COLORADO
Department of
Labor and Employment

Division of Labor Standards and Statistics
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Interpretive Notice & Formal Opinion ("INFO") #5C:

Complaints, Investigations, and Remedies as to Retaliation or Interference

Overview: This INFO covers the Division retaliation claim investigation process, including party responsibilities to provide information on their claims and defenses. It also covers whether a claim must be filed first with the Division before court, and types of relief authorized under retaliation laws the Division enforces.

Filing Claims at the Division, in Court, or Elsewhere

- What the Division does and doesn't investigate:
    - Colorado law requires the Division to investigate all **unpaid wage** claims, but doesn't require or fund the Division to investigate all **retaliation or interference** claims. The Division investigates as many retaliation or interference claims as its workload allows.
    - As INFO #5A explains, the Division has authority over only certain kinds of retaliation or interference: employer **action against employees exercising certain rights** (paid sick leave, health/safety whistleblowing, wage and hour rights, agricultural labor conditions, union/management rights, etc.) — not over whether a firing or other act was **unfair or unjustified in other ways**.
        - If the Division receives a complaint of a type it lacks authority over, it will refer the filer elsewhere if another agency covers that type of complaint. Workers may also wish to consult an attorney.

      Example 1: An employee claims they were fired for taking sick leave. That is a claim of retaliation for exercising rights under the Healthy Families and Workplaces Act ("HFWA"), unless any facts show HFWA doesn't apply. HFWA is a law within the authority of the Division, so it will either (A) investigate the claim or (B) notify the employee that it will not investigate, so they can file a lawsuit in court.

      Example 2: An employee claims it was unfair that they were fired for receiving a traffic ticket, because it was their first ticket in three years at the employer. The Division will not investigate because neither the Division, nor any other agency the Division is aware of, has authority over this kind of complaint.

      Example 3: An employee claims they applied for a job, but the employer's Human Resources Department told him they don't hire anyone over age 50. This is an age discrimination claim the Division lacks authority over. The Division will tell the employee of the two agencies that, unlike the Division, have authority over age discrimination claims: the Colorado Civil Rights Division ("CCRD"), and the federal Equal Employment Opportunity Commission ("EEOC").

- See the table on the next page for the details of how:
    - Retaliation or interference claims can be filed in **either the Division or a court** — but some kinds of claims have **required steps before filing in court**.
    - Most claims can be filed by any "**employee**" against an "**employer**" — but some kinds of claims can be filed by **non-employees**, or against those that aren't "**employers**"

Table 1: Claim Requirements, by Type of Retaliation or Interference

<table>
<tr><th>Claim Requirements, by Type of Retaliation or Interference:</th><th>Are there any required steps before filing in court?</th><th>Who can file claims, in addition to “employees” (as defined by the Wage Act)?</th><th>Whom can claims be filed against, in addition to “employers” (as defined by the Wage Act)?</th></tr>
<tr><td>Health or Safety Whistleblowing</td><td>Yes:
Must file with the Division first, which will
a) Investigate and rule on the claim, or
b) Tell the claimant it won’t investigate, so they can file in court</td><td>An independent contractor working for a “principal”
(as defined in the box to the right)</td><td>A state or local government employer the Wage Act excludes, &
A “principal”
(an entity that contracts with at least 5 independent contractors in-state)</td></tr>
<tr><td>Paid Sick Leave</td><td>Yes:
Before filing in court, must either:
1) File with the Division first [same as health/safety, above: Division either (a) investigates or (b) allows court filing], or
2) Send the employer a written demand for pay or other remedies, then allow 14 days to respond before filing in court</td><td rowspan="2">'Only an “employee” as defined by the Wage Act, which
a) excludes a true independent contractor, but
b) includes a worker misclassified as an independent contractor (or other kind of non-employee)</td><td>A state or local government employer the Wage Act excludes</td></tr>
<tr><td>Wages or Hours</td><td rowspan="2">No:
Can file either in the Division or in court</td><td>Only an “employer” as defined by the Wage Act, which:
a) Includes an individual with control over the decision, and
b) Excludes the state and many (not all) local governments</td></tr>
<tr><td>Agricultural Conditions
(e.g., heat protections, equipment rights, & access to services; see the INFO #12 series)</td><td>Any person with enough of a relationship (a family, work, or care or support relationship) with an agricultural employee</td><td>Only employers (or, as to some matters, principals as defined in PHEW) engaged in agriculture</td></tr>
</table>

The Division's Investigation Process (Colorado WARNING Rules 3.3-3.4)

- Filing a complaint. A worker should include the following if possible, but may submit a complaint with whatever information they do have, even if they do not have certain of the information listed below:
  - an **explanation** of the unlawful retaliation they claim — with, as much as possible, specific or approximate dates of key events, names of decision-makers and witnesses, etc.
  - **documents** supporting their claim — any relevant emails, texts, performance evaluations, termination letters, witness statements, etc.; and
  - relevant details of their **employment history** — positions at the employer with dates, etc.
- Initial review by the Division:
  - The Division first reviews whether a complaint is of a type the Division has **authority to investigate**.
  - If so, the Division reviews whether to exercise its **discretion to investigate** the complaint or not — based on information from the complainant, as well as Division resources to take on the investigation.
- If the Division decides *not* to investigate, it will send the complainant a **dismissal notice** stating that decision, and letting the complainant know they can pursue the claim in court.
  - When the Division declines to investigate a retaliation or interference claim that also includes a **wage claim**, only the retaliation or interference claim is dismissed; the wage claim will still be investigated.
- If the Division **decides to investigate** a retaliation or interference claim:

  (1) The Division sends the **complainant** a **Notice of Decision to Investigate**.

  (2) The Division then sends the **employer** a **Notice of Complaint** (NOC) describing the claims and providing relevant evidence, and allowing 28 days to respond. The employer response should include all information requested in the NOC, and an explanation of which, if any, allegations it disputes.

  (3) The Division then sends the complainant the employer response, and the **complainant may respond**.

  (4) The Division may **investigate further** — interviews, evidence requests, etc. — and then (unless it terminates and dismisses the investigation) issues a written determination. (WARNING Rule 3.3.6(A).)
- After considering any evidence relevant to the claim (see the ""What Facts and Evidence" section), the Division issues a **written determination** based on the facts and evidence. (WARNING Rule 3.4.1.)
  - The **complainant must prove all elements** of a claim: (1) they engaged in protected activity, then (2) the employer took adverse action against them, (3) based on the protected activity.
  - Proving employer action was "**based on**" protected activity means proving that the activity was a **motivating factor** for the action, even if the employer also had **other motivations**, lawful or unlawful.
  - If a violation is proven but the **employer proves it would have taken the adverse action anyway**, for another **lawful reason**, the Division will not order reinstatement, or post-termination back or front pay, as of the date the adverse action would have occurred for that other reason.
  - Whoever has the burden of proof must prove it is **more likely than not** that a violation occurred.
- If an investigation takes **over 180 days** from the Notice of Decision to Investigate, the complainant may demand that the Division close their investigation; the Division within 30 days will issue a determination or a dismissal notice to let the claimant pursue the claim elsewhere. (WARNING Rule 3.3.6(B).)

What Facts and Evidence Show that a Firing (or other Adverse Action) Was or Wasn't Retaliatory?

- A key difference between retaliation and interference:
  - **Interference** is unlawful **whether or not** the employer **intended** to interfere — because the question is whether any employer **action actually interfered with exercising rights**.
  - **Retaliation** is unlawful **only** if the employer **intended** to act against the employee for protected activity, or if the employer had a **policy or practice** that did so regardless of any intent — for example, refusing to consider an applicant who had engaged in protected activity like filing a lawsuit or other complaint.
- **Facts that can show** an employer did or didn't retaliate may be anything showing it did or didn't intend to retaliate, have a policy or practice against protected activity, etc. Parties should consider submitting **any of these three common kinds of evidence** that can show whether retaliation did or didn't occur.

(1) **Timing**: Was or wasn't the adverse action **soon after protected activity** by the claimant?

- An employer must **know** of protected activity to retaliate against it — which commonly is evidence the particular decision-maker knew, but proving "general corporate knowledge" can be enough.[1]
- A **short time period** between protected activity and adverse action, such as weeks to just a few months, **can** support an inference of retaliatory intent — **unless** evidence shows **another motivation**, such as misconduct or poor performance that also came before the adverse action.[2]
- A **long time period** would **not** support an inference of retaliatory intent[3] — **unless**, for example,
  - there is **other evidence of retaliatory intent** (such as hostility, or pretext — see below), or
  - the adverse action came at the **first opportunity** after protected activity — for example, at the next performance evaluation, or the next time the employee applied for another job.[4]

(2) **Hostility**: Did or didn't the employer display **hostility to protected activity** — for example, emails, texts, or witness statements showing employer upset about requesting leave or other protected activity?[5]

Example 4: A worker complains to OSHA about workplace health and safety violations. Between the complaint and the worker's termination, their boss repeatedly said snitching is bad for morale. The employer's comments show hostility towards the protected activity, which can be evidence of retaliation.

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[1] *E.g.,* *Harrington v. Aggregate Industries-Northeast Region, Inc.*, 668 F.3d 25, 31-32 (1st Cir. 2012) (holding it was "not necessary" for employee "to produce evidence ... its on-site managers were aware" of his protected activity, because "general corporate knowledge is sufficient," so "the fact that high-level Aggregate executives learned of the ... [employee's] whistleblowing several months before his firing suffices to show knowledge").

[2] *E.g.,* *Foster v. Mt. Coal Co., LLC*, 830 F.3d 1178, 1191 (10th Cir. 2016) ("'[W]e have held that a one and one-half month period between protected activity and adverse action may, by itself, establish causation. By contrast, we have held that a three-month period, standing alone, is insufficient to establish causation.'") (citation omitted).

[3] *E.g.,* *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 274 (2001) (for "mere proximity" between protected activity and adverse action, alone, to be "sufficient evidence of causality," three to four months is insufficient).

[4] *E.g.,* *Porter v. Regents of the University of Colorado*, No. 22-CV-00335-MDB, 2023 WL 2664207, at *8 (D. Colo. Mar. 28, 2023) (long period from protected activity to adverse action didn't defeat claim of employee who didn't apply for another job opportunity until three years after her complaint about the individual who then allegedly blocked her from that opportunity).

[5] *E.g.*, *Smothers v. Solvay Chemicals, Inc.* 740 F.3d 530 (10th Cir. 2014) ("Smothers argues that Solvay's negative comments and actions about his FMLA-protected absences demonstrate bias .... Even if an incident does not support an independent retaliation claim, it may be relevant background evidence" of retaliatory intent).

(3) **Pretext**: Did or didn't the employer's claimed reasons for the adverse action appear **pretextual** — that is, a **dishonest effort to cover up** another reason? Evidence of pretext can include the following:

- Does evidence **support or undercut** the employer's claimed reason for an adverse action?[6]
- Were **others treated better**, either **more positively** (promotion, assignments, pay, etc.) or **less negatively** (for misconduct, poor performance, etc.)? For misconduct or poor performance:
  - The best comparisons are others **similarly situated** — not necessarily the same job, but the same or similar conduct, employer standards, and decision**-makers**.[7]
  - A common question: If two (or more) employees had similar misconduct or performance issues, but one had engaged in protected activity while the other hadn't, then **did or didn't the claimant receive harsher treatment** (discipline, firing, etc.)?[8]
- Were or weren't the employer's explanations suspiciously **inconsistent or irregular**? For example:
  - Were its **reasons** for adverse action **consistent**, or **inconsistent** or otherwise **implausible**?[9]
  - In deciding and executing the adverse action, did it **act consistently or inconsistently** with its usual ways of deciding and executing actions of that kind — for example, did or didn't it follow its **usual procedures** for investigating or looking into misconduct or performance issues?[10]

Remedies for Violations: Money Awards, Fines, and Orders to Remedy and Prevent Violations

- **Goals in deciding what to order to remedy a violation**. If a claimant proves unlawful retaliation or interference, the following two goals determine what remedies are appropriate to order.
  - **Make-whole relief**: What remedies are needed to **make the claimant whole** by putting them, as much as possible, in no worse a position than they would be in **if the violation hadn't occurred**?
  - **Deterrence**: What remedies are appropriate to **deter violations** like the action against the claimant?
- **Different types of violations allow different remedies.** as the table on the last page details. Following is an explanation of each kind of remedy that may be ordered, depending on the type of retaliation/interference, as well as what the case facts show would be appropriate remedies.

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[6] *E.g.*, *MTB CO, LLC d/b/a Lakeshore Cannabis*, DLSS Claim #1238-23 (Citation Dec. 7, 2023) (employer claim that its action was a "mandatory termination, based upon [employer] policy," was undercut by (a) its handbook provision stating that for the type of misdeed at issue, the redress was subject to managerial discretion, and (b) its statement, before claimant's protected sick leave, that it would only issue a "writeup" for the misdeed); *Command Service Systems, Inc.*, DLSS Claim #1784-23 (Citation Nov. 8, 2023) (where employer's "Termination Letters" were not contemporaneous with the termination, but sent four months later, only after the employer received a Division NOC, finding that the reasons the employer asserted in the letters were after-the-fact justification, not persuasive evidence of actual reasons for termination).

[7] *E.g.*, *Ibrahim v. Alliance for Sustainable Energy*, 994 F.3d 1193, 1196 (10th Cir. 2021) ("An inference of discrimination can arise from an employer's favoritism toward a similarly situated employee .... Employees are similarly situated when they share a supervisor or decision-maker, must follow the same standards, and engage in comparable conduct.").

[8] *E.g.*, *Ibrahim*, 994 F.3d at 1196-97 ("Alliance presented a legitimate, nondiscriminatory reason for firing Dr. Ibrahim: inappropriate comments to two women. But Dr. Ibrahim rebutted this explanation with evidence of ... greater leniency toward C.B. in similar circumstances .... C.B. had yelled and cursed at a female subordinate [and] exchanged sexual text messages with subordinates .... C.B. was put on administrative leave and required to take ... classes. But Alliance allowed C.B. to return .... [T]he same three individuals ... deci[ded] to fire him and to issue only a warning to C.B.")

[9] *E.g.*, *Kids Corner*, DLSS Claim #3785-22 (Citation Dec. 29, 2023) (employer originally said in unemployment filings that the employee resigned after a regulatory authority told the employer that the employee could no longer work there; but employer then told the Division it terminated the employee due to low enrollment and the employee's attitude).

[10] *E.g.*, *Smothers v. Solvay Chemicals, Inc.*, 740 F.3d 530 (10th Cir. 2014) ("Failure to conduct a fair investigation of a violation that purportedly prompted adverse action may support an inference of pretext. Solvay said Smothers was fired because his quarrel with Mahaffey showed he was defiant and hostile. Smothers disputes this, and Solvay relied almost entirely on Mahaffey's version. Three decision-makers spoke with Mahaffey, none with Smothers.").

(A) Monetary awards — orders that a party who committed a violation must pay money to the person affected — depend on what is appropriate to make the victim whole and deter violations, based on the case facts.

(1) Back pay for lost compensation due to an adverse action (firing, pay cut, transfer or shift change that lowered wages or other compensation (e.g., commissions or tips), etc.) is awarded.

- Items covered: The lost compensation can be **wages, benefits, or other things of value** from the job (goods, services, etc.) that the adverse action took away.
- Time covered: Back pay covers the time from a firing (or other adverse action) until the pay award.
- Reduction by other earnings:
  - Back pay ends once an employee has **other work paying as much** as the job they lost.[11]
  - A claimant must **mitigate** their loss by seeking other **reasonably comparable work**, so back pay is reduced by what they did or could've earned elsewhere. That means a claimant:
    - **X** **hasn't mitigated** if they didn't seek (or declined) **comparable yet not identical** work — for example, a fired lawyer rejecting a comparable, but moderately lower-paid, lawyer job;
    - ✓ **has mitigated** if they sought reasonably comparable work, while declining work that **isn't reasonably comparable** — for example, a fired lawyer declining paralegal (not lawyer) jobs.
  - An employer arguing failure to mitigate "must show that there were substantially equivalent positions" the employee "could have discovered and for which [they were] qualified, but that [they] failed to exercise reasonable diligence to discover them."[12]

(2) Front pay, when reinstatement is not feasible, is awarded to employees who will continue to lose wages following the Division's determination as a result of the employer's adverse actions found to be unlawful retaliation/interference, including terminations, cut in pay, cut in hours, etc.

- Items Covered: Lost compensation can be **wages, benefits, or other things of value** from a job (goods, services, etc.) that the complainant will continue to lose due to the adverse action.
- Time covered: The front pay period covers the time between the date the Division issues a determination and a future date that reflects a time period sufficient to make the complainant whole.
- Reduction by other earnings: The points in this section of "Back pay" (above) apply.

(3) Reimbursement of other losses may be awarded if evidence shows they were a direct, foreseeable result of the adverse action — for example, extra bills due to losing pay or benefits. A party claiming such losses should submit the following, either with the complaint or as soon after as they can:

- a full explanation of what the loss was, and how it was caused by the violation; and
- any documentation available (such as a receipt or other record showing amounts paid) — for example, moving expenses if a retaliatory firing caused a need to move out of an apartment.

(4) Interest on money awarded for losses (back pay or reimbursement), annually since the loss, or liquidated damages, as remedies allowed by HFWA and the Wage Act.[13]

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[11] *E.g.* *Colorfood Management Corp., Inc. d/b/a Sukiya Ramen*, DLSS Claim #4807-21 (Citation Nov. 16, 2022) (limiting back pay award to two and a half weeks, when the employee began a new job with the same rate of pay and hours).

[12] *Hayes v. SkyWest Airlines, Inc.*, 12 F.4th 1186, 1211 n.15 (10th Cir. 2021).

[13] Interest on money withheld is 8% (C.R.S. § 5-12-102), but 12% for wage and hour retaliation (C.R.S. § 8-4-120(3)(a)(IV)); either rate is compounded annually. If a law allows liquidated damages, the Division will not also award interest as well.

(5) Civil penalties, liquidated damages, and punitive damages vary among retaliation laws.

- Wage and hour retaliation: A civil penalty of either double the unpaid wages, or $2,000 (whichever is greater), as well as a separate penalty of $50 per day the retaliation occurred or continued.
- Paid sick leave retaliation: Punitive damages, and liquidated damages equal to economic damages.[14]
- Certain agricultural labor rights retaliation: liquidated damages equal to actual damages (economic or other), or $10,000 (whichever is greater). See INFO #12D for more details.

(6) Emotional distress damages are available under various statutes, including those allowing "actual damages" rather than just economic damages, or only specific kinds of damages like back pay.[15]

(7) Attorney's fees and costs.[16]

(B) Orders to remedy and prevent violations also depend on what the facts of the case show would be appropriate for make-whole relief and deterrence.

(1) Reinstatement of an employee who lost a job (fired, demoted, denied promotion, etc.), or a portion of their work (reduced or less favorable hours, assignments, shifts, etc.), due to unlawful adverse action — or, **if reinstatement is impractical, front pay** (described above) for ongoing lost pay.

(2) Orders to stop any ongoing violations and/or remedy past violations — for example, changing an unlawful policy and/or send notice to employees correcting past violations.

(C) Fines to the state may be ordered for various substantive and procedural violations, such as

- **non-compliance** with investigative requests or Division orders,[17] or
- violation of **duties to pay** wages or to **notify workers** of rights.[18] See INFO #2B for more on fines.

Appeals: An appeal to a hearing officer of a retaliation determination must be submitted to, and received by, the Division within 35 days. See the Division appeal form, and INFO #2C on Division appeals generally.

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[14] *E.g.* *MTB CO, LLC d/b/a Lakeshore Cannabis*, DLSS Claim #1238-23 (Citation Dec. 7, 2023) (awarding back pay for earnings lost during period of unemployment, as well as liquidated damages equal to the back pay award).

[15] *E.g.,* *Gorsich v. Double B Trading Co.*, 893 P.2d 1357, 1363 (Colo. App. 1994) (where "actual damages," are allowed by a statute, "'[a]ctual damages' include non-economic damages," including "any non-economic losses or injuries incurred to the present time or which will probably be incurred in the future, including pain and suffering; inconvenience; emotional distress") (citing *Keohane v. Stewart*, 882 P.2d 1293 (Colo. 1994) ("actual damages" for slander include reputational harm, personal humiliation, mental anguish, or physical suffering)); *Panahiasl v. Gurney*, No. 04-04479, 2007 WL 738642, at *1-2 (N.D. Cal. Mar. 8, 2007) ("actual damages" allowed by a consumer statute include "damages for personal humiliation, embarrassment, mental anguish or emotional distress," and can be proven by, for example, (a) written "declarations attesting to their emotional distress" (*e.g.*, "panic, humiliation, nervousness, crying fits, difficulty eating and sleeping, and diarrhea"), or (b) evidence of how "abusive" a violation was (*e.g.*, "repeated telephone abuse").

While the Division may award emotional distress damages, such damages may, depending on the facts, be limited at the Division, compared to what might be available in a court, given the fuller processes available in litigation. *E.g.* *MTB CO, LLC d/b/a Lakeshore Cannabis*, DLSS Claim #1238-23 (Citation Dec. 7, 2023) (awarding $5,000 in emotional distress damages for HFWA retaliation where evidence showed employer caused employee to suffer distress by pressuring them, while ill with COVID-19, to commit potentially criminal fraud — falsifying medical evidence of another more serious medical condition — to justify the paid sick leave they were entitled to take).

[16] If a determination is made that the employer violated any retaliation provision under its authority, the Division can order the employer to pay the employee's reasons attorney fees and costs, except that costs cannot be awarded under PHEW, see C.R.S. § 8-4-120, C.R.S. § 8-14.4-105(3)(a), C.R.S. § 8-2-206(3)(c)(I - II), C.R.S. § 8-13.3- 411(4).

[17] C.R.S. §§ 8-1-114, 116, 117 (Division requests); C.R.S. § 8-1-140(2) (Division orders); *e.g.,* *Akkodis E&T LLC*, DLSS Claim #3266-22 (Citation Dec. 14, 2023) ($100 daily fine for not producing documentation requested by the Division); *Monigle*, DLSS Claim #0902-21 (Citation Dec. 2, 2021) ($5,800.00 fine for failure to comply with Division orders).

[18] C.R.S. § 8-4-109(3)(b) (wage payment duty); C.R.S. § 8-13.3-408(4) (notify employees of rights); *e.g.*, *The Denver Post, LLC et al.*, DLSS Case #21-0018, at 38-41 (Citation Dec. 2, 2022) ($74,300 fine for notice and posting violations); *Peak Vista Community Health Centers*, DLSS Case #22-0037, at 20-22 (Citation Aug. 3, 2021) (same, $44,950); *Super Mario Construction, LLC*, DLSS Case #20-0026, at 48 (Citation Nov. 23, 2021) ($15,400 wage non-payment fine).

Table 2: Remedies that May Be Ordered, by Type of Retaliation or Interference[19]

Remedies by Type of Retaliation or Interference:	Back pay *(from the loss until the order)*	Reinstate, or front pay	Emotional distress damages	Other economic losses	Punitive damages	Liquidated damages *(if no interest awarded)*	Fixed-sum penalty *(to the worker)*	Attorney fees and costs	Remedy orders *(fix violation, change policy, give notice, etc.)*	References *(statutes/rules on authority for types of relief)*
Health or Safety Whistleblowing	✔	✔	✔*	✔*	✔*		✔*	✔ (attorney fees only)	✔*	C.R.S. §§ 8-14.4-105(3)(a); 8-14.4-106; 8-4-140(2)
Paid Sick Leave	✔	✔	✔	✔	✔	✔		✔	✔	C.R.S. §§ 8-13.3-407(5)(b), 411(4)(b)(I-II); 8-5-104(2); 8-4-101 et. seq.
Wages or Hours	✔	✔	✔	✔		✔ ($2,000, or 2x unpaid wages)	✔ ($50 per day of violation)	✔	✔	C.R.S. §§ 8-4-120(3)
Agricultural Conditions *(heat protections, equipment rights, service access, etc.)*	✔	✔	✔	✔			✔ ($10,000 *if* the damages are <$10,000	✔	✔	C.R.S. §§ 8-2-206(3)(c)

For More Information: Visit the Division website, call 303-318-8441, or email cdle_labor_standards@state.co.us.

[19] Notes on Table 2: The table covers only monetary relief to persons affected and remedial orders, but not fines to the state.
✔ means the Division *or* a court can order that remedy.
✔* means *only* a court, not the Division, can order that remedy.