COLORADO
Department of
Labor and Employment

Division of Labor Standards and Statistics
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STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY, AND FINDINGS

Amendments to Wage Protection Act Rules, 7 CCR 1103-7 (October 25, 2019)

I. 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, as detailed further in the following sections.

II. SPECIFIC STATUTORY AUTHORITY: The Director ("Director") of the Division of Labor Standards and Statistics ("Division") 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.

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 the rules. The findings in Part IV below are hereby incorporated into this finding as well.

(B) Proper statutory authority exists for the rules. The specific statutory authority in Part II 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.

IV. SPECIFIC FINDINGS FOR ADOPTION. The Director further finds as follows.

A. RULEMAKING PROCESS.

After publishing proposed rules on August 20, 2019, the Division published notice of a public hearing on October 15, 2019, and solicited comments by October 24, 2019. Several written comments were received, and several attendees spoke at an audio-recorded public hearing. The Division read all written comments, and several key Division staff listened to recordings of all live hearing testimony, with the Labor Standards Director and Outreach Manager present for the entire hearing.[1] Based on the comments and testimony in the record, and its own research and analysis, the

[1] One commenter expressed concern as to whether the Division considered attendee comments that, though made in the presence of all attendees, were made after the hearing closed. The Division did not. After all

Division has determined that these rules shall be adopted as permanent rules.

B. RULE 1.2

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.

C. RULE 2.12

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.

D. RULE 2.15

Rule 2.15 interprets and enforces the Colorado vacation pay statute. That statute has generated confusion, conflicting views, and restrictive interpretations that the Division finds are causing substantial problems, based on the Division's extensive experience with employees and employees in wage disputes. The statutory provision at issue states:

> 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

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attendees either spoke or declined to speak on the audio-recorded record, the Labor Standards Director asked if anyone had further testimony. Hearing none, the record was closed. After, the Director thanked attendees for coming, and various attendees spoke with each other and with her for a few minutes before leaving. As the commenter noted, one attendee asked about the Division website and a particular complaint form's signature line—neither of which the rules addressed. Two others talked further about topics in the rules, but drew no substantive response from anyone at the Division—and because, as the hearing ended, they had declined to speak further on the record, the Division did not view any post-hearing conversation as part of the record, and has not considered it. More broadly, the Division always engages in stakeholder outreach, including informal exchanges with employers, workers, and others—which the APA, far from frowning upon it, actually mandates. "The agency *shall* establish a representative group of participants with an interest in the subject of the rule-making to submit views or otherwise *participate informally* in conferences on the proposals under consideration *or* to participate in the public rule-making proceedings...." C.R.S. § 24-4-103(2) (emphases added). What a rulemaking agency must do is exactly what the Division did here: hold a proper hearing; solicit written comments; and make clear what are, and are not, on-record comments that it will consider.

with the terms of any agreement between the employer and the employee.[2]

Rule 2.15 aligns with old Colorado Supreme Court precedent that "vacation pay like wages is both vested and determinable as of the date of termination."[3] Yet vacation pay has, for years, been a high-frequency topic of employer-employee disputes that are costly in time and money. Among the Division's thousands of annual complaints and other inquiries, the Division gives especially detailed analysis to the fraction that proceed to Division Hearing Officers—a sizable share of which tackle vacation pay. Of the 205 publicly posted Hearing Officer decisions, 23.9% address vacation pay.[4] Hearing Officers consistently have held that because the statute mandates that unused vacation "shall" be paid upon employment separation, the provision that vacation accrues "in accordance with the terms of the agreement" means only that employers decide matters such as *whether* to offer vacation, and if so *how much* accrues—not whether vacation that does accrue "shall" be paid.[5]

The Division also years ago published its interpretation that employers cannot claim vacation forfeiture is a permissible "use it or lose it" policy. A use-or-lose agreement can limit employees to *one year's* vacation, by disallowing year-to-year carryover of unused vacation—but *cannot* forfeit *all* vacation pay, as explained in a 2014 Division Advisory Bulletin (the "Advisory Bulletin"):

> A "use-it-or-lose-it" policy may *not* operate to deprive an employee of earned vacation.... [V]acation pay that is "earned and determinable" *must* be paid upon separation.... [A]greement between the employer and employee will dictate *when* vacation pay is "earned."[6]

This same Advisory Bulletin has repeatedly been held "persuasive and entitled to respect such that 'courts and litigants may properly resort [to it] for guidance.'"[7]

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[2] C.R.S. § 8-4-101(14)(a)(III) ("Vacation Pay Statute").

[3] *Hartman v. Freedman*, 591 P.2d 1318, 1321 (Colo. 1979) ("vacation pay like wages is both vested and determinable as of the date of termination."); see also *Hernandez*, 414 P.3d at 703 ("unused vacation time, bonuses, or commissions ... would not be available until separation because they may not become 'vested' or 'determinable' under the employment agreement until that time.")

[4] Division of Labor Standards and Statistics, Hearing Officer Decisions (as of date of this document, entering "vacation" as keyword yields 49 of the 205 decisions).

[5] *E.g., In re Excel Mech. Sys.*, Div. Case #5036-15, at 2-3 (Decis. #17-058, July 10, 2017) ("[A] policy cannot deprive an employee of *earned* vacation time and/or wages ... associated with that earned vacation time.") (emphasis in original); *In re Energy Smart Door Sys.*, Div. Case #5928-16, at 6 (Decis. #18-023, Apr. 25, 2018) ("Division has taken the reasonable position that an employer can no more require forfeiture of earned vacation wages upon separation than … of earned hourly wages."); *In re Ocedon II*, Div. Case #4109-17, at 7 (Decis. #18-081, Nov. 16, 2018) ("[E]ven if the policy did clearly provide for forfeiture of vacation upon separation, the Colorado Wage Act would prohibit its forfeiture because vacation pay was provided … pursuant to an agreement … , was determinable at the time of separation, and was earned for service."); *In re Rocky Mtn. Homecare*, Div. Case #4753-17, at 1, 11 (Decis. #19-006, Jan. 16, 2019) ("[E]mployer policy does not provide for payout … upon separation…. [Employer] must pay … vacation pay upon separation.").

[6] Division of Labor Standards and Statistics, *Wage Protection Act of 2014 Frequently Asked Questions*, at 4-5 (non-binding guidance, since replaced by Rule 2.15).

[7] *Brunson v. Colo. Cab Co.*, 433 P.3d 93, 99-100 (Colo. App. 2018) (granting Division Advisory Bulletin *Skidmore* deference); *see Table Servs. v. Hickenlooper*, 257 P.3d 1210, 1216 (Colo. App. 2011) (positively

Division Hearing Officer decisions have consistently held the same as the Advisory Bulletin: "'Use it or lose it' provisions often refer to carryover provisions between years," so "a forfeiture of vacation upon separation … [is] not a genuine use or lose it provision."[8] Division's Hearing Officer decisions are binding pronouncements of the Division that qualify as statutory "final agency action"[9] and thus receive the same deferential treatment as binding pronouncements as Division rules.[10]

Despite the Division's clear and consistent interpretation of the Vacation Pay Statute, two Colorado courts recently held that the statute permits employers to forfeit *all* earned vacation pay upon termination.[11] These new interpretations conflicted with, but did not expressly address or reject, the Division's binding Hearing Officer decisions and the Division's Advisory Bulletin interpretation. Consequently, 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,[12] and (b) responding to many requests, from employers and employees, for guidance on their vacation pay rights and responsibilities. "The Division receives approximately 6,000 … wage complaints and written inquiries per year," in addition to the guidance it provides in the form of "public materials [that] are crucial to ensuring that customers are well-educated and informed" about Colorado wage law.[13] To help prevent disputes, the Division operates a call center that answers questions from "thousands of

citing Advisory Bulletin); *Sutton v A&A Quality Appliance*, No. 2012 CV 3520, 2013 WL 6171522, at *7 (Colo. Dist. Ct., July 02, 2013) (positively citing U.S. Labor Department Fact Sheet); *Salazar v. Butterball*, 644 F.3d 1130, 1143-44 (10th Cir. 2011) ("apply[ing] Colorado rules of construction," crediting Division Fact Sheet and Advisory Bulletin); *cf. Telluride Resort v. Dep't of Revenue*, 40 P.3d 1260, 1264 (Colo. 2002) ("In carrying out its responsibilities," agency "must construe and apply the statutes it administers," so while its "construction is advisory, not binding," courts "consider the … interpretation in construing the statutes.").

[8] *In re Energy Smart Door Sys.*, Div. Case #5928-16, at 6 (Decis. #18-023, Apr. 25, 2018) (disallowing forfeiture policy); *see In re Advanced Prof'l Sec.*, Div. Case #5626-16, at 3-4 (Decis. No. 18-009, Mar. 7, 2018) ("[U]nder the employer's 'use it or lose it' policy, the only relevant year … of vacation earnings was 2016.… [T]he Colorado Wage Act provides that the employer's 'use it or lose it' policy was permissible, but the employer was required to pay for the vacation … earned but not used before separation in 2016.").

[9] C.R.S. § 8-4-111.5.

[10] *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385, 388-89 (Colo. App. 2000) (granting deference to administrative appeal decision, and noting with approval that the administrative appeal panel had "relied upon previous [panel] decisions"; "deference ... should be given to the interpretation of the statute…. The [Appeals] Panel's interpretation will be set aside only if it is inconsistent with the clear language … [or] legislative intent"). Treatment of these Hearing Officer decisions as binding Division pronouncements warranting deference is especially proper because these Hearing Officer decisions, and the investigative determinations they review, were consistent for the entire period for which they are publicly available. *E.g., Weld Cty. School Dist. RE-12 v. Bymer*, 955 P.2d 550, 557 (Colo. 1998) ("The fact that ALJs have been applying this concept for some time undermines the Employer's claim that this concept is unworkable.").

[11] *Nieto v. Clark's Mkt., Inc.*, 2019 COA 98 (Colo. App. 2019), *cert. petition pending*, Colo. Sup. Ct. #19SC000553; *Blount, Inc. v. Colo. Dept. of Labor & Emp'mt, Div. of Labor Standards & Statistics, and Cynthia Walter*, Denver Cty. Dist. Ct. #17CV34019, *app. pending*, Colo. Ct. App. No. 18CA2455.

[12] C.R.S. §§ 8-4-111(1)(a), 8-4-111(2)(a)(I).

[13] Department of Labor and Employment, *2018-2019 Performance Plan*.

Coloradan[] employers and employees" annually.[14] Due to the confusion generated by now-conflicting interpretations, 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 management-side 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. Employees, in turn, now are less guaranteed to receive their earned vacation pay when they separate from employment, risking loss of subsistence that is harmful to public health, safety, and welfare.

Given the Division's expertise, analysis, and statutory role, it finds that its interpretation of the Vacation Pay Statute was proper for years, and that at best courts reaching a contrary interpretation simply viewed an ambiguous statute differently. Rule 2.15 supplants those differing judicial interpretations, as is proper for administrative rules interpreting statutory provisions.[15]

The view that vacation pay is forfeitable is a view that the statutory phrase "in accordance with the terms of any agreement" allows an agreement to eviscerate the core provision of the statute: "If an employer provides paid vacation for an employee, the employer *shall pay* upon separation from employment *all vacation pay* …." That interpretation would contravene the principle, which the Division finds important as a guide to applying and interpreting wage statutes, applies that rejects statutory "constructions that would render words or phrases meaningless or superfluous."[16]

The Division further finds that the legislative history of the Vacation Pay Statute confirms that the General Assembly intended to create a substantive and non-waivable right for employees to be compensated for unused vacation pay at separation of employment. The Vacation Pay Statute was added to the Colorado Wage Claim Act ("CWCA") in 2003.[17] A pre-amendment version of the section included express language permitting an employer-employee "agreement ... [for] forfeiture

[14] *Notice Regarding Opinion/Exemption Letters*, at 2 (Division posted policy, June 24, 2019).

[15] *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) (upholding agency interpretation that rejected prior court interpretations: "A court's prior judicial construction of a statute trumps an agency construction ... only if ... [it] follows from the unambiguous terms ... and thus leaves no room for agency discretion" based on the "'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'") (citations omitted) (emphasis added); *see Padilla-Caldera v. Holder*, 637 F.3d 1140, 1153 (10th Cir. 2011) ("*Brand X* makes clear that BIA is not bound by circuit court authority regarding interpretation of ambiguous statutory provisions .... The BIA's [administrative] determination ... is a reasonable interpretation of ambiguous statutory provisions to which we owe *Chevron* deference. … BIA's interpretation of the statute, not this court's ... , is the authoritative interpretation."); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1248 (10th Cir. 2008) ("[E]ven the Supreme Court's[] prior interpretation ... forecloses an agency's reasonable construction only if the ... statute ... [is] unambiguous.").

[16] *Dubois v. Abrahamson*, 214 P.3d 586, 588 (Colo. App. 2009); *see Pub. Serv. Co. v. Wallis & Cos.*, 986 P.2d 924, 931 (Colo. 1999) ("ambiguous" term capable of two constructions should not be given the construction that would render[] the phrase ... meaningless"); *see Shigo, LLC v. Hocker*, 338 P.3d 421, 425 (Colo. 2014) (rejecting statutory construction that would render a single word as mere "surplusage"); *Denver Publ. Co. v. Bd. of Cty. Comm'rs of Arapahoe Cty.*, 121 P.3d 190, 200-01 (Colo. 2005) (declining to adopt interpretation of ambiguous statutory phrase that would render an entire subsection "superfluous")

[17] See HB 03-1206, at 4, 2003 64th Gen. Assemb., 1st Reg. Sess. (Colo. 2003).

of accrued vacation pay."[18] That provision was later removed from the final version by amendment and does not appear in the CWCA.[19] Testimony from a Senate Business Committee session explains the decision to strike the above language that permitted vacation pay forfeiture:

> We are striking language ... there had been language put in here regarding whether employers could forfeit vacation pay, and through our discussions, the language had an unintended consequence. So we found it easier just to strike it and keep it very clear that the employee is entitled to any earned vacation time upon termination.[20]

The legislature removed language about "forfeiture" precisely to avoid the erroneous interpretation of the Colorado courts allowing vacation pay forfeiture.

Rule 2.15 is also consistent with the general rule, which the Division finds helpful and important in fulfilling its statutory duties to enforce and interpret Colorado wage law, that remedial statutes like the Vacation Pay Statute must be construed broadly.[21] The purpose of the CWCA (and the Vacation Pay Statute therein) is to "assure the timely payment of wages and to afford adequate judicial relief when wages are not paid" and "is to be liberally construed."[22] In effecting this remedial purpose, courts have routinely held that an employee may not forfeit earned compensation by contract.[23] As noted by one employment attorney commenter, an experienced wage law attorney and Colorado Plaintiff Employment Lawyers Association representative, the Vacation Pay Statute and other CWCA provisions are consistently interpreted to prevent forfeiture of earned pay:

> [S]everal abuses … would come about without the protection of Section 2.15.… [T]here is plenty of caselaw that prohibits employers from depriving employees of commissions … where they're terminated before the event that actually triggers payment of the commission … while the commission itself has been earned. Employers could adopt policies like that without … Section 2.15. They could force employees to forfeit their bonuses, even though those bonuses were earned, but they could be terminated … even though all the events that would entitle them to the earned bonus had occurred. So there's very strong policy that prohibits a forfeiture.… Any other interpretation that allows a forfeiture of earned vacation allows employers

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[18] HB 03-1206 (Preamended), at 6, 2003 64th Gen. Assemb., 1st Reg. Sess. (Colo. 2003).

[19] *See* HB 03- 1206, at 4, 2003 64th Gen. Assemb., 1st Reg. Sess. (Colo. 2003); C.R.S. § 8-4- 101(14)(a)(III).

[20] *See* HB 03- 1206, at 4, 2003 64th Gen. Assemb., 1st Reg. Sess. (Colo. 2003); see also § 8-4-101(14)(a)(III), C.R.S. 2018, testimony by Heidi Heltzel.

[21] *See Watson v. Publ. Serv. Co. of Colorado*, 207 P.3d 860, 864 (Colo. 2008).

[22] *Hartman v. Cmty. Responsibility Ctr., Inc.*, 87 P.3d 202, 207 (Colo. App. 2003); *Montemayor v. Jacor Commc'ns, Inc.*, 64 P.3d 916, 923 (Colo. App. 2002).

[23] *E.g., Hallmon v. Advance Auto Parts, Inc.*, 921 F. Supp. 2d 1110, 1120 (D. Colo. 2013) (handbook provision that employee "'must be an active Team Member at time of payout' to receive bonuses after termination … "d[id] not redefine when [employee] ha[d] earned his bonuses or when they ha[d] vested. Rather, it provides a condition for the payment of bonuses that otherwise have already vested and are already determinable within the meaning of the CWCA. Adopting [employer]'s argument [that firing forfeits bonuses] … would allow employers to manipulate similar contractual language to avoid paying rightful wages … by conveniently terminating them shortly before their payday, contravening the public policy behind the CWCA.")

to manipulate their own contractual language to avoid paying rightful wages[24]

In addition, an interpretation allowing forfeiture would, the Division further finds, frustrate the purpose of C.R.S. § 8-4-121, which provides that "[a]ny agreement, written or oral, by any employee purporting to waive or to modify such employee's rights in violation of this article shall be void." The "'wages' or 'compensation'" protected by the statute includes "[v]acation pay earned in accordance with the terms of any agreement."[25] One court held that a handbook provision invalid under C.R.S. § 8-4-121 because it required forfeiture of a bonus if an employee was separated before the bonus was paid.[26] The statutory language defining bonuses as "'wages' or 'compensation'" mirrors the language defining vacation pay: "Bonuses or commissions earned for labor or services performed *in accordance with the terms of any agreement between an employer and employee*."[27] That court decision rejected the argument that a bonus agreement could forfeit bonuses, because that "would allow employers to manipulate similar contractual language to avoid paying rightful wages to employees by conveniently terminating them shortly before their payday, contravening the public policy behind the CWCA."[28] A rule allowing *vacation* pay forfeiture—while *bonus* forfeiture is disallowed—would inconsistently require one interpretation of "in accordance with the terms" for bonus pay, and a wholly different interpretation of this same phrase for vacation pay[29]—generating confusion that, the Division finds, would worsen employers' uncertainty, employees' inability to secure earned pay, and the Division's difficulty fulfilling its public functions.

However, following stakeholder engagement, the public hearing, and submitted comments, the Division substantially amended the text of Rule 2.15 for clarity, without changing the substance. Gillian Bidgood, an experienced management-side employment attorney, noted two ways the text of the original rule could be improved. First, the original proposed text of Rule 2.15 had "an internal conflict because of the use of the term 'use it or lose it,'" she noted—adding that the rule could avoid that conflict, by deleting the phrase "use it or lose it," and instead providing instead that what the rule allows is for employers to limit further "accrual" of paid vacation after employees reach a "cap" of a year's worth. Second, the original rule, to limit forfeiture, stated that an employee's amount of accrued vacation cannot "diminish[] … for any reason"—which needed to be clarified by adding that an accrued vacation can diminish due to *employees' use of vacation* that s/he had accrued.[30] Both changes have been incorporated into the final rule.

For these reasons and those set forth in the Division's NOTICE OF ADOPTION of Amendments to Wage Protection Act Rules, 7 CCR 1103-7 (August 20, 2019), the Director finds that it is necessary and desirable to make Rule 2.15 a permanent rule.

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[24] Recorded public hearing testimony by David Lichtenstein, Oct. 15, 2019.

[25] C.R.S. § 8-4-101(14)(a)(III).

[26] *Hallmon v. Advance Auto Parts, Inc.*, 921 F. Supp. 2d 1110 (D. Colo. 2013).

[27] C.R.S. § 8-4-101(14)(a)(II) (emphases added).

[28] *Hallmon*, 921 F. Supp. 2d at 1120.

[29] C.R.S. § 8-4-101(14)(a)(III), in the same statutory subsection and immediately after the "bonus" definition.

[30] Written comment submitted by Gillian Bidgood, Oct. 23, 2019.

E. RULE 3.2.3

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 C.R.S. § 8-4-113(2) allows filing in "any court."

F. RULE 4.7

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.

G. RULE 4.8

Rule 4.8 clarifies that all Colorado 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, and prevailing interpretation of existing statutes, support the interpretations in Rule 4.8, most authority is in non-binding judicial decisions, leaving them not written in binding form—which is why the Division finds great value and importance in Rule 4.8.

Due to a lack of clear, binding authority protecting immigrant workers, the Division has been refused information on possible violations due to worker fear that providing information on violations leaves them vulnerable to reprisals exploiting their actual, perceived, or even (as noted below) dishonestly reported immigration status. The lack of clear protection for immigrant workers has generated the problems noted in Part F (Rule 4.7) above; Part F is incorporated by reference into

this Part G as if fully set forth herein.

The Division finds that these harms result from its investigation and enforcement of labor rights being hindered by: (1) immigrant workers' uncertainty about (a) their rights to their wages, (b) their rights against retaliation, and (c) whether they risk exploitation of their immigration status if they file or provide information supporting labor claims; and (2) the Division's current inability to point to binding legal authority providing immigrant workers reassurance about (1)(a)-(c).

In a written comment to the Division, one employment attorney noted the impact of actual or threatened reprisal on employees' ability and willingness to enforce their rights:

> For individuals who are undocumented, the fear of immigration enforcement (often implicitly or explicitly threatened …) is almost always enough to convince employees not to stand up for their legal rights, even in the face of egregious abuse. As a result, a significant amount of wrongdoing by employers goes unreported and unredressed, allowing unscrupulous individuals and businesses to break the law with impunity.
>
> At times, the threat of frivolous immigration enforcement action is enough to convince even immigrants who are lawfully documented not to stand up for their legal rights in the workplace. I have represented many documented immigrants who were hesitant to report wrongdoing because of well-founded fears (sometimes stoked by threats from their employers) that they would be falsely accused of immigration crimes and deported. In one case, I represented a natural-born citizen ... whose employer repeatedly threatened to falsely report him as an "illegal" immigrant and have him deported simply because he was of Mexican ancestry and spoke English with an accent.[31]

The Division finds this attorney's report to be true based on experience dealing with many immigrant workers who have alleged wage and other labor law violations.

"[T]here are a number of cases finding that evidence of immigration status has no relevance" to wage claims in Colorado.[32] Yet immigration status is not only irrelevant, but also a source of an "*in terrorem* effect" that stifles enforcement of wage rights. Courts, including in the below Colorado case, have long recognized the need to protect wage claimants from the fear of retaliation that can prevent undocumented employees from bringing rightful wage claims:

> Courts have ... denied discovery requests related to a plaintiff's immigration status because of the *in terrorem* effect that discovery into such issues would have on litigants.… [W]hile [litigation] discovery … is generally broad and far-reaching, ... the added *in terrorem* effect … weighs in favor of … a protective order …. If forced to disclose their immigration status, most undocumented aliens would withdraw their claims or refrain from bringing an action such as this in the first instance. This would effectively eliminate the FLSA [the federal analogue to the CWCA] as a means for

[31] Written comment submitted by Hunter Swain, Oct. 14, 2019.

[32] *Torres v. Cache Cache, Ltd.*, No. 12-CV-00150-LTB-KMT, 2012 WL 6652856, at *3 (D. Colo. Dec. 21, 2012) (Colorado Wage Claim Act and federal FLSA wage claims of all employees, spanning four years, at "a high-end Aspen restaurant") (citing *Reyes v. Snowcap Creamery, Inc.*, 898 F. Supp. 2d 1233, 1235-36 (D. Colo. 2012) (same, CWCA and FLSA wage claims at Erie restaurant)).

protecting undocumented workers from exploitation and retaliation.[33]

Courts even have noted the need to "question the veracity" of some who claim a need to investigate immigration status only *after* facing unpaid wage claims. In the above case, the defendant employers claimed a non-retaliatory reason for seeking immigration attorney files on its employee, the wage claim plaintiff, but the Court noted:

> The Court questions the veracity of this statement given Defendants' prior … state[ment] that they were seeking access to [immigration] files because those documents "will disclose whether Plaintiff was an undocumented alien at the time of his employment" and to support their defense that Plaintiff is not entitled to the protections of the FLSA because he is an "undocumented alien."[34]

In another case, multiple proprietors of an employer and their attorney plotted to have an immigrant wage claimant deported by summoning him for a deposition they never intended to take, because they also summoned an ICE agent to wait for him at the deposition—as explained by a unanimous three-judge panel that declared the "underhanded plan" to be illegal retaliation:

> [T]en weeks before the state court trial, the Angelos' attorney, Anthony Raimondo, set in motion an underhanded plan to derail Arias's lawsuit. Raimondo's plan involved enlisting the services of U.S. Immigration and Customs Enforcement ("ICE") to take Arias into custody at a scheduled deposition and then to remove him from the United States. A second part of Raimondo's plan was to block Arias's California Rural Legal Assistance attorney from representing him. This double barrel plan was captured in email messages back and forth between Raimondo, Joe Angelo, and ICE ….[35]

Courts have noted similar abuses under other laws protecting immigrant workers, such as the Trafficking Victims Protection Act ("TVPA"):

> The Court need not extensively examine each of the potential ways in which the TVPA can be violated, as it finds it sufficient to examine only the "abuse of the legal process" prong. Several cases have found the "abuse of the legal process" prong to be satisfied by conduct in which the employer threatens to involve law enforcement or immigration authorities in order to persuade the employee to remain faithful or continue working. For example, in *Kiwanuka*, … a Tanzanian national … alleged that her employer "abused the legal process by threatening her with deportation should she fail to perform the work demanded of her." The court found allegations that the employer threatened the "involvement of the FBI and deportation" as potential

[33] *Reyes v. Snowcap Creamery, Inc.*, 898 F. Supp. 2d 1233, 1235-36 (D. Colo. 2012) (bold emphasis added) (first paragraph citing *Galaviz–Zamora v. Brady Farms, Inc.,* 230 F.R.D. 499, 501–03 (W.D. Mich. 2005); *F*; *Zeng Liu v. Donna Karan Int'l,* 207 F. Supp. 2d 191, 192–93 (S.D.N.Y. 2002); *Flores v. Albertsons, Inc.,* No. CV0100515, 2002 WL 1163623, at *5–6 (C.D.Cal. Apr. 9, 2002)) (second paragraph quoting *Flores v. Amigon,* 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002)) (reversing order to produce immigration documents).

[34] *Reyes v. Snowcap Creamery, Inc.*, 898 F. Supp. 2d 1233, 1235-36 (D. Colo. 2012).

[35] *Arias v. Raimondo*, 860 F.3d 1185, 1187 (9th Cir. 2017).

> punishments was sufficient … [for] a claim under the TVPA. In *Ramos-Madrigal*[,] … allegations that the employer retained employees' visa extension documents and threatened them "with serious immigration consequences in order to prevent them from leaving employment" were sufficient to allege a claim ....[36]

The Division finds that lack of clear and adequate protection from retaliatory reports or threats to report immigration status would "effectively eliminate" the CWCA "as a means for protecting undocumented workers from exploitation and retaliation," and would hinder the Division in its investigation and enforcement duties. The Division therefore views Rule 4.8 as a critical tool for protecting against the "in terrorem" effects that inhibit wage law enforcement. These protections are particularly timely in light of the Colorado legislature's recent pronouncements in HB 19-1267 concerning labor trafficking and wage theft:

> (I) Between 2015 and 2017, state prosecutors filed 129 cases using the new human trafficking statutes, only one of which was for labor trafficking;
>
> (II) Victims of labor trafficking, like those of sex trafficking, should not be seen as complicit in their victimization and are worthy of justice;
>
> (III) Persons who commit the crime of human trafficking often commit other crimes such as wage theft, tax evasion, and workers' compensation fraud, which drains local and state resources, as well as denies the state its right to revenue;
>
> (IV) A comprehensive approach is needed to address … labor trafficking….
>
> [(V)(3)](c) In order to protect all workers, it is necessary to close loopholes that allow for the exploitation of human labor for profit.[37]

While HB 19-1267 made real progress towards redressing and preventing wage theft and labor trafficking, the Division finds, Rule 4.8 is a critical element of the "comprehensive approach" to "close loopholes" and address the above harms to Colorado workers—because those suffering violations of the CWCA, 19-1267, and other statutes need to feel empowered to report violations, and protected when they do.

For the foregoing reasons and those set forth in the Division's NOTICE OF ADOPTION of Amendments to Wage Protection Act Rules, 7 CCR 1103-7 (August 20, 2019), the Division finds that Rule 4.8 shall become a permanent rule.

V. EFFECTIVE DATE. These rules take effect on December 19, 2019.

Scott Moss
Director
Division of Labor Standards and Statistics

October 25, 2019
Date

[36] *Camayo v. John Peroulis & Sons Sheep*, No. 10-CV-00772-MSK-MJW, 2012 WL 4359086, at *4 (D. Colo. Sept. 24, 2012), *adhered to on reconsideration*, 2013 WL 3927677 (July 30, 2013) (citations omitted).

[37] Colorado House Bill 19-1267 (signed May 16, 2019).

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