

## DEPARTMENT OF LABOR AND EMPLOYMENT

### Division of Labor Standards and Statistics

## PREVAILING WAGE AND RESIDENCY (PWR) RULES

### 7 CCR 1103-6

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As proposed September 29, 2023; if adopted, effective January 1, 2024.

#### **Rule 1. Statement of Purpose; Dual Jurisdiction; Separability**

- 1.1** The general purpose of these Prevailing Wage and Residency (PWR) Rules, 7 CCR 1103-6, is to exercise the authority of this Division to administer and enforce the Keep Jobs in Colorado Act (KJICA), C.R.S. Title 8, Article 17, C.R.S. § 8-17-101 et seq., the Colorado Quality Apprenticeship Training Act of 2019, C.R.S. Title 24, Article 92, Part 2, C.R.S. § 24-92-201 et seq. (Prevailing Wage Act), the Colorado Energy Sector Public Works Project and Craft Labor Requirements Act, C.R.S. Title 24, Article 92, Part 3, C.R.S. § 24-92-301 et seq., and the Thermal Energy Act, C.R.S. Title 40, Article 3.2, Part 1 C.R.S. § 40-3.2-105.7. These rules are issued under the authority and as enforcement of Articles 1, 4, 6, 17, and 24 of C.R.S. Title 8 (2023); C.R.S. § 24-92-209(7); and C.R.S. §§ 8-17-104 and -106; and are intended to be consistent with the State Administrative Procedure Act, C.R.S. § 24-4-101, et seq.
- 1.2** Incorporations by Reference. Hereby incorporated by reference into these PWR Rules are Title 8, Articles 1, 4, 6, and 17 of the Colorado Revised Statutes (C.R.S.) (2023); Title 24, Article 92, of the C.R.S.; the Wage Protection Rules, 7 CCR 1103-7 (2023); the Colorado WARNING Rules, 7 CCR 1103-11 (2023); and the Davis Bacon Act and its implementing regulations, 40 U.S.C. § 3141 et seq. Earlier versions of such laws and rules may apply to events that occurred in prior years. Incorporation excludes later amendments to or editions of the constitution, statutes, and rules; all cited laws are incorporated in the forms that are in effect as of the effective date of these Rules. Where these Rules reference another rule, the reference shall be deemed to include all subparts of the referenced rule. 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. Except where any of these Rules, or any other Colorado rules or statutes, provide otherwise, these Rules, as well as the Acts that these rules implement and enforce (KJICA and Prevailing Wage Act), should be interpreted consistently with the federal Davis-Bacon Act and its implementing regulations, 40 U.S.C. § 3141 et seq. All sources cited or incorporated by reference 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 at a reasonable charge or can be accessed 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 them at cost upon request or provide the requestor information on how to obtain a certified copy of the material incorporated by reference from the agency originally issuing them. All Division rules are publicly available at [www.coloradolaborlaw.gov](http://www.coloradolaborlaw.gov).
- 1.3** Administration and Dual Jurisdiction. The Division shall have jurisdiction over all questions arising with respect to the administration and interpretation of these Rules. Pursuant to C.R.S. § 24-92-202(3), the Department of Personnel and Administration (DPA) may promulgate additional rules applicable to rights under C.R.S. Title 24, Article 92, Part 2. Given the remedial purposes of the Prevailing Wage Act, in the event of any conflict between the DPA's rules and these Rules, the rule(s) providing greater protection for the rights of employees shall govern. Whenever employers are subject to both Colorado and federal and/or local law, the law providing the greater protection or setting the higher standard shall apply. For information on federal law, contact the U.S. Department of Labor, Wage and Hour Division.

- 1.4 Separability. These Rules are intended to remain in effect to the maximum extent possible. If any part (including any section, sentence, clause, phrase, word, or number) is held invalid, (A) the remainder of the Rules remain 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.

## **Rule 2. Definitions**

- 2.1 “Agency of government” as used in the Prevailing Wage Act, C.R.S. § 24-92-201(1) means any agency, department, division, board, bureau, commission, institution, or section of the state, which is a budgetary unit exercising construction contracting authority or discretion. “Agency of government” does not include any county, city and county, city, municipality, town, school district, special district, or any other political subdivision of the state.
- 2.1.1 “Contracting Agency” is the specific agency of government with which a contractor or subcontractor has a contract for a public project.
- 2.2 “Authorized representative” means a person who is designated by a party to a complaint to represent the party during the Division’s complaint and/or appeal process.
- 2.3 “Colorado labor” as used in KJICA, § 8-17-101(2)(a), means labor that is performed on a public project by any person who is a resident of the state of Colorado, without discrimination as to race, color, creed, sex, sexual orientation, marital status, national origin, ancestry, age, or religion, except when sex or age is a bona fide occupational qualification.
- 2.3.1 A resident of the state of Colorado is a person who can provide a valid Colorado driver’s license, a valid Colorado state-issued photo identification, or other documentation showing that the person has resided in Colorado for the last thirty days.
- 2.4 “Contractor” as used in the Prevailing Wage Act, C.R.S. § 24-92-201(2), means any employer, person, entity, individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons that has a contract for a public project with a Contracting Agency.
- 2.5 “Davis Bacon Act” refers to the Davis-Bacon and Related Acts (DBRA), 40 U.S.C. § 3141 et seq.
- 2.6 “Director” means the Director of the Colorado Division of Labor Standards and Statistics, or his or her designee.
- 2.7 “Division” means the Division of Labor Standards and Statistics within the Colorado Department of Labor and Employment.
- 2.8 “Employees” and/or “workers” under KJICA and Prevailing Wage Act.
- 2.8.1 Under KJICA, § 8-17-105, a “worker” is defined pursuant to the Davis Bacon Act, 29 C.F.R. § 5.2. Workers are those whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual.
- 2.8.2 Under the Prevailing Wage Act, C.R.S. § 24-92-201(4), “employees” are workers who are employees pursuant to the Colorado Wage Act, C.R.S. § 8-4-101(5), and who are engaged by contractors or subcontractors to perform jobs on various types of public projects, including as mechanics, laborers, or other construction workers.
- 2.9 “Fringe benefit”, as used in KJICA, C.R.S. § 8-17-105, is defined pursuant to the Davis Bacon Act, 29 C.F.R. § 5.23. Fringe benefit includes the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in

writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits.

**2.10** "Public works project" or "public project" have the following definitions:

**2.10.1** Under KJICA, C.R.S. § 8-17-101(2)(b), C.R.S. § 24-103-908(1), and C.R.S. § 24-92-102(8), "public works project" has the same meaning as "public project", and is defined as:

- (A)** any public project as defined in C.R.S. § 24-92-102(8), including any construction, alteration, repair, demolition, or improvement of any land, building, structure, facility, road, highway, bridge, or other public improvement suitable for and intended for use in the promotion of the public health, welfare, or safety and any maintenance programs for the upkeep of such projects, including any such project awarded by any county, including any home rule county, municipality, as defined in C.R.S. § 31-1-101(6), school district, special district, or other political subdivision of the state. It does not include any project:
  - (1)** for which appropriation or expenditure of moneys may be reasonably expected not to exceed five hundred thousand dollars in the aggregate for any fiscal year;
  - (2)** under the supervision of the department of transportation for which appropriation or expenditure of funds may be reasonably expected not to exceed two hundred fifty thousand dollars in the aggregate of any fiscal year; or
  - (3)** that is financed with any amount of federal money.
- (B)** any publicly funded contract for construction entered into by a governmental body of the executive branch of the state of Colorado which is subject to the "Procurement Code", articles 101 to 112 of title 24, C.R.S.; and
- (C)** any highway or bridge construction, whether undertaken by the department of transportation or by any political subdivision of the state of Colorado, in which the expenditure of funds may be reasonably expected to exceed fifty thousand dollars.

**2.10.2** Under the Prevailing Wage Act, C.R.S. § 24-92-201, "public project"

- (A)** means any construction, alteration, repair, demolition, or improvement of any land, building, structure, facility, road, highway, bridge, or other public improvement suitable for and intended for use in the promotion of public health, welfare, or safety and any operation or maintenance programs for the operation and upkeep of such projects. "Public project" includes any work, construction, or repair performed by a private party through a contract to rent, lease, or purchase at least fifty percent of the project by one or more agencies of government, and may include projects undertaken pursuant to contracts awarded under Title 24, Article 92, Part 1, C.R.S., or under Title 24, Article 93, C.R.S. It does not include any project:
  - (1)** that receives federal funding; or
  - (2)** whose contracting agency is the Department of Transportation.

- (B) includes an “energy sector public works project,” defined by C.R.S. § 24-92-301(5), and may include thermal energy network or thermal energy system projects, defined by C.R.S. § 40-3.2.108. It does not include any project:
  - (1) for which a public utility or cooperative electric association invitation for bids or proposals issued before January 1, 2024; or
  - (2) listed under C.R.S. § 24-92-304(1)(c).

**2.11** “Site of the project” as used in KJICA, C.R.S. § 8-17-105, is defined pursuant to the Davis Bacon Act definition of “site of the work,” 29 C.F.R. § 5.2. Site of the project is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is either established specifically for the performance of the contract or project or dedicated exclusively, or nearly so, to the performance of the contract or project for a specific period of time.

**2.11.1** Not included in the site of the project are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular public works contract or project.

**2.12** A “wage determination” as defined by the Prevailing Wage Act, C.R.S. § 24-92-205(1), is the determination made by the Colorado Department of Personnel and Administration establishing prevailing wage rates for the applicable trade or occupation and the particular geographical locality of the public project. A “wage determination” includes the original decision and any subsequent decisions modifying, superseding, correcting, or otherwise changing the provisions of the original decision.

**2.13** “Wages,” “scale of wages,” “wage rates,” “minimum wages,” and “prevailing wages” as defined by the Prevailing Wage Act, C.R.S. § 24-92-201(6), means:

- (A) The employee’s basic hourly rate of pay;
- (B) Any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and
- (C) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers, mechanics, and other construction workers pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the workers affected in advance.

Unless otherwise noted, when used herein, the term “wages” includes fringe benefits, except where it is used to refer to wages as defined in the Colorado Wage Act, C.R.S. § 8-4-101(14).

**2.14** A “willful violation,” as defined by the Prevailing Wage Act, C.R.S. § 24-92-209(2)(b), includes an intentional violation and a violation made with reckless disregard or deliberate ignorance of the law. A contractor or subcontractor acts with “reckless disregard” of the requirements of the law if, for example, it should have inquired further into whether its conduct was in compliance with the law and failed to make adequate further inquiry. Whether employees accepted or agreed to accept less than the required rate of wages or voluntarily made refunds is not a defense to willfulness.

### **Rule 3. KJICA: The “Colorado Labor” Requirement and Contractor Obligations**

**3.1** Under C.R.S. § 8-17-101(1), workers meeting the Rule 2.3 definition of “Colorado labor” are required to perform at least eighty percent of the work on public projects undertaken in the state of Colorado and financed in whole or in part by funds of the state of Colorado or its counties,

- school districts, or municipalities, unless the requirement is waived by governmental body financing the public works project.
- 3.2** Compliance with Rule 3.1 is measured over the entirety of the completed project, and is determined using the total taxable wages and fringe benefits paid to workers meeting the Rule 2.8.1 definition of “Colorado labor,” minus any per diem payments made to such workers.
- 3.3** In order to meet the Rule 2.3 definition of “Colorado labor,” workers must provide contractors with adequate proof of residency.
- 3.3.1** Each contractor shall retain the documentation required under the law for at least ninety days after the completion of the project.
- 3.3.2** Workers who establish residency during the course of the project also qualify as “Colorado labor” under Rule 2.3.
- 3.3.3** The Division assesses the acceptability and validity of residency documentation on a case-by-case basis. The Division examines the totality of the circumstances and the evidence provided for each covered worker in the reviewing of residency documentation. Examples of potentially acceptable residency documentation may include, but not limited to:
- (A)** valid Colorado’s driver’s license or state-issued photo identification;
  - (B)** Colorado voter registration;
  - (C)** utility or water bill;
  - (D)** rental lease;
  - (E)** state income tax returns; and/or
  - (F)** documentation reflecting ownership of residential real property in Colorado.
- 3.3.4** The following documentation must be provided by the contractor to the Division in the event of an investigation:
- (A)** documentation reflecting the taxable wages and fringe benefits for each covered worker on the public works project; and
  - (B)** the required residency documentation for each covered worker on the public works project.
- 3.4** The governmental body financing a public works project shall waive the eighty percent requirement if there is reasonable evidence to demonstrate insufficient Colorado labor to perform the work of the project and if compliance with the law would create an undue burden that would substantially prevent a project from proceeding to completion.
- 3.4.1** A governmental body that allows a waiver shall post notice of the waiver and a justification for the waiver on its website.
- 3.4.2** A governmental body shall not impose contractual damages on a contractor for a delay in work due to the waiver process.
- 3.5** All contracts let for public works financed in whole or in part by funds of the state, counties, school districts, or municipalities of the state of Colorado shall contain provisions for the preference in employment of Colorado labor.

#### **Rule 4. Prevailing Wage Act: Contractor Payment Obligations**

- 4.1** A contractor or subcontractor is required to pay all laborers, mechanics, and other construction workers all wages owed under the Prevailing Wage Act, C.R.S. § 24-92-202, no less frequently than once every seven calendar days (not workdays), regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such employees.
- 4.2** A contractor or subcontractor may discharge its minimum obligation for the payment of wages as contained in a wage determination by paying all employees the full amount unconditionally and at least once per week, the prevailing wage as defined in Rule 2.13.
- 4.3** An employee performing multiple positions with differing prevailing wage rates or classifications must be paid the appropriate wages on the wage determination for the classification(s) of work actually performed, without regard to skill.

#### **Rule 5. Prevailing Wage Act: Coverage of Energy Projects**

- 5.1** Contracts between lead contractors and the owners of an energy sector public works project, as defined in C.R.S. § 24-92-303(5), must include provisions expressly requiring that all work performed under the contract comply with the apprenticeship requirements of C.R.S. § 24-92-115(7) and prevailing wage requirements in C.R.S. § 24-92-201 et seq. if:
  - (A)** the energy sector public works project (1) is either (a) a power generation project with a nameplate generation capacity of one megawatt or higher, or (b) an energy storage system as defined by C.R.S. § 40-2-202 with an energy rating of one megawatt of power capacity or four megawatt hours of useable energy capacity or higher, and (2) has aggregated public assistance from the state of five hundred thousand dollars or more (C.R.S. § 24-92-304(1)(b)(I)); or
  - (B)** the energy sector public works project (1) is included under C.R.S. § 24-92-303(5)(b)(II), (2) has a total project cost of one million dollars or more, and (3) has aggregated public assistance from the state, funding from a public utility, or funding from a cooperative electric association of five hundred thousand dollars or more (C.R.S. § 24-92-304(1)(b)(II)).
- 5.2** Owners of energy sector public works projects must either (1) provide quarterly copies of “craft labor certifications” to the CDLE Division of Labor Standards and Statistics, or (2) require by contract that lead contractors do so. C.R.S. § 24-92-305(4). This Rule does not apply to an energy sector public works project where all construction work is covered by a “project labor agreement” as defined in C.R.S. § 24-92-303(9). C.R.S. § 24-92-306(2).
  - 5.2.1** Craft labor certifications are “all documentation and certification of payroll required for an energy sector public works project in accordance with the requirements of section[s] 24-92-115(7)” and 24-92-201 et seq. C.R.S. § 24-92-303(4).
  - 5.2.2** Craft labor certifications must include (1) a sworn attestation that the lead contractor is fully compliant with these requirements, and (2) identical, equivalent craft labor certifications for all subcontractors participating in the energy sector public works project, C.R.S. § 24-92-305(3), and are additionally required as reports to the Division pursuant to C.R.S. §§ 8-1-114, 8-1-117.
  - 5.2.3** Craft labor certifications should be submitted to the Division quarterly, by the end of the month following the close of each calendar quarter (January-March, etc.), pursuant to instructions posted at [coloradolaborlaw.gov](http://coloradolaborlaw.gov).

- 5.3** Any thermal energy network project or thermal energy system project that an agency of government or a state institution of higher education procures, and that is a public project, must comply with:
- (A)** the prevailing wage requirements of C.R.S. § 24-92-201 et seq. if the estimated contract cost of the project is five hundred thousand dollars or more (C.R.S. § 40-3.2-105.7(1)(b)); and
  - (B)** the apprenticeship requirements of C.R.S. § 24-92-115 if the estimated contract cost of the project is one million dollars or more (C.R.S. § 40-3.2-105.7(1)(a)).

## **Rule 6. Filing and Investigation of Complaints**

### **6.1 KJICA Complaints**

- 6.1.1** A person who alleges a potential violation of KJICA may file a complaint with the Division within ninety days after the date the public project was completed (not the date that the work was performed).
- (A)** Anonymous complaints are not accepted by the Division.
  - (B)** Complaints shall be filed using the Division-approved form, and the complaint shall include the complainant's signature, contact information, and the basis for the complaint. Failure to include this information on the complaint form may result in administrative dismissal of the complaint.
- 6.1.2** Upon the receipt of a KJICA complaint, the Division shall notify the contractor of the complaint.
- 6.1.3** Either party may designate an authorized representative to act on its behalf in filing a complaint with the Division. The party may designate an authorized representative by filing the Division-approved form with the Division. The party may revoke the authorized representative's authority by contacting the Division in writing.
- 6.1.4** The Division commences the investigation only after completion of the project.
- 6.1.5** The Division investigates KJICA complaints pursuant to the Wage Protection Rules, 7 CCR 1103-7, to the extent not inconsistent with those Rules.

### **6.2 Prevailing Wage Act Complaints**

- 6.2.1** An employee, former employee, or contracting agency ("complainant") may file a complaint with the contracting agency for a public project regarding any perceived violation of the prevailing wage requirements of Title 24, Article 92, Part 2 or Rule 4 of these Rules.
- (A)** A complainant may, but is not required to, use the Division's public project prevailing wage complaint form to file a complaint with the contracting agency.
  - (B)** Upon receipt of a complaint, the contracting agency shall report the perceived violation to the contractor of the project, and, if applicable, the subcontractor which is the subject of the complaint within 48 hours of being made aware of the alleged violation.
  - (C)** If, within fifteen days of being notified of the alleged violation, the contractor or subcontractor (1) demonstrates to the contracting agency that no violation occurred or that any violation was the result of legitimate administrative error and (2) remedies any violation, the complaint shall be dismissed.

- (D) If the contracting agency determines that a “willful violation” occurred or the contractor or subcontractor fails to remedy any alleged violation within fifteen days of being notified, the contracting agency shall report the violation to the Division. Upon receiving a report of an alleged violation from a contracting agency, the Division will treat the report as a complaint and investigate it pursuant to the Wage Protection Rules, 7 CCR 1103-7, to the extent not inconsistent with those Rules, to determine if the perceived violation was conducted in a willful manner, as defined in Rule 2.14 of these Rules.

**6.2.2** If a complaint is not resolved by either the contracting agency, or the Division, the complaining employee or former employee may file a civil action in court within 120 days from the later of: (1) the employee’s complaint to the contracting agency, if it is not resolved under Rule 6.2.1(C) or reported to the Division under Rule 6.2.1(D) of these Rules in that time; or (2) the Division’s determination pursuant to Rule 5 of the Wage Protection Rules, 7 CCR 1103-7.

- (A) Such civil action may be brought in the district court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom in the civil complaint is filed resides or has their principal place of business, and must be brought within three years after the occurrence of the alleged violation.
- (B) Such civil action may be brought for appropriate injunctive relief, actual damages, or both, and may be brought by one or more employees or former employees on behalf of him or herself or themselves and other employees similarly situated.

## **Rule 7. Remedies and Fines**

### **7.1 KJICA Remedies and Fines**

**7.1.1** If the Division determines that a contractor has knowingly violated Rule 3, it shall subject the contractor to the following fines:

- (A) for the first violation, either five thousand dollars or an amount equal to one percent of the cost of the contract, whichever is less;
- (B) for the second violation, either ten thousand dollars or an amount equal to one percent of the cost of the contract, whichever is less; or
- (C) for the third violation and any subsequent violation thereafter, either twenty-five thousand dollars or an amount equal to one percent of the cost of the contract, whichever is less.

If the Division has imposed three or more KJICA fines on a contractor within the past five years and finds the violations to be egregious, the Division may initiate the process to debar the contractor pursuant to C.R.S. § 24-109-105.

### **7.2 Prevailing Wage Act Remedies and Fines**

**7.2.1** If the Division reaches a determination pursuant to Rule 5 of the Wage Protection Rules, 7 CCR 1103-7, that a willful violation of Rule 4 of these Rules occurred, the Division may order any remedies permitted by law, including but not limited to that the Division:

- (A) shall order restitution of applicable back pay for the impacted employees, including damages in an amount equal to the amount of unpaid wages or benefits owed, and any penalties that may be awarded under the Colorado Wage Act (unpaid fringe benefit contributions owed shall be paid to the appropriate



benefit fund, except that in the absence of an appropriate fund the benefit shall be paid directly to the individuals), and

- (B) shall subject the contractor to the following fines:
  - (1) for the first violation, five thousand dollars;
  - (2) for the second violation, ten thousand dollars; and
  - (3) for the third violation and all subsequent violations thereafter, twenty-five thousand dollars.

**Rule 8. Retaliation Prohibited**

- 8.1 It is unlawful to retaliate for filing any complaint, or instituting or causing to be instituted any proceeding, under any law or rule related to wages or hours, including but not limited to these Rules and the statutes they implement, under C.R.S. §§ 8-4-120, 8-6-115, Rules 4.7 – 4.8 of the Wage Protection Rules, 7 CCR 1103-7, and the Colorado WARNING Rules, 7 CCR 1103-11.

**Rule 9. Appeals**

- 9.1 A complainant or respondent may appeal a Division determination pursuant to Rule 6 of the Wage Protection Rules, 7 CCR 1103-7, to the maximum extent consistent with the Colorado Administrative Procedures Act, C.R.S. §§ 24-4-105, -106.