



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

Wage Protection Rules, 7 CCR 1103-7 (2023), as adopted November 10, 2022.

I. BASIS: The Director (“Director”) of the Division of Labor Standards and Statistics (“Division”) has authority to adopt rules and regulations on wage-and-hour and workplace conditions, under authority listed in Part II, which is incorporated into Part I as well. These rules update the Wage Protection Rules, 7 CCR 1103-7, which implement the Colorado Wage Act (“CWA”) as amended, including but not limited to by the Wage Protection Act (“WPA”), C.R.S. § 8-4-101 et seq., and Colorado Senate Bill 22-161 (“SB161”); the Healthy Families and Workplaces Act (“HFWA”), C.R.S. § 8-13.3-401 et seq.; and the Agricultural Labor Rights and Responsibilities Act, codified in relevant part at C.R.S. §§ 8-6-101.5, 8-6-120, and 8-13.5-201 et seq.

II. SPECIFIC STATUTORY AUTHORITY: The Director is authorized to adopt and amend rules and regulations to enforce, execute, apply, and interpret Articles 1, 2, 4, 6, 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, 13.3, and 13.5, including but not limited to §§ 8-1-101, 103, 107, 108, 111, 130; §§ 8-4-111, -113; §§ 8-6-102, 104, 105, 106, 108, 109, 111, 116, 117, 120; § 8-12-115; §§ 8-13.3-401, 403-405, 407-411, 416; and § 8-13.5-202, 203, 204.

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

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

A. Rule 1: Statement of Purpose and Authority

Amendments to Rule 1 non-substantively amend relevant citations.

B. Rule 2.3: Average Daily Earnings

The amendment to Rule 2.3 addresses the fact that the rule now says C.R.S. § 8-4-109(3)(b) refers to “average daily earnings,” which it will not as of January 1, 2023, under SB161.

C. Rule 2.4: Certified Copies

The amendment to Rule 2.4 clarifies that a “certified copy of any citation, notice of assessment, or order imposing wages due, fines, or penalties” under C.R.S. § 8-4-113: (1) does not require a copy separate from the initially issued citation, notice, or order, as long as the Division certifies the accuracy of the issuance; (2) can be issued for “any” citation, notice of assessment, or order, not just a “final” order — a clarification that became relevant with recent statutory and rule amendments providing for sequenced citations, notices, or orders — such as under SB161 provisions for certain claimants to be awarded attorney fees and costs, which may be awarded in a later order, after an initial citation or notice of assessment is already issued; (3) may be issued by any Division official as delegated by the Director — not just a compliance investigator or hearing officer as existing rule states; and (4) is issued only a reasonable period after the appeal deadline — to allow for the possibility of a stay or other order halting the filing or enforcement of a certified copy.

D. Rule 2.13: Terminated Employee

The amendment to Rule 2.13 addresses the fact that the reference to “terminated employee” will move from C.R.S. § 8-4-105(1)(e) to C.R.S. § 8-4-105(1)(e)(I) on January 1, 2023, under SB161.

E. Rule 2.16: Written Demand

SB161 amended the penalties applicable under C.R.S. § 8-4-109, effective January 1, 2023. The rule amendment clarifies as follows. First, the new penalty amounts apply when an employer’s refusal to pay wages within 14 days of a written demand occurs on or after January 1, 2023, even if a written demand was sent before that date; *i.e.*, the new

penalty amounts apply if a written demand is sent on or after December 18, 2022. Second, if an employer’s first refusal to pay wages is before January 1, 2023 (*i.e.*, if it rejects a written demand sent before December 18, 2022), then: (1) the *pre-SB161* penalties still apply if, on or after December 18, 2022, either (a) the claimant sends another written demand and the employer refuses to pay the wages owed within 14 days of that second written demand, or (b) the Division sends a Notice of Complaint (which by statute counts independently as a written demand triggering penalties), and the employer pays the wages owed within 14 days of the Notice of Complaint; *but* (2) the *SB161 penalties* apply if, on or after December 18, 2022, the Division sends a Notice of Complaint and the employer fails to pay the wages owed within 14 days of that Notice of Complaint.

F. Rule 2.21: Division Debtors

New Rule 2.21 defines “Division debtor,” a term used in new Rule 8 to encompass any party who owes wages, fines, or penalties determined to be due. Existing Rule 2.21 is accordingly renumbered to be Rule 2.22.

G. Rule 3.1: Division Forms and Instructions

Existing Rule 3.1 already requires use of Division-approved forms. The rule amendment adds, for situations in which no form exists but the Division requires certain information or submissions from any party, that Division may require such information or submissions to be provided whether or not a Division-approved form exists — which is relevant, among other situations, to multiple new types of matters the Division has been assigned by recent legislation, including attorney fee and cost applications, and filings related to administrative liens and levies, under SB161.

H. Rule 3.1.5, 3.3, 3.4, 4.2.2 Investigation of Similarly Situated Employees or Multiple Claims

Existing Rule 3.1.5 already notes the statutory limit of \$7,500 for wage claims. Because SB161 now provides that wage claims can be filed on behalf of other similarly situated employees, the Rule 3.1.5 amendment clarifies that the \$7,500 limit is per individual employee. Amendments to Rules 3.3 and 3.4 similarly accommodate Division investigation and disposition of wage claims of multiple employees in group or consolidated investigations. New Rule 4.2.2 applies existing Division burden of proof and pleading standards to complaints filed on behalf of similarly situated employees, or complaints that other similarly situated employees may join, under SB161. As suggested by a comment the Division received on the proposed rule, the adopted rule also clarifies that the Division’s authority to investigate, or decline to investigate, such complaints does not affect its authority to initiate direct investigations pursuant to 7 CCR 1103-8.¹

I. Rule 3.5.2(A): Pay Rate Calculation for Paid Sick Leave under C.R.S. § 8-13.3-402(8)

The Amendment to Rule 3.5.2(A) changes no substance, but clarifies and streamlines the definition of the pay rate for HFWA leave. The rule had cross-referenced the COMPS Order definition of a regular pay rate, but conformity with HFWA required clarification that HFWA expressly excludes certain pay types from the pay rate for HFWA leave (C.R.S. § 8-13.3-402(8)), and to define a lookback period the rule established. The amendment also adds clarity by removing the COMPS Order cross-reference.

J. Rules 4.7(B) and 4.8.2(B): Investigation

The amendments to Rules 4.7(B) and 4.8.2 update the quoted language from C.R.S. § 8-4-120 to conform with SB161 amendments to that statutory section.

K. Rule 6: Appeal

The amendments to Rule 6.1.1 and Rule 6.2 aim to enhance appeals efficiency and ensure the prompt resolution of appeals. Rule 6.1.1 already provided that a valid appeal must be timely, be signed, and allege a clear error. Division experience has shown that some appeal requests meet that test, yet still lack any plausible merit justifying further review or proceedings. Division experience also has shown that certain appeals present issues that may be resolved on the papers, without need to plan and conduct a live hearing; amended Rule 6.2 therefore allows such appeals to be adjudicated on the papers, as long as parties have notice and opportunity to be heard on whether a live hearing is needed.

New Rule 6.1.5 clarifies an appeal filing does not, except to the extent that a stay is granted, automatically toll deadlines applicable under, or triggered by issuance of, the determination, decision, or order being appealed. For example, SB161 creates new penalties and fines applicable to employers who do not pay within 60 days of a determination. If a

¹ See Written comment by Towards Justice, 11/01/22, at 1.

determination lacks language tolling that deadline in the event of an appeal, an appeal filing alone would not toll those 60 days. A party may still, as in established Division practice, request a stay as part of its appeal.

L. Rule 7: Attorney Fees and Costs

SB161 amended the Colorado Wage Act to give the Division authority to order, in administrative claims, reasonable costs to prevailing wage claimants, and attorney fees to prevailing claimants who recover at least \$5,000 in unpaid wages. To implement this new authority, new Rule 7 sets forth procedures for parties to apply for attorney fees or costs, dispute other parties' fee or cost applications, and appeal fee or cost decisions. After proposal, the Division received a comment on its proposed Rule 7, which suggested that in place of the rule's language that attorney fees and costs are available "where permitted by law," that it identify that "the law allows for recovery of fees and costs associated with advocacy in wage complaints and appeals in cases where the employee recovers more than \$5,000 in unpaid wages."² However, while the purpose of the rule change is primarily to implement the SB161 attorney fee and cost provision, new Rule 7 may also apply to certain retaliation or interference proceedings (and as such, it is incorporated by reference into the Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving ("WARNING") Rules, 7 CCR 1103-1, Rule 3.9 as adopted contemporaneously with these rules). Therefore, while the Division does not adopt the comment's proposed language, which may be overly limiting, the adopted rule clarifies that fees and costs are available only to "employees, or other applicable claimants or complainants," rather than to "parties," as SB161 and relevant anti-retaliation law implemented by the Colorado WARNING Rules provide.³

M. Rule 8. Administrative Liens and Levies

SB161 amended the Colorado Wage Act to give the Division authority to issue notices of administrative liens and levies against employers or other persons with possession, custody or control of assets of a party that fails to pay wages, fines, or penalties determined to be due. New Rule 8 sets forth procedures for parties to claim exceptions or exemptions, or file appeals for joint accounts; for the Division to decide the merits of such claims or appeals; and for the Division to provide notice of such determinations. The adopted rule retains the substance of the proposed rule with changes to:

- (A) reorganize Rules 8.2 and 8.3 to be better-organized and reduce redundancy;⁴
- (B) detail a broader range of persons or entities who, depending on the facts, may warrant receipt of a notice of a lien and levy, and inclusion in any subsequent developments;⁵ and
- (C) provide more detail on how notices of liens and levies may be rescinded or modified, in particular (1) further detail on showings that can justify rescission or modification of a notice of lien and levy (e.g., prejudicial Division failure to follow proper procedures), (2) adding the specification that it will be a hearing officer reviewing any filings that oppose a notice of lien and levy (paralleling existing Division appeal practice), and (3) adding specification of key matters as to which notice must be provided in any rescission or modification, including the specific scope of asset(s) released, and the extent to which a rescinded notice of lien and levy may be re-issued.⁶

V. EFFECTIVE DATE. These rules take effect January 1, 2023.



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

November 10, 2022

Date

² *Id.*

³ See C.R.S. § 8-14.4-105(3)(a) (Protected Health/Safety Expression and Whistleblowing Act ("PHEW") provision providing for attorney fees where an investigation yields a determination that retaliation or interference occurred); C.R.S. § 8-2-206(3)(c) (Agricultural Labor Rights and Responsibilities Act ("ALRRRA") provision providing that "[a]n agricultural employee, a person who has a familial or workplace relationship with the agricultural employee, or a person with whom the agricultural employee exchanges care or support who has been aggrieved by retaliation by a person may assert a claim" and seek attorney fees).

⁴ As proposed, Rules 8.2 and 8.3 each addressed a different type of opposition a party can file as to a notice of lien and levy; and each of the two rules similarly detailed the procedures for filing and adjudicating such oppositions; as adopted, Rule 8.2 now covers all types of oppositions to notices of lien and levy, while Rule 8.3 details the filing and adjudication procedures.

⁵ E.g., co-owners, or others with possession, custody, or control, of any asset(s) at issue in a notice of lien and levy.

⁶ E.g., re-issuance may occur if a rescission was due to a lack of proper notice, rather than due to the asset in question being exempt.