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Interpretive Notice & Formal Opinion ("INFO") #15C:

Speech and Organizing Rights for Government Employees under the Protections for Public Workers Act ("PROPWA")

Overview. This INFO summarizes, with over 30 examples to illustrate, government employee rights to free speech, advocacy, and organizing under the PROPWA statute[1] and rules,[2] both in effect on July 1, 2024.

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Coverage. PROPWA covers almost all **state or local government** employment, with several key limits.

- It covers only certain **state** employees who are outside the state **personnel system**.
- It excludes **county** employees covered by the Collective Bargaining by County Employees Act ("COBCA"), but it does cover employees of counties exempted by COBCA (INFO #15B).
- It excludes **mass transportation** (*e.g.*, RTD) covered by the Labor Peace Act (INFO #15A).

Employee Rights protected by PROPWA: **1) Expressive** activity; **2) Concerted** activity; **3) PROPWA** activity.

(1) Expressive Activity.

(a) What's protected? Two broad categories:

(i) Work-related speech — on **workplace issues** or public employee **representation**.[3] Six examples:

Protected as Work-Related Speech:	*Not Protected as Work-Related Speech:*
Asking for a raise, or to fix work equipment	*Speech on cultural topics like movies*
Meeting with an outside union official about how or whether to unionize their workplace	*Gossip or criticism about a co-worker's or supervisor's personal life*
Criticizing the employer's response to safety issues like a lack of training	*Non-work-related criticism of an employer (but that may be "public participation" – below)*

[1] C.R.S. Title 29, Article 33 (S.B. 23-111, enacted June 6, 2023, and effective July 1, 2024).

[2] 7 CCR 1103-17 (adopted Feb. 2, 2024, and effective July 1, 2024).

[3] C.R.S. 29-33-104(1)(a) (protecting rights to "discuss or express the public employee's views regarding public employee representation, workplace issues, or the rights granted to the public employee in [PROPWA]").

(ii) Public participation, while off duty and not in uniform (C.R.S. 29-33-104(1)(c)), which includes:

- **speech on public or work issues** with members of the public employer's governing body, and
- **other political activities** in the same manner as other Coloradans. Four examples:

Protected as Public Participation:	*Not Protected as Public Participation:*
Opinions about the federal NASA budget	*Social gossip about a co-worker*
Attending or speaking at a rally for a cause or candidate, whether or not work-related — or refusing to do so.[4]	*Non-issue-related speech on cultural topics like movies or music*

(b) What are the limits of expressive activity protection?

(i) Disruption (PROPWA Rule 4.4.4). Activity is not protected if it **materially disrupts** — for reasons **other than disagreement** with the activity —

- public employee **duties**;
- public employer **operations**; or
- delivery of public **services**.

Example 1: After disputes with management over a training policy intended to help fill vacant positions, an employee successfully urged co-workers to stop complying with the training program established by that employer's policy. The reduced participation in the training program prevented the employer from filling various vacant positions.

➔ This speech is too disruptive to be protected. While criticism of a workplace policy is generally protected, discouraging employees from performing assigned duties disrupts the employer's operations and its ability to deliver public services.[5]

Example 2: Kindergarten teachers Cory and Pat attend protests off-duty. Cory chanted that corrupt socialists rigged an election for leftists and should be arrested; Pat chanted that corrupt capitalists rigged tax law for business and should be arrested. Angry parents threaten to withdraw children from the school if Cory isn't fired or moved to another grade. Other angry parents threaten the same as to Pat. There are enough angry parents to threaten two disruptive impacts: (1) a school budget cut if enough parents withdraw children; and (2) several parents in each teacher's classes are refusing to attend parent-teacher conferences, or volunteer to help with class events.

➔ The teachers' activity could materially impair significant interests: impact #1, delivery of public services; impact #2, professional relationships required by their duties.

➔ But the teachers can't be fired or transferred, because both disruptive impacts result from public *offense or disagreement*. Protection can't be denied "simply because some members of the public find ... speech offensive and for that reason may not cooperate" in the future. "The Supreme Court has squarely rejected what it refers to as the "heckler's veto" as a justification for curtailing 'offensive' speech ... to prevent

[4] *Donaggio v. Arlington County*, 880 F. Supp. 446, 458 (E.D. Va. 1995) ("Freedom of speech includes the right to refrain from speaking" and "is violated when police officers are compelled to participate in an expressive activity, such as the demonstration against the assault weapons ban"), *aff'd on oth. grounds*, 78 F.3d 578 (4th Cir. 1996).

See generally Janus v. AFSCME Council 31, 585 U.S. 878, 905 (2018) (requiring "public employees to affirm or support beliefs with which they disagreed" is unlawful).

[5] *See generally Waters v. Churchill*, 511 U.S. 661, 680-81 (1994) ("when an employee counsels her co-workers to do their job in a way with which the public employer disagrees, her managers may tell her to stop").

public disorder" — because that could deny protection to an employee who "attends a meeting of a religious or other group to which some members of the public object."[6]

Example 3: A sheriff fired Wallace, a detention center guard, after learning he (1) identified himself to reporters as a guard during a Ku Klux Klan rally at his home, and (2) "promoted white supremacist views and ... Klan activities within the [center] and ... publicized his support of the ... Klan while ... an employee": with employees, he "promoted his rally ... by distributing a flyer" and telling them "a cross would be ignited at dark"; with inmates, he "had worn a watch with an Aryan Nation flag ..., and discussed ... the Aryan Nation"; and he "used hand signals associated with the ... Klan, and phrases such as 'weiss macht' (German for 'white power'), hundreds of times" at the prison.

➔ Wallace engaged in expression on racial issues, which (however offensive) qualifies as being on a "matter of public concern," so it is protected unless too disruptive.

➔ But the firing was lawful because the activity was too disruptive. "Avoiding racially motivated violence is essential" to "efficient and safe [prison] operation." In becoming an "identified [Klan] supporter" to employees, inmates, and the public, he significantly "impaired ... the perception of fairness" his job and prison operations required.[7]

(ii) Official duties (PROPWA Rule 4.2.2). PROPWA doesn't protect **speech that's part of the duties** that the public employer pays and assigns the public employee to perform.

Example 4: Richard, a criminal prosecuting attorney, was fired after he wrote to his supervisor, then said in a criminal court case his office was prosecuting, that certain prosecution evidence was from a search warrant that was based on police misrepresentations.

➔ The firing didn't violate speech rights. Even if on a matter of public concern, his speech was made as a government employee, not a private citizen, because the County paid and assigned him to serve as an attorney in its criminal prosecutions.[8]

But speech is an unprotected part of "official duties" only if it's what the employee is *paid to produce* as their job. Otherwise, speech remains protected even if it's *related* to, or *learned* from, their job.

Example 5: Edward testified for the prosecution at a co-worker's criminal fraud trial. He learned the information in the course of his duties, and the fraud related to the co-worker's employment for their employer. The employer fired Edward for giving that testimony.

➔ The firing was unlawful. Giving testimony wasn't "ordinarily within the scope of [the] employee's duties," which is the "critical question" — so it remained protected even though it was *related* to and *learned* from his employment.[9]

Example 6: Joe, a high school football coach, prays after games — alone at first, but then some student players asked if they could join him, and he responded: "'This is a free country. You can do what you want." Most (not all) players then joined his prayers after many (not all) games. The school asked him to stop, and fired him for refusing.

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[6] *E.g.,* *Flanagan v. Munger*, 890 F.2d 1557, 1566-67 (10th Cir. 1989) (in analysis of disruptive effects of public employee speech ("activity which interferes with ... efficient operation"), police officers' lawful but "sexually explicit" expressive activity was protected, since any disruptive loss of cooperation traced to offense taken by others).

However, the *Flanagan* officers' activity might have lost protection if it were *job-related*, as in *San Diego v. Roe* (below).

[7] These facts, quotes, and outcome are from *Weicherding v. Riegel*, 160 F.3d 1139 (7th Cir. 1998). *See also* *San Diego v. Roe*, 543 U.S. 77 (2004) (lawful to fire officer who — unlike those in *Flanagan* (above) who sold unrelated videos made by others — instead sold videos of himself, on a website, in uniform, identified as an officer, in fictional sex acts with people he stopped as an officer).

[8] These facts and outcome are from *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

[9] These facts, quotes, and outcome are from *Lane v. Franks*, 573 U.S. 228 (2014).

➔ The firing was unlawful. Religious speech is a matter of public concern. Though on employer property, with those Joe supervises, he engaged in "private speech, not government speech." It "did not 'ow[e its] existence' to his "responsibilities as a public employee" and "was not ... speech 'ordinarily within the scope' of his duties as a coach. He did not speak pursuant to government policy ... [or] convey a government ... message. He was not ... discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce."[10]

(iii) Reasonable limits on time, place, or manner (PROPWA Rule 4.2.3). Some limits are only on where, when, and how certain speech is allowed. Example: A small residential park may ban loud events after midnight ("time"), in kiddie pools for toddlers ("place"), or with open flames ("manner").

- A **public forum** — a place **traditionally** for speech (like parks) **or designated** by government as open for speech (like community centers) — allows **limited restrictions**, only those that are:
  - **neutral** on **both content** (*e.g.*, allowing sports but not political rallies isn't content-neutral) and **viewpoint** (*e.g.*, disallowing only one political party's events isn't viewpoint-neutral);
  - serving a **significant interest** (like public safety or property damage), not just any interest (like requiring pedestrians to divert around a small area being used for speech); and
  - **narrowly tailored** to that interest, with ample **known alternatives available** (like barring loud activity in part of a park, but not in other parts that are similarly viable for the speech).
- If a place is **not a public forum** — including a "**limited public forum**" government opened to only certain speech or groups — government can have **more restrictions**, as long as they are:
  - **neutral** on **viewpoint** — they don't need to be **content**-neutral, since a limited public forum may be restricted to certain topics; and
  - **reasonable** for the purpose of the forum — but they don't need to be "narrowly tailored" to a "significant" interest, because only public fora are presumed open to all speech.

Example 7: At a monthly meeting of the Library Board of Trustees, during the "open forum" time for comment on any library-related matters, a librarian spoke on the environmental impacts of lithium batteries in vehicles. The Board has a rule against comments that are "too long, personal attacks, abusive, or irrelevant," and commonly halts irrelevant comments. The Chair interrupted the librarian to explain that comments must be relevant and that libraries have no role in the environmental impact of car propulsion options. The librarian kept talking about lithium batteries, and the Chair told security to escort them away, which took minutes more of arguing with the librarian. This delayed the next commenter, prevented comments by others waiting to speak, and postponed action on the Board vacancy until next month to allow more comments.

➔ The Board meeting is a "limited public forum," because the government opened it to the public for *certain* matters — so restrictions on speech are permissible if they are viewpoint-neutral and reasonable based on the forum's purpose.[11]

➔ Stopping the comments was permissible. It was viewpoint-neutral (it wasn't based on disagreement about car batteries) and reasonable given the forum's purpose (maximizing the opportunity for the public to discuss library-related matters). However, it could be unlawful retaliation if the employer then takes adverse action against the employee that goes beyond what a member of the public would face.

[10] These facts, quotes, and outcome are from *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2424 (2022).

[11] *Pollak v. Wilson*, No. 22-8017, 2022 U.S. App. LEXIS 35636, (10th Cir. 2022) (school board meetings qualified as limited public forum); *Griffin v. Bryant*, 30 F. Supp. 3d 1139, 1173 (D.N.M. 2014) (municipal board meetings qualified).

Example 8: The same librarian in the prior example, at the next meeting's open forum, criticized the library's new ban on certain books that some called inappropriate for children. Several commenters supported the ban at the last meeting. The librarian said the library Director ignored concerns about the ban, and the topics of some banned books show they're not inappropriate. The Board cut off the librarian for ignoring warnings to stop her "personal attacks" on the Director, and to stop describing banned books.[12]

➔ Stopping the comments was impermissible. The speech was on a matter of public concern, and within the limited public forum's scope (public discussion of library matters). Stopping the comments failed both requirements for restrictions on speech in even a non-public forum. (1) It wasn't viewpoint-neutral, since pro-ban speakers were allowed. (2) It wasn't reasonable based on the purpose of the forum: criticizing a public official with authority over the entity that the forum is about and discussing books facing a ban from public resources, are core public speech, not disruption.[13]

➔ The exception that denies protection to speech within "official duties" doesn't apply: though the speech was related to and learned from her job, it's the librarian's own private speech, not government speech she was paid to produce. See Examples 4-6.

Example 9: After the Dry Springs School District announced layoff plans, teachers protested by gathering with signs in the median of the street along the school. Dry Springs police removed the teachers under a city ordinance against remaining in medians other than to cross roads. This is the only recent gathering in a median in Dry Springs.

➔ Because sidewalks and medians are traditional places for public protests and displays of views, they are traditional public forums, so the restriction must (1) be neutral as to both content and viewpoint, (2) be narrowly tailored to a significant government interest, and (3) leave ample alternative channels for the speech.[14]

➔ The restriction is unlawful. It may be "neutral" (there's no evidence teachers were singled out), and preventing car accidents may be a "significant interest" — but Dry Springs can't show the restriction is "narrowly tailored" to that interest (it lacks evidence such events increase accidents), nor that it left a similarly effective alternative channel (by design, it bars protests where they're most likely to be seen).

(iv) Public participation is protected only when "**off duty and not in uniform**" (C.R.S. 29-33-104(1)(c)).[15]

Example 10: During unpaid "on-call" hours, a firefighter participates in a rally to remove one city council member. Six months later, when the city council voted on the annual fire department budget, all other council members spoke to support the proposed funding levels. But then the city council member who was the subject of the rally threatened procedural tactics to prevent a vote on the fire department budget, unless the council used the vote to eliminate that firefighter's position — which it then did.

➔ Eliminating the firefighter's position was illegal: the facts show it was an effort to retaliate against a rally that counts as "public participation"; and the firefighter was off duty because under wage law, "on call" hours are unpaid only when employees are free to engage in personal activities, including political participation.[16]

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[12] These facts, quotes, and outcome are from *McBreairty v. Sch. Bd. of RSU22*, 616 F. Supp. 3d 79, 85 (D. Me. 2022).

[13] *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995).

[14] *McCraw v. Okla. City*, 973 F.3d 1057, 1061-62 (10th Cir. 2020) ("Given public use for expressive purposes, even a median in ... a busy-eight lane road, with a fifty mile-per-hour speed limit ... , is a traditional public forum") (citation omitted).

[15] This restriction doesn't apply to other kinds of protected activity: work-related speech; concerted activity; or complaints or opposition as to PROPWA violations.

[16] For more on wage obligations as to "on call" time or other time worked, see INFO #20A.

(2) Concerted Activity.

(a) What's protected? Two broad categories:

(i) **organizing** activity — forming, joining, or aiding employee organizations (or declining to do so); and

(ii) other activity for **mutual aid or protection** among employees.

- Activity is **concerted** if **multiple employees** are involved, which typically means either of these:
  - Multiple employees are **involved in the activity itself**. Example: Conversation among co-workers, or one employee attempting to persuade one or more other employees.[17]
  - The activity is **by one** employee, but is **about one or more other** employees. Example: One employee advocating for better safety conditions for employees working elsewhere.[18]
- **Examples** of concerted activity:
  - Employees **sharing** information or a petition on pay, work safety, or other work conditions.
  - Employees **talking together** about work issues, themselves, or to an employer or others.
  - Employees **maintaining confidential** information from other employees (*e.g.*, criticism of a boss or co-workers, or union organizing plans) that they have no legal obligation to disclose.
  - Similar acts by **one** employee if on **authority** from, or to **induce action** by, other employees[19] — but **not** if the employee is pressing an **individual** grievance that doesn't affect others' rights. (Note: *some* one-employee complaints may be protected *work-related* speech; see above).
  - **Strikes** are a form of concerted activity **both protected and limited** by other laws.[20]
    - Strikes are **disallowed** for **many public** employees — specifically:
      - a **county** employee covered by COBCA (but not in counties COBCA excludes); or
      - a **state** employee who is covered by state employee union-management law.[21]
    - Strikes are **permitted** for **other public** employees — with the qualification that strikes are **disallowed** during the following Division proceedings under the Industrial Relations Act:[22]
      - a Division "**investigation, hearing, or arbitration**" of the labor dispute; or
      - a Division **intervention** — *i.e.*, if the Division uses its authority to temporarily halt a work stoppage to investigate or for voluntary dispute resolution like mediation.[23]

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[17] Urging others to join concerted activity is protected even if its "inception" was "only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization." *Meyers Indus.*, 268 NLRB 493, 494 (1984).

[18] Under federal law, an "employee" is "not ... limited to the employees of a particular employer" (29 U.S.C. 152(3)), a "definition ... intended to protect ... otherwise proper concerted activities in support of employees of employers other than their own," so concerted activity "encompasses such activity." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978).

[19] These NLRB examples use the established federal "concerted activity" definition that PROPWA never departed from.

[20] NLRB, "The Right to Strike"; *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9 (1962) (workers in a non-unionized workplace engaged in protected concerted activity in a walkout to protest the employer's failure to adequately heat the worksite).

[21] Colorado Partnership for Quality Jobs and Services Act, C.R.S. 24-50-1101 et seq.; see INFO #15A (state), #15B (county).

[22] *Martin v. Montezuma-Cortez Sch. Dist. RE-1*, 841 P.2d 237, 247-48 (Colo. 1992) (under C.R.S. 8-1-126, "public employees have a qualified or conditional right to strike, as do private employees[,] ... subject to the authority of the director of the division of labor"). The "subject to the authority of the director" proviso is covered immediately below.

[23] C.R.S. 8-1-126 (covering both exceptions). Colorado law requires *advance notice* before *certain* kinds of strikes, as listed in INFO #15B (40 days for a mass transportation authority like RTD, 30 days for certain agriculture strikes, 20 days for private sector employers not covered by federal law), but not for *other public sector* strikes outside those three areas.

- Strikes have **other limits** under established law or agreements, such as the following.
  - Stikes can't pursue **goals forbidden** by law. Example: A strike can't aim to make a public employer deduct union dues for all employees, even those not authorizing deductions.
  - Strikes can't violate lawful **limits in collective bargaining agreements** as to strikes.

(b) What are the limits of concerted activity protection?

(i) Disruption (PROPWA Rule 4.4.4).

Example 11: An employee supporting a drive to recognize a union tells the manager, "if this [office] is smart, they'll support the union drive," because if the drive fails, the union would still support the workers by using violence "to get in" to the office anyway.

➔ This is not protected concerted activity. Union advocacy is ordinarily protected, but that is outweighed by the disruption of a credible (even if a bluff) violence threat, so the employer can act against the employee[24] — unless it is singling out only threats related to labor rights activity (*i.e.*, if it hasn't acted against other similar threats).

Example 12: In a collective bargaining agreement negotiation, an employee bangs the table and calls a management official a "[expletive] liar" for saying they can't afford raises.

➔ This activity is protected. "There is a fundamental difference ... between employee misconduct committed during [concerted] activity and ... during ordinary work."[25] "Normally remarks ... [in] a grievance meeting or collective bargaining constitute protected activity, even though they may include profane or disrespectful language."[26]

Example 13: An employee bangs a table and calls a manager a "[expletive] liar," in a public area of city hall, in claiming recent promotion decisions violate seniority rules.

➔ This is not protected concerted activity — assuming this isn't a time and place where angry outbursts have been tolerated; if they have been, singling out only concerted activity would be unlawful. Concerted activity extends protection to outbursts that might be "misconduct" in the context of ordinary work (see prior example), but the extent of protection depends on context (nature, time, place, etc.), and such an outburst during a workday dispute, around others, went too far to remain protected.[27]

(ii) Conduct violating legal responsibilities (PROPWA Rule 4.3.2(A)(2)(b)).

Example 14: An employee, to support a drive for union recognition, reads confidential personnel files, without authorization, to learn of other employees' medical conditions — for example, conditions they cited as reasons to take sick leave — in order to persuade employees that a union could improve their insurance coverage for their conditions.

➔ This is not protected concerted activity. The employer can act against the employee for violating requirements of confidentiality to other employees, so long as it is not singling out only *pro-union* confidentiality breaches for punishment.

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[24] *E.g.,* *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964) (employee saying union would use dynamite to retaliate if union drive failed is unprotected, though in this case the NLRB found the employee hadn't actually made that threat).

[25] *Lion Elastomers LLC*, 372 NLRB No. 83, at 2 (2023) (citing *Hawaiian Hauling Serv.*, 219 NLRB 765, 766 (1975) (though concerted activity included profanity, "lack of ... diplomacy does not render conduct unprotected"); other citations omitted).

[26] *Atlantic Steel*, 245 NLRB 814, 819 (1979).

[27] *E.g.,* *Atlantic Steel*, 245 NLRB 814 (1979) (rejecting argument that concerted activity with profanities (calling supervisor a "lying son of a bitch" and/or "m--f--liar") at a worksite, during working time, where others can hear them, "is protected as would be a spontaneous outburst during the heat of a formal grievance proceeding or in contract negotiations").

Example 15: An employee supporting a union repeatedly insults an anti-union co-worker with a racial slur, while working and when on breaks with co-workers in the break room.

➔ This is not protected concerted activity. Criticizing a co-worker's union views is concerted activity, but employers are responsible for stopping unlawful harassment.[28]

(iii) Confidential or managerial employees, each based on narrow PROPWA-specific definitions.

- A "**confidential** public employee" exempt from concerted activity rights is only someone who either
  - develops, presents, or contributes significantly to **employer positions** on labor relations;
  - accesses **confidential** (including non-public planning or strategy) information related to developing, presenting, or decision-making on employer labor relations positions; *or*
  - advises the employer as its **attorney** on PROPWA or other labor relations matters.[29]

Example 16: A Sheriff's "confidential assistant" schedules meetings, receives mail, forwards calls that include calls from the county labor attorney, and maintains and pulls personnel files of all employees for the Sheriff. The Sheriff fired the assistant for signing a petition urging the Sheriff to reinstate a deputy discharged after a workplace injury.

➔ The "confidential assistant" has access to confidential information, but not confidential information "related to developing, presenting, or decision-making on employer labor relations positions," so they are not a PROPWA-exempt "confidential employee," and signing the petition is protected concerted activity under PROPWA.[30]

- A "**managerial** public employee" exempt from concerted activity rights is only someone who:
  - is **executive-level**; *and*
  - has **significant decision-making authority**, including the authority to develop employer policies or programs, or administer an agency or other subdivision of the employer.[31]
  - **Not qualifying** for this "managerial" exemption is any "**non-policymaking** employee even if the employee **oversees, manages, or directs** other employees."

Example 17: An employer is in collective bargaining with a union. The employer's Deputy Human Resources Director, who writes many of its HR policies, tells the union that when the employer says it can't afford raises due to "the new budget projection," they'll give the union counter-arguments to more optimistically interpret that projection.

➔ This activity is unprotected. This Deputy HR Director is both a confidential employee ("develops or presents the [employer's] positions with respect to employer-employee relations") and a policy-level employee ("significant decision-making authority to develop employer policies or programs").[32]

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[28] *E.g.,* Lion Elastomers LLC, 372 NLRB No. 83, at 8-9 (May 1, 2023) (concerted activity protection does not mean employers must "tolerate employee conduct that reasonably could be characterized as creating a hostile work environment"; noting with approval Dowd v. United Steelworkers, 253 F.3d 1093, 1102 (8th Cir. 2001), which found union conduct unlawful "where, over several days, employees crossing picket line were subjected to racial slurs and threats of physical violence each time they drove into and out," and "fear[ed]for their personal safety") (other citations omitted).

[29] C.R.S. 29-33-104(1)(b)(I); PROPWA Rule 2.7.1.

[30] NLRB v. Hendricks Cty. Rural Elec. Mbrshp. Corp., 454 U.S. 170 (1981); *see also* Micronesian Telecommunications Corp., 273 NLRB 354 (1984) (access to personnel files is insufficient to confer confidential employee status).

[31] C.R.S. 29-33-104(1)(b)(II); PROPWA Rule 2.7.2. Certain firefighter supervisors also qualify. C.R.S. 29-33-103(5)(b)(II) ("A firefighter who is a "supervisor", as defined in section 29-5-203(15), is a 'managerial employee'"); 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")).

[32] C.R.S. 29-33-104(1)(b)(II); PROPWA Rule 2.7.2.

Example 18: Same facts as the prior example, but in a different HR Department where the role of the Deputy HR Director is only employee-specific matters (leave requests, suspensions, etc.), with no "responsibilities to formulate policies or programs" (the policy-level employee definition) or "to develop or present management positions with respect to employer-employee relations" (the confidential employee definition).

➔ This activity is protected. This Deputy HR Director doesn't qualify as an exempt confidential or policy-level employee, leaving the concerted activity protected.[33]

(iv) Solicitation limits (PROPWA Rule 4.3.2(C)).

Example 19: An employer prohibits employees seeking union recognition from seeking signatures during breaks and active working time. The employer prohibits talking or sharing material about other non-work topics during active working time, but not breaks.

➔ This concerted activity *may not* be restricted during *break* time: other similar activity isn't restricted, so the employer appears to be singling out union-related activity.

➔ This concerted activity *may* be restricted during active working time, because the employer is applying a neutral restriction that doesn't disfavor union-related activity — as long as the employer isn't applying this restriction in a discriminatory manner (for example, punishing union-related violations while giving other violations only a warning). And if the employer *hadn't* restricted non-union conversation or materials during active working time, it couldn't single out union-related activity for restriction.[34]

(3) PROPWA Activity. Most of the below points are not specific to PROPWA, but instead are how retaliation claims work generally — so they are detailed more in the INFO #5 series (on retaliation law generally).

(a) What's protected? Two broad categories:

(i) Complaint or investigation activity — whether the complaint or investigation is **formal or informal**, is **internal or external**, or is **verbal or written** — such as:

- making or supporting a **complaint** of a PROPWA violation; or
- offering **evidence** in an investigation of a PROPWA violation.[35]

(ii) Opposition activity — such as:

- **refusing** to participate in or support a PROPWA violation;
- **supporting** someone else who refuses in one of those ways; or
- **providing information** to others on learning their rights and how to assert them.

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[33] It is well-established that Colorado labor laws look to "the realities of ... [the] relationship" of employee to employer, not to formal characterizations like titles. *Colorado Custom Maid, LLC v. Industrial Claim Appeals Office*, 2019 CO 43, ¶ 2, 441 P.3d 1005, 1007 (under Colorado Employment Security Act).

See also *Stampados v. Colorado D & S Enterprises, Inc.*, 833 P.2d 815, 817, 1992 WL 5951 (Colo. App. 1992) (rejecting argument to look to "the label rather than the actual nature of the relationship").

[34] *E.g.,* *Republic Aviation v. NLRB*, 324 U.S. 793, 805 (1945) (presumptively invalid to bar union solicitation by employees on employer premises outside working hours); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 621 (1962) (presumptively invalid to ban solicitation, or literature distribution, without limiting ban to working time and areas); *Jensen Enterprises*, 339 NLRB 877, 878 (2003) (employer "may forbid ... talking about a union ... when the employees are supposed to be actively working, if that prohibition also extends to other subjects not ... connected with ... work," but is in violation if "employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work").

[35] C.R.S. 29-33-104(3) (exercising any PROPWA rights, including a "complaint or giv[ing] any information or testimony").

(b) What are the limits of PROPWA activity protection?

(i) If an **employee is incorrect** about a right or violation they claim, they remain protected *if* (A) the claim was in **good faith** (*i.e.*, they genuinely believed it) *and* (B) that belief was **reasonable**.

(ii) If an **employer is incorrect** in believing an employee did or may engage in protected activity, adverse action remains unlawful *if* that belief was a *motivation* of the employer.

Employer Responsibilities under PROPWA are to not: 1) **retaliate** or

2) **interfere** with employee rights; or

3) **dominate** or **interfere** with employee organizations.

(1) Non-Retaliation against Rights. It is unlawful for an employer to **act against an employee** for exercising any rights PROPWA protects (expressive, concerted, or PROPWA activity). What's illegal is:

- any **adverse action** — an act that might **deter** a reasonable worker from protected activity — for which
- protected activity was a **motivating factor** for the decision to take the adverse action — which can be proven with evidence such as that:
  - the employer was **hostile** to the protected activity;
  - there was **suspicious timing**, like an otherwise unexplained firing soon after protected activity; or
  - the employer's claimed reason for its action was **suspiciously false** enough to be viewed as a **pretext** aiming to hide a different, unlawful motive.

Example 20: Off duty, Lors asked co-workers to join a labor rally. Weeks later, the employer received two complaints that Lors was hostile to female employees. In investigating, the employer told Lors it has them under surveillance and checks their daily activities.

➔ The investigation, including the surveillance, is lawful. Employer action coming shortly after protected activity can be evidence of retaliatory intent, but not if there is a credible lawful explanation for the employer action — like the two complaints.

Example 21: Same facts as the prior example, except: the employer had pressed the two employees, who had never expressed any concern about Lors, to file the complaints.

➔ The investigation, including the surveillance, is unlawful.[36] It can't be explained credibly by complaints an employer itself baselessly caused to be filed, so evidence of retaliation includes the (a) unexplained close timing from protected activity to employer action, and (b) suspicious falsity of the claimed reason for the investigation.

- For more on **what is and isn't unlawful "retaliation" or "interference," see the INFO #5 series**, including #5A (what actions count as retaliation or interference) and #5C (what is proof of retaliation).

(2) Non-Interference with Rights.

- Employers can't **interfere** with any PROPWA-protected activity. (PROPWA Rule 4.4.2(A)).
- An employer rule, policy, or action can't "be **overly broad or vague** in a way that may be reasonably understood as ... 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 light of ... past practice, the context of the workplace, and the field of work." (PROPWA Rule 4.4.2(B)).

[36] *See Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 58 (2006) (retaliatory surveillance/investigation is unlawful).

Example 22: Giannis's duties as a pharmacist assistant in a hospital include filling prescriptions, working with customers and doctors, and calming customers upset about problems often outside Giannis's control. During a break, Giannis vented to other pharmacist assistants that they do the hard work of remedying doctors' or pharmacists' mistakes or delays that sometimes cause dangerous waits for needed medication. Hospital policy prohibited "negative comments on ... operations of the hospital, or specific conduct of supervisors or peers[,] that impacts" anyone's "perception of the hospital."

➔ Giannis's speech is protected against employer action as both (a) concerted activity (with co-workers, about work conditions), and (b) on a matter of public concern (health services delivery). Also, the hospital policy interferes with protected activity: even if it didn't aim to interfere, its "astonishing breadth" means a reasonable worker may well understand it as "a virtual blanket prohibition on all speech critical of" the employer.[37] And the broader a restriction, the harder to justify: "speculative ills targeted by the ... policy are not sufficient to justify such sweeping restrictions."[38]

Example 23: Boulueblo Community College's employee handbook says: "Voice complaints directly to your immediate superior or H.R. through our 'open door' policy. Constructive complaints through our open channels are the best way to a great workplace for all."

➔ The policy only urges making complaints to supervisors or HR. It doesn't *disallow*, or threaten *consequences* for, other complaint methods like speaking with co-workers. So it can't reasonably be read to prohibit protected activity.[39]

Example 24: An employer disallowed an employee's group email to employees about a union rally. It doesn't generally limit employees to work emails; several employees recently emailed about fantasy football, including a company-wide email inviting others to join.

➔ Disallowing a union-related email was unlawful interference with union activity by an employer that ordinarily does not disallow non-work emails.[40]

(3) Non-Domination/Interference with Employee Organizations (C.R.S. 29-33-104(3)(b)).

- Employers can't **dominate or interfere** with an **employee organization**, because employees have a right to freely support, participate in, or be represented by an organization of their choice.

Example 25: A famously passionate union, Federated Amalgamated National Government Service (FANGS), began organizing — so the employer worked to install a more cooperative union first, Cooperative Organization for Work Services (COWS): it had an employee organize for COWS, set a worker meeting where COWS explained plusses of the COWS approach and minuses of the FANGS approach, and voluntarily recognized COWS as workers' exclusive representative as soon as it had enough signatures.

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[37] The quotes are from, and the facts and holding adapted from, *Liverman v. Petersburg*, 844 F.3d 400, 404 (4th Cir. 2016).

[38] *Hyland Machine Co.*, 210 NLRB 1063, 1071 (1974) (employer argued it intended to prohibit only personal use of company machinery with a rule stating, "Devote your efforts here only to company business — personal work or soliciting the help of other employees in the performing of personal work is banned" — but the words "company business" and "personal work" could apply to protected activity, and the employer never told employees any limits to the rule).

[39] *Hyundai America Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 316 (D.C. Cir. 2015) ("A reasonable employee would not read the provision, with its exhortatory language and lack of penalties, to prohibit complaints protected by" the statutory right to engage in concerted activity); *see also* *Kinder-Care Learning Centers, Inc.*, 299 N.L.R.B. 1171 (1990) (invalidating policy that prohibited complaints to customers and threatened disciplinary action for noncompliance).

[40] *Communications Workers of America, AFL-CIO v. NLRB*, 6 F.4th 15, 30 (D.C. Cir. 2021) (ban on "mass communication for any non-business purpose" that targeted content related to concerted activity was unlawful interference).

➔ The employer violated PROPWA with "conduct that benefits one union at the expense of another" or that pressures employee choices, not just "tell[ing] your employees that you favor a particular union."[41] Even if employees weren't provably "coerced," they "did not have the complete freedom of choice contemplated," because the employer "conceived the idea of bringing [in] the [favored union] ... , selected the employee to represent the Union, and aided the Union's ... efforts." Union choice rights exist "to protect against this type of interference" where "employees did not freely control their choice of [union],"[42] so the employer "intruded on its employees' statutory right" to choose, and "unlawfully assisted" a favored union.

- But PROPWA **doesn't restrict** employer creation or control of the sorts of **internal, often advisory, employee councils or committees** that can raise, not lower, employee engagement and influence.[43]

Example 26: Mudland School creates a "Teachers' Policy Committee" for teachers to make recommendations on school performance, spending priorities, facilities, and culture. The school creates and selects members, sets meeting times and places, and tells the committee which recommendations it does and does not want a full memo on.

➔ This Committee is not an "employee organization" that PROPWA restricts employers from controlling or influencing, so the school's actions as to the committee are lawful.

Employer Rights that can be exercised, without violating PROPWA, include the following:

(1) Declining to recognize a union (C.R.S. 29-33-103(7)). Unlike in the private sector, or parts of the public sector with union recognition rights (*e.g.*, COBCA-covered counties), at other employers PROPWA covers:

- employees do **not** have a **right to an election** for union representation by submitting petitions; and
- although an employer **may voluntarily** recognize a union, an employer is **not required** to recognize or negotiate with a proposed union that employees wish to become represented by.

(2) Employers may express certain non-interfering views on unions — specifically:

- If multiple unions are organizing, an employer may say it "**favor**[**s**] a **particular** union," but must refrain from "conduct that **benefits** one union at the expense of another" or **pressures** employee choices;[44]
- An employer may express **general** views regarding the benefits or drawbacks of unions or collective bargaining — in particular, **predictions** of effects of unionization, if based on **objective facts** and **demonstrably probable** consequences **beyond employer control**.[45] (PROPWA Rule 4.4.3).

Example 27: Once a union drive starts, an employer's weekly update email to employees includes this: "With a union, pay would need to be set by collective bargaining, with no guarantee of a raise, and an employee couldn't negotiate their own personal raise."

➔ This is permissible: the statements about effects of unionization are predictions of probable consequences; though they aren't impartially worded, that's permissible, because they are based on the employer's views of unionization generally.

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[41] NLRB, "Interfering with or dominating a union" (acts benefitting one union or "reasonably tend[ing] to coerce employees").

[42] The quotes are from, and the facts and holding adapted from, *Farmers Energy Corp. v. NLRB*, 730 F.2d 1098 (7th Cir. 1984).

[43] An "employee organization" is "an organization independent of the employer in which ... employees may participate and that exists for the purpose, in whole or in part, of acting on behalf of and for the benefit of ... employees concerning ... grievances, labor disputes, wages, hours, and other terms and conditions." It includes "agents or representatives" of the employee organization, but not "an organization, including a committee, advisory council, or other similar group, that includes public employees but is created by a public employee's employer." C.R.S. 29-33-103(3); PROPWA Rule 2.4.

[44] NLRB, "Interfering with or dominating a union" (acts benefitting one union or "reasonably tend[ing] to coerce employees").

[45] *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 580-81 (1969).

Example 28: Same as the prior example, except the employer adds after that sentence: "And your pay probably will be lower, due to smaller or no raises, if there's a union."

➔ This is impermissible: the statement about unfavorable pay is at worst a threat to cut pay if employees vote for a union, and at best a prediction of consequences that isn't "based on objective facts," "demonstrably probable," or "beyond employer control."

(3) Employers may limit employee rights under PROPWA "to the extent **necessary to maintain the nonpartisan role**" of the employer's nonpartisan legislative, judicial, or election-related staff.[46]

- Because this exception allows limiting rights only if "**necessary**" to keep certain government work "**nonpartisan**," its focus is allowing limits more on **public participation** than on other protected activity (work-related speech, concerted activity, or complaints or opposition as to PROPWA violations).

Example 29: Uki is a state legislative budget analyst. Off duty, Uki mocks a major political party's state officials on social media. Uki is fired when a newspaper reports Uki's posts.

➔ The firing is lawful *if* there isn't evidence Uki was singled out for their views — for example, if others in a similar position weren't fired for posting similar but opposite views. Assuming no singling out: preventing harsh partisan commentary by nonpartisan legislative staff is necessary to maintain their nonpartisan role.[47]

Example 30: The same employee from the prior example made a different social media post instead: that climate change is a hoax, so they should be free to water their artificial grass, to make it look more natural and lustrous, whenever they want.

➔ Uki's public participation has no reasonable connection to their nonpartisan role, so it cannot serve as a valid basis for disciplinary action.

Example 31: Employees in an elections division begin to organize a union. The employer opposes the unionization effort based on the exception for non-partisan election staff.

➔ The non-partisan exception does not apply. Restricting this sort of concerted activity does not serve, and certainly is not "necessary" to, "maintain[ing] the nonpartisan role" of the elections division.

Unfair Labor Practice ("ULP") Complaints & Investigations

- ULP complaints can be filed with the Division, by **six months after** the employee knew of the violation, or reasonably should have known. (C.R.S. 29-33-105(1)-(2)).
  - Only violations of **specific rights protected by PROPWA** qualify as ULPs — **not other "unfair" acts**.
  - The Division accepts "**complaints or other leads**" as to possible violations (C.R.S. 29-33-105(2)).
    - **Complaints**: A party submitting a complaint with their name and contact information is a "charging party" that will be notified of further action on the complaint.
    - **Other leads**: A party submitting information anonymously, or asking to remain confidential or not be involved in further action, is not a "charging party" who must be notified of further action. "Leads" are requests that the Division investigate on its "own initiative, or at the request of any interested party." In such matters, "the name or interest of any such party shall not be disclosed if not necessary to resolution." (PROPWA Rule 5.1.1(F).) To the extent feasible, the Division will aim to notify sources of leads who are not "charging parties."

[46] C.R.S. 29-33-104(2)(a)).

[47] *See generally* Bakalar v. Dunleavy, 580 F. Supp. 3d 667, 685-86 (D. Alaska 2022) (similar activity by a longtime attorney for an elections division is unprotected under the First Amendment).

- The Division determines which complaints or other leads, in its discretion, **warrant investigation**.
- If the Division investigates a complaint or lead to conclusion, it then issues a **determination** with its findings as to whether a violation occurred, and if so, any appropriate remedial orders.
- Within 35 days of the date of the decision, ULP determinations may be **appealed** to a hearing officer for a **hearing**. For more on appeals of Division determinations generally, see INFO #2C.
- If the Division finds a violation after an investigation, it may issue orders to:
  - **cease** engaging in the ULP, and show continued **compliance**;
  - pay **fines** for certain violations;[48]
  - remedy violations, such as by (for more on relief for individual employees, see INFO #5C) —
    - **notifying** employees (individually or by posting) of orders to change policy or cease the ULP, and
    - making employees whole (*i.e.*, in the same position as if no ULP occurred), with orders such as —
      - **compensating** an employee's economic losses (lost pay, expenses, etc.), and
      - **reinstating** an employee to a lost job, or part of a job (*e.g.*, lost shifts) — or if reinstatement is not feasible, compensating the job loss with a reasonable period of front pay; and

- Those whose claims aren't investigated by the Division may, depending on the case, file complaints or lawsuits asserting rights under **other laws** that the Division may not be able to enforce — such as:[49]
  - **speech** under the First Amendment to the U.S. Constitution — which protects expression on matters of public concern (similar to PROPWA "public participation" rights);
  - **lawful off-duty conduct** under Colorado law — which prohibits terminating an employee for "engaging in any lawful activity off the premises of the employer during nonworking hours," with exceptions for certain reasonable job requirements and conflicts of interest;[50]
  - **anti-discrimination/harassment** under federal or Colorado laws prohibiting adverse actions or other **mis**treatment (like hostile work environments) based on race, sex, etc.; or
  - **anti-retaliation** under federal and Colorado law — which prohibit adverse actions or other negative treatment (like a hostile work environment) based on various protected activities.[51]

For More Information: Visit the Division website, call 303-318-8441, or email cdle_LaborRelations@state.co.us.

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[48] *E.g.*, C.R.S. 8-1-140(2) (minimum $100 daily fine if party "fails, refuses, or neglects to perform any duty lawfully enjoined[,] ... or fails ... to obey any lawful order[,] ... by the director"), 8-3-110(7) (Division may order party to cease ULP, reinstate employee with backpay, and show compliance); 8-3-116 (misdemeanor if a person "prevents, impedes, or interferes with" Division Labor Peace Act (LPA) duties); 8-3-121 (ULP damages); 8-3-122 (LPA violation is a misdemeanor).

[49] The Division offers this "publish[ed] guidance on other possible employee redress for those whose claims are not investigated" per PROPWA (C.R.S. 29-33-105(2)(a)), but can't advise or investigate on laws outside its jurisdiction.

[50] C.R.S. 24-34-402.5 (exception for activity "Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or ... group ..., rather than to all employees" or "Is necessary to avoid a conflict ... with any responsibilities to the employer" or appearance of a conflict).

[51] The Division investigates *some* retaliation (*e.g.*, as to wages, sick leave, unequal pay by sex, or health/safety whistleblowing), but *not all* (*e.g.*, as to race, sex, or disability discrimination). For more detail, see the INFO #5 series.