COLORADO
Department of
Labor and Employment

Division of Labor Standards and Statistics
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NOTICE OF ADOPTION

Amendments to Wage Protection Act Rules, 7 CCR 1103-7 (August 20, 2019)

I. Adopted Rules. As authorized by Colorado Labor and Industry Law, C.R.S. Title 8, and the Colorado Administrative Procedure Act, C.R.S. § 24-4-103, notice is hereby given of the adoption of the following rules, the text of which accompanies this notice:

Amendments to Wage Protection Act Rules, 7 CCR 1103-7

II. Basis, Purpose, and Specific Statutory Authority. A Statement of Basis, Purpose, Specific Statutory Authority, and Findings accompanies this notice and is incorporated by reference.

III. Findings, Justifications, and Reasons. The Findings, Justifications, and Reasons for Adoption, within the incorporated Statement of Basis, Purpose, Specific Statutory Authority, and Findings, are incorporated by reference.

IV. Effective Date. These rules take effect on December 19, 2019, or as soon thereafter as the rule-making process is completed. These rules also are being adopted on a temporary basis on August 20, 2019, effective immediately, and remaining in effect until the earlier of (1) their adoption as permanent rules or (2) 120 days after their adoption.

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

August 20, 2019
Date

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

Amendments to Wage Protection Act Rules, 7 CCR 1103-7 (August 20, 2019)

(1) BASIS AND PURPOSE: These rules conform the Wage Protection Act ("WPA") Rules, 7 CCR 1103-7, to statutory changes to C.R.S. Title 8, and serve important public needs that the Director finds are best served by these rule updates, amendments, and supplements.

(2) SPECIFIC STATUTORY AUTHORITY: The Director of the Division of Labor Standards and Statistics is authorized to adopt and amend rules and regulations to enforce, execute, apply, and interpret Articles 1, 4, and 6 of Title 8, C.R.S. (2019), as well as all rules, regulations, investigations, and other proceedings of any kind pursued thereunder, by the provisions of Articles 1, 4, and 6, including, *inter alia*: § 8-1-103(1),(3), § 8-1-107(2)(p), § 8-1-111; § 8-1-112; § 8-1-122(2); § 8-1-130; § 8-4-111; § 8-4-111.5; § 8-4-118; § 8-4-120; § 8-6-102; § 8-6-105 to -112; § 8-6-115 to -117; § 8-6-119. Authority also derives from the Administrative Procedure Act, C.R.S. § 24-4-103.

(3) 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 the rules. The findings in Part (4) below are hereby incorporated into this finding as well.

(B) Proper statutory authority exists for the rules. The specific statutory authority in Part (2) above is hereby 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.

(E) Any duplicating or overlapping of the regulation is explained by the Division.

(4) SPECIFIC FINDINGS FOR ADOPTION. The Director further finds as follows:

(A) Rule 1.2 amends the versions of the Colorado Revised Statutes ("C.R.S.") that are incorporated by reference into all of the WPA Rules. Currently, Rule 1.2 states that the 2016 versions of the C.R.S. are incorporated, but several recently enacted laws have changed the definitions of critical terms, mostly as of January 1, 2020, but in one case (House Bill (HB) 19-1254, which amended C.R.S. § 8-4-103(6)) as of August 2, 2019. The WPA Rules need to be updated both to correct the § 8-4-103(6) reference immediately and to provide notice to stakeholders that the recently enacted laws changing the C.R.S. as of January 1, 2020, will also apply to the WPA Rules.

(B) Rule 2.12 clarifies that "tips" and "gratuities" are treated the same, despite the recently enacted House Bill (HB) 19-1254 referring to "gratuities" while existing rules refer mainly to "tips." Enacted on May 13, 2019, HB 19-1254 went into effect on August 2, 2019. The Division finds that the potential for confusion is high from two sources of binding law using different terminology, risking uncertainty for employees and employers alike in the large Colorado restaurant sector, and other sectors with tipped employees, and that such uncertainty risks employees not

getting paid, employers facing additional compliance costs, and both employees and employers facing additional risk of labor disputes due to the lack of clarity as to their rights and responsibilities.

(C) Rule 2.15 redresses recent conflicting interpretations, and unduly restrictive interpretations, of the vacation pay statute, C.R.S. § 8-4-101(14), which have generated the following problems that the Division finds are substantial, based on its extensive experience with employees and employees in wage disputes.

(1) Recent interpretations that unused vacation pay is forfeited upon employment separation is contrary to the text and legislative intent of the vacation pay statute, which states that the "'[w]ages' or 'compensation'" that cannot be forfeited include "[v]acation pay earned in accordance with the terms of any agreement. If an employer provides paid vacation for an employee, the employer shall pay upon separation from employment all vacation pay earned and determinable in accordance with the terms of any agreement between the employer and the employee." The legislature expressly rejected a prior version of that provision that would have allowed an "agreement between the employer and the employee that requires or results in loss or forfeiture of accrued vacation pay."[1] The Division, based on its expertise in the field and its detailed investigations and careful analyses of a vast number of vacation pay cases, (a) finds the statutory text clear in barring forfeiture, (b) finds clear evidence of legislative intent to bar forfeiture in the legislature's express rejection of the draft statutory provision allowing forfeiture clauses, and (c) has issued many years of consistent interpretations and rulings holding vacation pay non-forfeitable.

(2) At best, those arguing vacation pay forfeitability can claim ambiguity in the statute. Multiple experienced management and labor attorneys have expressly told the Division the statute is "ambiguous" in saying that upon employment separation, "[v]acation pay earned in accordance with the terms of any agreement" must be paid "in accordance with the terms of any agreement" -- language some employers cite in not paying vacation upon separation. If the statute is ambiguous, it is the Division's role to clarify, through its determinations, rulings, and regulations.

(3) The Division has been unable to provide reliable answers as it previously could in fulfilling its important public functions of (a) issuing determinations on the many vacation pay disputes it receives, which the Division is mandated to investigate pursuant to C.R.S. § 8-4-111(1)(a), and (b) responding to many requests, from employers and employees, for guidance on their vacation pay rights and responsibilities. The Division is also expending substantially more of its limited resources trying to continue performing these important public functions.

(4) Employers are facing costly legal fees and diversion of management time fielding vacation pay disputes that are increasing in complexity, and likely to grow in number, due to the legal uncertainty about employers' vacation pay responsibilities. As multiple management attorneys have told the Division, whether they agree or disagree with our particular rules, providing "clarity" as to wage responsibilities is of high importance for employers, especially small employers.

[1] 64th Colo. Gen. Assembly, 1st Reg. Sess., H.B. 03-1206, at p.6 (preamended version with provision expressly allowing employers to "notify" employees of agreements requiring "forfeiture of accrued vacation pay" -- which provision was struck from the version enacted as 8-4-101(14)) (online at https://www.leg.state.co.us/2003a/inetcbill.nsf/fsbillcont/177D0898409F1BA987256CA700741BBB?Open&file=1206BU_01.pdf)

(5) Employees now are less guaranteed to receive their earned vacation pay when they face separation from employment, risking loss of subsistence that is harmful to public health, safety, and welfare, as elaborated in Part (6) below.

(6) Adoption of these rules is imperatively necessary for the preservation of public health, safety, or welfare, and compliance with permanent rule-making provisions before adoption would be contrary to the public interest. These rules will prevent and redress the harms noted above in Parts (1)-(5) (which are hereby incorporated into this finding as well), and the legislature has repeatedly issued findings that preventing and redressing unlawful wage non-payment prevents and redresses significant harms to public health, safety, and welfare.

(a) The Wage Protection Act of 2014, which created the Division's authority and requirement to rule-make on, investigate, and issue determinations on all wage complaints it receives, included the following findings as to the importance of compliance with, and enforcement of violations of, state wage payment laws: "The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety." (Colorado S.B. 14-005, § 11, enacted May 29, 2014.)

(b) The Colorado Chance to Compete Act, which limited the screening of job applicants based on criminal history, included the following findings that are more broadly relevant to the problem of workers being under-paid: that when people "work at jobs that are below their potential" or otherwise suffer "underemployment," they "struggle to provide for their families," and "[c]hildren and families suffer." (Colorado H.B. 19-1025, § 1, enacted May 28, 2019.)

(D) Rule 3.2.3 clarifies that C.R.S. § 8-4-113(2), which provides that a certified copy of any citation, notice of assessment, or order imposing wages due, fines, or penalties pursuant to this article may be filed with the clerk of "any court" having jurisdiction over the parties at any time after the entry of the order, allows filing in *either* a county court or a district court. This rule is needed because a reference elsewhere to filing in "district court" (which is just *one* court where filing is proper) has, the Division learned, caused confusion among some stakeholders about the propriety of filing in *county* courts -- which they are, because § 8-4-113(2) allows filing in "any court."

(E) Rule 4.7 clarifies that individuals who provide the Division information on labor violations can do so confidentially. While state law details the Division's need to protect confidential information, it does not expressly detail specific information that is confidential, which leaves confidentiality determinations to Division discretion, but leaves promises of confidentiality on uncertain ground. Consequently, the Division has been refused information on possible violations due to worker fear that providing information on violations leaves them vulnerable without legally binding assurances of confidentiality. The Division finds that its inability to offer legally binding assurances of confidentiality has generated the following problems that it finds are substantial, based on its experience and its extensive experience with employees and employees in labor investigations.

(1) The Division's difficulty procuring tips on labor violations is hampering its ability to develop the Direct Investigations program for which the Colorado legislature appropriated substantial funds as of July 1, 2019.

(2) Individuals who do provide tips face heightened retaliation risk and justifiable anxiety due to the lack of legally binding assurances of confidentiality.

(3) Labor violations known to workers are going uninvestigated and unredressed, causing harms to public peace, health, and safety, as noted in Part (B)(5) above, which is hereby incorporated into this finding as well.

(F) Rule 4.8 clarifies that workers have the same wage law rights regardless of immigration status, and that exploiting the immigration status of workers to hinder wage claims and investigations is an act of retaliation, obstruction, and/or extortion under existing statutes. While the weight of legal authority supports these views, most authority is in non-binding judicial decisions, leaving them not written in binding form. The Division finds that the same harms detailed in Part (E) above (which is incorporated into this finding as well) result from its investigation and enforcement of labor rights being hindered (1) by immigrant workers' uncertainty -- (a) about their rights to their wages, (b) about their rights against retaliation, and (c) about whether they risk exploitation of their immigration status if they file or provide information supporting labor claims -- and (2) by the Division's current inability to point to binding legal authority providing immigrant workers reassurance about Parts (1)(a)-(c).

(5) EFFECTIVE DATE. These rules take effect on December 19, 2019, or as soon thereafter as the rule-making process is completed. These rules also are being adopted on a temporary basis on August 20, 2019, effective immediately, and remaining in effect until the earlier of (1) their adoption as permanent rules or (2) 120 days after their adoption.

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