

## DEPARTMENT OF LABOR AND EMPLOYMENT

### Division of Labor Standards and Statistics

#### DIRECT INVESTIGATION RULES

##### 7 CCR 1103-8

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As proposed December 29, 2023; if adopted, to be effective April 1, 2024.

#### Rule 1. Statement of Purpose and Authority

- 1.1 Authority and relation to prior orders. The general purpose of these Direct Investigation Rules is to implement the Division of Labor Standards and Statistics's authority to conduct direct investigations of potential violations of labor standards law contained in C.R.S. Title 8, Articles 1, 2, 4-6, 12, 13.3, 13.5, and 14.4. These rules are adopted pursuant to the Division's authority in, and as enforcement of, these Articles, and are intended to be consistent with the requirements of the State Administrative Procedure Act, C.R.S. § 24-4-101, et seq. Unless otherwise noted, in these Rules: all statutes cited apply the most recent 2023 versions of the Colorado Revised Statutes, all rules cited apply the most recent versions adopted as of the adoption of these Rules.
- 1.2 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.
- 1.3 Incorporation by reference. Colo. Const. art. XVIII, § 15 (2023); Title 8, Articles 1, 2, 4-6, 12, 13.3, 13.5, and 14.4 of the Colorado Revised Statutes, including the Equal Pay for Equal Work Act, C.R.S. § 8-5-101 et seq. (2024); 7 CCR 1103-1; 7 CCR 1103-7; 7 CCR 1103-11, 7 CCR 1103-13, and 7 CCR 1103-15, are hereby incorporated by reference into this rule, except where these Rules differ. Such incorporation excludes later amendments to or editions of the constitution, statutes, and rules. They 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 of Labor Standards & Statistics at a reasonable charge. They can be accessed electronically 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 shall provide the requestor with information on how to obtain a certified copy of the material incorporated by reference from the agency originally issuing them. All Division Rules are available to the public at [www.coloradolaborlaw.gov](http://www.coloradolaborlaw.gov). 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.

#### Rule 2. Definitions

- 2.1 "Division" means the Division of Labor Standards and Statistics in the Colorado Department of Labor and Employment; "Director" means the Director of the Division.
- 2.2 "Employee" has the meaning provided by C.R.S. § 8-4-101(5), except as follows, or as otherwise required by statute:
  - (A) under the Equal Pay for Equal Work Act, C.R.S. § 8-5-101 et seq., "employee" has the meaning provided by C.R.S. § 8-5-101(4);
  - (B) under the Healthy Families and Workplaces Act, "employee" has the meaning provided by C.R.S. § 8-13.3-402(4);
  - (B) under the Public Health Emergencies Whistleblower Act, C.R.S. § 8-14.4-101, et seq. "employee" and "worker" have the meaning provided by C.R.S. § 8-14.4-101(5), and where that Act applies, provisions of these Rules applicable to an "employee" shall apply equally to a non-employee "worker"; and

- (D) under the Agricultural Labor Rights and Responsibilities Act, as codified in relevant part at C.R.S. §§ 8-6-101.5, 8-6-120, and 8-13.5-201 et seq., “employee” has the meaning provided by C.R.S. §§ 8-13.5-201 and 8-2-206(1)(b), as applicable.
- 2.3 “Employer” has the meaning provided by C.R.S. § 8-4-101(6), except as follows, or as otherwise required by statute:
- (A) under the Healthy Families and Workplaces Act, C.R.S. § 8-13.3-401 et seq., “employer” has the meaning provided by C.R.S. § 8-13.3-402(4);
  - (B) under the Chance to Compete Act, C.R.S. § 8-2-130 et. seq., “employer” has the meaning provided by C.R.S. § 8-2-130(2)(c);
  - (C) under the Colorado Public Health Emergencies Whistleblower Act, C.R.S. § 8-14.4-101, et seq., “employer” and “principal” have the meaning provided by C.R.S. § 8-14.4-101(3), and where that Act applies, provisions of these Rules applicable to an “employer” shall apply equally to a non-employer “principal”;
  - (D) under the Equal Pay for Equal Work Act, C.R.S. § 8-5-101 et seq., “employer” has the meaning provided by C.R.S. 8-5-101(5); and
  - (E) under the Agricultural Labor Rights and Responsibilities Act, as codified in relevant part at C.R.S. §§ 8-6-101.5, 8-6-120, and 8-13.5-201 et seq., “employer” has the meaning provided by C.R.S. § 8-3-104(1).
- 2.4 A “correct address” for a party, including but not limited to as used in C.R.S. § 8-4-101(15) and these or other applicable Division rules, can include, but is not limited to (unless defined otherwise by statute, rule, or order): a physical or email address the party used, or provided to the Division, in the investigation (unless the party notifies the Division to use an alternate valid address instead); the party’s email address; the address on file with the Colorado Secretary of State for the party or their registered agent; or an address actually used, or publicly posted as a current address for mail or deliveries, by the party.
- 2.5 “Fine” means any monetary amount assessed against an employer and payable to the Division.
- 2.6 “Notice of Investigation” means a notice to an employer which identifies potential violations under investigation and includes initial demands for documentation and records.
- 2.7 “Notice of Investigation Termination” means a notice to an employer that no further action is contemplated by Direct Investigations regarding the potential violations described in the Notice of Investigation
- 2.8 “Place of employment” is defined at C.R.S. § 8-1-101(12).
- 2.9 “Labor Standards law” is defined as laws within, and rules promulgated pursuant to, C.R.S., Title 8, Articles 1, 2, 4-6, 12, 13.3, 13.5, and 14.4, and includes Colo. Const. art. XVIII, § 15; 7 CCR 1103-1, 1103-4, 1103-5, 1103-7, 1103-9, 1103-11; and any other Rules promulgated pursuant to the Division’s authority in the foregoing statutes.
- 2.10 “Witness” means any person or entity ordered to provide, or volunteering to provide, documents, information, or other evidence in a direct investigation.
- 2.11 A “written demand,” including as used in C.R.S. § 8-4-101(15), can be sent to the employer by electronic means, including but not limited to email and text message. Wages must be owed at the time of sending for the written demand to be considered valid. The penalty provisions in C.R.S. § 8-4-109(3)(b) effective on January 1, 2023, shall apply if the 14-day deadline for payment after the sending of a written demand without penalties passes on or after January 1, 2023, unless a prior written demand was sent more than 14 days before January 1, 2023. Notwithstanding the foregoing, when a Division Notice of Investigation, Citation, Notice of Assessment, or other

Division-issued document satisfying the requirements of a written demand, is sent where the 14-day deadline for payment is on or after January 1, 2023, the passing of that deadline triggers those penalty provisions, regardless of whether a prior written demand was sent before the Division's. A Citation and Notice of Assessment will constitute a written demand for the payment of any wages described therein, in accordance with C.R.S. § 8-4-101(15), and will be treated as such pursuant to C.R.S. § 8-4-109(3).

### **Rule 3. Investigations**

- 3.1 The Division may initiate a direct investigation of any potential violations of any labor standards law it has authority to enforce or investigate. The scope of an investigation may include all impacted individuals, including all of an employer's employees or contractors, or any subset or combination thereof.
- 3.2 The Division shall initiate the direct investigation by sending a Notice of Investigation to a correct address of the employer. The direct investigation is not limited to the time period or potential violations identified in the Notice of Investigation. The Division may, at its discretion, expand the direct investigation beyond the scope of the Notice of Investigation.
- 3.3 The employer and any witness may designate an authorized representative to represent it during the investigation.
- 3.4 In the course of a direct investigation, the Division may utilize all information gathering powers authorized by statute through orders to the employer or any witness, and may issue fines pursuant to this same authority for failure or refusal to comply with these orders. *See, e.g.,* C.R.S. §§ 8-1-114, -116, -117, -120; 8-4-111(1)(c), -118, -120; 8-5-103(1)(b).
- 3.5 During a direct investigation, the Division may issue directives, instructions, protocols, and procedures to an employer and witnesses, and may establish protocols or procedures governing an investigation. Such directives, instructions, protocols, and procedures are presumed to be "lawful order[s]" within the meaning of C.R.S. § 8-1-140(2). Failure to comply with a lawful order may subject the noncompliant individual or entity to fines. *Id.*
- 3.6 The employer is responsible for ensuring the Division has its current contact information and correct address as defined in Rule 2. Conclusive proof of service includes proof of delivery to any correct address as defined in Rule 2. Proper service is effective regardless of whether the party reads or opens the material served.

### **Rule 4. Determination**

- 4.1 Upon completing the investigation, the Division may issue a determination detailing its conclusions.
  - 4.1.1 The Division may issue a Citation against an employer that the Division determines by a preponderance of evidence has violated labor standards law.
  - 4.1.2 The Division may issue to the employer a Notice of Assessment for one or more employee(s) whom the Division determines by a preponderance of the evidence has suffered a violation of labor standards law and who is owed any remedies.
  - 4.1.3 Determinations by the Division may include all remedies authorized by law, that are supported by the Division's findings, including:
    - (A) monetary or other relief authorized by the statute(s) under which the investigation was conducted, including but not limited to, where applicable —
      - (1) any unpaid wages, penalties, and/or fines under C.R.S. Title 8, Article 4,
      - (2) if a violation of C.R.S. Title 8, Articles 13.3 (HFWA) or 14.4 (PHEW) cost an employee or worker a job or pay, back pay plus either reinstatement or (if reinstatement is infeasible) front pay for a reasonable period, and/or
      - (3) other fines or penalties authorized by statutes applicable to the investigation;

- (B) fines or penalties authorized by the statutes on Division investigative and enforcement authority in C.R.S. Title 8, Articles 1, 4, and 5; and/or
  - (C) order(s) to cease non-compliance and/or effectuate compliance, as authorized by the statute(s) under which the investigation was conducted and statutes on Division investigative and enforcement authority in C.R.S. Title 8, Article 1, 4, 5, and 6.
- 4.1.4 The Division may issue to the employer a Notice of Assessment inclusive of all wages, penalties, fines and/or other remedies assessed upon the employer.
- 4.1.5 The Citation and Notice of Assessment will identify the violation, any wages, penalties, and/or other remedies owed to the employee(s), and any fines owed to the Division. If the Division concludes that wages and/or other sums are owed to the employee, but cannot calculate the precise amount due, then the Division may award a reasonable estimate.
- 4.1.6 For cases in which a valid written demand was sent prior to the issuance of the Citation and Notice of Assessment, to encourage compliance by the employer, if the employer pays the employee(s) all wages and compensation owed within 14 days after a Citation and Notice of Assessment is sent to the employer, the Division may reduce by up to fifty percent any penalties imposed pursuant to C.R.S. § 8-4-109, and may waive or reduce any fines imposed.
- 4.1.7 If the Division does not determine that an employee suffered a violation of labor standards law, the Division may issue a Notice of Investigation Termination.
- 4.2 The Division shall send the determination via U.S. postal mail, electronic means, or personal delivery to a correct address of the employer on the date the determination is issued.
- 4.3 The appeal deadline is calculated from the date the Division's determination is originally issued and sent to the employer.
- 4.4 If any copies of the Division's determination are sent to the employer after the date of its issuance, those copies are only courtesy copies and do not change the 35-day appeal and termination deadlines.

## **Rule 5. Appeal**

- 5.1 The employer may appeal a Citation and one or more Notices of Assessment.
  - 5.1.1 A valid appeal is a written statement that is timely filed with the Division, explains the clear error in the determination or other grounds that are the basis for the appeal, and has been signed by the employer or the employer's authorized representative. The employer is encouraged to use the Division's appeal form.
  - 5.1.2 No appeal will be heard and no hearing will be held unless the appeal is received by the Division within 35 calendar days of the date the determination is sent. It is the responsibility of the employer filing the appeal to ensure the appeal is received by the Division within the 35-day filing deadline.
  - 5.1.3 Upon receipt of the appeal, the Division will notify the parties of the date of the hearing and any interim deadlines via U.S. postal mail, electronic means, or personal delivery.
  - 5.1.4 Upon receipt of the appeal, the Division will send a copy of the record of its investigation to the parties via U.S. postal mail, electronic means, or personal delivery. All evidence submitted to the Division as part of the investigation is part of the record on appeal and need not be resubmitted.
  - 5.1.5 The filing of an appeal does not, except to the extent that a stay is granted, toll any deadlines applicable under, or triggered by the issuance of, the determination, decision, or order being appealed.

- 5.2 Parties to the appeal will be the employer and the Division Direct Investigations program. Notices to the Division as a party, including disclosure of new evidence pursuant to Rule 5.6, should be sent via email to [cdle\\_ls\\_direct\\_investigations@state.co.us](mailto:cdle_ls_direct_investigations@state.co.us).
- 5.3 An employer that timely files a valid appeal of the Division's determination will be afforded an administrative appeal hearing before a Division hearing officer. Parties may appear by telephone.
- 5.4 Consistent with C.R.S. § 8-4-111.5, the hearing officer shall have the power and authority to call, preside at, and conduct hearings. The hearing officer has the power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed determination.
  - 5.4.1 The provisions of C.R.S. § 8-4-111.5(2)(b) and (c), and of (3)(b), are applicable to an appeal filed pursuant to Rule 5.1 to the maximum extent allowable by law.
- 5.5 The parties may submit new testimonial evidence to the hearing officer in accordance with deadlines imposed by the Division. The parties may submit new documentary or other non-testimonial evidence in accordance with deadlines imposed by the Division and upon showing "good cause," which may be assessed based on any relevant factors, including but not limited to:
  - 5.5.1 That the new evidence was previously not known or obtainable, despite diligent evidence-gathering efforts by the party offering the new evidence;
  - 5.5.2 That the party failed to receive fair notice of the investigation or of a key filing by another party or by the Division to which the new evidence is responsive;
  - 5.5.3 That factors outside the control of the party prevented a timely action or interfered with the opportunity to act, except that the acts and omissions of a party's authorized representative are considered the acts and omissions of the party and are not considered to be a factor outside the party's control as intended by this rule;
  - 5.5.4 That a determination raised a new issue or argument that cannot be responded to adequately without the new evidence;
  - 5.5.5 That, at the investigation stage, the party offering new evidence requested more time to submit evidence, yet was denied, and in the hearing officer's judgment (a) the need for more time was legitimate and did not reflect neglect by the party, (b) the denial of the request for more time was unwarranted, and (c) exclusion of the evidence would cause substantial injustice to the party; and/or
  - 5.5.6 That failure to admit the evidence otherwise would cause substantial injustice and did not arise from neglect by the party.
- 5.6 New evidence must be sent to all other parties to the appeal. Failure to send all new evidence to all other parties to the appeal may result in the evidence being excluded from the record.
- 5.7 If the employer that filed the appeal does not participate in the hearing, the appeal may be dismissed.
- 5.8 The Division shall keep a full and complete record of all proceedings in connection with the investigation. All testimony at a hearing must be recorded by the Division but need not be transcribed unless the hearing officer's Decision is appealed.
- 5.9 The hearing officer may, upon the application of any party or on his or her own motion, convene a prehearing conference to discuss the issues on appeal, the evidence to be presented, and any other relevant matters that may simplify further proceedings.
- 5.10 The hearing officer shall make a decision on each relevant issue raised, including findings of fact, conclusions of law, and an order. The hearing officer will decide whether the Division's determination is based on a clear error of fact or law.
- 5.11 The hearing officer shall not engage in *ex parte* communication with any party to an appeal.

- 5.12 The Division shall promptly provide all parties with a copy of the hearing officer's decision via U.S. postal mail, electronic means, or personal delivery, as consistent with applicable law.
- 5.13 Any party to the administrative proceeding may appeal the hearing officer's decision only by commencing an action for judicial review in the district court of competent jurisdiction within 35 days after the date of mailing of the decision by the Division. A 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. Judicial review is limited to appeal briefs and the record designated on appeal.
- 5.14 An appeal may, at the discretion of the hearing officer, be sequenced and/or divided into two or more stages on discrete questions of liability and/or relief (*i.e.*, bifurcation), yielding two or more decisions and/or phases of the appeal.

#### **Rule 6. Certified Copy**

- 6.1 The Division shall issue and file a certified copy of the Division's final decision in accordance with C.R.S. § 8-4-113(2); 7 CCR 1103-7, Rule 2.4; and any other applicable statute or rule.

#### **Rule 7. Preservation of Actions**

- 7.1 No Citation, Notice of Assessment, or Notice of Investigation Termination issued by the Division is intended to preclude an employee from initiating or pursuing a civil action or other administrative proceeding. Evidence obtained by the Division in the course of a direct investigation may be considered in determining whether an employee has initiated a wage complaint pursuant to 7 CCR 1103-7, Rule 4.2.1.

#### **Rule 8. Discrimination and Reprisal Prohibited**

- 8.1 The provisions against retaliation, interference, and discrimination for protected activity in labor standards law (including but not limited to C.R.S. §§ 8-1-116, 8-1-140, 8-4-120, 8-6-115, 8-13.3-407, 8-14.4-102, 7 CCR 1103-11, and 7 CCR 1103-1) apply to individuals who assist or otherwise participate in the Division's investigations under this rule.
  - 8.1.1 Unlawful "interference" with a Division direct investigation, at any stage (*e.g.*, from anticipated investigations through appeals or post-decision enforcement) includes any act (whether an affirmative act, an omission, or a statement) that:
    - (A) tends to mislead or intimidate actual or potential witnesses, or discourage actual or potential witnesses from providing evidence or information to the Division;
    - (B) conceals relevant evidence or information from the Division, or knowingly or recklessly furnishes false or misleading evidence or information to the Division; or
    - (C) otherwise inhibits the provision of accurate evidence or information to the Division.