COLORADO LAW
UNIVERSITY OF COLORADO BOULDER

Civil Practice Clinic
Robert & Laura Hill Clinical Suite
Wolf Law Building |

May 20, 2020

Submitted via e-mail to michael.primo@state.co.us
Colorado Department of Labor and Employment
Division of Labor Standards and Statistics
633 17th Street
Denver, CO 80202-2107

Comment of Colorado Law Civil Practice Clinic

Re: Proposed Changes to the Colorado Overtime and Minimum Pay Standards Order #36 Rules, Wage Protection Act Rules, and Wage and Hour Direct Investigation Rules

On April 15, 2020, the Colorado Department of Labor and Employment's Division of Labor Standards and Statistics (the "Division") issued three proposed rules. The primary effect of these rules is to (1) adopt a totality-of-the-circumstances, economic realities-based test for joint employment, consistent with Colorado H.B. 19-1267, and (2) make changes regarding the standard for accepting new evidence in appeals before the Division. As articulated below, the University of Colorado Law School's Civil Practice Clinic (the "Clinic") is generally supportive of the proposed rules. Additionally, the Clinic urges the Division to adhere to the current rulemaking schedule and make these rules effective on July 15, 2020.

The Civil Practice Clinic, one of nine clinical education programs at the University of Colorado Law School, represents underrepresented and/or low-income individuals with employment law claims. Student-attorneys in the Clinic represent employees with wage-and-hour claims before the Division during wage-and-hour investigations and at the appeal phase. Our clients represent a wide swath of industries in Colorado: bar and restaurant employees, home health care workers, horse trainers, construction workers, landscapers, marijuana trimmers, mortgage loan specialists, and campaign canvassers.

1. The Division should adopt the proposed rule regarding the definition of "employer"

Each year, thousands of Coloradans are victims of wage theft. Studies show that hundreds of millions of dollars in wages and benefits are stolen from Colorado workers every year.[1] This

[1] *See, e.g.,* Chris Stiffler, *Wage Nonpayment in Colorado: Workers Lose $750 Million Per Year*, Colorado Fiscal Institute (January 21, 2014), https://www.coloradofiscal.org/wp-content/uploads/2014/03/Wage-Nonpayment-in-Colorado-Final-1.pdf (estimating the annual value of unpaid wages as $749.5 million); *see also* 2019 Colo. Sess. Laws, ch. 182, sec. 1(2) (acknowledging that wage theft costs workers hundreds of millions of dollars and costs the state tens of millions in revenue).

problem affects some of the most vulnerable members of the workforce such as low-wage workers in the construction, food service, and agriculture industries.

In some cases, employers attempt to avoid liability for wage theft (among other forms of worker mistreatment) by using labor intermediaries such as subcontractors or franchisees. Under such an arrangement, the intermediary is the purported direct employer but may be undercapitalized and therefore unable to meet its wage-and-hour obligations to employees. Moreover, the intermediary may be influenced—directly or indirectly—by the other employer in such a way that makes it challenging or impossible for the intermediary to comply with wage and hour laws. When the upstream employer—such as a general contractor, parent corporation, or franchisor—designs procedures, objectives, and incentives that make it impossible for the intermediary to meet business targets without mistreating workers, workers often lose: when their wage theft claim reaches only the undercapitalized intermediary who is unable to pay what they are rightfully owed, they are left without an adequate remedy. Meanwhile, the ultimate employer profits from the workers' labor while avoiding any liability for their wages and compensation. Joint employment doctrine addresses this problem by defining when an employee is employed by multiple entities for the purposes of wage-and-hour law compliance.

In 2019, Colorado enacted H.B. 19-1267, which represented an important step towards addressing these issues. In doing so, the General Assembly acknowledged that Colorado's definition of "employer" was too narrow[2] and chose to replace it with the broader statutory definition in the federal Fair Labor Standards Act (FLSA) which defines employer "as any person acting directly or indirectly in the interest of an employer in relation to an employee."[3] In adopting the FLSA's statutory definition of employer, Colorado also adopted the federal joint employment doctrine *that existed at the time*, which used a totality-of-the-circumstances examination of the economic realities of the employment relationship.

On March 16, 2020, the U.S. Department of Labor (USDOL) adopted a joint employment test that is fundamentally inconsistent with prior federal joint employment doctrine and H.B. 19-1267.[4] The USDOL's new test completely discards the long-standing economic realities approach and instead adopts a "check the box" approach that will severely narrow joint employer responsibility and increase wage theft. This regulatory change, however, does not affect the FLSA's statutory definition of employer that was in effect at the time that H.B. 19-1267 was passed. Because of the potential for confusion as to what test applies in Colorado, the Division's proposed rule is necessary to implement the language and legislative intent of H.B. 19-1267 and clarify that the USDOL's rule does not control the joint employer determination in Colorado.

The Division should adopt the proposed joint employer rule because the rule is necessary to implement H.B. 19-1267, consistent with long-standing joint employment principles, and will help address the widespread problem of wage theft.

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[2] 2019 Colo. Sess. Laws, ch. 182, sec. 1(3) (declaring that labor is a thing of value subject to theft, existing law does not provide sufficient protections for workers, and that "[i]n order to protect all workers, it is necessary to close loopholes that allow for the exploitation of human labor for profit.").

[3] 2019 Colo. Sess. Laws, ch. 182, sec. 2(6) ("Employer. . . . has the same meaning as set forth in the federal Fair Labor Standards Act, 29 U.S.C. Sec. 203(d). . .") (internal quotation marks omitted); Fair Labor Standards Act, 29 U.S.C. 203(d).

[4] 29 C.F.R. § 791.2 (2020).

2. The Division should adopt the proposed changes to the Wage and Hour Investigation Rules

The Clinic also generally supports the proposed changes to the Wage Protection Act Rules, 7 CCR 1103-7.[5] In particular, the changes to Rule 6.3 (New Evidence in Appeals) strike a generally appropriate balance between incentivizing parties to provide all relevant information during the investigation phase with protecting the right to present legal arguments and present new documentary evidence for good cause. The Clinic supports the adoption of a broad definition of "good cause" that will allow the hearing officer to consider all of the circumstances and not be limited by a list of factors. The proposed rule is consistent with this principle.

While the Clinic generally supports the changes to Rule 6.3, the Clinic is concerned about the impact the changes could have on employee complainants, who often proceed unrepresented during the complaint and investigation phase. The Clinic has represented several employees in appeals regarding their claims before the Division, and are concerned that these rules may limit the ability of complainants to provide corroborating information of their claims at the appeal stage.

For a variety of excusable reasons, a pro se complainant might not provide relevant documentary evidence that could corroborate her or his claims—such as communications, agreements, or pay statements—during the investigation phase. These reasons could include lack of access to relevant documentation, technological complications (e.g., not knowing how to download and send text messages or recover archived e-mails), or not understanding if or how certain documents might be legally relevant to their claims. Employees may also not know that documentary evidence is relevant until after an employer has presented a new argument or documents in their appeal.

Because employees generally have less legal and technical sophistication than employers, have less access to resources, and do not bear the burden of record retention[6], the Clinic believes that the "good cause" determination should be interpreted leniently towards employees—and particularly those that were unrepresented at the investigation phase.

To this end, the Clinic asks the Division to consider the following minor changes to its proposed Rule 6.3:

- Add a factor under Rule 6.3: "That the party is an employee who was unrepresented at the complaint and investigation phase."

- Amend Proposed Rule 6.3.4: "That a determination <u>or appeal</u> raised a new issue or argument that cannot be responded to adequately without the new evidence."

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[5] While the Clinic notes that similar changes are proposed to Wage and Hour Direct Investigation Rules, 7 CCR 1103, the Clinic's concerns apply specifically to situations in which an employee complainant is a party, and thus focus our comments on the changes to the Wage Protection Act Rules.

[6] C.R.S. § 8-4-103(4.5); Colorado Overtime and Minimum Pay Standards (COMPS) Order #36, Rule 7.1, 7.3, 7 CCR 1103-1.

- Additionally, the proposed Rule 6.3 is not explicit regarding whether the rule applies to new documentary evidence that is attached to the appeal form, or if this evidence is already admitted into the record. The Clinic believes that the rule should apply to all new documentary or non-testimonial evidence offered on appeal (including anything attached to the appeal form). The Division may wish to make this explicit in Rule 6.3 in order to avoid ambiguity.

3. The Division should not delay issuing final rules nor should it delay the effective date

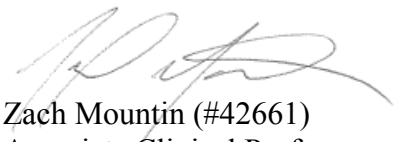
The Clinic is aware that some industry trade organizations are requesting that the Division delay this rulemaking proceeding due to the current COVID-19 pandemic. This is neither necessary nor prudent. A delay will likely do substantial harm—to employee rights and the Division's enforcement efforts—but have little or no discernible benefit. And, importantly, delaying implementation of the proposed joint employer rule would do violence to the clear legislative intent of H.B. 19-1267, which expressly expanded the definition of "employer" and broadened the scope of joint employment doctrine under Colorado law.

Business advocacy groups have claimed that a delay is necessary because of the COVID-19 pandemic. They argue that the proposed rules—particularly the joint employer changes—create a new burden that businesses must navigate during a time when many businesses are already facing economic distress. However, this concern is misplaced because the proposed rules do not create any new burdens for businesses that are currently in compliance with the wage-and-hour laws. Moreover, the joint employer rule is not a "new" rule. Rather, it is based on a test with long-standing roots in federal statutory law, agency interpretation, and case law that has been applied by Colorado courts. The proposed rules should therefore not cause distraction or burden for lawfully-operating employers.

Delaying these proposed rules would also perpetuate unnecessary uncertainty for employees and businesses. If the Division delays this rulemaking, both employees and employers may be unsure about what constitutes joint employment in Colorado, which could lead to increased and protracted litigation. Employers need certainty so they can plan and facilitate investment and partnerships and employees deserve to receive their rightfully earned wages in a timely manner. A delay in this rulemaking would be unfair as businesses may currently believe that the USDOL joint employment test applies under Colorado law. But the legislature has already declared that the proper standard is the broader joint employer doctrine that was in place at the time H.B. 19-1267 was enacted. The Division should adhere to the current rulemaking schedule in order to provide certainty to Colorado employees and businesses.

If anything, the COVID-19 pandemic is additional cause to implement the proposed rules as scheduled because of the extreme financial distress the pandemic is causing for workers and families. Thus, the COVID-19 pandemic is not cause to delay this rulemaking. The Division should issue the final rule as scheduled it has clear guidance from the legislature and because a delay could do significant harm while having little benefit.

Respectfully Submitted,



Zach Mountin (#42661)
Associate Clinical Professor
Director, Civil Practice Clinic
University of Colorado Law School
Civil Practice Clinic

Matt Forstie
Student-Attorney, Civil Practice Clinic
University of Colorado Law School