COLORADO
Department of Labor and Employment

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Interpretive Notice & Formal Opinion ("INFO") # 5:

Public Health Emergency Whistleblower ("PHEW") Law

Overview

This INFO #5 covers rights and responsibilities under Colorado's public health emergency whistleblower law (HB 20-1415, July 11, 2020) ("PHEW"), as implemented by the Colorado Whistleblower, Anti-Retaliation, Non-interference, and Notice-Giving ("Colorado WARNING") Rules, 7 CCR 1103-11.

Workers and Entities Covered

Most Colorado labor laws cover only "employers" and "employees," but PHEW covers any "worker" (not just "employees") for any "principal" (not just "employers"):

- **Covered "principals" are:** (A) "employers," as defined in existing Colorado wage law;[1] (B) any "entity that contracts with five or more independent contractors in the state each year"; and (C) state and local government employers (but not the federal government).[2]
- **Covered "workers" are:** (A) "employees," as defined in existing Colorado wage law; and (B) any person "who works for an entity that contracts with five or more independent contractors in the state each year."[3]

Worker concerns, opposition, and participation that are protected

A principal cannot retaliate against, or interfere with, the following worker activities:[4]

- **Concerns**: raising a "reasonable concern about workplace violations of government health or safety rules, or about an otherwise significant workplace threat to health or safety, related to a public health emergency."
- **Opposition**: "opposing any practice the worker reasonably believes is unlawful" under PHEW.
- **Participation**: "making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing as to any matter the worker reasonably believes to be unlawful" under PHEW.

Those protections come with the following limits and conditions.

- **Public health emergency**: Protection applies only to activities related to a "public health emergency," defined by statute as (A) "a public health order issued by a state or local public health agency" or (B) "a disaster emergency declared by the governor based on a public health concern."[5] A statewide PHE based on the COVID-19 pandemic was declared March 11, 2020,[6] and as of this INFO remains ongoing.[7] For updates on the status of the public health emergency, visit: https://covid19.colorado.gov/public-health-executive-orders.

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[1] *See* C.R.S. § 8-4-101(6).
[2] C.R.S. § 8-14.4-101(3).
[3] C.R.S. § 8-14.4-101(5).
[4] C.R.S. §§ 8-14.4-102(1),(4); *see* WARNING Rule 5.1 concerning protected activity.
[5] C.R.S. § 8-14.4-101(4).
[6] A "disaster emergency" related to COVID-19 was originally declared by Governor Jared Polis on March 11, 2020 (Exec. Order D 2020 003, Mar. 11, 2020), followed by periodic renewed and/or amended declarations.
[7] The "Colorado COVID-19 Disaster Recovery Order" "rescinds … and restates" the original disaster emergency declaration "to focus on the State's recovery from the COVID-19 pandemic emergency," but also "continue[s] the State's disaster declaration and essential directives … [to] ensure agency access to … funding and enable the State to continue COVID-19 response and recovery." (Exec. Order D 2021 122, July 8, 2021, with directives on vaccines, health facilities, economic recovery, and funding). That Disaster Recovery Order has been extended by later periodic orders since Executive Order D 2021 125 on August 6, 2021 (amending Disaster Recovery Order, and ordering that it otherwise "shall remain in full force and effect as originally promulgated").

- **Reasonableness**: Workers are protected even if they are incorrect about a claimed violation, if their belief was "reasonable" and in "good faith." Workers are *not* protected for communications (A) that are "knowingly false," or are made "with reckless disregard for the truth or falsity of the information," or (B) that "share individual health information that is otherwise prohibited from disclosure" by state or federal law.[8]

- **Principal need not *agree* with or *act on* incorrect concerns**: If a worker's concern is reasonable but incorrect, the principal is not required to agree with it, or to take any action the worker requests. It just cannot fire or otherwise act against the worker for raising that concern (for example, with a demotion, discipline, a cut in pay or hours, or an undesired transfer or shift change).

- **Principal control, and communication to others**: Where the protected activity is raising a "concern" (rather than opposition or participation), it is protected only (A) if made to "to the principal, the principal's agent, other workers, a government agency, or the public"; (B) if the worker states what action, condition, or situation constitutes a qualifying violation or threat; and (C) as to a principal that "controls the workplace conditions giving rise to the threat or violation."[9]

Worker Use of Personal Protective Equipment That is Protected

A principal must allow, and cannot act against a worker for, "voluntarily wearing at the worker's workplace the worker's own personal protective equipment, such as a mask, faceguard, or gloves" ("PPE") — with these limits and conditions on the PPE that the worker has a right to wear:[10]

- only PPE that "provides a higher level of protection than the equipment provided by the principal," which requires that it (A) does not provide less protection for others (*e.g.* a mask with a vent) and (B) is cleaned or replaced if the principal-provided PPE is cleaned or replaced;

- only PPE that "is recommended by a federal, state, or local public health agency with jurisdiction over the worker's workplace"; and

- only PPE that "does not render the worker incapable of performing the worker's job or prevent a worker from fulfilling the duties of the worker's position."

  Examples: If a principal provides a worker *no* face covering when a face covering is needed due to an airborne pathogen, or required by a health order, any worker-supplied face covering is considered to satisfy all of the above requirements, unless the principal proves that the worker's face covering is worse than none at all. If a principal provides PPE that satisfies all applicable health agency recommendations *and* is acquired from a known, reliable provider, then a worker's PPE of the same type must also come from a reliable provider.[11]

Non-Disclosure Agreements Restricting Protected Activity Are Unlawful And Unenforceable

A principal may have otherwise valid agreements or policies requiring non-disclosure or confidentiality, but under PHEW, a principal "shall not require or attempt to require":

- an agreement that "would limit or prevent the worker from disclosing information about workplace health and safety practices or hazards related to a public health emergency"; or

- a "workplace policy that would limit or prevent such disclosures."

Under PHEW, any such provisions are "void and unenforceable as contrary to the public policy of this state," and a principal's "attempt to impose" one "is an adverse action in violation" of PHEW.[12]

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[8] C.R.S. §§ 8-14.4-102(5)-(6).

[9] C.R.S. § 8-14.4-102(1) and WARNING Rule 5.1.2.

[10] C.R.S. § 8-14.4-102(3) and WARNING Rule 5.2.

[11] WARNING Rule 5.2.3 (covering both of these examples as "Special Cases" under the PPE rules).

[12] C.R.S. § 8-14.4-102(2).

Worker Complaint Rights

A worker can file a complaint of retaliation or interference with PHEW rights with the Division, but cannot file a lawsuit in court without first filing with the Division. Unlike laws requiring the Division to investigate all *unpaid wage* claims, PHEW and other laws do not require the Division to investigate all *retaliation or interference* claims. After receiving a retaliation or interference complaint, the Division will review it, and may conduct a preliminary investigation to decide whether to fully investigate the complaint, in light of Division resources and other considerations.

- If the Division decides *not* to fully investigate a complaint, it will provide the worker a Notice of Right to Sue within 30 days of receipt of a complete complaint, which authorizes the worker to pursue a lawsuit in court. A complaint is considered "complete" when the complainant has provided all information and documents needed to process the complaint, as requested by the Division.
- If the Division decides to fully investigate a complaint, it will (1) notify the complainant of its decision, (2) send the employer a Notice of Complaint describing the claims and providing relevant evidence, and allowing the employer 28 days to respond; (3) provide the complainant an opportunity to respond to the employer's evidence; and (4) issue a determination based on all evidence produced by the parties.
- If an investigation takes longer than 180 days from the date when a complete complaint was received by the Division, the complainant may demand a Notice of Right to Sue; the Division must then issue either a determination or a Notice of Right to Sue by 210 days after the date when a complete complaint was received. The Division may also terminate an investigation and issue a Notice of Right to Sue at any time during an investigation prior to a determination.

If the worker proves unlawful retaliation or interference (after a Division investigation, or in a lawsuit), then depending on how it affected the worker, the principal may be ordered to pay the worker past and future lost pay (if a firing, cut in pay or hours, etc., is found to be a violation), to reinstate the worker (if the violation cost the worker their job), to cease any ongoing violation, and/or to pay fines or penalties that statutes authorize for non-compliance. A lawsuit in court may be able to provide the worker additional remedies that the Division cannot order, such as emotional distress damages.[13]

Notice and Compliance Duties of Principals

Principals must provide workers with notice of their rights under PHEW as follows.[14]

- Principals may post the Colorado Workplace Public Health Rights Poster, available on the Division website and updated annually in December, or use their own poster with the same substantive information.
- If workers have limited English language ability, principals must post in every language spoken by at least 5% of the workforce. The Division poster is available in Spanish and many other languages; and principals may ask the Division for additional translations.
- The posting must be "in a conspicuous location" where workers can read it at every work site. If the work site or other conditions make a physical posting impractical (including remote work), the principal must provide a copy of the poster to each employee or worker within their first month of work.

Additional Information

Visit the Division's website, call 303-318-8441, or email cdle_labor_standards@state.co.us.

[13] C.R.S. §§ 8-14.4-105, 106.

[14] C.R.S. §§ 8-14.4-103 (requirements for principals to "post notice a worker's rights" under PHEW, and for the Division to promulgate PHEW notice rules); WARNING Rule 4 (PHEW notice rules).