

DEPARTMENT OF LABOR AND EMPLOYMENT

Division of Labor Standards and Statistics

WAGE PROTECTION RULES

7 CCR 1103-7

~~As proposed on September 29, 2021; if adopted November 10, 2021, to be~~ effective January 1, 2022.

Rule 1. Statement of Purpose and Authority

- 1.1** The general purpose of these Wage Protection Rules (Rules) is to implement labor laws within the jurisdiction of the Division, including but not limited to the Colorado Wage Act (CWA) as amended by the Wage Protection Act (WPA) of 2014, C.R.S. § 8-4-101 et seq., the Healthy Families and Workplaces Act (HFWA) of 2020, C.R.S. § 8-13.3-401 et seq., and the Agricultural Labor Rights and Responsibilities Act, as codified in relevant part at C.R.S. §§ 8-6-101.5, 8-6-120, and 8-13.5-201 et seq. These rules are adopted pursuant to the Division’s authority to adopt and amend rules and regulations to enforce, execute, apply, and interpret Articles 1, 2, 4, 6, and 13.3, and 13.5 of Title 8, C.R.S. (2022), and all rules, regulations, investigations, and other proceedings of any kind thereunder, by the Administrative Procedure Act, C.R.S. § 24-4-103, and provisions of Articles 1, 2, 4, 6, ~~and~~ 13.3, and 13.5, including but not limited to §§ 8-1-101, 103, 107, 108, 111, 130; § 8-4-111; §§ 8-6-102, 104, 105, 106, 108, 109, 111, 116, 117, 120; § 8-12-115; ~~and~~ §§ 8-13.3-401, 403-405, 407-411, ~~and~~ 416; and §§ 8-13.5-202, 203, 204.
- 1.2** Incorporation by Reference. Title 8, Articles 1, 2, 4, 6, 12, ~~and~~ 13.3, and 13.5 of the Colorado Revised Statutes (2022) are hereby incorporated by reference, except that earlier versions of such laws and rules may apply to events that occurred in prior years. Such incorporation excludes later amendments to or editions of the statutes. These statutes are available for public inspection at the Colorado Department of Labor and Employment, Division of Labor Standards & Statistics, 633 17th Street, Denver CO 80202. Copies may be obtained from the Division of Labor Standards & Statistics at a reasonable charge. These statutes can be accessed electronically from the website of the Colorado Secretary of State. Pursuant to C.R.S. § 24-4-103(12.5)(b), the agency shall provide certified copies of the statutes incorporated at cost upon request or shall provide the requestor with information on how to obtain a certified copy of the material incorporated by reference from the agency originally issuing the statutes. All Division Rules are available to the public at www.coloradolaborlaw.gov. Where these Rules have provisions different from or contrary to any incorporated or referenced material, the provisions of these Rules govern so long as they are consistent with Colorado statutory and constitutional provisions.
- 1.3** Separability. These Rules are intended to remain in effect to the maximum extent possible. If any part of a rule (including any section, sentence, clause, phrase, word, or number) is held invalid, (A) the remainder of the rule remains valid, and (B) if the provision is held not wholly invalid, but merely in need of narrowing, the provision should be retained in narrowed form.
- 1.4** The Director of the Division of Labor Standards and Statistics in the Department of Labor and Employment (Director) has the authority to enforce the statutes cited in Rule 1.1 above and these Rules.

Rule 2. Definitions and Clarifications

- 2.1** “Administrative procedure” means the process used by the Division to investigate wage complaints in accordance with C.R.S. § 8-4-111 and C.R.S. §§ 8-13.3-407(4), -410, and -411.
- 2.2** “Authorized representative” means a person designated by a party to a wage complaint to represent the party during the Division’s administrative procedure. To designate an authorized representative, the party must comply with the requirements of Rule 4.3.

- 2.3** “Average daily earnings,” as used in C.R.S. § 8-4-109(3)(b), will be calculated as follows, unless the Division identifies a legitimate reason to use a different method of calculation:
- 2.3.1** The most recent typical workweek or pay period will generally be used to calculate the average daily earnings. The total gross amount of wages and compensation will be divided by the number of days worked.
 - 2.3.2** If an employee is entitled to and has been paid less than the Colorado minimum wage, and has not earned more than the Colorado minimum wage, then the Colorado minimum wage will be used to calculate average daily earnings.
 - 2.3.3** All compensation paid to employees, including the hourly rate, shift differential, minimum wage tip credit, regularly occurring non-discretionary bonuses, commissions, and overtime may be included in the average daily earnings calculation.
- 2.4** “Certified copy,” as used in C.R.S. § 8-4-113, means a copy of a final Division decision (issued by a compliance investigator or hearing officer) signed by the Director of the Division, or his or her designee, certifying that the document is a true and accurate copy of the final decision. A certified copy must be requested in writing. A Division decision (issued by a compliance investigator or hearing officer) will not be certified unless: either (1) all appeal deadlines have passed and no appeal has been filed or (2) if an appeal was timely filed, the decision was not superseded on appeal. A certified copy will not be issued in the event of termination pursuant to C.R.S. § 8-4-111(3).
- 2.5** “Determination” means a decision issued by a compliance investigator upon the conclusion of a wage complaint investigation. “Determination” includes: Citation and Notice of Assessment, Determination of Compliance, and Notice of Dismissal, if that Notice of Dismissal is issued after the Division initiated the administrative procedure as described in Rule 4.4.
- 2.6** “Employee” has the following definitions:
- 2.6.1** Under the CWA, C.R.S. § 8-4-101(5), an “employee” means any person, including a migratory laborer, performing labor or services for the benefit of an employer. For the purpose of these Rules, relevant factors in determining whether a person is an employee include the degree of control the employer may or does exercise over the person and the degree to which the person performs work that is the primary work of the employer; except that an individual primarily free from control and direction in the performance of the service, both under his or her contract for the performance of service and in fact, and who is customarily engaged in an independent trade, occupation, profession, or business related to the service performed is not an “employee.”
 - 2.6.2** Under the HFWA, C.R.S. § 8-13.3-402(4), “employee” has the same meaning as in C.R.S. § 8-4-101(5), but does not include an “employee” as defined in 45 U.S.C. § 351(d), who is subject to the federal “Railroad Unemployment Insurance Act,” 45 U.S.C. § 351 et seq. An employee’s “family member” means (1) an employee’s immediate family member, as defined in C.R.S. § 2-4-401(3.7); (2) a child to whom the employee stands in loco parentis or a person who stood in loco parentis to the employee when the employee was a minor; or (3) a person for whom the employee is responsible for providing or arranging health- or safety-related care. C.R.S. § 8-13.3-402(6).
- 2.7** “Employer” has the following definitions:
- 2.7.1** Under C.R.S. § 8-4-101(6), “employer” has the same meaning as in the federal Fair Labor Standards Act at 29 U.S.C. § 203(d), and includes a foreign labor contractor and a migratory field labor contractor or crew leader; except that the provisions of the COMPS Order do not apply to the state or its agencies or entities, counties, cities and counties, municipal corporations, quasi-municipal corporations, school districts, and irrigation,

reservoir, or drainage conservation companies or districts organized and existing under the laws of Colorado. "Foreign labor contractor" and "field labor contractor" have the definitions in C.R.S. §§ 8-4-101(7), (8.5).

- 2.7.2** Under the HFWA, C.R.S. § 8-13.3-402(5), "employer" has the same meaning as in C.R.S. § 8-4-101(6), except that an "employer" also includes the state and its agencies or entities, counties, cities and counties, municipalities, school districts, and any political subdivisions of the state, but does not include the federal government.
- 2.7.3** A "successor employer" is responsible for an acquired employer's HFWA obligations, including but not limited to accrued, requested, or in-progress leave, and "means an employing unit, whether or not an employing unit at the time of acquisition, that ... acquires all of an organization, a trade, or a business[,] or substantially all of the assets[,] of one or more employers subject to" HFWA. C.R.S. § 8-13.3-402(12). Acquiring "substantially all of the assets" of an employer is defined as in 26 U.S.C. § 368(a)(1)(C) and Rev. Proc. 77-37, § 3.01; acquiring "a trade or a business" is defined as in C.R.S. § 8-76-104(11)(c).
- 2.7.4** To determine whether an employer meets the 16-employee threshold for HFWA coverage in 2021 pursuant to C.R.S. § 8-13.3-403(1)(b), the rules for counting employees to determine whether an employer is covered under the federal Family and Medical Leave Act apply: the employer must employ the requisite number of employees "for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year"; "[a]ny employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week"; "[e]mployees on paid or unpaid leave, including [sick or medical] leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable expectation that the employee will later return to active employment"; "a corporation is a single employer rather than its separate establishments or divisions"; and employees are counted only if "within ... the United States," including any state, the District of Columbia, or any territory or possession of the United States. 29 CFR §§ 825.104-105.
- 2.8** The "employer's correct address," including as used in C.R.S. § 8-4-101(15), can include, but is not limited to, the employer's email address, the employer's address on file with the Colorado Secretary of State, and the address of the employer's registered agent on file with the Colorado Secretary of State.
- 2.9** When considering whether there is "good cause" for an extension of time, including as used in C.R.S. § 8-4-113(1)(b), the Division will determine whether the reason is substantial and reasonable and must take into account all available information and circumstances pertaining to the specific complaint.
- 2.10** "Post," including as used in C.R.S. § 8-4-107, may include electronic posting in a place readily accessible to all employees.
- 2.11** "Public health emergency" is defined as in C.R.S. § 8-13.3-402(9):
- (A) An act of bioterrorism, a pandemic influenza, or an epidemic caused by a novel and highly infectious agent, for which (1) an emergency is declared by a federal, state, or local public health agency, or (2) a disaster emergency is declared by the Governor; or
 - (B) A highly infectious illness or agent with epidemic or pandemic potential for which a disaster emergency is declared by the Governor.

A public health emergency is "declared" by any initial, amended, extended, restated, or prolonged declaration of an emergency that meets the above definition. Employees have up to 80 hours of

- supplemental paid sick leave usable as of January 1, 2021, because a public health emergency declared after the HFWA effective date remains in effect long enough to trigger paid leave in 2021 (under HFWA § 405 and Rule 3.5.1(C), distinct from the up to 80 hours of leave provided for 2020 by HFWA § 406 to conform to the federal paid leave law that expires on December 31, 2020). Employees receive their supplement of up to 80 hours of leave usable as of January 1, 2021, under HFWA § 405 only once during the entirety of a public health emergency even if such public health emergency is amended, extended, restated, or prolonged.
- 2.12** “Records reflecting the information contained in an employee’s itemized pay statement,” as used in C.R.S. § 8-4-103(4.5), may be kept electronically. The records are not required to be copies of the pay statements but must reflect all information contained in the pay statements.
- 2.13** “Terminated employee,” as used in C.R.S. § 8-4-105(1)(e), includes any employee separated from employment, whether the separation occurs by volition of the employer or the employee.
- 2.14** The Division may enforce the gratuity provisions described in C.R.S. § 8-4-103(6) through the administrative procedure described in C.R.S. § 8-4-111. The legal treatment of “tips,” “gratuities,” or other monies paid on a similar basis, in any source of law, is identical regardless of the terminology used.
- 2.15** “Wages’ or ‘compensation’” has the same meaning as in C.R.S. § 8-4-101(14). “Paid sick leave” required by HFWA constitutes “wages” under C.R.S. § 8-4-101(14); is covered by the provisions of C.R.S. Title 8, Article 4, and these Rules; is defined as paid time off from work that is provided by an employer for one of the qualifying reasons described in C.R.S. §§ 8-13.3-404 to -406. C.R.S. § 8-13.3-402(8)(a),(b).
- 2.16** A “written demand,” including as used in C.R.S. § 8-4-101(15), can be sent to the employer by electronic means, including but not limited to email and text message. Wages must be owed at the time of sending for the written demand to be considered valid.
- 2.17** Vacation Pay.
- 2.17.1** C.R.S. § 8-4-101(14)(a)(III), includes in the definition of “[w]ages’ or compensation’’: “Vacation 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.” “Vacation pay” is pay for leave, regardless of its label, that is usable at the employee’s discretion (other than procedural requirements such as notice and approval of particular dates), rather than leave usable only upon occurrence of a qualifying event (for example, a medical need, caretaking requirement, bereavement, or holiday).
- 2.17.2** The “earned and determinable in accordance with the terms” provision does not allow a forfeiture of any earned (accrued) vacation pay, but does allow agreements on matters such as: (1) whether there is any vacation pay at all; (2) the amount of vacation pay per year or other period; (3) whether vacation pay accrues all at once, proportionally each week, month, or other period; and (4) whether there is a cap of one year’s worth (or more) of vacation pay. Thus, employers may have policies that cap employees at a year’s worth of vacation pay, but that do not forfeit any of that year’s worth.

For example, an agreement for ten paid vacation days per year:

- (a) *may* provide that employees can accrue more than ten days, by allowing carryover of vacation from year to year;
- (b) *may* cap employees at ten days; but

- (c) may not diminish an employee's number of days (other than due to use by the employee).
- 2.18 "Willful," in Articles within C.R.S., Title 8, that this Division enforces or administers, has the same meaning as under 29 U.S.C § 255(a) and 29 C.F.R. § 578.3(c).
- 2.19 C.R.S. § 8-4-103(1)(b) describes circumstances under which employers are "subject to the penalties specified in section 8-4-113(1)." Despite use of the word "penalty" in this section, this language does refer to the fine described in C.R.S. § 8-4-113(1) and is payable to the Division.
- 2.20 A complaint, appeal, or other submission to the Division is considered "filed" with the Division when it is received by the Division via mail, fax, email, online submission, or personal delivery. Any complaint, appeal, or other submission to the Division received after 11:59pm Mountain Time is considered filed the next business day. Any such submission is considered "signed," or to have a "signature," if has either an ink signature, a scanned signature, an electronically drawn or generated signature, or a typed name entered by the party or their authorized representative in the signature area; by signing in any such fashion, the individual is deemed to have agreed and assented that the document is signed by them.
- 2.21 These Rules are to be read in conjunction with other rules promulgated and enforced by the Division with additional requirements, including but not limited to the Colorado Overtime and Minimum Pay Standards Order ("COMPS Order"), 7 CCR 1103-1, and the Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving Rules ("Colorado WARNING Rules"), 7 CCR 1103-11.

Rule 3. Filing a Wage Complaint

- 3.1 An employee who wishes to file a wage complaint with the Division shall use the Division-approved form(s).
 - 3.1.1 A wage complaint may only be filed by the employee who did not receive his or her wages or compensation.
 - 3.1.2 A wage complaint shall include the employee's signature, employee's contact information, employer's contact information, and basis for the wage complaint. Failure to include this information on the wage complaint form may result in dismissal of the wage complaint.
 - 3.1.3 The failure of an employee to respond in a timely manner to informational or investigatory requests by the Division may result in dismissal of the wage complaint.
 - 3.1.4 If a wage complaint is dismissed before a Notice of Complaint is sent to the employer because the employee failed to respond to a Division request for information, the complaint may be reopened if the employee provides the requested information or documentation to the Division within 35 days of the Division's request for information. Employees may be required to file a new complaint if the employee's response is received more than 35 days after the Division's request for information.
 - 3.1.5 The Division shall not accept wage complaints for amounts exceeding \$7,500.
 - 3.1.6 An anonymous complaint is not a "wage complaint" within the meaning of C.R.S. § 8-4-111 and C.R.S. §§ 8-13.3-402(8)(a)(I)-(II), - 407, -410, -411 and will not be investigated using the Division's administrative procedure. The Division may choose to address an anonymous complaint outside of the administrative procedure.
- 3.2 An employee may pursue a wage complaint through either the court system or the Division's administrative procedure.

- 3.2.1 Employees are not required to use the Division’s administrative procedure in order to pursue a wage complaint in court.
- 3.2.2 The Division does not have jurisdiction over any wage complaint that has been adjudicated or is currently being adjudicated by a court of competent jurisdiction.
- 3.2.3 As provided by C.R.S. § 8-4-113(2), 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. Such a filing can be in a county or district court, and will thereby have the effect of a judgment from which execution may issue.
- 3.3 The employee may withdraw the wage complaint at any time prior to issuance of a determination by notifying the Division in writing.
- 3.4 The Division may exercise its discretion to have an investigation sequenced and/or divided into two or more stages on discrete questions of liability or relief (e.g., bifurcation), yielding two or more determinations and/or phases of the investigation.
- 3.5 Accrual, use, and other matters relating to paid leave under HFWA.
 - 3.5.1 Accrual of HFWA leave. Paid leave begins to accrue at the commencement of employment or on January 1, 2021, whichever is later.
 - (A) For the minimum HFWA accrual rate of one hour of leave for every 30 hours worked, up to cap of 48 hours per benefits year (C.R.S. § 8-13.3-403(2)(a)), accrual is based on all “time worked” under Rule 1.9 of the COMPS Order, 7 CCR 1103-1, with regular and overtime hours counting equally; except under C.R.S. § 8-13.3-403(2)(c), an overtime-exempt employee accrues paid leave based on their normal hours worked up to a maximum of forty per week. Once employees have accrued 48 hours of paid leave during the benefit year, they do not accrue more, except if an employer chooses to provide paid leave in a greater amount. C.R.S. §§ 8-13.3-403(2)(a), -413.
 - (B) For hours accrual for purposes of C.R.S. § 8-13.3-403(2)(a), the best available, reasonable estimate shall be used for employees paid on a fee-for-service basis for which hours are not ordinarily tracked and cannot feasibly be tracked, except that higher education adjunct faculty paid on a per-credit or per-course basis shall be deemed to work three hours total for each in-class hour.
 - (C) On the day a public health emergency is declared within the definition of Rule 2.11, employers are required to immediately provide each employee with additional hours of paid leave, usable as of the date of the declaration, January 1, 2021, or the employee’s first date of employment, whichever is later -- whatever the employee has accrued prior to the declaration of the public health emergency at the regular HFWA rate (*i.e.*, one hour per 30 worked, up to a maximum of 48 per benefit year), and a one-time supplement with the number of hours needed for:
 - (1) employees who normally work forty or more hours in a week to have access to 80 hours of total paid leave; and
 - (2) employees who normally work under forty hours in a week to have access to paid leave hours that are at least the greater of the number of hours the employee (a) is scheduled for work or paid leave in the fourteen-day period after the leave request, or (b) actually worked in the fourteen-day period prior to the declaration of the public health emergency or the leave request, whichever is later.

- (D) During the entire duration of a public health emergency (*i.e.*, during the time between the date on which the emergency is declared and four weeks after the date of the official termination or suspension of the emergency declaration), employers:
- (1) are required to permit employees to take both (a) the paid leave they have accrued prior to the declaration date of the public health emergency pursuant to C.R.S. § 8-13.3-403(2)(a), for any of the qualifying reasons provided in C.R.S. § 8-13.3-404(1), and (b) the amount of supplemental paid leave that was provided to the employee on the date of the declaration of a public health emergency, for any of the qualifying reasons provided in C.R.S. § 8-13.3-405(3);
 - (2) remain subject to the minimum accrual requirements of C.R.S. § 8-13.3-403(2)(a), and employees continue to accrue paid leave (up to 48 hours per benefit year); and
 - (3) must permit an employee to use the full amount of supplementary leave provided under C.R.S. § 8-13.3-405(1) and this rule, prior to using any of the employee's previously-accrued leave under C.R.S. § 8-13.3-403(2)(a), if an employee required leave in circumstances that qualify under both C.R.S. § 8-13.3-404(1) and C.R.S. § 8-13.3-405(3) (*e.g.*, an employee is experiencing symptoms of a communicable illness that was the subject of the declaration of a public health emergency and needs to obtain testing and treatment).

(E) Yearly Basis for HFWA leave.

- (1) Carryover. Pursuant to C.R.S. § 8-13.3-403(3)(b), "up to forty-eight hours of paid sick leave that an employee accrues in a year but does not use carries forward to, and may be used in, a subsequent year." For purposes of C.R.S. § 8-13.3-403(3)(b), "year" means "a regular and consecutive twelve-month period as determined by an employer." C.R.S. § 8-13.3-402(13). The employer shall not be required to, but may, permit an employee to carry forward more than forty-eight (48) hours of unused paid leave from one benefit year to the next. C.R.S. §§ 8-13.3-403(3)(b), -413.
- (2) "Benefit year" definition. The applicable "benefit year" is the period of 12 consecutive months established by an employer in which an employee shall accrue and use earned sick leave. Unless otherwise established by an employer in a written policy, a "benefit year" is the calendar year. If an employer transitions from one type of year to another, the employer must ensure that the transition process maintains all HFWA rights, and must notify employees in writing of any such changes.

3.5.2 Pay rate and amount of HFWA leave. Under C.R.S. § 8-13.3-402(8), leave must be paid at the same rate and with the same benefits, including health benefits, as the employee normally earns during hours worked, not including overtime, bonuses, or holiday pay. Leave must be paid on the same schedule as regular wages.

- (A) The pay rate for leave must be at least the applicable minimum wage. The HFWA pay rate shall be calculated using the same rules applicable to calculating an employee's "regular rate" ~~for overtime purposes~~ under Rule 1.8 of the COMPS Order, 7 CCR 1103-1, except that: (1) bonuses included in the regular rate calculation are excluded from the HFWA pay rate calculation; (2) only the method in COMPS Rule 1.8.3(A) may be used for employees with variable hourly

rates, except that the rate is measured over 30 days pursuant to the following subsection (3); and (3) the HFWA regular rate shall be determined based upon the employee's pay over the 30 calendar days prior to taking leave, unless the employee has not yet worked 30 calendar days in which case the longest available period shall be used. The HFWA pay rate for employees covered by Rule 3.5.1(B) shall be calculated in accordance with that Rule.

- (B) The number of hours of paid HFWA leave an employee can take is the number of hours the employer reasonably anticipated they would have worked during the period of the leave, based on: (1) their regular schedule of hours actually worked; (2) or, if leave is during a period the employee was anticipated to depart from a regular schedule, then hours anticipated for that period; (3) or, if the number of hours the employee would have worked during the period cannot be reasonably anticipated, then their average hours worked during their most recent 30 calendar days of work. If an employee has not yet been employed for 30 calendar days, their entitlement must be determined under 3.5.2(B)(1) or (2).
- (C) Indeterminate shifts. If an employee uses paid leave for a shift of indeterminate length (for example, a shift that is defined by business needs rather than a previously specified number of hours), an employer may determine the number of paid leave hours used by the employee based on the number of hours actually worked by a replacement employee in the same shift. ~~If there is no replacement employee for the indeterminate shift, an employer may determine the number of paid leave hours used by the employee based on the number of hours actually worked by the employee for their most similar shift in the past or a similarly situated employee who works the same shift or who has worked a similar shift in the past.~~
- (D) On-call employees are entitled to use paid leave during any hours they have been scheduled to work, ~~including hours among the employee's on-call time that the employer actually requests the employee to work, or any other hours that would qualify as "time worked" as defined by Rule 1.9 of the COMPS Order, 7 CCR 1103-1. Otherwise, b-~~Being "scheduled to work" does not include shifts for which an employee has been asked to be available or on-call, ~~unless the employee is performing work, including any "time worked" as defined by COMPS Order, 7 CCR 1103-1, Rule 1.9.~~ However, if an on-call employee has an agreement with an employer to be paid for a scheduled shift regardless of whether the employee actually works the shift, the employer must provide paid leave to a qualifying employee for that shift.

3.5.3 Use of HFWA leave.

- (A) Because an employee "may use accrued paid sick leave as it is accrued," C.R.S. § 8-13.3-403(3)(a), HFWA leave may be used immediately upon accrual, but an employer may, in the ordinary course of business and in good faith, verify employee hours within a month after work is performed and adjust accrued leave to correct any inaccuracy, provided that the employee is so notified in writing.
- (B) An employer may require use of HFWA leave in hourly increments, or may require or allow smaller minimum increments; if an employer does not specify the minimum increment in writing, employees nevertheless may not use increments smaller than a tenth of an hour (*i.e.*, six-minute increments).
- (C) An employer cannot apply an absence or attendance policy to an employee's HFWA-qualifying leave use if it could result in adverse action against the employee, including discipline, as defined in C.R.S. § 8-13.3-407(2)(b). However, after an employee has exhausted all leave required by HFWA, an employer can

apply an absence or attendance policy to any absences taken by the employee.

3.5.4 Applicability of a general paid time off (“PTO”) policy to HFWA leave. HFWA does not require additional leave if an employer policy provides fully paid leave for both HFWA and non-HFWA purposes (e.g., sick time and vacation) and makes clear to employees, in a writing distributed in advance of an actual or anticipated leave request, that:

- (A) its leave policy provides PTO --
 - (1) in at least an amount of hours and with pay sufficient to satisfy HFWA and applicable rules (including, if a public health emergency is declared, a supplemental amount of leave required to satisfy C.R.S. § 8-13.3-405(1) and Rule 3.5.1(C),
 - (2) for all the same purposes covered by HFWA and applicable rules, not a narrower set of purposes, and
 - (3) under all the same conditions as under HFWA and applicable rules, not stricter or more onerous conditions (including but not limited to matters such as accrual, use, payment, annual carryover of unused accrued leave, notice and documentation requirements, and anti-retaliation and anti-interference rights); and
- (B) additional HFWA leave need not be provided when employees use all of their available PTO for non-HFWA-qualifying reasons (e.g., vacation). C.R.S. § 8-13.3-403(4), except if a public health emergency is declared after an employee uses some or all available PTO for the applicable benefit year, the employer must supplement the employee’s current total of accrued, unused leave pursuant to Rule 3.5.1(C).

3.5.5 Notice by employees of HFWA-qualifying leave.

- (A) An employee may request leave orally or in writing, including electronically (for example, by email or text message). An employer may choose additional methods of receiving requests or notifications that it deems acceptable, but shall not restrict employees from using any method that notifies the employer effectively. C.R.S. § 8-13.3-404(2).
- (B) For HFWA leave for any health-related or safety-related reason within C.R.S. § 8-13.3-404, if the employee’s need for leave is “foreseeable,” (1) an employee shall make a good-faith effort to provide advance notice and a reasonable effort to schedule the leave in a manner that does not unduly disrupt employer operations, and (2) an employer may by written policy require reasonable procedures to provide notice of foreseeable leave, but shall not deny paid sick leave based on noncompliance with such a policy. C.R.S. § 8-13.3-404(2),(5).
- (C) For HFWA leave that is “related to public health emergency” under C.R.S. § 8-13.3-405(3): An employee shall notify their employer of their need for leave as soon as practicable if (1) the need for leave is foreseeable and (2) the employer’s place of business is not closed. C.R.S. § 8-13.3-405(4).

3.5.6 An employer may require “reasonable documentation” that leave is for a HFWA-qualifying purpose only if the leave requested or taken is for “four or more consecutive work days,” C.R.S. § 8-13.3-404(6), defined as four consecutive days on which the employee would have ordinarily worked absent the leave-qualifying condition, not four consecutive calendar days. An employer may not require an employee to provide documentation that leave is for a qualifying reason “related to [a] public health emergency” under C.R.S. § 8-

13.3-405(3),(4).

- (A) When documentation is required, an employer may request only “reasonable” documentation, which is defined as not more documentation than needed to show a HFWA-qualifying reason for leave, as described in subparts (B), (C), and (D) below, and an employer shall not require disclosure of “details” regarding the employee's or family member's “health information” or the “domestic violence, sexual assault, or stalking” that is the basis for HFWA leave (C.R.S. § 8-13.3-412(1)).
- (B) To document leave for a health-related need under C.R.S. § 8-13.3-404(1)(a), (b):
 - (1) If the employee received any services (including remote services) from a health or social services provider for the HFWA-qualifying condition or need, a document from that provider, indicating a HFWA-qualifying purpose for the leave, will suffice.
 - (2) An employee who did not receive services from a provider for the HFWA-qualifying leave, or who cannot obtain a document from their provider in reasonable time or without added expense, can provide their own writing indicating that they took leave for a HFWA-qualifying purpose.
- (C) To document leave for a safety-related need covered by C.R.S. § 8-13.3-404(1)(c) (*i.e.*, domestic abuse, sexual assault, or criminal harassment): A document under subpart (B)(1) (from a health provider or a non-health provider of legal services, shelter services, social work, or other similar services) or an employee writing under (B)(2) will suffice, as will a legal document indicating a safety need that was the reason for the leave (*e.g.*, a restraining order, other court order, or police report).
- (D) Submission of documentation to an employer may be provided (1) by any reasonable method, including but not limited to electronic transmission, (2) at any time until whichever is sooner of an employee's return from leave (or termination of employment, if the employee does not return), (3) without a requirement of the employee's signature, notarization, or any other particular document format.
- (E) Confidentiality of leave-related information and documentation. Any information an employer possesses regarding the health of an employee or the employee's family member, or regarding domestic abuse, sexual assault, or criminal harassment affecting an employee or employee's family member, shall be treated as confidential and may not be disclosed to any other individual except the affected employee, unless the affected employee provides written permission prior to such disclosure. C.R.S. § 8-13.3-412(2)(c). If the information is in writing, it shall be maintained on a separate form and in a separate file from other personnel information, and shall be treated as a confidential medical record by the employer. C.R.S. § 8-13.3-412(2)(a)-(b).
- (F) If an employer reasonably deems an employee's documentation deficient, without imposing a requirement of providing more documentation than HFWA or applicable rules permit, prior to denying leave, the employer must: (1) notify the employee within seven days of either receiving the documentation or the employee's return to work (or termination of employment, if the employee does not return), and (2) provide the employee the minimum of seven days to cure the deficiency after the employee is notified that the employer deems the existing documentation inadequate.

- 3.5.7** Employer records of accrued and used paid leave hours. An employer “shall retain records for each employee for a two-year period, documenting hours worked, paid sick leave accrued, and paid sick leave used” (C.R.S. § 8-13.3-409(1)), except that two-year limit does not diminish the obligation to retain pay statement records for three years (C.R.S. § 8-4-103(4.5)). Upon an employee’s request, an employer must provide, in writing or electronically, documents sufficient to show, or a dated statement containing, the then-current amount of paid leave the employee has (1) available for use, and (2) already used during the current benefit year, including information as to any accrued leave provided and used subject to C.R.S. § 8-13.3-403 and any supplemental public health emergency-related leave provided and used subject to C.R.S. § 8-13.3-405(3). Employees may make such requests no more than once per month, except they may make an additional request when any need for HFWA leave arises. Employers may choose a reasonable system for fulfilling such requests, including but not limited to listing such information on each pay stub, using an electronic system where employees can access their own information, or providing the necessary information in a letter or electronic communication.
- 3.5.8** Collective bargaining agreements that provide for equivalent or more generous paid sick leave.
- (A) If a bona fide collective bargaining agreement (“CBA”) “provides for equivalent or more generous paid sick leave for the employees covered” (C.R.S. § 8-13.3-415(2),(3)), then:
- (1) HFWA does not apply additional requirements (e.g. it does not require an additional 48 hours of leave when a CBA provides the same amount of leave); and
- (2) HFWA does not invalidate the CBA or require its re-opening.
- (B) A CBA “provides for equivalent or more generous paid sick leave” (C.R.S. §§ 8-13.3-415(2),(3)) if the CBA does not diminish any employee protections under HFWA and rules promulgated thereunder, including but not limited to the requirements in Rule 3.5.4(A) and:
- (1) accrual and carryover;
- (2) use and its conditions (e.g., documentation and notice to employers); and
- (3) protection and effectuation of paid sick leave rights through notice to employees and prohibitions against retaliation based on, or interference with, protected activity.
- (C) This Rule applies to a CBA that is either:
- (1) “in effect on the effective date” of HFWA, July 14, 2020; or
- (2) “initially negotiated or negotiated for the next collective bargaining agreement after th[at] effective date . . . if the requirements of this Part 4 are expressly waived in the [CBA].” (C.R.S. §§ 8-13.3-415(2),(3).)

Rule 4. Investigation

- 4.1** Wage complaints shall be assigned to Division compliance investigators. Investigatory methods used by the Division may include:

~~(A-)~~ Interviews of the employer, employee, and other parties;

- ~~(B-)~~ Information gathering, fact-finding, and reviews of written submissions; and
 - ~~(C-)~~ Any other lawful techniques that enable the Division to assess the employer's compliance.
- 4.2** The Division will evaluate wage complaints under the following burden of proof structure:
- 4.2.1** To initiate a wage complaint, an employee must provide an explanation of the basis for the complaint that is clear, specific, and shows the employee is entitled to relief. The employee must provide sufficient evidence from which both a violation of Colorado wage and hour laws and an estimate of wages due may be reasonably inferred.
 - 4.2.2** The burden then shifts to the employer to prove, by a preponderance of the evidence, that the employee is not entitled to the claimed relief. If the employer fails to meet its burden, the Division may award wages and/or penalties to the employee based on the employee's evidence.
 - 4.2.3** If the Division concludes that wages are owed to the employee, but cannot calculate the precise amount of wages due, then the Division may award a reasonable estimate of wages due.
- 4.3** Any party to a wage complaint may designate an authorized representative to represent the party during the Division's administrative procedure.
- 4.3.1** The party may designate an authorized representative by filing the Division-approved form with the Division.
 - 4.3.2** If not using the Division-approved form, and the authorized representative is a licensed attorney or accountant, the party or the authorized representative must provide written notice to the Division that the authorized representative will represent the party during the Division's administrative procedure.
 - 4.3.3** If not using the Division-approved form, and the authorized representative is not a licensed attorney or accountant, the party must provide a signed written notice to the Division that the authorized representative will represent the party during the Division's administrative procedure.
 - 4.3.4** The party may revoke the authorized representative's authority by contacting the Division in writing.
- 4.4** After receipt of a wage complaint that states a claim for relief, the Division will initiate the administrative procedure by sending a Notice of Complaint to the employer, along with any relevant supporting documentation submitted by the employee, via U.S. postal mail, electronic means, or personal delivery.
- 4.4.1** If the Notice of Complaint cannot be delivered, the administrative procedure has not been initiated. If a proper address is located or provided, the Division will resend the Notice of Complaint, and the employer's deadline to respond will be calculated from the date of the subsequent notice.
 - 4.4.2** If the Division cannot determine the employer's correct address, it may contact the employee to request the employer's address. The Division may dismiss the wage complaint if neither the employee nor the Division can determine the employer's correct address.
 - 4.4.3** The employer's response to the Notice of Complaint must include the completed Division Employer Response Form, as well as any additional information or documentation requested by the Division. An insufficient response from the employer may be considered

a failure to respond under C.R.S. § 8-4-113(1)(b).

- 4.4.4** If an employer obtains a good cause extension to respond under C.R.S. § 8-4-113(1)(b), the extension does not waive or reduce penalties owed to the employee pursuant to C.R.S. § 8-4-109(3)(b) if the employer fails to pay the employee's wages within fourteen days after the Notice of Complaint is sent.
- 4.4.5** Where a claim, complaint, or investigation for violation of these Rules or the statutes they enforce has been filed or commenced, the employer shall preserve all relevant documents until final disposition and until the expiration of the statutory period within which a person aggrieved may bring a civil action.
- 4.5** After receipt and review of the employer's response, the Division may contact the employee for additional documentation or information. If the employer denies, in whole or in part, the allegations in the Notice of Complaint, and the Division determines further investigation would be beneficial, the Division shall send to the employee any relevant supporting documentation submitted by the employer. If the employee does not respond to the request for additional documentation or information by the deadline given, the Division will make a determination based on the information in the record.
- 4.6** All parties to a wage complaint are responsible for ensuring the Division has current contact information.
- 4.6.1** All parties must promptly notify the Division of any change in contact information, including mailing address, email address, and phone number.
- 4.6.2** Parties should not rely on the U.S. Postal Service to forward mail. Failure to respond to a notice because mail was not forwarded to a new address will not be excused.
- 4.7** In any Division investigation, proceeding, or other action, if information is provided to the Division by a source requesting confidentiality, and that information is used only as a basis for procuring other evidence, not offered as evidence itself, then the source shall remain confidential. Any such confidential source is unlawful to disclose (unless the source consents) in any administrative or judicial proceeding, in response to any records or information request, or in any other manner, in order to effectuate statutory requirements including but not limited to the following:
- (A) If information is properly treated as confidential, the Division "shall provide a physical environment and establish policies and procedures to ensure confidentiality for all information regarding any employer, employee, or person pertaining to any action pursuant to articles 1 to 13" (C.R.S. § 8-1-115);
 - (B) "No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any employee who has filed any complaint or instituted or caused to be instituted any proceeding under this article or related law or who has testified or may testify in any proceeding on behalf of himself, herself, or another regarding afforded protections under this article (C.R.S. § 8-4-120);
 - (C) It is unlawful to "discharge[] or threaten[] to discharge, or in any other way discriminate[] against an employee" because s/he "may testify in any investigation or proceeding relative to enforcement of this article" (C.R.S. § 8-6-115); and
 - (D) It is unlawful to take adverse action based on "participat[ing] in an investigation, hearing, or proceeding or cooperat[ing] with or assist[ing] the Division in its investigations of alleged violations" of HFWA (C.R.S. §§ 8-13.3-402(10), -407).
- 4.8** Immigration status is irrelevant to wage rights and responsibilities, including the right to access paid leave without retaliation or interference under HFWA, and the Division shall assure that

wage rights and responsibilities apply regardless of immigration status, including but not limited to as follows.

- 4.8.1** The Division will not voluntarily provide any person or entity information concerning the immigration status of (a) a party to a wage claim, (b) a person offering information concerning a wage claim, or (c) a person with a relationship with anyone in categories (a) or (b).
- 4.8.2** Any effort to use a person's immigration status to negatively impact the wage and hour law rights, responsibilities, or proceedings of any person or entity is an unlawful act of obstruction, retaliation, and/or extortion, based on statutory provisions including but not limited to the following that make it unlawful:
- (A) For "any person" to "hinder[] or obstruct[] the director or any such person authorized by the director in the exercise of any power conferred by this article," including but not limited to wage investigations, rulemakings, or adjudicative or judicial proceedings (C.R.S. § 8-1-116(2));
 - (B) For an employer to "intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any employee who has filed any complaint or instituted or caused to be instituted any proceeding under this article or related law or who has testified or may testify in any proceeding on behalf of himself, herself, or another regarding afforded protections under this article" (C.R.S. § 8-4-120);
 - (C) For any person to "threaten[] to report to law enforcement officials the immigration status of the threatened person or another person" to "induce another person" to give up money "or another item of value" (C.R.S. § 18-3-207(1.5)), including inducing the surrender of any "tangible and intangible personal property, contract rights, choses in action, [or] services ... , and any rights of use or enjoyment connected therewith" (C.R.S. § 18-1-901); and
 - (D) For an employer to deny "any right guaranteed under" HFWA, or to take "any adverse action against an employee for exercising any right guaranteed" by HFWA (C.R.S. §§ 8-13.3-402(10), -407).

Rule 5. Determination

- 5.1** Upon conclusion of the investigation of a wage complaint, the Division will issue a determination.
- 5.1.1** The Division shall send the determination to all parties via U.S. postal mail, electronic means, or personal delivery on the date the determination is issued by the Division's compliance investigator. The Division shall notify the parties of their termination and any appeal rights pursuant to C.R.S. § 8-4-111(3) and C.R.S. § 8-4-111.5(1).
- 5.1.2** The date of "issuance" of the Division's determination, as used in C.R.S. § 8-4-111(3), is the date the Division's determination is "sent," as used in C.R.S. § 8-4-111.5(1). Both the termination and appeal deadlines are calculated from the date the Division's determination is originally issued and sent to the parties.
- 5.1.3** If any copies of the decision are sent to the parties after the date the Division's determination is originally issued and sent to the parties, those copies are provided only as a courtesy and do not change the thirty-five day appeal and termination deadlines.
- 5.1.4** Determinations by the Division may include the following remedies, depending on which, if any, the Division's findings support:
- (A) monetary or other relief authorized by the statute(s) under which the wage

complaint was filed, including but not limited to, where applicable --

- (1) any unpaid wages, penalties, and/or fines under C.R.S. Title 8, Articles 1, 4, 6, and 13.3;
 - (2) if a claim under C.R.S. Title 8, Article 13.3 (HFWA) cost the employee a job or pay, back pay plus either reinstatement or (if reinstatement is infeasible) front pay for a reasonable period; and/or
 - (3) other fines or penalties authorized by statutes applicable to the complaint;
- (B) fines or penalties authorized by the statutes on Division investigative and enforcement authority in C.R.S. Title 8, Articles 1, 4, 6, and 13.3; and/or
- (C) order(s) to cease non-compliance and/or effectuate compliance, as authorized by the statute(s) under which the complaint was filed and statutes on Division investigative and enforcement authority in C.R.S. Title 8, Article 1, 4, 6, and 13.3.

Rule 6. Appeal

6.1 Any party to the claim may appeal the Division's determination.

6.1.1 Parties are encouraged, though not required, to use the Division's appeal form. A valid appeal is a written statement that is timely filed with the Division, explains the clear error in the determination that is the basis for the appeal, and has been signed by the party or the party's authorized representative.

6.1.2 No appeal will be heard and no hearing will be held unless the appeal is received by the Division within thirty-five calendar days of the date the determination is sent. It is the responsibility of the party filing the appeal to ensure the appeal is received by the Division within the thirty-five day filing deadline.

6.1.3 Upon receipt of the appeal, the Division will notify the parties of the date of the hearing and any interim deadlines via U.S. postal mail, electronic means, or personal delivery.

6.1.4 Upon receipt of the appeal, the Division will send a copy of the appeal and a copy of the record of its investigation to the parties via U.S. postal mail, electronic means, or personal delivery. All evidence submitted to the Division as part of the investigation is part of the record on appeal and need not be resubmitted.

6.2 Parties who timely file a valid appeal of the Division's determination will be afforded an administrative appeal hearing before a Division hearing officer. Parties may appear by telephone.

6.3 The parties may submit new testimonial evidence to the hearing officer in accordance with deadlines imposed by the Division. The parties may submit new documentary or other non-testimonial evidence in accordance with deadlines imposed by the Division and upon showing "good cause," which may be assessed based on any relevant factors, including but not limited to:

6.3.1 That the new evidence was previously not known or obtainable, despite diligent evidence-gathering efforts by the party offering the new evidence;

6.3.2 That the party failed to receive fair notice of the investigation or of a key filing by another party or by the Division to which the new evidence is responsive;

6.3.3 That factors outside the control of the party prevented a timely action or interfered with the opportunity to act, except that the acts and omissions of a party's authorized representative are considered the acts and omissions of the party and are not considered

to be a factor outside the party's control as intended by this rule;

- 6.3.4 That a determination raised a new issue or argument that cannot be responded to adequately without the new evidence;
 - 6.3.5 That, at the investigation stage, the party offering new evidence requested more time to submit evidence, yet was denied, and in the hearing officer's judgment (a) the need for more time was legitimate and did not reflect neglect by the party, (b) the denial of the request for more time was unwarranted, and (c) exclusion of the evidence would cause substantial injustice to the party; and/or
 - 6.3.6 That failure to admit the evidence otherwise would cause substantial injustice and did not arise from neglect by the party.
- 6.4 New evidence must be sent to all other parties to the appeal. Failure to send all new evidence to all other parties to the appeal may result in the evidence being excluded from the record.
 - 6.5 If the party who filed the appeal does not participate in the hearing, the appeal may be dismissed.
 - 6.6 All testimony at a hearing must be recorded by the Division but need not be transcribed unless the hearing officer's decision is appealed.
 - 6.7 The hearing officer may, upon the application of any party or on his or her own motion, convene a prehearing conference to discuss the issues on appeal, the evidence to be presented, and any other relevant matters that may simplify further proceedings.
 - 6.8 The hearing officer will decide whether the Division's determination is based on a clear error of fact or law.
 - 6.9 The hearing officer shall not engage in ex parte communication with any party to an appeal.
 - 6.10 An appeal may, in the discretion of the hearing officer, be sequenced and/or divided into two or more stages on discrete questions of liability and/or relief (e.g., bifurcation), yielding two or more decisions and/or phases of the appeal.
 - 6.11 The hearing officer's decision constitutes a final agency action pursuant to C.R.S. § 24-4-106. The Division shall promptly provide all parties with a copy of the hearing officer's decision via U.S. postal mail, electronic means, or personal delivery. The Division shall notify the parties of their appeal rights pursuant to C.R.S. § 8-4-111.5(5).