COLORADO
Department of
Labor and Employment

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

Colorado Overtime & Minimum Pay Standards Order (COMPS Order) #39, 7 CCR 1103-1 (2024), as adopted November 9, 2023.

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 the authority listed in Part II, which is incorporated into Part I as well.

II. SPECIFIC STATUTORY AUTHORITY: The Director is authorized to adopt and amend regulations and rules to enforce, execute, apply, and interpret Articles 1, 4, and 6 of Title 8, C.R.S. (2023), and all regulations, rules, investigations, and other proceedings of any kind pursued thereunder, by the Administrative Procedure Act, C.R.S. § 24-4-103, and provisions of Articles 1, 4, 6, 12, and 13.5 including C.R.S. §§ 8-1-101, 103, 107, 108, 111, 130; 8-4-111; 8-6-101.5; 102, 104, 105, 106, 108, 109, 111, 116, 117, 120; 8-12-115; 8-13.5-202, 203. Each of the preceding provisions is quoted in Appendix A to the COMPS Order, which is incorporated herein by reference.

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

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

A. Rule 1.8.3: Regular rates for employees with multiple jobs

Rule 1.8.3 is amended non-substantively. The rule covers how to calculate regular rates for employees with "two or more non-exempt *jobs*," but the title refers to employees with "multiple ... *rates*." To more clearly state how the rule covers employees with multiple rates due to multiple *jobs*, the title is deleted.

B. Rule 1.9.1: Time worked

When the Division replaced the Minimum Wage Order with COMPS Order #36 in 2020, it noted that it amended the "time worked" rule for the express purpose of making clear that Colorado law covers, as "time worked" that must be compensated, various tasks that were initially covered by federal wage law, but then excluded by the federal Portal-to-Portal Act ("PTPA").[1] As adopted in 2020, Rule 1.9.1 listed various tasks the PTPA excluded from federal wage law, and Rule 1.9.1 stated that Colorado law included such tasks as "time worked," as long as they took over one minute.[2]

In the years since Rule 1.9.1 took effect, questions and concerns have arisen about its one-minute rule. Some have asked whether the one-minute exclusion applies to *all* kinds of time worked, even core work tasks. The Division believes it was clear the one-minute rule did not impose a new exclusion on *all* kinds of time worked; that would have been a *narrowing* of what counts as time worked. Rather, as the Division clearly stated at the time, the 2020 time worked rule served to clarify that Colorado more *broadly* defined time worked than federal law. In particular, Rule 1.9.1 expressly included, as compensable time worked, a list of tasks the PTPA excluded from federal coverage — as long as, Rule 1.9.1 provided, those tasks took more than one minute. But to avoid any confusion, Proposed Rule 1.9.1 was amended to more explicitly say the

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[1] "Rule 1.9, which defines what time qualifies as "time worked" that must be compensated, is revised to clarify that Colorado has not followed, and will not follow in the COMPS Order #36, the federal Portal-to-Portal Act ("PTPA"), 29 U.S.C. § 251 et seq. That Act narrowed the rights the FLSA provides, but in the ensuing decades, no Colorado statute, nor any Colorado rule, has adopted the language of the PTPA, nor any similar language." Statement of Basis for COMPS Order #36, p.12 (Jan. 22, 2020).

[2] "Pre-/Post-Shift Time Worked

- Federal wage law ... originally counted pre-/post-shift tasks (screenings, gear time, etc.) as time worked — until a later federal statute (the Portal-to-Portal Act, "PTPA") excluded some "preliminary and postliminary" activity ....
- But: Colorado never adopted the federal statute excluding pre- and post-shift activities from time worked (the PTPA).
- Pre-/post-shift tasks like these may take just seconds, but count as time worked if over one minute:
  - ✓ putting on or removing required clothes or gear ...."

Interpretive Notice and Formal Opinion ("INFO") #20A (last updated Jan. 26, 2023) (emphases removed).

minute threshold applied to only tasks excluded by federal law, yet included by Colorado law.

But by more explicitly embracing the PTPA than before, the proposed amendments to Rule 1.9.1 may have exacerbated, rather than redressed, another key concern the Division has heard, both before and during this rulemaking: the Division declared the PTPA an inappropriate limit on time worked, so why would it rely on the PTPA to define which short tasks need not be compensated? And relying on the PTPA for the one-minute rule has proven to pose another critical problem: the PTPA is a poor match for the purpose of the one-minute rule. The one-minute rule is not so much *an exception to the requirement to pay* for all time worked. Instead, it's more a *recognition that requiring tracking is impractical* for certain short tasks. But the PTPA defines the tasks it excludes with different considerations: whether the task is outside regular shifts; and how integral or indispensable it is to the job. Those considerations lead the PTPA to exclude certain time that *can* be tracked. For example, the PTPA excludes end-of-day waiting for screenings before exiting, which in many situations can be tracked: it's entirely within the worksite; and it's immediately before a worker's exit — which, without the PTPA, could be a well-defined end point for their time worked.

Based on the Division's review and research of the above concerns, it finds that Rule 1.9.1 should retain a one-minute rule, with two amendments. First, the threshold should be "under one minute," rather than "one minute or less." The purpose of the one-minute rule always was to exclude tasks measured in seconds, rather than minutes. And research the Division conducted, in response to feedback and concerns about the one-minute rule, confirms a need to reject older court decisions excluding tasks measured in minutes rather than seconds (cited in the paragraph below).

Second, which tasks the one-minute rule covers should depend not on the *PTPA's* off-point considerations (time of day and nature of activity), but instead on the factors in the *federal de minimis rule* — which exists to recognize the same need as the one-minute rule: "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded."[3] Yet certain older decisions applying the de minimis rule had stretched it into too broad an exclusion from time worked, the Division found in 2019 in researching and drafting the COMPS Order. Those decisions excluded as de minimis: (1) tasks as long as *ten minutes*; (2) *daily* tasks as long as *seven minutes*; and (3) even time a judge found was "*regularly* occurring, *readily ascertainable*, and therefore ... *not 'uncertain and indefinite*.'"[4] That is why COMPS Order #36 expressly rejected the de minimis rule in Rule 8.1(B). The Division is retaining Rule 8.1(B) because it found, and continues to find, that those older cases show the danger that an uncabined de minimis rule can be stretched into too broad an exclusion from time worked.

Yet the Division finds that the risk of overuse of a de minimis rule is substantially lower (A) if the de minimis rule is limited to tasks of *under one minute*, and (B) due to more recent federal court decisions applying the rule more appropriately. Most notably, a 2021 federal circuit decision in this jurisdiction reversed a lower court ruling that not only approvingly cited the older cases excluding seven- to ten-minute tasks, but also was the decision rejecting as *de minimis* a task the court itself found is "regularly occurring, readily ascertainable, and therefore is not 'uncertain and indefinite.'"[5]

Accordingly, the Division finds that adopting the de minimis rule for tasks of under one minute would better serve key goals of the COMPS Order "time worked" rule: (1) *recognizing the impracticality* of requiring certain seconds-long tasks to be tracked; and (2) *accurately distinguishing which tasks* make tracking impractical (a) with a test (*de minimis*) crafted for exactly that distinction, and that recent decisions define more appropriately than previously, (b) rather than with a federal statute (PTPA) whose key point (excluding certain tasks based on their nature and time of day, regardless of trackability) ill-matches goal #1 above. Adopted Rule 1.9.1 therefore applies to tasks of under one minute the three de minimis factors as defined and applied by the recent federal circuit case law the Division finds apt:

(A) the *difficulty of recording* the time, or alternatively of *reasonably estimating* the time;
(B) the *aggregate amount* of compensable time, for each employee as well as for all employees combined; and
(C) whether the activity was performed on a *regular basis*.[6]

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[3] *Peterson v. Nelnet Diversified Solutions, LLC*, 15 F.4th 1033 (10th Cir. 2021).

[4] *Peterson*, 400 F. Supp. 3d 1122 (D. Colo. 2019) (stating point (3), and citing cases that had stated points (1) and (2)) (emphases added), *reversed*, 15 F.4th 1033 (10th Cir. 2021).

[5] *Peterson*, 400 F. Supp. 3d 1122 (D. Colo. 2019), *reversed*, 15 F.4th 1033 (10th Cir. 2021).

[6] *Peterson*, 15 F.4th 1033 (10th Cir. 2021).

C. Rules 1.8.1 and 1.10: Tips

Rule 1.8.1 is amended to clarify that tips are not part of the "regular rate" that rises 50% for overtime hours. This has been the Division's interpretation — *e.g.*, a tipped minimum wage employee's overtime rate is at 1.5 times minimum wage, not 1.5 times the sum of minimum wage plus their tips. But it has come to the Division's attention that:

- federal law expressly excludes tips from regular rates, while Colorado law did not expressly name "tips" among the lengthy list of items excluded from regular rates;
- that this Division not only has received *inquiries* about whether tips are included in regular rates (from attorney and non-attorney inquirers alike), but also a number of *complaints filed* by employees arguing that employers should have paid higher overtime rates of 1.5 times the sum of their wages plus their tips — paralleling class action and other lawsuits filed against employers in other jurisdictions claiming the same.[7]

The Division therefore amends Rule 1.8.1 to avoid any such interpretation of Colorado law on overtime pay.

Rule 1.10 amends the "tipped employee" definition that has proven unsatisfyingly unclear, especially as tipping is expanding to more occupations that may or may not qualify under the too-nebulous current rule. The import of Rule 1.10 is this: an employer can pay up to $3.02 less than minimum wage as a "tip credit" (Rule 6.2.3), but only for a "tipped employee" (Rule 1.10). An employee receiving tips *directly* from customers (waitstaff, hotel housekeepers, etc.) clearly can qualify as a "tipped employee." The thornier question, often hotly disputed and litigated, is which other employees (busser, host, etc.) can be paid less than full minimum wage as a "tip credit" by being included in a "tip pool" arrangement to share tips customers leave.[8] Rule 1.10 exists to answer that question: tip credits and tip pooling are lawful for a "tipped employee," defined in prior Rule 1.10 (*i.e.*, before these now-adopted amendments) as an employee "in an occupation in which s/he customarily and regularly receives more than $30 per month in tips" directly or from a tip pool.

There always has been a circularity to this definition that, at its core, says it's lawful to pool tips among those who customarily and regularly pool tips. Various problems with circular definitions are well-known, and two are especially relevant here. First, they don't *adapt* well to change: for example, if an occupation is tipped now, but wasn't in the past, is it "customarily" tipped? Second, they're incomplete, because they commonly require departing the text for more helpful *unwritten* definitions — as here: the most common way courts and agencies analyze which not-directly-tipped employees are "customarily and regularly" tipped is look at their *duties*. As summarized by a recent article written by a national law firm that represents Colorado employers, and posted by the Colorado Restaurant Association:

> ... experience in DOL [U.S. Department of Labor] investigations[] shows that DOL evaluates whether and to what extent *an employee performs significant customer-service functions in contact with patrons* .... This typically involves analyzing whether the *nature, frequency, and quantity of an employee's direct customer service and interaction* support characterizing the worker as being among those who customarily and regularly receive tips. For instance, it is unlikely that an employee who engages in customer contact infrequently or only to a trivial extent would be classified that way.[9]

This Division agrees that this definition not only is commonly applied, but also makes sense: if the question is, "who can fairly lay claim to a share of tips customers leave," then a fair answer is, "those who helped serve the customers leaving those tips." The problem is that this sensible answer appeared nowhere in prior Rule 1.10, leaving it unhelpful as guidance to employers and employees — and leaving courts and agencies free to, at times, embrace different answers.

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[7] *E.g., Zepeda v. Ulta Salon, Cosmetics & Fragrance,* No. SA CV 17-2184-DOC(JDEx), 2018 WL 6981842 (C.D. Cal. June 1, 2018) (class action lawsuit under California wage law seeking higher overtime rates by claiming employee tips count as part of "regular rates" that rise 50% for all overtime hours); *Denson v. DC Restaurant Holdings*, No. 19-CV-01609 (DLF), 2021 WL 4988994, at *2 (D.D.C. Oct. 27, 2021) (lawsuit arguing the same under D.C. (not federal) wage law); *Leleux v. Covelli Family Ltd. Partnership*, No. 617CV747ORL37TBS, 2017 WL 11036826, at *1 (M.D. Fla. Nov. 14, 2017) (lawsuit arguing the same under federal law).

[8] In this discussion, "tip pooling" includes tip-sharing arrangements by any name or structure (e.g., "tipping out" co-workers).

[9] "Can You Include Sushi Chefs and Other Unique Positions in Your Tip Pool?" (written by the law firm Fisher Phillips, LLP, and published on the website of Colorado Restaurant Ass'n) (dated May 5, 2023; last visited Sept. 27, 2023) (emphasis added).

Applying *just the text* of prior Rule 1.10, without the unwritten definition focused on customer service contact: qualifying as a tipped employee depends on whether the requisite tips are not only regularly received, but also "customarily" received in the employee's "occupation" — two terms that troublingly blur the inquiry. Especially in jobs sometimes but not always tipped, or coming to be tipped more often as payment customs and technology change:

- How "*regularly*" tips are received is a knowable fact; how "*customarily*" tips are received is far murkier.
- The tips and duties of *an individual* are knowable facts; the tips and duties of *"an occupation"* are far murkier.

And this murkier look to occupational custom, not just to a specific employer/employee situation, can yield rulings that define "'customarily and regularly' ... in reference to *industry practice*, not a *specific business's* practice" in isolation.[10] And that definition can exclude from tip pools/credits an employee who is regularly treated as a "tipped employee" at a *specific employer*, but is in an *occupation* that isn't "customarily" tipped. Take cashiers: some courts have held that restaurant cashiers must be paid full minimum wage, without a tip credit, because they aren't customarily tipped in their occupation.[11] But other courts have held the opposite, based on the specific employer/employee situation — such as whether employees mix cashier duties with enough "customarily" tipped duties,[12] or whether cashiers are in a more specific occupation that customarily has tips left directly for them, rather than just shared in a tip pool.[13]

Fact-specific borderline cases are inevitable — but more frequent when a rule says the answer depends on the tips and duties of the "occupation" (not the specific employee), and on how "customary" (not just how "regular") tips are for that occupation. This lack of clarity has yielded frequent employee complaints that they don't qualify for tip pools/credits, so their employers owe them back wages — burdening this Division that by law must investigate and adjudicate all wage complaints it receives, burdening employers who (win or lose) are subjected to those investigations, and risking surprise to whichever party (employee or employer) loses the adjudication on this too-often unpredictable issue.

To redress these problems by improving the clarity of who is and isn't a tipped employee eligible for tip pools/credits, adopted Rule 1.10 amends the "tipped employee" definition in two ways. First, whether an "*occupation*" is "*customarily*" tipped enough for tip-pooling/sharing is replaced by an expressly individualized look to the *duties* of the *particular employee*, as described in the article quoted above: whether "employees ... perform significant customer-service functions in contact with patrons." Based on years of prior experience amending wage rules to add clearer definitions, the Division believed that making the key focus (customer-service contact) an express rule, rather than an unwritten rule, will (A) decrease the volume of complaints and disputes, and (B) decrease the risk of occasional rulings that an employee receives enough regular tips yet isn't in an "occupation" that's "customarily" tipped. Based on stakeholder input, a written comment from the Colorado Restaurant Association, the Division added to adopted Rule 1.10 a list, from U.S. Department of Labor Guidance, of employee types commonly satisfying the above-detailed duties test to qualify as a "tipped employee." That list had not been in the proposed rule, but the Division agrees with the Restaurant Association (a) that it is consistent with the proposed rule, and (b) that including it in the rule offers employers and employees additional clarity.

Increasing the clarity that "tipped employees" eligible for tip pools/credits include a range of employees with customer-service contact, as well as employees in newly "tipped" occupations, comes with a need to modernize the *minimum amount of tips* to qualify — in order to avoid letting the new definition sweep in those whose tips are too trivial to fairly characterize them as "tipped employees." More broadly, Rule 1.10 exists to provide a definition of who is "tipped" enough to be fairly defined as a "tipped employee." This Division finds that $30 per month has proven an inaccurate, arbitrary definition of who can be fairly characterized as a "tipped employee."

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[10] *E.g., Shin & Koo, Inc. d/b/a White Tree Sushi & Asian Cuisine*, DLSS Direct Investig. #20-0019, p.2 (May 13, 2021) ("'customarily and regularly' is in reference to industry practice, not a specific business's practice" alone, in isolation from industry practice).

[11] *E.g., Marshall v. Krystal Co.*, 467 F. Supp. 9 (E.D. Tenn. 1978) (restaurant tip pool invalid for including employees in occupations not customarily and regularly receiving tips, including cashiers).

[12] *E.g., Townsend v. BG-Meridian, Inc.*, No. CIV-04-1162-F, 2005 WL 2978899 (W.D. Okla. 2005) (restaurant was compliant in paying (a) full minimum wage to those spending entire shifts on cash registers and phone orders, and (b) tipped minimum wage to those whose shifts include waitstaff duties as well as time on cash registers and phone orders).

[13] *E.g., Manning v. St. Petersburg Kennel Club*, No. 8:13-cv-3060-T-36MAP, 2015 WL 477364, at *2 (M.D. Fla. Feb. 5, 2015) (cashiers at gambling establishment were "tipped employees" because they received "direct 'personal' tips" in "tip boxes ... at each of the three cashier stations, ... labeled 'CASHIER AND BRUSH TIPS'").

Updating $30 per month from 1977[14] yields $1.64 per hour[15] in tips — which the Division finds an apt definition of the minimum to qualify as a "tipped employee," and far more apt than the outdated $30 per month, for several reasons.

(1) *"Per month" is inapt.* In an economy that has come to include more part-time workers, a *monthly* total is inapt. Unlike the full-timer who would qualify with just one tip of *$2 per day* (see point (2) below), a low-hours part-timer (for example, one four-hour shift a week) would need multiple tips, almost *$2 per hour*, to qualify — an unjustifiable arbitrariness in how differently the "tipped employee" definition treats full- and part-time employees.

(2) *The $30 threshold is out of date.* If $30 per month was a fair description of what made for a "tipped employee" in 1977, then an inflation-adjusted equivalent is a fair description today. The inaptness of the $30 threshold today is clear from what it actually means: in full-time work, *less than $1.50 daily* — or, one small tip per day. Nobody could fairly call someone working a full day, yet earning just one $1.50 or $2.00 tip, a "tipped employee."

(3) *$1.64 per hour is a sensible minimum threshold to be fairly characterized as a regularly tipped employee*. $1.64 per hour is just over half the $3.02 maximum hourly tip credit — making it a reasonable threshold for tip credits to make sense. When an employer claims a tip credit, an employee receiving tips *below* $3.02 actually gains no earnings from those tips; the tips just let the employer pay a bit less of their minimum wage. Tip credits make the most sense for the vast majority of tipped employees (like restaurant waitstaff) whose tips regularly exceed (and commonly *far* exceed) $3.02. Tip credits also can make sense for employees with tips fluctuating above and below $3.02 — a reason to allow the credits when tips are somewhat below $3.02. But an employee earning *far below* $3.02 per hour in tips (*e.g.*, about half or less) is hard to call a "tipped employee," since their tips actually provide them no additional earnings, instead just covering a small fraction of the minimum wage the employer must assure they receive. Finally, aside from the relationship of the $1.64 threshold to the $3.02 tip credit: $1.64 per hour amounts to *one small tip per hour* — which is a reasonable minimum for an employee to be fairly described as a regularly tipped employee. Or the opposite: anyone receiving *less* than one small tip per hour *cannot* be fairly described as a regularly tipped employee.

D. Rule 2.4.10: Airline overtime

Rule 2.4.10 is a new, narrow exemption allowing interstate airlines to not pay time-and-a-half overtime rates for hours above 40 in a workweek "when such hours are voluntarily worked by the employee pursuant to a shift-trading practice under which the employee has the opportunity in the same or in other workweeks to reduce hours worked by voluntarily offering a shift for trade or reassignment." This amendment conforms the COMPS Order to the wage and hour law of other states with major airports, which already had this exemption (*e.g.*, California, Washington, New Jersey).

One written stakeholder comment, from United Airlines, noted how the proposed rule was insufficiently clear on its coverage. Upon review, the Division agrees. The proposed rule covered "interstate air carriers," which it defined as air carriers "with interstate routes." But because "with interstate routes" is a phrase nowhere else in any law, there is no established definition of what carriers would and wouldn't qualify — risking uncertainty for employers and employees. However, as that comment noted, a federal law applicable to air carriers, while covering different matters (the Railway Labor Act that covers certain union/management relations matters), already has a definition of which air carriers are "interstate" — a "carrier by air engaged in interstate or foreign commerce." Because that definition is decades old, extensive precedent already defines which air carriers do and don't qualify. The adopted rule therefore clarifies that it covers "a carrier by air engaged in interstate or foreign commerce" — to let employers and employees know that if they have met that established federal definition, they meet the similar definition under this Colorado rule.[16]

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[14] Inflation-adjusting $30 in 1977 to 2024, by the same CPI the Division must adjust the Colorado minimum wage by, yields an estimated $188.57 per month in 2024. Data show commonly tipped food service workers average 29 hours per week, and support an assumption of 20 days off per year (holidays, vacation, sick/personal days, days a business is closed, etc.), yielding an average of $1.64 per hour. The figure in the proposed rule was $1.55 per hour, but a written comment by Professor Zach Mountin, citing a range of Bureau of Labor Statistics data, suggested two corrections to make the Division's calculations and assumptions more accurate. Upon review, the Division finds the professor's math and data analyses correct, and adopts his corrections, yielding $1.64 per hour.

[15] Any employer claiming tip credits of under $3.02 per hour is *already required to track average hourly tips* in each pay period — to know how much below full minimum wage they can pay, because the tips must make up the difference from full minimum wage.

[16] The Division did not cite or incorporate the Railway Labor Act itself for various reasons, including the Division's general reluctance (not just as to this particular rule) to define Colorado law by referencing a federal law in which the Division lacks expertise (here, because the Railway Labor Act is inapplicable to this rule or other Division work, since it covers mainly union/management relations under federal law). Instead, as the Division often does to add clarity and predictability to a new Colorado rule, it writes the new rule

One written stakeholder comment, from the Colorado AFL-CIO, opposed this new exception as allowing waiver of established overtime rights, and because "it's often impossible to tell what's really 'voluntary' and what may be the result of coercion on the part of the employer." The Division agrees that a seemingly "voluntary" employee decision could actually trace to employer coercion or pressure, often for subtle reasons — pressure or coercion can be explicit or implied, and can be intentional or an unintentional result of power dynamics. Accordingly, the Division clarifies what it means for an employee decision to be "voluntary" in these regulatory findings and history, as well as in forthcoming published guidance. Under well-established labor law principles, if a law requires that a certain type of employee decision is permissible, but only if "voluntary" — commonly an employee decision not to exercise a right, like (as here) a right to take time off rather than take on more work — then it does not qualify as voluntary if, in reality, it was coerced or pressured. There cannot be a complete list of all situations that are and aren't voluntary; employer/employee relationships are human interactions that vary too much with the facts and nuances of each unique situation. But the well-established labor law principles of voluntariness provide meaningful guidance, including the following:

1) An employee decision to take on work is *not voluntary* if refusing would subject them to an *adverse action*.[17]

2) A writing's *language* saying it is a "Voluntary" employee decision or agreement does not defeat evidence that it is *non-voluntary in reality*, which includes:

   a) *implied threats or pressure* — for example, if the employee "was told that he 'had to sign it or, you know, they will take other actions," even though the the "other actions" were left unspecified; and

   b) requests sufficiently *repeated or strongly worded* that they are *more like demands than offers* — for example, if the employer "came back to me a third time and told me that I had to sign."[18]

3) An employee's decision to take on work *is voluntary* if, for example:

   a) the employer merely *offered*, as "two *options,*" *either* full or partial time off with some paid work;[19] *or*

   b) the employee *initiated* the idea of taking on the work — as long as there is no evidence the employee's decision "was anything but voluntary."[20]

E. The adopted rules also include various other technical or otherwise non-substantive changes where stakeholders suggested, and/or Division review found a need for, clarifications or corrections.

V. EFFECTIVE DATE. These rules take effect January 1, 2024.

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

November 9, 2023
Date

with language drawn from another, more well-established source of law, such as federal law or the law of another state.

[17] *Evans v. Books-A-Million*, 762 F.3d 1288 (11th Cir. 2014).

[18] *Wilson v. Decibels of Oregon, Inc.*, No. 1:16-cv-00855-CL, 2017 U.S. Dist. LEXIS 176983 (D. Or. Sep. 11, 2017).

[19] *D'Onofrio v. Vacation Publications, Inc.*, 888 F.3d 197 (5th Cir. 2018) ("[The employer] offered Karen two options: she could go on unpaid FMLA leave or she could log in remotely a few times per week and continue to service her existing accounts so that she could keep the commissions from those accounts while on leave. Karen chose the latter option, and agreed to continue servicing existing clients but not take new leads.").

[20] *Massey-Diez v. University of Iowa Community Medical Services*, 826 F.3d 1149 (8th Cir. 2016) (early return from leave was voluntary, although the employer proposed a specific plan for her early return, because the employer's proposal was a response to the employee *first* saying that to avoid further depleting her paid time off, she was "open for suggestions" on ways to let her return early).