limited to (1) certification or decertification of exclusive representatives or (2) determinations on unfair labor practice complaints.³⁵ Other agency actions, decisions, orders, or interpretations — such as the determination of an appropriate bargaining unit as provided in Rule 4.4 — are not appealable because as a general rule, “courts will not interfere with agency proceedings until the agency has taken final action.”³⁶ Such non-final agency actions may be addressed within a judicial appeal of a final agency action where relevant and appropriate. This distinction is consistent with the traditional delineation of which decisions, final determinations, and orders are and are not appealable, in labor relations contexts³⁷ and judicial appellate procedure.³⁸ In response to comments requesting greater clarity on what constitutes final agency action in the COBCA

³⁰ *E.g.*, written comment by Boulder County Attorney’s Office, submitted by Olivia Lucas, 4/28/23, at 3 (with respect to procedures for unfair labor practices complaints suggesting the Division “more closely following the LPIR rules related to investigations and hearings...”); written comment by Gunnison County Board of County Commissioners, submitted by Matthew R. Hoyt, 4/28/23, at 4 (same).

³¹ *E.g.*, C.R.S. § 24-50-1113(3) (“Any controversy concerning unfair labor practices of the state or certified employee organization may be submitted to the division by the state, certified employee organization, or affected employee in a manner and with the effect provided in article 3 of title 8 and rules promulgated thereunder . . .”).

³² State Labor Relations Rules, 7 CCR 1103-12, Rule 4.1.12 (not providing for a hearing prior to a Division determination).

³³ C.R.S. § 24-4-106(2) (“Final agency action . . . shall be subject to judicial review as provided in this section[.]”).

³⁴ *Doe v. Colo. Dep’t of Pub. Health & Env’t*, 2019 CO 92, ¶ 38, 451 P.3d 851, 858-59 (quoting *Chittenden v. Colo. Bd. of Soc. Work Exam’rs*, 2012 COA 150M, ¶ 26, 292 P.3d 1138, 1143; citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (same criteria, federal APA); see *MDC Holdings, Inc. v. Parker*, 223 P.3d 710, 720-21 (Colo. 2010) (same criteria, whether town tax decision is “final” and appealable).

³⁵ C.R.S. § 8-3.3-106(3)(b) (“The decision and order of a hearing officer constitutes a final agency action pursuant to section 24-4-106. The director shall promptly provide all parties with a copy A party may seek judicial review . . . pursuant to section 24-4-106.”).

³⁶ *Colo. Health Facilities Review Council v. Dist. Ct.*, 689 P.2d 617, 621 (Colo. 1984); see also *Envirotest Sys. v. Colo. Dep’t of Revenue*, 109 P.3d 142, 144 (Colo. 2005) (“Unless the requirements of section 24-4-106(8) are met, interlocutory judicial review of an issue presented in the agency proceeding encroaches on the executive function; thus, courts otherwise will not interfere with ongoing agency proceedings until they are finalized.”); *State Pers. Bd. v. Dist. Court of Denver*, 637 P.2d 333, 337 (Colo. 1981) (even “[a] claim that the statute is unconstitutional does not give the judiciary the power under section 24-4-106(8) to interfere with an administrative agency in advance of its taking final action”).

³⁷ Notes 20-23.

³⁸ See C.A.R. 1(4)(a) (allowing appeal from “a final judgment”). Compare *Citizens for Responsible Growth v. RCI Dev. Ptnrs.*, 252 P.3d

process,³⁹ language was also added throughout the rules to better clarify which decisions are not separately subject to judicial review.

G. Other.

Though the Division was authorized by COBCA to adopt rules about impasse, C.R.S. § 8-3.3-114, the Division concluded that the statute’s detailed process did not require supplementation with rules at this time.

V. EFFECTIVE DATE. The COBCA 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

1104, 1106-07 (Colo. 2011) (final court judgment or decision is generally “one that ends the particular action in which it is entered, leaving nothing further to be done to completely determine the rights of the parties”) *with Scott v. Scott*, 136 P.3d 892, 897 (Colo. 2006) (“[A]ppellate courts may not review interlocutory orders without specific authorization by statute or rule[.]”) (quoting *Mission Viejo Co. v. Willows Water Dist.*, 818 P.2d 254, 258 (Colo. 1991)); *Curtis, Inc. v. Dist. Ct.*, 186 Colo. 226, 230, 526 P.2d 1335, 1337 (1974) (“[M]atters relating to pretrial discovery are ordinarily reviewable only by appeal and not in an original proceeding[.]”); *FTC v. Alaska Land Leasing, Inc.*, 778 F.2d 577, 578 (10th Cir. 1985) (“[P]retrial discovery rulings are interlocutory and not appealable as final orders[.]”).

³⁹ *E.g.*, written comment by Boulder County Attorney’s Office, submitted by Olivia Lucas, 4/28/23, at 2 (“We suggest that the Proposed Rules better clarify when certain Director/Division determinations can be appealed.”).