DEPARTMENT OF LABOR AND EMPLOYMENT

Division of Labor Standards and Statistics

PROTECTIONS FOR PUBLIC WORKERS ACT (PROPWA) RULES

7 CCR 1103-17

Proposed August 30, 2024; if adopted, to be effective December 1, 2024.

Rule 1. Statement of Purpose and Authority.

1.1 Authority and relation to other orders. The general purpose of these Protections for Public Workers Act ("PROPWA") Rules is to exercise the authority of the Director, through the Division, to administer and enforce the provisions of the Protections for Public Workers Act, Colorado Revised Statutes (C.R.S.) Title 29, Article 33 (2023), C.R.S. § 29-33-101 et seq. These Rules are intended to be consistent with the rulemaking requirements of the State Administrative Procedure Act, C.R.S. § 24-4-103.

1.2 The Director of the Division has authority to enforce, interpret, apply, and administer the provisions of C.R.S. Title 29, Article 33 and these Rules.

1.3 Incorporation by Reference. The Protections for Public Workers Act ("PROPWA"), C.R.S. § 29-33-101 et seq., is hereby incorporated by reference into these Rules. Such incorporation excludes later amendments to or editions of the statutes. These statutes 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. Electronic access is available 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 the statutes incorporated 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 the statutes. All Division rules are available to the public at 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. Where these Rules reference another rule, the reference shall be deemed to include all subparts of the referenced rule.

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 Rule remains 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 and Clarifications.

2.1 "Authorized representative" means a person designated by a party to any unfair labor practice complaint or other Division administrative proceeding to represent the party. A party may designate an authorized representative by filing the Division-approved form or a signed written notice to the Division that the authorized representative will represent the party. Authority of the authorized representative may be revoked by the party upon written notice to the Division.

2.2 "Director" means the Director of the Division of Labor Standards and Statistics, and includes a designee or agent to perform any delegable functions of the Director pursuant to authority granted by any applicable provision of law, including but not limited to C.R.S. § 8-1-103(1).

2.3 "Division" means the Division of Labor Standards and Statistics in the Colorado Department of Labor and Employment.

2.4 "Employee organization" means an organization independent of the employer in which public employees may participate and that exists for the purpose, in whole or in part, of acting on behalf of and for the benefit of the public employees concerning public employee grievances, labor disputes, wages, hours, and other terms and conditions of employment. "Employee organization" includes any agents or representatives of the employee organization designated by the employee organization. "Employee organization" does not include an organization, including a committee, advisory council, or other similar group, that includes public employees but is created by a public employee's employer.

2.5 "Order" means any decision, rule, regulation, requirement, or standard promulgated by the Director, as defined by C.R.S. § 8-1-101(11).

2.6 "Person" refers to one or more individuals, an employee, an employee organization, partnerships, associations, corporations, legal representatives, trustees, or receivers.

2.7 "Public employee" means an individual employed by a public employer; except those employees employed in the personnel system of the state established in Section 13 of Article XII of the state Constitution, or employees employed by an employer, as defined in C.R.S. § 8-3-104(12). "Public employee" includes two types of employees as follows:

2.7.1 "Confidential public employee" means a public employee who: (A) develops or presents the positions of the employer with respect to employer-employee relations, contributes significantly to the employer's decision-making in connection with such positions, or accesses confidential information, including the employer's non-public planning or strategy information, in connection with the development, presentation, or decision-making of the employer's positions with respect to employer-employee relations; or (B) provides legal advice to the employer as the employer's attorney related to this Article 33 or other labor relations matters.

2.7.2 "Managerial public employee" means an executive-level public employee with significant decision-making authority including the authority to develop employer policies or programs or administer an agency or other subdivision of the employer. "Managerial employee" does not include a non-policymaking employee even if the employee oversees, manages, or directs other employees; except that a firefighter who is a "supervisor," as defined in C.R.S. § 29-5-203(15) ("the chief and all officers in the rank or position immediately below the chief who report directly to the chief"), is a "managerial employee" for purposes of this Article 33.

2.8 "Public employer" means a county or municipality; a district, business improvement district, special district created pursuant to Title 32, authority, or other political subdivision of the state, a county, or a municipality; the Colorado School for the Deaf and Blind established in Article 80 of Title 22; a state institution of higher education as defined in section 23-18-102(10)(a), and a local district college operating pursuant to Article 71 of Title 23; the Office of State Public Defender created in section 21-1-101; the University of Colorado Hospital Authority created in section 23-21-503; the Denver Health and Hospital Authority created in section 25-29-103; the Joint Budget Committee staff, the Legislative Council staff, the Office of Legislative Legal Services, the staff of the Office of the Chief Clerk of the House of Representatives, and the Senate Services staff; the majority and minority caucus staff of the House of Representatives and the Senate; a board of cooperative services established pursuant to the "Boards of Cooperative Services Act of 1965," Article 5 of Title 22; any school district as defined in section 22-7-1003(20); a district charter school pursuant to part 1 of Article 30.5 of Title 22; or an institute charter school which means a charter school authorized by the State Charter School Institute pursuant to part 5 of Article 30.5 of Title 22. Counties covered by the Collective Bargaining by County Employees Act ("COBCA") are not "public employers" for purposes of these rules.

2.9 "Retaliation" and "interference" (or other forms of those words) are as defined in the Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving Rules, 7 CCR 1103-11.

2.10 "Unfair labor practice" means a violation of any rights or obligations in PROPWA or these Rules.

Rule 3. Filing, Service, and Deadlines.

3.1 Documents shall be filed electronically, on a Division-approved form if one is available, pursuant to these Rules and any orders, instructions, and deadlines provided or published by the Division. If the Division does not publish an applicable form or provide one to a party when the party intends to file, or if a party cannot readily use such means, the party may file by any means that provides the filing to the Division, including but not limited to email, other electronic means, or mailing or hand-delivering copies. A document is considered "filed" when received by the Division; a document received after 11:59 p.m. Mountain Time is considered "filed" the next business day.

3.2 Any submission is considered "signed" or to have a "signature" if it has either an ink, scanned, or electronically drawn or generated signature, or a typed name entered by the party or their authorized representative in the signature area. By signing in any such manner, the individual is deemed to have agreed and assented that the document is signed by them.

3.3 Except as otherwise provided by these Rules, or by the Director, whenever service of a document or information is required, service is made to a person or party by hand-delivery, mail, or transmission by facsimile, or other electronic means. The email address or facsimile number on file with the Division or furnished by the person or party shall be used for service. The current address on file with the Division or the last known address of the person or party shall be used for mailing.

3.4 Calculations of any prescribed or allowed time periods shall be in accordance with C.R.S. § 2-4-108.

3.5 Deadlines and schedules under these Rules shall generally be set in light of the goals of PROPWA, including but not limited to: effective enforcement of PROPWA rights and responsibilities; providing all parties notice and opportunity to be heard; and timely protection of public employees from retaliation for engaging in protected concerted activity.

3.6 Deadlines may be extended for "good cause" if the request is made three days before the deadline, absent emergencies or exigent circumstances. In considering whether good cause exists under these Rules or applicable statutes for extensions of deadlines, the Director will determine whether the reason is substantial and reasonable, based on all the available information and circumstances, and the above-listed goals of PROPWA.

Rule 4. Scope of Rights and Responsibilities under PROPWA.

4.1 Protected Activity under PROPWA.

4.1.1 Types of Activities Protected. PROPWA protects public employee rights to engage in the following activities in C.R.S. §§ 29-33-104(1)(a)–(d) and -104(3) ("Section 104 activity"):

(A) speech on employee representation, workplace issues, or PROPWA rights ("Section 104(1)(a) activity");

(B) concerted activity for mutual aid or protection ("Section 104(1)(b) activity");

(C) political participation while off duty and not in uniform, including (i) speech with the public employer's governing body (or any of its members) on work terms and conditions or matters of public concern, and (ii) political activity of other kinds in the same manner as other Coloradans ("Section 104(1)(c) activity");

(D) organizing, forming, joining, or assisting an employee organization, or refraining from doing so ("Section 104(1)(d) activity"); and

(E) exercising any rights under PROPWA, including but not limited to complaining, testifying or otherwise submitting evidence or information about, or opposing (verbally or in writing) what the employee believes, reasonably and in good faith, to be a violation of PROPWA ("Section 104(3) activity").

Section 104(1)(a) and 104(1)(c) activities collectively are "PROPWA expressive activity";
Section 104(1)(b) and 104(1)(d) activities collectively are "PROPWA concerted activity."

4.1.2 When Multiple Sections Apply. If activity may or is alleged to qualify under multiple of Sections 104(1)(a)–(d) or 104(3), or any other section of any applicable law (constitutional, statutory, or regulatory), then it shall be analyzed separately under each section as to scope of protection, defenses, and other matters.

4.1.3 Applicability of Other Law. Any enumeration in PROPWA or in these Rules of rights, responsibilities, or limits thereupon is not intended to deny, modify, or limit other rights or responsibilities under any other source of law (constitutional, statutory, or regulatory) that may apply to situations also covered by PROPWA.

4.2 PROPWA Expressive Activity: Scope and limits (Section 104(1)(a) and (c) activity).

4.2.1 Expressive activity is protected unless the employer shows that an exception in Rules 4.2 or 4.4 applies.

4.2.2 Official Duties. PROPWA expressive activity shall not be protected if it is pursuant to or part of duties that the public employee either:

(A) is paid by their public employer to perform; or

(B) otherwise has a responsibility to perform under a directive from their public employer.

4.2.3 Restrictions on the Time, Place, and Manner of Expressive Activity.

(A) In a place that qualifies as a public forum. A place qualifies as a "public forum" open for expressive activity by the public, including by public employees, if it has been traditionally open to such activity, or was opened for such activity by a public entity. In a public forum, expressive activity is unprotected if the activity is contrary to a limitation on the time, place, or manner of such activity:

(1) that is set and enforced on a content-neutral and viewpoint-neutral basis;

(2) that is narrowly tailored to serve a significant governmental interest; and

(3) that leaves open ample alternative channels for the activity that are known and available to the public employee.

(B) In other places. Expressive activity in places other than a public forum is unprotected if it is contrary to a limitation on the time, place, or manner of such activity:

(1) that is reasonable in light of the purposes of the forum; and

(2) that is viewpoint-neutral.

4.3 PROPWA Concerted Activity: Scope and Limits (Section 104(1)(b) and (d) activity).

4.3.1 Scope of Concerted Activity Protected. "Concerted activity" is activity by one or more public employees for the purpose of mutual aid or protection (irrespective of any subjective motivations of the employee), among employees of the same or another employer, and includes the protected rights of employees set forth in 29 U.S.C. § 157; except that "protected, concerted activity for the purpose of mutual aid and protection" does not include the right or obligation to recognize or negotiate a collective bargaining agreement.

4.3.2 Limits on Protection. Concerted activity is protected unless the employer shows that an exception in Rules 4.3 or 4.4 applies.

(A) Protected concerted activity does not include the activities of a confidential public employee or a managerial public employee, as defined in C.R.S. § 29-33-103(5)(b).

(B) Concerted activity of solicitation, or distribution of written materials, related to an employee organization may be restricted during any working time (*e.g.*, interacting directly with customers) if the restriction does not discriminate or retaliate against, or interfere with, the activity (as set forth in Rules 4.4.1–4.4.2).

4.4 Management Rights: Scope and Limits.

4.4.1 Permissible Employer Actions. Even if a public employee did or may engage in PROPWA protected activity, adverse action — termination, discipline, or other action that may deter protected activity — is not unlawful under PROPWA if it is not imposed (or disproportionately imposed) in whole or in part to discriminate against, interfere with, or otherwise deter protected activity.

4.4.2 Impermissible Interference or Retaliation. A public employer rule, policy, or action shall not:

(A) impermissibly interfere with or retaliate against protected activity, including if it was enacted or enforced in response to protected activity as a way to interfere with or retaliate against such activity; or

(B) be overly broad or vague in a way that may be reasonably understood as impermissibly interfering with or retaliating against protected activity, when read by a public employee dependent upon their job who acts reasonably, and in good faith, in interpreting the potential restriction in light of factors such as past practice, the nature of the workplace, and the field of work.

4.4.3 Employer Expressive Activity. Public employers may express views, including engaging in conversations, with public employees about the advantages and disadvantages of employee organizations and collective bargaining. In doing so, such expression:

(A) may include general views on employee organizations, or predictions of the effects of unionization on the employer, to the extent such predictions have a basis in objective fact as demonstrably probable consequences beyond employer control; but

(B) may not include or be accompanied by actions reasonably tending to discriminate against, interfere with, or otherwise deter protected activity, such as an economic (or other) threat of the employer's own volition, a promise of a benefit for foregoing or causing others to forego protected activity, or creating an impression of surveillance — whether or not protected activity is actually interfered with, deterred, or surveilled.

4.4.4 Activity that results in material disruption of a public employee's duties, a public employer's operations, or the delivery of public services is not protected activity; except that an employer's or other individual's disagreement with the content or viewpoint expressed through an employee's activity or a strike by employees does not constitute material disruption.

4.4.5 A public employer may limit the rights of a public employee to the extent necessary to maintain the nonpartisan role of the employer's nonpartisan legislative, judicial, or election-related staff.

Rule 5. Unfair Labor Practice Filings and Proceedings.

5.1 Unfair Labor Practice Complaints.

5.1.1 Unfair labor practice complaints ("complaints" as used in this Rule 5) shall be filed on the designated form provided by the Division, and shall comply with any other Division instructions as to the information and/or documentation required by the Division.

(A) An aggrieved party filing a complaint is designated a "charging party." A party against whom a complaint is filed is designated a "respondent."

(B) Either party may designate an authorized representative to act on their behalf in the Division's complaint and/or appeal process in accordance with these Rules.

(C) A complaint must be received by the Division within six months after the date on which the charging party knew or reasonably should have known of the alleged unfair labor practice.

(D) The charging party shall set forth a clear and concise statement of the facts constituting the unfair labor practice and (to the extent that the party is able) the statutes allegedly violated.

(E) Failure to respond in a timely manner to Division requests for additional supporting information and/or documentation may result in dismissal of the complaint.

(F) The Director may initiate, file, and investigate any such complaint on their own initiative, or at the request of any interested party. The name or interest of any such party shall not be disclosed if not necessary to resolution of the complaint. Decisions under this Rule are within the discretion of the Director's authority to enforce and administer PROPWA, these Rules, and other applicable statutes and rules.

5.1.2 The Division will evaluate complaints to determine if the Division has jurisdiction over the alleged conduct, if sufficient allegations and evidence have been shown from which an unfair labor practice may be reasonably inferred, and if, in the Director's good faith discretion and judgment, the complaint warrants investigation.

(A) In exercising its discretion, the Division may decline to investigate, or may defer action on, a complaint if evidence shows the dispute is within the scope of a dispute resolution process, established by a collective bargaining agreement applicable to both parties, with a neutral third-party arbiter authorized to issue a binding decision.

5.1.3 If a complaint provides insufficient evidence, the Division will notify the charging party and may request additional information and/or documentation.

5.1.4 A charging party may withdraw a complaint at any time prior to issuance of a determination.

5.2 Notice of Unfair Labor Practice Complaints to Respondents.

5.2.1 After determining that a complaint offers sufficient allegations and evidence that, if proven true, would state a claim of an unfair labor practice, the Division shall give notice of the allegations, and request that an answer be filed by each respondent.

5.2.2 The respondent shall file an answer responding to each allegation in the complaint, and attach any documentation or evidence the respondent wishes the Division to consider in reviewing the complaint, within 21 days of the date the Division sends a copy of the complaint to the respondent. The Division may exercise discretion to shorten the response deadline.

5.2.3 Upon receiving a written request for an extension that states the reason an extension is required, and that otherwise complies with Rule 3.6, the Division may, at its discretion, extend the period for the respondent to file an answer for good cause in accord with these Rules.

5.2.4 Upon written request, at the Division's discretion, other parties or entities may be joined as charging parties or respondents.

5.3 Investigation and Determination of Unfair Labor Practice Complaints.

5.3.1 Upon receipt of a complaint, the answer, and any supplemental information or documentation, the Division shall determine whether additional investigation is required, which may include, but is not limited to:

(A) interviews of the employer(s), employee(s), and/or other parties;

(B) information gathering, fact-finding, and reviews of written submissions; and

(C) any other methods that may help assess whether an unfair labor practice occurred.

5.3.2 During the investigation, if information is provided to the Division by a source requesting or otherwise warranting confidentiality, and that information is used as a basis for procuring other evidence but not offered as evidence itself, or as evidence of liability, but not to establish individual relief for the source of the information, or in other circumstances in which confidentiality is necessary and appropriate, then the source shall remain confidential.

5.3.3 The Director may exercise discretion to adjourn hearings; to permit additional time for submissions; to extend ordered deadlines for good cause or by consent; and to issue orders disposing of a complaint without a hearing.

5.3.4 Where a complaint or investigation for violation of these Rules or the statutes they enforce has been filed or commenced, all parties shall preserve all relevant documents until final disposition and until the expiration of the statutory period within which a person aggrieved may bring a civil action.

5.3.5 The Division may exercise its discretion to have an investigation sequenced and/or divided into two or more stages on discrete questions of liability or relief (*e.g.*, bifurcation), yielding two or more determinations and/or phases of the investigation.

5.3.6 The Division may exercise its discretion to terminate an investigation at any time.

5.3.7 The burden of proof to establish an unfair labor practice is on the charging party, who must establish by a preponderance of the evidence that an unfair labor practice occurred.

5.3.8 The Division shall make a determination as to whether an unfair labor practice occurred, and issue written findings and orders to all parties. Absent a timely request for a hearing pursuant to Rule 5.3.9, the determination shall constitute final agency action, and the final decision of the Director, subject to judicial review pursuant to C.R.S. §§ 24-4-106 and 29-33-105(4),(5).

5.3.9 A hearing may be requested within 35 days after the Division's determination of a complaint, and conducted in accord with Rule 6.4 of the Labor Peace and Industrial Relations Rules, 7 CCR 1101-1, which is incorporated herein by reference. Absent timely modification, the decision rendered after the hearing shall constitute final agency action and the final decision of the Director subject to judicial review pursuant to C.R.S. §§ 24-4-106 and 29-33-105(4)–(5).

5.4 Remedies for Unfair Labor Practices.

5.4.1 The Division shall consider the unique circumstances of rural counties as defined in C.R.S. § 29-33-103(1)(b) in assigning remedies.

5.4.2 Remedies for unfair labor practices may include any of the following, pursuant to investigative and enforcement authority under applicable statutes the Division enforces or administers.

(A) Damages to compensate losses caused by an unfair labor practice, including but not limited to, where applicable: back pay with benefits; lost dues for an employee organization; and other direct or foreseeable pecuniary harm.

(B) Reinstatement or instatement with the same seniority status the employee would have without the violation, or (if (re)instatement is not feasible) front pay with benefits.

(C) Orders to cease and remedy violations and effects thereof; effectuate compliance by modifying or rescinding policies, practices, or agreements; otherwise redress direct or indirect consequences of violations; and provide notice of any such changes.

(D) Any other relief authorized by applicable statutes the Division enforces or administers.