



**STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY,
AND FINDINGS FOR ADOPTION AS TEMPORARY OR EMERGENCY RULES**

WAGE PROTECTION RULES, 7 CCR 1103-7 (adopted Dec. 23, 2020, effective Jan. 1, 2021)

(1) Basis, Purpose, and Specific Statutory Authority for Adoption of Temporary or Emergency Rules. The latest version of the Wage Protection Rules was adopted on November 10, 2020, with an effective date of January 1, 2021. These temporary or emergency rules clarify ambiguity in existing statutory and rule text as to whether paid leave for needs related to COVID-19, which has been required under the Healthy Families and Workplaces Act (“HFWA”), C.R.S. § 8-13.3-401 et seq., since July 14, 2020, will terminate after December 31, 2020. Rules 2.11 and 3.5.1(C) are amended to clarify that a public health emergency that triggers COVID-related paid leave in 2021 may be an emergency declared at any time on or after the HFWA statutory effective date of July 14, 2020, and that a qualifying emergency already has triggered 80-hour COVID-related paid leave as of January 1, 2021.

(2) Specific Statutory Authority. The Director of the Division of Labor Standards and Statistics in the Colorado Department of Labor and Employment (the “Division”) is authorized to adopt and amend rules and regulations to enforce, execute, apply, and interpret C.R.S. Title 8, Articles 1, 4, 6, 13.3, and all rules, regulations, investigations, and proceedings of any kind thereunder, by the Administrative Procedure Act, C.R.S. § 24-4-103 (including temporary or emergency rules in § 103(6)), and provisions of Articles 1, 4, 6, and 13.3, including but not limited to: §§ 8-1-101, 103, 107, 108, 111, 130; § 8-4-111; §§ 8-6-102, 104-106, 108-109, 111, 116-117; §§ 8-13.3-401, 403-405, 407-411, 416.

(3) Findings, Justifications, and Reasons for Adoption as Temporary or Emergency Rules. Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds: (A) demonstrated need exists for the rules, as detailed in Part (4) (incorporated herein); (B) proper statutory authority exists for the rules, as detailed in Part (2) (incorporated herein); (C) to the extent practicable, the rules are clearly stated so 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.

(4) Specific Findings For Adoption As Temporary Rules. Pursuant to C.R.S. § 24-4-103(6), the Director finds as follows.

COVID-19 can affect any Coloradan, but various populations are at heightened risk of serious illness or death, including: “Older adults [and] People who have serious chronic medical conditions like: Heart disease[,], Diabetes[, and] Lung disease.”¹ While some employers provide paid sick time that lets employees avoid coming to work while ill, not all do, and many workers who are ill, or are exposed to a contagious illness, cannot afford time off work without paid sick leave. Paid sick leave is less commonly provided to low-wage workers who cannot afford unpaid time off, including in key sectors dealing with high customer and client volume.² A key recommendation of the U.S. Centers for Disease Control and Prevention is to avoid contact with those potentially infected with COVID-19: “Avoid close contact with people who are sick [A]void touching high-touch surfaces in public places – elevator buttons, door handles, handrails, handshaking with people, etc [I]f You Are Sick ... Stay home and call your doctor.”³ Thus, the problem of working while ill is not new, but COVID-19 substantially increases its

¹ U.S. Centers for Disease Control & Prevention, *People at Risk for Serious Illness from COVID-19*.

² Elise Gould, [Amid COVID-19 outbreak, the workers who need paid sick days the most have the least](#) (Economic Policy Institute, March 9, 2020).

³ U.S. Centers for Disease Control and Prevention, [People at Risk for Serious Illness from COVID-19](#).

threat to the health and safety of Colorado employees, businesses, residents, and visitors.⁴

Based on these emergency threats to public health and safety, Colorado and federal law have, since spring 2020, required paid leave for a range of health and safety needs related to COVID-19. On March 11, 2020, as COVID-19 cases in Colorado and in the United States increased, Colorado Governor Jared Polis declared a State of Disaster Emergency, and announced numerous emergency measures to protect public health and safety -- including having this Division promulgate temporary or emergency rules, the Colorado Health Emergency Leave with Pay (“Colorado HELP”) Rules, adopted and effective the same day as the March 11th declaration.⁵ After various amendments through April 2020, Colorado HELP required 80-hour paid COVID leave⁶ for a range of needs related to COVID-19 (most notably: illness, testing, quarantining, or having a family member with any such need), for employees in key industries that covered roughly two-thirds of Colorado employees.⁷ On April 1, 2020, federal law similarly required up to two weeks of paid leave for COVID-19 needs.⁸

Neither of these spring 2020 Colorado and federal paid leave requirements covered all employees, however. Colorado then enacted the Healthy Families and Workplaces Act (“HFWA”), C.R.S. § 8-13.3-401 et seq., on July 14, 2020, in part to fill in that gap. HFWA required, effective immediately, that “each employer in the state, regardless of size, shall provide paid sick leave,” not only to all employees already covered by the 80-hour COVID leave provided by “the federal ‘emergency Paid Sick Leave Act’,” but also to “to each employee who is *not* covered under the ‘Emergency Paid Sick Leave Act’,”⁹ thereby unambiguously covering all Colorado employees and employers of all sizes and in all sectors and industries, except for the only two exceptions in the statute: employees of the federal government and employees subject to the federal Railroad Unemployment Insurance Act.¹⁰

With federal paid leave law scheduled to expire after December 31, 2020, HFWA included a separate provision to assure 80-hour leave after that date, if the COVID-19 emergency itself did not also end in 2020. As of January 1, 2021, HFWA required up to 48 hours of paid leave for a broad range of health and safety needs, not just those related to COVID-19 -- but that leave accrues gradually in 2021, at one hour of leave per 30 hours worked, so no employee would accrue a full (eight-hour) day of leave until at least mid-February.¹¹ To assure access to 80-hour COVID leave in 2021 -- not just slowly-accruing 48-hour general paid leave that would leave Coloradans no meaningful amount of COVID leave in early 2021, and only 48 hours even after all of their general leave accrued -- HFWA also provided as follows: To the extent that a public health emergency is declared, employers must “supplement” employees’ leave allotment from 48 hours of gradually-accruing leave, to “immediate” access to a full 80-hour allotment of COVID leave, identical to the leave employees had in 2020, with the new 80-hour leave provided as of 2021, continuing until four weeks after the emergency ends:

⁴ Elise Gould, [*Lack of paid sick days and large numbers of uninsured increase risks of spreading the coronavirus*](#) (Economic Policy Institute, Feb. 28, 2020).

⁵ Colorado HELP Rules, 7 CCR 1103-10 (adopted & effective March 11, 2020; terminated July 14, 2020).

⁶ All federal and Colorado paid COVID leave statutes and rules adjust the 80-hour leave to proportionally fewer hours for part-time workers. But for simplicity, all such leave is referred to herein as “80-hour COVID leave.”

⁷ Colorado HELP Rules, 7 CCR 1103-10 (as amended March 26, April 3, and April 27, 2020).

⁸ Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127, 134 Stat. 178 (Mar. 18, 2020), § 5102 et seq.; 29 C.F.R. § 826.100 et seq. (associated regulations).

⁹ C.R.S. § 8-13.3-406 (emphasis added).

¹⁰ C.R.S. § 8-13.3-402(4),(5)(b).

¹¹ C.R.S. § 8-13.3-403.

8-13.3-405. Additional paid sick leave during a public health emergency. (1) In addition to [48-hour] paid sick leave accrued under section 8-13.3-403, on the date a public health emergency is declared, each employer in the state shall supplement each employee's accrued paid sick leave as necessary to ensure that an employee may take ... paid sick leave for the [COVID-19] purposes specified in subsection (3) ... [of] eighty hours¹²

One interpretation of § 405 (above) that came to this Division's attention, in inquiries by employers and their representatives, is that to trigger a new 80-hour COVID-19 leave allotment in 2021, the emergency *declaration itself* must occur in 2021. The Division initially found that interpretation plausible but, upon further analysis, finds that it is not the proper interpretation of § 405, for two reasons.

First, the text of § 405 does not say 80-hour COVID leave in 2021 can be triggered by *only a 2021* emergency declaration, rather than a 2020 emergency declaration that is ongoing in, or extends into, 2021. Under § 405, the 80-hour COVID *leave itself* takes effect only in 2021, because 2020 was covered by the federal law 80-hour COVID leave that § 406 expanded to all employers and employees -- regardless of whether there was a declared emergency. But although § 405 requires 80-hour leave *usable only in 2021*, § 405 itself *took effect in 2020*, upon the July 14, 2020, HFWA enactment. What § 405 required as of July 14, 2020, is that as of *any* "date a public health emergency is declared" -- with no restriction to declarations in 2021 or 2020 -- "each employer ... shall supplement" employees' 2021 leave, raising it from 48 to 80 hours, usable by employees until four weeks after the emergency ends. Thus, as long as there was an emergency declared on or after the HFWA effective date (July 14, 2020) that continued long enough to extend its paid leave into 2021, employers must supplement whatever leave employees have in 2021, by raising it to 80 hours usable for COVID needs as of January 1, 2021. In short, a qualifying 2020 emergency declaration required supplementing employees' upcoming 2021 leave, as long as the emergency was long enough for the paid leave requirement to extend into 2021.

Second, both the clear purpose and structure of HFWA are to require 80-hour COVID leave consistently and continuously: first, as of the 2020 HFWA effective date, by expanding coverage from prior federal and state paid leave law that excluded many Coloradans; then, after the federal paid leave law expires at the end of 2020, by providing that same leave, as long as a public health emergency declaration triggers a need for such leave in 2021. Even assuming the contrary, narrower interpretation could be a plausible reading of the HFWA text, the purpose and structure of HFWA would be undercut by that interpretation -- *i.e.*, by an interpretation that 80-hour COVID leave ends on December 31, 2020, even if a COVID emergency remains, unless a redundant additional declaration is issued in 2021. "When a statute is reasonably capable of more than one interpretation, the interpretation that supports the policies underlying the statute should be applied rather than one that disserves these policies." *Cellport Sys. v. Peiker Acoustic GMBH & Co.*, 335 F. Supp. 2d 1131, 1133 (D. Colo. 2004). And more specifically: "A statute will not be narrowly interpreted when it is designed to declare and enforce a principle of public policy." *Colorado for Family Values v. Meyer*, 936 P.2d 631, 633 (Colo. App. 1997).

However, the Division has learned that the possibility of that narrower interpretation is leading employers to believe it is acceptable under HFWA to terminate employees' access to 80-hour COVID leave after December 31, 2020. Consequently, the Division sees an emergency need to codify the proper interpretation now, in temporary or emergency rules amending Wage Protection Rules 2.11 and 3.5.1(C), 7 CCR 1103-7 (key rules implementing and interpreting HFWA), to clarify as follows (the underlined text is what these temporary or emergency rules add; the rest is existing text in Rules 2.11 and 3.5.1(C)):

¹² C.R.S. § 8-13.3-405(1) (or proportionately less than 80 hours for part-time workers, per 405(1)(b)).

2.11 “Public health emergency” is defined as in C.R.S. § 8-13.3-402(9):

- (A) An act of bioterrorism, a pandemic influenza, or an epidemic caused by a novel and highly infectious agent, for which (1) an emergency is declared by a federal, state, or local public health agency, or (2) a disaster emergency is declared by the Governor; or
- (B) A highly infectious illness or agent with epidemic or pandemic potential for which a disaster emergency is declared by the Governor.

A public health emergency is “declared” by any initial, amended, extended, restated, or prolonged declaration of an emergency that meets the above definition. Employees have up to 80 hours of supplemental paid sick leave usable as of January 1, 2021, because a public health emergency declared after the HFWA effective date remains in effect long enough to trigger paid leave in 2021 (under HFWA § 405 and Rule 3.5.1(C), distinct from the up to 80 hours of leave provided for 2020 by HFWA § 406 to conform to the federal paid leave law that expires on December 31, 2020). Employees receive their supplement of up to 80 hours of leave usable as of January 1, 2021, under HFWA § 405 only once during the entirety of a public health emergency even if such public health emergency is amended, extended, restated, or prolonged.

3.5.1 Accrual of HFWA leave. ...

- (C) On the day a public health emergency is declared within the definition of Rule 2.11, employers are required to immediately provide each employee with additional hours of paid leave, usable as of either the date of the declaration or January 1, 2021, whichever is later -- whatever the employee has accrued prior to the declaration of the public health emergency at the regular HFWA rate (*i.e.*, one hour per 30 worked, up to a maximum of 48 per benefit year), and a one-time supplement with the number of hours needed for:
 - (1) employees who normally work forty or more hours in a week to have access to 80 hours of total paid leave; and
 - (2) employees who normally work under forty hours in a week to have access to paid leave hours that are at least the greater of the number of hours the employee (a) is scheduled for work or paid leave in the upcoming fourteen-day period, or (b) actually worked on average in the fourteen-day period prior to the declaration of the public health emergency or January 1, 2021, whichever is later.

The HFWA text allows not just an initial emergency declaration to qualify, but also what Rule 2.11 clarifies is sufficient: an “amended, extended, restated, or prolonged declaration of an emergency” -- and the history of HFWA makes clear that such declarations *must* qualify. HFWA was enacted on July 14, 2020 during the COVID-19 pandemic, with extensive legislative history making clear that it was enacted to address that pandemic. As of that date, there *already* was an initial emergency declaration in effect: [Executive Order D 2020 003](#), “Declaring a Disaster Emergency Due to the Presence of Coronavirus Disease 2019 in Colorado,” issued by Governor Jared Polis on March 11, 2020. That initial emergency declaration lasted 30 days; since that date, successive “extended” or “amended” emergency declarations have repeatedly declared the emergency for 30 days at a time, starting on April 8, 2020.¹³

¹³ [Executive Order D 2020-032](#), “Amending and Extending Executive Order D 2020 003 Declaring a Disaster Emergency Due to the Presence of Coronavirus Disease 2019 in Colorado” (April 8, 2020); *see* [Public Health & Executive Orders](#),” Colorado Department of Public Health & Environment (listing all such successive orders).

This record of Colorado’s emergency declarations confirms: As of the July 2020 HFWA enactment, it was clear that each COVID-19 emergency declaration was lasting only 30 days. To interpret an “extended” or “amended” COVID emergency declaration as insufficient to trigger COVID leave under HFWA, the Division would have to assume one of the following:

- (A) that that the legislature, which intended for a COVID emergency to triggers COVID leave, was unaware that the Governor was declaring COVID emergencies solely with extended or amended emergency declarations -- an implausible assumption that the same legislature carefully addressing the COVID emergency, in multiple enactments, was unaware of the Governor’s high-profile COVID declarations; *or*
- (B) that the legislature rejected how the Governor was declaring COVID emergencies, by withholding COVID leave in HFWA unless the Governor, rather than continue his practice of efficiently issuing extensions of the initial COVID emergency, instead switched to writing and issuing completely new declarations with the same content -- also an implausible assumption, because (i) the Division listened to the entire HFWA legislative history and found no evidence of such intent, and (ii) the Division also listened to the entire HFWA signing ceremony, where the Governor signed HFWA with all sponsors present, with no indication that HFWA reflected a legislative-executive disagreement on how COVID emergencies must be declared.

Because the above makes clear that an extended or amended emergency declaration in 2020 qualified as an emergency declaration triggering COVID leave, the Division is codifying that point in Rule 2.11.

The Governor’s recurring extended or amended COVID emergency declarations have included two in the month preceding adoption of these rules: [Executive Order D 2020-268](#) (amended emergency declaration, Dec. 3, 2020), which amended the prior emergency declaration, [Executive Order D 2020 264](#) (extended emergency declaration, Nov. 28, 2020). Each of Executive Orders 2020-264 and 2020-268 continues through December 27, 2020, and qualifies as a “public health emergency” declaration under HFWA, C.R.S. § 8-13.3-402(9), and Wage Protection Rules 2.11 and 3.5.1(C).¹⁴

The HFWA requirement of 80-hour COVID leave for 2021 extends “until four weeks after the official termination or suspension of the public health emergency.”¹⁵ With a qualifying public health emergency currently existing through December 27, 2020 (as of the date of adoption of these temporary or emergency rules), the § 405 requirement that paid leave continue for four weeks past the end of an emergency means that the requirement of 80-hour COVID leave will continue through at least most of January 2021 -- and will continue longer into 2021 to the extent that either (1) a renewed, extended, and/or amended emergency declaration continues to be issued (as it has been at least monthly since March 11, 2020), and/or (2) a different emergency declaration related to COVID-19 is issued in 2021.

This Division is authorized to adopt and amend rules and regulations to enforce, execute, apply, and interpret C.R.S. Articles 1, 4, 6, and 13.3 of Title 8, and all rules, regulations, investigations, and

¹⁴ This detailing of two recent orders is not intended as an exhaustive list of every issuance by the Governor or a public health agency that may qualify as a public health emergency declaration triggering 80-hour COVID leave as of January 1, 2021, under HFWA §§ 402(9) & 405, and Wage Protection Rules 2.11 & 3.5.1(C). Anticipated future declarations, including in 2021, would further trigger such leave, mooted the issue of a 2020 declaration triggering 80-hour COVID leave in 2021. But the two recent orders, detailed above, suffice to establish that under HFWA, existing public health emergency declarations already have triggered 80-hour COVID leave in 2021.

¹⁵ C.R.S. § 8-13.3-405(2)(b).

other proceedings thereunder, by the Administrative Procedure Act, C.R.S. § 24-4-103 (including § 103(6) temporary or emergency rules), and Articles 1, 4, 6, and 13.3 provisions including but not limited to those listed in Part (2) (incorporated herein). The HFWA provisions include broad “implementation and enforcement” authority for this Division,¹⁶ with accompanying broad authority to “adopt rules as necessary for such purposes,”¹⁷ along with various more specific rulemaking mandates and grants of authority.¹⁸

The above-listed HFWA grants of authority include that “the Division ... may exercise all powers granted under Article 1 of this Title 8” for its HFWA implementation and enforcement role.¹⁹ Article 1 was already among the pre-existing Title 8 statutes that long have granted the Division authority over workplace conditions relevant to the need for paid sick leave during a public health emergency -- including the authority that had supported the adoption and enforcement of the Colorado HELP Rules that (from March 11 to July 14, 2020), based on pre-HFWA Title 8 authority, had implemented and enforced a requirement of paid COVID leave before HFWA.²⁰

Further supporting Division authority for these rules is the above-cited State of Disaster Emergency declared repeatedly from March through December 2020 by Colorado Governor Jared Polis, as the number of identified COVID-19 cases has increased. The declaration supported executive action pursuant to multiple emergency executive authority statutes.²¹ These rules comport with such emergency authority because the Governor on March 11, 2020, in his first disaster emergency declaration, expressly

¹⁶ C.R.S. § 8-13.3-410; *see also* C.R.S. § 8-13.3-411 (Division “jurisdiction over the enforcement of” HFWA).

¹⁷ C.R.S. § 8-13.3-410; *see also* C.R.S. § 8-13.3-411 (Division use of its pre-existing Article 1 rulemaking and enforcement authority for HFWA purposes).

¹⁸ *E.g.*, C.R.S. §§ 8-13.3-403, 407, 408.

¹⁹ C.R.S. § 8-13.3-411.

²⁰ *E.g.*, C.R.S. § 8-1-111 (“The director is vested with the power and jurisdiction to have such supervision of every employment and place of employment in this state as may be necessary adequately to ascertain and determine ... *the obedience by the employer to all laws and all lawful orders* requiring ... *places of employment to be safe*, and requiring the *protection of the life, health, and safety of every employee* ... , and to *enforce all provisions of law* relating thereto,” including the provisions of C.R.S. Title 8, Article 6, listed next); C.R.S. §§ 8-6-101(1) (“The welfare of the state of Colorado demands that workers be protected from *conditions of labor that have a pernicious effect on their health* and morals, and it is therefore declared, in the exercise of the police and sovereign power of the state of Colorado, that ... *unsanitary conditions of labor* exert such pernicious effect.”), 8-6-104 (“It is unlawful to employ workers in any occupation within this state under *conditions of labor detrimental to their health* or morals”), 8-6-106 (“The director shall determine ... *standards of conditions of labor ... not detrimental to health* or morals for workers.”). (Emphases added to all of the preceding citations.) Confirming the breadth of these legislative bans, declarations, and administrative authority grants is the statutory instruction: “Whenever this article or any part thereof is interpreted by any court, it shall be liberally construed by such court.” C.R.S. § 8-6-102. Such a rule requires “broader interpretation” if differing interpretations of the statutory breadth are plausible. *Dillabaugh v. Ellerton*, 259 P.3d 550, 554 (Colo. App. 2011) (“if ambiguity exists, a broader interpretation comports with the requirement ... [of] liberal interpretation”).

²¹ *E.g.*, C.R.S. §§ 24-33.5-704(2) (“Under this part 7, the governor may issue executive orders, proclamations, and regulations and amend or rescind them. Executive orders, proclamations, and regulations have the force and effect of law.”); 24-33.5-704.5(1)(e) (“In the event of an emergency epidemic that has been declared a disaster emergency, the [expert emergency epidemic response] committee shall convene as rapidly and as often as necessary to advise the governor, who shall act by executive order, regarding reasonable and appropriate measures to reduce or prevent spread of the disease, agent, or toxin and to protect the public health.”); 24-33.5-711.5(2) (“The conduct and management of the affairs and property of each hospital, physician, health insurer or managed healthcare organization, health care provider, public health worker, or emergency medical service provider shall be such that they will reasonably assist and not unreasonably detract from the ability of the state and the public to successfully control emergency epidemics that are declared a disaster emergency.”).

directed immediate rulemaking to require paid COVID leave; then on July 14, 2020, the legislature enacted and the Governor signed HFWA to expand paid COVID leave immediately; and at least monthly, including since HFWA, the Governor has issued renewed, extended, and/or amended disaster emergency declarations. Any such declaration thus is an exercise of HFWA authority to issue a declaration triggering for 2021 the same paid COVID leave that the executive and legislative uniformly have required for 2020 and beyond, based on the continued, and recently worsening, public emergency.

Based on the above-detailed findings as to the imperative risk to health, safety, and welfare if COVID leave is not required, and the imperative need to prevent non-compliance with the HFWA 80-hour COVID leave requirement as of January 1, 2021: The Division finds that it would be contrary to the public interest to await the months-long ordinary rulemaking period before issuing rules providing a binding clarification of the need for 80-hour paid COVID leave as of January 1, 2021 -- supporting temporary or emergency rules under the Administrative Procedure Act, C.R.S. § 24-4-103(6)(a).

A temporary or emergency rule may be adopted without compliance with the [ordinary APA] procedures ... [and] less than the twenty days' notice ... , or where circumstances imperatively require, without notice, only if the agency finds that immediate adoption of the rule is imperatively necessary to comply with a state or federal law or federal regulation or for the preservation of public health, safety, or welfare and compliance with the requirements of this section would be contrary to the public interest and makes such a finding on the record. Such findings and a statement of the reasons for the action shall be published... A temporary or emergency rule shall become effective on adoption or on such later date as is stated in the rule, shall be published promptly, and shall have effect for not more than one hundred twenty days...

COVID-19, and the threat it poses of the sort of workplace contagion that has been proven extremely harmful to the health of workers, employers, customers, and the public -- for many, even deadly -- easily exceeds various justifications that have been found sufficient for temporary or emergency rules:

- helping applicants get probationary driver's licenses, more quickly than regular rulemaking allows, was sufficient justification for a "temporary or emergency" rule in *Elizondo v. Motor Vehicle Division*, 570 P.2d 518, 523 (Colo. 1977); and
- a "budgetary emergency" sufficed, even though the problem was known "long before," and it was held that if "the reasoning process that leads to the rule's adoption [is] defensible," an agency need not justify a rule with "specific, objective data," in *Colo. Health Care Ass'n v. Dep't of Soc. Servs.*, 598 F. Supp. 1400 (D. Colo. 1984), *aff'd*, 842 F.2d 1158 (10th Cir. 1988).

(5) Effective Date. These rules are being adopted as temporary or emergency rules on December 23, 2020, with an effective date of January 1, 2021, replacing the existing Wage Protection Rules, 7 CCR 1103-7, that were adopted on November 10, 2020, with an effective date of January 1, 2021.



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December 23, 2020

Date