WINTER 2023 RULEMAKING PUBLIC HEARING

Date of Hearing: January 30, 2024

Appearances: Scott Moss, Division of Labor Standards & Statistics Director

Miki Gann, Division Rulemaking Program Assistant

Kristina Rosett, Managing Policy Advisor

Recorded digitally and transcribed by Ditto Transcripts
DIRECTOR MOSS: All right, good afternoon, everyone. My name is Scott Moss. I’m Director of the Division of Labor Standards & Statistics here at CDLE. The Division of Labor Standards & Statistics is in the Department of Labor and Employment, I should say, not the acronym. The time is 2:04 p.m., on Tuesday, January 30, 2024. This is a public rulemaking hearing held by the Division with participants listening and speaking by internet and/or by phone. A recording of the hearing will be added to the administrative record. With me at this hearing are several Division officials, including Miki Gann, the Division’s Rulemaking Program Assistant who will be helping emcee today’s proceedings, and Kristina Rosett, Managing Policy Advisor, among others. Today, we will be accepting testimony on three sets of rules that were proposed on December 29, 2023. First, the Wage Protection Rule 7 C.C.R. 1103-7. These are rule amendments that amend the existing rules to implement Bill 23-231, which allows the Division to disperse funds to claimants who are not paid after citations for wage violations they suffered, with the funds dispersed from the Division’s Wage Theft Enforcement fund. Second, to create and implement the mediation program for pay disparity matters, as authorized by the Colorado Equal Pay for Equal Work Act amendments in
Bill 23-105, and for other possible technical amendments. The second set of rules is the Direct Investigation Rules 7 C.C.R 1103-8. These are amendments to existing rules to incorporate and ensure consistency with statute and rule changes since the last ruled amendments three years ago, such as Senate Bill 22-161 and changes to other division rules since then. Also to update the rules to reflect the Division’s discretionary investigative authority that will include pay disparities now under the Colorado Equal Pay for Equal Work Act amendments, and other possible technical amendments. The third set of rules is to the Senate Labor Relation Rule 7 C.C.R 1103-12. These are amendments to increase conformity with the Colorado Administrative Procedure Act, as to appeal procedure and other possible technical amendments. Anyone may speak on any one or more of these rules in any order. We will not be taking testimony on other labor law or policy topics that are not part of these proposed rules. For all rules from the Division, the notice of public hearing and the associated rulemaking documents were filed with the Secretary of State for publication on their website and in the state register, as provided by the Colorado Administrative Procedure Act. The Division then posted all rulemaking documents on our website and publicized them through our contact of several hundred, but really thousands of stakeholders, because our
stakeholder list is a mix of individuals and organizations with memberships that were believed to have interest in our rules. For more information on any proposed rules from the Division, or for the text of these rules, visit our rulemaking page cdle.colorado.gov/laborrules. It’s on your screen for those who are here by computer. For those who are here by phone, again it’s cdle.colorado.gov/laborrules.

Before we begin, a few rules and guidelines for the record. Here we’re accepting oral testimony, as well as written comments, through the chat window available to anyone here by computer. The same administrative record will include all verbal testimony, all comments in the chat window, and all written comments submitted outside this hearing. All testimony and comments are reviewed by the same division officials, including me. So, while you’re free to comment or testify by any means you prefer, there is no need to repeat points in multiple forms of testimony and comment submission. The written comment deadline is Tuesday, February 6, 2024. That’s next Tuesday, at 5 p.m. Written comments can be submitted, again, in the chat window if they’re short, or from the comment form on our labor rules pages, or by emailing to cdle_laborstandardsrules@state.co.us. That email address is on your screen too. The hearing is for comments, again, specific to these proposed rules. If instead you have
individualized questions you would like the answer to, we would happy to respond outside this hearing. Just email the same address and we will route your question. We do anticipate the time for today’s hearing will be enough to hear all testimony. On the off chance we need more time or if we have technical difficulties, we may continue the hearing on another date, which we will announce at the end of the hearing, or in addition, we’re gonna post the DTLs on our webpage by 12 p.m. tomorrow if there’s a need to continue this hearing. Thank you again for taking the time to attend this public hearing and participate in our rulemaking process. We will now proceed with verbal testimony. We will start with those who signed up to testify in advance, but I don’t believe we have any such folks who contacted us in advance, so we will start by just inviting testimony from anyone here.

A couple rules and guidelines. First, please keep your computer or phone on mute until or unless you’re speaking. When you’re speaking, please to the following. These are instructions on your screen, but I want to read them aloud to emphasize for folks here by phone. First, when called upon, please unmute yourself as control+B on your keyboard or *6 on your phone. Please state your full name, as well as whatever you’re comfortable stating of your job, your organization, if any, other relevant facts.
If you wish to exercise your right to anonymity under Wage Protection Rule 4.7, just give a first name or a fake name, and as much of your job’s role or role as you’re comfortable offering. Third, start by saying which rule or rules you will discuss. If you just starting speaking, I will interrupt to ask which rules are these about just to help us follow along and help those in attendance understand. Fourth piece, please speak in a slow, clear voice. Of course, I butched that sentence ironically, and keep your testimony to five minutes. Some folks may have more than five minutes of speaking. If so, that’s fine. That’s what written comments are for. Just submit written comments of any length you wish. Fifth, we may ask you to repeat anything that may not have been said loudly enough or clearly enough, or if there was a tech glitch that we thought might not be heard, I may ask you follow questions which you’re free to answer however you wish or not at all. Now, when you finish, please mute yourself again. Finally, if you would like to give your name and information for the record, whether you testify or not -- in particular, if you’re not on the Division stakeholder list that has sent notices of these other proposed rules or other Division publications, you can email us. You can say in the comment window what contact information you would like to submit, or use the form on our rules page, which
again is cdle.colorado.gov/laborrules. Thank you all for
your understanding and your participation in these
important matters of Colorado Labor Law and Policy. We’ll
now invite comments from those in attendance. So, anyone
interested in speaking who is here by computer, type your
name in the chat window, and we’ll give it a minute for
folks to state their name, list their name, and then we’ll
start calling on people in order. If you’re here by phone,
don’t worry, we’re not gonna forget about you. We’re just
calling on those here by computer first, because they can
list their names, and then we’ll call on anyone here by
phone. Miki, I believe there’s nobody here by phone I’m
seeing, right? It looks like everyone is here by computer?
MS. GANN: No, yeah.
DIRECTOR MOSS: Okay.
MS. GANN: Correct.
DIRECTOR MOSS: So, we’ll do the phone call, the
call -- phone call, the call for phone participants if
anyone appears by phone, but otherwise we’ll see as we’re
going by solicitation for speakers based on who is here by
computer, so anyone who is here feel free to type in. I
will say, if you’re having some problem finding or typing
in the chat window, you are free to just unmute yourself
and start talking. We just encourage folks if you can to
put your name in the chat window so that we don’t have a
bunch of people speaking at once. Although, the way this is going so far, I don’t sense that will be a problem. But we’ll give a minute or two. Let you think if you have anything to say or ask, feelings to share. I’ll also add while we’re waiting that on our rules page, again cdle.colrado.gov/laborrules, that’s where you can find not only the button to submit comments, but starting as of tomorrow, we’ll be posting all written comments received. They aren’t updated, only because our first comment received was today. We ran the bell and are starting to get ready to post it. So, we will have a link to the folder with all the written comments received, so that folks can review all comments submitted by others, and you can respond to any of those comments if you wish, get a bit of the dialogue going. And while we’re waiting, Miki, are you able to share the labor rules page so we can show folks where they can find all that? Great, thanks. So, you click on the pretty box that says labor rules, then you open the box that says proposed and recently adopted, the second blue bar. If you scroll down, you’ll see these rules, and if you scroll down further -- comments and hearings, yep. You’ll see if each of our rulemakings, we have several rulemakings, one every several months. Under recent rulemaking, we have three bullet points under each rulemaking. This is the Winter 2023 Rulemaking. We’ll
soon be listing which rules these are. Again, the wage protection, direct investigation, state labor relations rules. You can see the notice of public hearing. That link will replaced by the recording of this hearing when we have it, where you can hear me read a lot of instructions and the like apparently. And then, we have the comment form below that. And below that, there’s going to be a bullet point that says comments, 2023 Rulemaking. That’s gonna be a link to publicly viewable folder that has written comments we’ve received. So, we will have that up as of tomorrow. We didn’t have it up yet because we had no comments until just a couple hours ago. So, we tend to post comments within 24 hours of receiving them, so at any point you can go back to this page and see if anybody has commented, see what you think of their comments, if you want to respond, submit a thumbs up emoticon in response or whatever comment you wish to submit on your own or responding to other comments, you can do that. And we have a speaker, Louise Myrland. Feel free to go ahead.

Ms. Myrland: Good afternoon, everyone. Thank you for the opportunity to be here and to ask a question about the Wage Protection Rules. My name is Louise Myrland. I’m part of the staff at the Women’s Foundation of Colorado, and part of the Equal Pay Coalition that advocated for the passage of Senate Bill 23-105, Ensure
Equal Pay for Equal Work. And as our coalition reviewed the Wage Protection Rules, we were not entirely clear on how claims of wage and equity would function under the proposed changes to the rules for filing a wage complaint. And the comment that we submitted in writing earlier addressed that question. And while we’re here and there’s not a long list of other speakers, I thought I would ask for — for you, Scott, and the team from CDLE, to share a little bit more about how you intend for this to work, because we certainly want to be well informed if folks come to members of the Equal Pay Coalition with questions like this. Thanks.

DIRECTOR MOSS: Thank you. And I have skimmed the comment. I just skimmed only because it was just a couple hours ago and, you know, was frantically seeing if I could at least get the gist of this call. So, your point is well taken and we’re gonna want to be clear about what rules we’re using for these claims. Where we are landing, where we’re happy to hear other comments and feel free to submit follow ups too, is that the Wage Protection Rules were written in 2014 and have been modified since to cover our roughly 3500 unpaid wage complaints a year. Those are a mandatory jurisdiction where we investigate and review each one. The pay disparity complaints we’ll receive, it’s discretionary as to which we investigate, we shall
investigate, due to our ability and staffing levels, but it’s not mandatory for each one. And for that reason, we think the Wage Protection Rules might not be the best home for the procedures for those complaints. The other -- but however, your point is taken that we’re gonna need to be clear, and we’re hoping to be clear in our guidance, our infos, about what the exact procedures will be. If anything, we’ve left it a little unclear in the rules I understand, because first, the direct investigation rules, which are the rules that traditionally govern our discretionary jurisdiction investigations. They already referenced the Equal Pay Act, so I generally put that citation in, you know, two years or so ago just in case we got jurisdiction over these complaints, so that we wouldn’t necessarily have to make that specific amendment if we had to, at least start taking complaints before we could amend rules ‘cause for all we knew a statute might be amended to give us jurisdiction before we could amend rules. Sometimes things take effect right away. So, we do have rules that could cover it. Where we’re inclined, and you should feel free to opine in your written complaints or now about this, is that we’ve, as a division that’s a number of new programs and areas of labor law to take complaints about over the last five years, we keep finding that whenever we have new programs we adopt some procedures, we
find we have to tweak them, what have you, and especially where a program or a type of complaint doesn’t have as many microlevel managed restrictions as unpaid wage complaints. Unpaid wage complaints, the statute lays out a number of days for things. Most statutes haven’t been written like mercifully. So, we went a little minimalist in our rules as to the paid disparity complaint simply because we’ve learned some humility over the past several years and if we adopted very specific rules now, our hunch was that we would have to modify them in short order, and we felt like we do have enough in place in direct investigation of the rules that we can send out binding notices of the complaint that order employers to respond, let us investigate, issue rulings without more directive rules. We may find more directive rules are needed, but we went a little minimalist because we felt like if we tie ourselves down, we would just be assuring that we would need to change things as we find whether 14 days or 21 or 30 days enough. And our investigative authority is broad enough under statute that we can order folks to respond to whatever we ask. So, if we get a complaint, we send the employer a notice complaint, we have ample authority to order them to respond in any number of days we see fit and to issue fines if they don’t respond. We do know that, of course, whether we write procedures and info and rules or not, we are going to
have in an info more detail on what is expected for complaints. So, as of now, we’ve received a couple complaints under this law. We are moving ahead in reviewing them. We just have -- we put a complaint form, that was the important thing, so folks could file. Beyond that, we are going to investigate where we think a complaint warrants it by issuing investigative demands to the employer. They are no less binding without very specific rules at this point. And our review candidly is that we’re gonna learn what we should say in the investigations. Do employers -- if we start giving -- if we were, for example, to say employers have four days to respond and they respond that that’s nuts, we need a lot more than we say, okay, we need to have more days. So, but as we learn what these investigations need, we’re gonna see, for example, what number of days. What are standard things we ask and what might be codified in a rule that might not be? We are going to be investigating these in short. We don’t have directive rules, but we’re gonna clarify as much as we can about the process. In the complaint form we tried to clarify what we need from claimants, and as for what we need from employers, our notice of complaint that we send employers is pretty specific and directive. It’s not a set of universal rules, but is a set of binding orders that tell employers what
they need to provide and the consequence of not providing it. It reiterates anti-retaliation protections that are already codified. I do want to add, for example, one function of a rule (inaudible - 0:16:59), you know, stress that retaliation is illegal, but that’s already illegal. I do want to note that in 8-4-120 of the C.R.S that’s part of the Wage Protection Act, but it bans retaliation as of last year as to any proceeding or any law or rule related to wages or hours, which Equal Pay Law certainly qualifies as. So, we believe, in other words, that between our statutory investigative and anti-retaliation authority, and our ability to issue fines for non-compliance, and our authority under the equal pay act to issue citations and orders, we think we have the authority to be rolling the program and we’ve started it already. That said, if there are things that you think are necessary to be in a rule that aren’t there yet, and it’s not enough if we’re just clearing the complaint form and what we order employers to respond with, we’re more than happy to here and we can treat these rules, whatever mix of wage protection rules or the direct investigation. So, that’s -- again, a rule hearing more than I normally give, but since we have time today and this is something I would happily tell any stakeholder, it was a good question. Because once we’re going, we have more minimalist rules for these
investigations, it’s fair to ask us how it’s going to be investigated when a complaint comes in, but I do want to share that when a complaint comes in, the complainant and the employer will very clear on their obligations under this law, just by the lack of rules specifying numbers of days and the like. So, feel free to follow up if you have anything to add or to think about that and cogitate on it for later. Excellent question. Let me just ask for anyone just listening. “Thank you, and what timeframe should we look for updated info about the complaints investigations?” (inaudible - 0:18:36) at whatever point we feel like we’ve learned enough to write something useful. So, it might take after one or two or more investigations we learn oh, this is something that we should tell the public ex ante before they complain, so that they’ll know this. Or it could be that after a complaint or investigation or two, we don’t know much more to say other than what’s in the complaint form and the notice we give employers. So, a rule of thumb generally with infos is that (inaudible - 0:19:02) statute. We invented the genre just a couple years ago. Our view is put in info when have something useful to say. We are also keeping tracking of substantive useful things about equal pay law, about pay disparities. Our view is we don’t want not spend a lot of -- we never spend a lot of times in rules or infos just repeating the
statute. That’s my least favorite thing for rules or
guidance to do. So, we don’t tend to do that, so the
question is what point will there be enough material for an
info that I have to clarify some procedural things and/or
clarify some substantive things, gray area. So, we find
that that often takes care of itself because the substance
of what we need to clarify is often governed by what
questions we get. So, when the equal pay transparency law
was new on January 1, 2021, we kept a Google sheet of every
question we were asked. We eventually came to have over a
hundred questions, and when we hit a critical mass, most of
what is now Info 9a formally Info 9, about pay
transparency. It’s basically answering all the questions
we got asked. I don’t think there were any questions we
were ever asked that aren’t in that other than maybe some
one offs. So, the short answer is when we have enough
things to say that we think it could be helpful, yeah, we
intend to come out with info at that point, because it
helps us as much as everybody else to clarify things that
we want people to know before filing a complaint or in
setting their pay policies. That said, I will add if
you’re an important stakeholder like others that is calling
elsewhere that if you can think of things that would useful
to clarify, feel free to suggest them and we’ll put them in
the hopper as things that we’re looking into saying in an
info. And again, it doesn’t have to be a suggestion of something really specific to say. It could be as simple as here is what’s happening where more clarity could be useful, see if you have anything to say in it, and it’s our job to look into whether we can say anything useful.

Anyone else interested in speaking? We’ll give it another minute or two. While we’re waiting, I might as well give some coming attractions, as if you’re in the movies, you know, and seeing some previews. So, we do have another rulemaking coming up. This Thursday, we have a stakeholder meeting on that rulemaking. It’s rules related to the Job Application Fairness Act. That’s the rule set that will govern the new statute, the Job Application Fairness Act that restricts asking inquiries about age and job applications. It’ll also be about potentially merging those rules that will be coming with other existing rule sets about job postings and job applications given that we now have several laws in Colorado, mostly of pretty recent vintage governing what job applications or job postings must say, must ask, must not ask, may ask. So, we’re looking into merging those to harmonize a bit. Anywhere we can have one rule set rather than four seems like a good thing. So, we’re looking into that and happy to have a conversation about that. That’s this Thursday at 2 p.m., there will be a stakeholder meeting. If you don’t have the
link to that feel free to email the address on the screen. And then, rules will be proposed about that by March likely. Last call for any questions, comments, feelings. I’ll give it one more minute. I’ll note that while we’re all sitting here in front of a computer screen, the high temperature for today and the next two days are gonna be in the mid-60s and that’s around this time a day, so if this meeting ends early I hope some of you can maybe enjoy being outside while the good weather is here. Though don’t expect it to last because it’s still late January/early February. That has been your meteorology report. And with that, a minute has lapsed or two since I last asked, so the time is 2:27 p.m., hearing no further speakers interested over the time since we started the hearing and inviting speakers, we’ll call the hearing to a close. Last call going once, twice, three times, no other speakers. All right, thank you all for attending. With that, the time is 2:27 p.m., and this hearing is closed. Thank you all for attending.
I hereby certify that the above and foregoing constitutes a transcript of all the audible testimony taken at a hearing in Denver, Colorado, on January 30, 2024, in the matter of WINTER 2023 RULEMAKING PUBLIC HEARING, which hearing was digitally recorded by the State of Colorado and transcribed by me to the best of my ability.

Dated at Drummonds, Tennessee, this 5th of February, 2024.

Holly Massanelli
Transcriptionist
Ditto Transcripts