

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

Direct Investigation Rules, 7 CCR 1103-8 (2024), as proposed December 29, 2023; to be followed and replaced by a final Statement at the conclusion of the rulemaking process.

I. BASIS: These rules conform the Direct Investigation Rules (“DI”), 7 CCR 1103-8, to statutory changes to C.R.S. Title 8, and serve important public needs that the Director finds best served by these rule updates and amendments.

II. SPECIFIC STATUTORY AUTHORITY: The Director of the Division of Labor Standards and Statistics is authorized to adopt and amend rules and regulations to enforce, execute, apply, and interpret Articles 1, 2, 4-6, 12, 13.3, 13.5, and 14.4 of Title 8, C.R.S. (2023) and including the Equal Pay for Equal Work Act, C.R.S. § 8-5-101 et seq. (2024); as well as all rules, regulations, investigations, and other proceedings of any kind pursued thereunder, by provisions of these Articles 1, 2, 4-6, 12, 13.3, 13.5, and 14.4. Authority also derives from the Administrative Procedure Act, C.R.S. § 24-4-103.

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.

The Direct Investigation Rules were first written in 2019 before the Direct Investigation program existed at the Division, then updated only modestly the next year, before the program reached what the Division considered fully operational status in 2021. With these Rules not updated since the program’s infancy, the Division found several areas requiring adjustment, though none that result in significant changes to how the Division operates the Direct Investigations program:

- incorporating and ensuring consistency with statutory and rule changes of the past several years — *e.g.*, changes in Senate Bill 22-161 to multiple areas of wage and hour law and procedure, and changes to other Division rules;
- updating the rules to reflect that, under the Colorado Equal Pay for Equal Work Act amendments in Senate Bill 23-105, Division discretionary investigative authority will include pay disparities based on sex; and
- various technical amendments to add clarity and eliminate redundancy, in ways that have proven warranted since the rules were last amended.

A. Rules 1-2: Statement of Purpose and Definitions

These proposed amendments conform Rules 1 and 2 to rules and statutes that have become effective since these rules were last amended, including amendments to the Wage Protection Rules, 7 CCR 1103-7, and otherwise make non-substantive technical clarifications, corrections, or formatting edits. Direct Investigation Rules 2.4 and 2.11, on correct addresses and written demands respectively, incorporate, or closely parallel, concurrent proposed amendments to the Wage Protection Rules, 7 CCR 1103-7. As such, in these and any other Direct Investigation Rule changes that incorporate amendments to the Wage Protection Rules, this Statement of Basis and Purpose incorporates the concurrent proposed Wage Protection Rules Statement of Basis and Purpose.

B. Rule 3: Investigations

Rule 3 is modified, as proposed, in a number of ways to eliminate Rule content that is redundant with the Division’s statutory authority and the program’s efforts to create investigatory procedures, and to remove unnecessary Rule content.

Rule 3.1 is modified to simplify the criteria for the initiation of a Direct Investigation and to provide a concise basis for, and scope of, a Direct Investigation. Prior Rule 3.2 is subsumed in the new Rule 3.1. Prior Rules 3.3, 3.4, and 3.5 are eliminated entirely. The prior Rule 3.1 set out a list of broad criteria defining circumstances under which a Direct Investigation could be initiated, while Rules 3.3–3.5 provided related information concerning the basis for, and scope of, a Direct Investigation. Experience of the past several years has shown that, for various reasons, these Rules are unhelpful and inapt. First, criteria

for strategic enforcement decisions cannot be *accurately codified* in a list, experience has shown: such decisions are not only case-specific, but dynamic over time as the Division's enforcement priorities and legislative charges evolve. Second, criteria for strategic enforcement decisions are *inapt as rule content*. These rules were written at a time when the program was new to the state, and when the Division published guidance had not been updated in years, so their goal was simply illustrative, to explain key purposes of strategic enforcement — a goal better served by published guidance, experience has shown. Third — and partly because of the prior two points on the infeasibility of accurately codifying enforcement priorities as rule content — subparts of prior Rule 3.1 provided exceptionally broad and vague criteria that did not prove helpful in defining the nature of the program's strategic enforcement efforts. Fourth, prior Rule 3.3's reference to a two- to three-year statute of limitations has been removed both because it is unnecessary for rules to recite statutory limitations periods and because with Direct Investigations spanning a range of different statutory and factual situations, that specific limitations period from the Wage Act may not always apply.

Additions to prior Rule 3.6, now Rule 3.2, clarify that a Direct Investigation, as a discretionary exercise of authority to investigate under a wide range of labor statutes, is not limited in scope by the contents of a Notice of Investigation. This modification was prompted by the common misconception among employers that a Direct Investigation could not inquire into time periods and violations not identified in the Notice of Investigation, despite the program's statutory obligation to inquire into any potential violation. The program's intent in issuing Notices of Investigation has always been to give an employer fair notice of what potential violations the program is aware of *at the time the Notice is issued*, not to permanently define the scope of a Direct Investigation.

Prior Rules 3.7, 3.8, 3.10, and 3.11 are eliminated entirely. The text of prior Rule 3.9 is now in Rule 3.3 with the minor addition of allowing authorized representatives for witnesses. These prior Rules provided procedures applicable to Direct Investigations. Based on several years' experience conducting investigations, the program found that these rules proved largely unhelpful and unnecessary. First, much of the content of these Rules just redundantly reiterated Division statutory authority. Second, the contents of these Rules were redundant with detailed investigative procedures the program implements in its investigations pursuant to its statutory authority to issue lawful orders. These procedures reflect the program's intent to improve its operations as it continues to gain experience and receive feedback regarding its investigations and strategic enforcement efforts.

As modified, Rule 3.4 concisely identifies the program's statutory authority to gather information and to issue orders and fines. This information was previously stated in more detail in prior Rules 3.8 and 3.10.

As modified, Rule 3.5 clarifies that the investigative procedures implemented by the program in the course of an investigation are presumptively issued pursuant to the program's statutory authority.

Prior Rule 3.12, now Rule 3.6, is supplemented to clarify that employers are responsible for providing a correct physical address in addition to contact information, and to clarify that documents sent to addresses provided by the employer are presumed to have been properly served.

C. Rules 4-5: Determinations and Appeals

The prior Rule 4 is proposed to be deleted as unnecessary, and not creating any substantive requirements for Direct Investigations. The rule was drafted before any Direct Investigations had been conducted, and provided for notice of the Division's preliminary findings in a Direct Investigation. But this permissive rule merely restated information the Division can already provide to employers under investigation, with unnecessary definitions of the content and response deadlines that may be inapplicable depending on the needs of a particular investigation. Consequently, the optional step of issuing a notice of preliminary findings has fallen substantially into disuse. This rule neither directs nor informs actual practice in a Direct Investigation, and is thus deleted.

Rule 4 (formerly Rule 5) is largely unchanged, with only technical clarifications, such as replacing a description of written demands in a prior rule 5.1.6 with a definition of written demands in Rule 2.

Rule 5 (formerly Rule 6) likewise has technical clarifications, and is amended to note expressly that, to the extent applicable, appeals will be conducted in a manner consistent with the Colorado Administrative Procedure Act.

D. Rule 8: Discrimination and Reprisal Prohibited

Former Rule 9.1 clarified that protections from "retaliation, interference, and discrimination for protected activity in labor

standards law” apply to Direct Investigations. This rule, now Rule 8.1, has not been substantively changed. However, the Rule did not provide a definition of interference and was drafted before the program had experience conducting investigations and defending its determinations on appeal. Through experience, the Division has found a need to clarify that “interference” in the context of a Direct Investigation includes not only interference *with worker rights*, but also interference *with an investigation*. Thus, the addition of Rule 8.1.1 defines interference and clarifies what conduct may constitute interference in any stage of a Direct Investigation, from pre-investigation orders to provide information through appeals and post-determination enforcement of final orders.

E. Other Amendments

The proposed rules also include various other technical or otherwise non-substantive changes where Division review found a need for clarifications or corrections.

V. EFFECTIVE DATE. If adopted, these rules take effect April 1, 2024, or as soon after as rulemaking completes.



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

December 29, 2023

Date