

- (8) Upon receipt of an appeal form, the Division shall mail a copy to the Respondent's last known address. A copy shall also be mailed to the Respondent's attorney of record. The Respondent may, within ten (10) calendar days after the date the Division mails the appeal to the Respondent, file a written statement in opposition to such appeal. The Commission or its authorized designee may grant the Respondent an extension for good cause if such application for extension is filed within the 10 days allowed for filing a statement in opposition to the appeal. Only one such extension may be granted.

(B) Commission's Action on Appeal.

- (1) The Commission shall consider an appeal at a Commission meeting following the timely filing of the appeal with the Division. The Commission's review shall be limited to the issues raised by the Charging Party on the designated appeal form and for which the Respondent had an opportunity to respond.
- (2) The Commission may take the following action on appeal: it may reverse the Director's determination of no probable cause; it may remand the charge to the Division for further investigation; or it may uphold the Director's determination of no probable cause. If the Commission remands to the Division for further investigation of a charge, it shall provide specific direction for any required further investigation.
- (3) The Commission's decision on appeal shall be mailed to the parties at their last known addresses.

~~Rule 10.7 — Extensions of Time During the 270-Day Investigative Period. (This Rule 10.7 is effective only as to any complaints filed before 11:59 p.m., August 9, 2022. See Laws 2022, Ch. 473 (HB 22-1367), § 2, eff. August 10, 2022.)~~

~~(A) — Procedure.~~

- ~~(1) — Whenever a party to a charge filed with the Colorado Civil Rights Division wishes to request an extension of time pursuant to § 24-24-306(11), C.R.S., such request shall be made to the Commission, a Commissioner or the Administrative Law Judge by notifying the Division.~~
- ~~(2) — Extensions of time shall not exceed a total of ninety (90) days to all Charging Parties and ninety (90) days to all Respondents or a total period of one hundred and eighty (180) days.~~
- ~~(3) — Written notice of the approval or disapproval of an extension request shall be provided to all parties by the Division.~~

~~(B) — Standard for Granting Extensions.~~

~~In determining whether good cause has been shown for approving a request for extension of time, the Commission, a Commissioner, or Administrative Law Judge shall consider all relevant factors including, but not limited to, whether the failure to grant an extension would jeopardize the rights of any party, whether there have been administrative delays that would adversely affect the rights of any party, whether there are other factors outside the control of any party, including any administrative delays during the investigatory process of the Division, that caused delays in the administrative process and whether the rights of any party would be unduly prejudiced by the granting of an extension.~~

Rule 10.78 – General Rules Governing Hearing Procedures.

- (A) When a case is set for formal hearing pursuant to § 24-34-306(4), C.R.S., the hearing procedures shall be governed by the Office of Administrative Courts Procedural Rules, 1 Code Colo. Reg. 104-1, as amended, relevant Office of Administrative Court Policies and subject to the following specific requirements:
- (1) The hearing shall commence within one hundred and twenty (120) days of service of the notice of hearing and complaint, unless the Administrative Law Judge has granted an extension. If the 120th day falls upon a Saturday, Sunday, or State of Colorado legal holiday, the hearing shall commence on the next regular business day.
 - (2) If any of the express provisions of the Rules of Procedure or Policies of the Office of Administrative Courts conflicts with the express provisions of the Law or these Rules, the Law or these Rules shall control and take precedence over the procedure or policy determined to be in conflict.
 - (3) The case in support of the complaint shall be presented at the hearing by the attorney general's office as counsel in support of the complaint, pursuant to § 24-34-306(8), C.R.S.
 - (4) Discovery procedure shall be those specified by the General Rules of Procedure of the Office of Administrative Courts of the Colorado Department of Personnel and Administration.
 - (5) At the discretion of the administrative law judge, the complainant shall be permitted to intervene through counsel to present oral testimony or other evidence and to examine and cross examine witnesses.
 - (6) If a party presents a motion for summary judgment, the presentation of the motion with supporting evidence may constitute the commencement of the hearing.
- (B) The case in support of the complaint shall be presented at the hearing by the attorney general's office as counsel in support of the complaint. At the discretion of the ALJ, the complainant shall be permitted to intervene through counsel to present oral testimony or other evidence and to examine and cross examine witnesses.

Rule 10.89 – Declaratory Orders.

- (A) These rules are adopted pursuant to § 24-4-105(11), C.R.S., in order to provide for a procedure for entertaining requests for declaratory orders to terminate controversies or to remove uncertainties with regard to the applicability of statutory provisions or rules or orders of the Commission to persons defined in the rules.
- (B) Any person may petition the Commission for a declaratory order to terminate controversies or to remove uncertainties as to the applicability to the petitioner of any statutory provision or of any rule or order of the commission.
- (C) The Commission will determine, in its discretion and without notice to petitioner, whether to rule upon any such petition. If the Commission determines that it will not rule upon such a petition, the Commission shall promptly notify the petitioner of its action and state the reasons for such action.
- (D) In determining whether to rule upon a petition filed pursuant to this rule, the Commission will consider the following matters, among others:

- (g) If the Commission rules upon the petition without a hearing, it shall promptly notify the petitioner of its decision.
- (2) The Commission may, in its discretion, set the petition for hearing under § 24-4-105, C.R.S., upon due notice to petitioner, for the purpose of obtaining additional facts or information or to determine the truth of any facts set forth in the petition or to hear oral argument on the petition. The notice to the petitioner setting such hearing shall set forth, to the extent known, the factual or other matters into which the Commission intends to inquire. For the purpose of such a hearing, to the extent necessary, the petitioner shall have the burden of proving all of the facts stated in the petition, all of the facts necessary to show the nature of the controversy or uncertainty and the manner in which the statute, rule or order in question applies or potentially applies to the petitioner and any other facts the petitioner desires the Commission to consider.
- (G) The parties to any proceeding pursuant to this rule shall be the Commission and the petitioner. Any other person may seek leave of the commission to intervene in such a proceeding, and leave to intervene will be granted at the sole discretion of the Commission. A petition to intervene shall set forth the same matters as required by Rule 10.9(E) of this rule. Any reference to a "petitioner" in this rule also refers to any person who has been granted leave to intervene by the Commission.
- (H) Any declaratory order or other order disposing of a petition pursuant to this rule shall constitute final agency action subject to judicial review pursuant to § 24-4-106, C.R.S.

Rule 10.9~~4~~ – Administrative Law Judge's Initial Decision.

The Administrative Law Judge shall issue an initial decision within thirty (30) days after the conclusion of the hearing, unless an application for extension of time is granted by the Commission or a Commissioner. Such initial decisions shall be rendered in accordance with § 24-4-105, C.R.S., except that the decision shall include a statement of the reasons why the findings of fact lead to the conclusions. In the absence of an appeal of the initial decision within (30) days of service, the initial decision shall become the final order of the Commission.

Rule 10.10~~4~~ – Appeals of (Exceptions to) the Administrative Law Judge's Decision.

- (A) Filing Exceptions.
Any party who seeks to appeal the initial decision of the Administrative Law Judge shall file exceptions with the commission at the Division's Denver office within thirty (30) days after service of the initial decision upon the parties, in accordance with §24-4-105, C.R.S.
- (B) Designation of Record.
An appealing party shall designate relevant parts of the record on appeal to the Commission within twenty (20) days of service of the initial decision, in the manner required by § 24-4-105, C.R.S. A copy of this designation shall be served on all parties. Within ten (10) days thereafter, any other party or the agency may also file a designation of additional parts of the transcript of the proceedings which is to be included. Failure to designate a transcript is deemed a waiver of a request to prepare a transcript.

(C) Transcript.

Any party who designates a transcript as part of the record is responsible for obtaining and paying a certified court reporter who shall contact the Division's Denver office to obtain a copy of the hearing recording, prepare a transcript, and file it with the Division's Denver office no more than 60 days after the designation of record. If no transcript has been filed within the time limit, the record will be certified and the transcript will not be included in the record or considered on appeal. In the absence of the transcript, the Commission is bound by the findings of fact of the ALJ.

(D) Final Order on Appeal.

The Commission shall issue a final order on any appeal/exception. The Commission may adopt the initial decision of the Administrative Law Judge, reverse the initial decision, or modify the initial decision in part.

(E) Record.

The Commission's final order on the appeal shall be included in the certified record of the proceedings. The entire record shall be filed at the Division's Denver office and shall be available for examination during regular business hours.

10.11~~2~~ – Charges Initiated by the Commission, a Commissioner, or the Attorney

General.

(A) General.

The procedures set forth in this Rule govern the practice and procedure for charges initiated by the Commission, a Commissioner or the Attorney General pursuant to § 24-34-308(1)(b), C.R.S. All procedures not specified in this Rule shall be governed by the general rules of practice and procedure provided by Rules 10.3 through 10.8 and rules 10.10 through 10.12. The Commission, Commissioner, or Attorney General is subject to a duty to follow all applicable administrative rules.

(B) Who May File.

The Commission, a Commissioner, or the Attorney General may make, sign, and file a charge alleging a discriminatory or unfair practice in cases where the Commission, a Commissioner, or the Attorney General determines that the alleged discriminatory or unfair practice imposes a significant societal or community impact.

(C) Charges.

(1) Basis for Charge.

A charge may be initiated when the Commission, Commissioner, or Attorney General has cause to believe that any person or entity has been engaged in a discriminatory or an unfair practice that imposes a significant societal or community impact as described under Parts 4 through 7 of the Law. The basis of belief for initiating a charge is information from any source sufficient to suggest that a discriminatory or unfair practice has been or is being committed.

Rule 10.123 – Investigations of Discrimination Charges Referred by the Colorado State Personnel Board.

(A) General.

Whenever a certified state employee or an applicant for classified state employment files a consolidated appeal/dispute form alleging discriminatory employment practices with the Colorado State Personnel Board (hereinafter, the "Board"), the Board refers the employee or applicant to the Division for an investigation of the allegations of discrimination, unless the employee or applicant waives the investigation by the Division, pursuant to C.R.S. §24-50-125.3. The procedures set forth in this Rule govern the practice and procedure for conducting such investigations.

(B) Time Limit for Filing Charges in Investigations Referred by the Board.

A Charging Party referred by the Board shall file a charge with the Division within the time limit specified by the Board. If the Charging Party fails to file a charge within said time limit, the Charging Party shall be deemed to have waived an investigation by the Division and the Division shall not conduct an investigation, unless the Charging Party shows good cause to the Board for failing to comply with the time limit.

(C) Advisory Opinion Only.

The Division shall conduct an investigation of allegations of discrimination referred by the Board within the time limits specified by the Law and these Rules. Upon conclusion of the investigation, the Director shall render an advisory opinion ("Letter of Opinion") to the parties and for information of the Board. The Division shall notify the parties that the Letter of Opinion is advisory only and that the final administrative disposition of the matter is within the discretion of the Board.

(D) Charge Limited to Allegations Contained in the Notice of Appeal.

The claims alleged in a charge of discrimination filed pursuant to an investigation referred to the Division by the Board shall be limited solely to those allegations of discriminatory employment practices contained in the consolidated appeal/dispute form filed with the Board. If the Board permits the Charging Party to consolidate multiple appeals alleging additional allegations of discriminatory or unfair practices, the Division shall permit the Charging Party to amend the charge accordingly.

(E) No Right to Sue Issuance.

Because the Division's processing of a charge referred by the Board does not exhaust administrative remedies, the Division may not grant a request for issuance of a right to sue notice to a Charging Party referred by the Board. At any time during the course of an investigation, however, the Charging Party may waive further investigation and request administrative closure by the Division, whereupon the Division shall return the matter to the Board for final disposition. Such request shall be in writing, signed by the Charging Party or the Charging Party's attorney.

(F) No Right of Appeal to the Commission.

A Charging Party referred by the Board for an investigation by the Division does not have a right of appeal to the Commission from a Letter of Opinion finding no probable cause. Upon issuance of the Letter of Opinion by the Director, the Division shall cease all processing of the charge and return a complete copy of the investigatory file and Letter of Opinion to the Board for final disposition.

Rule 10.134 – Interpretation.

- (A) Construction of rules. These rules shall be liberally construed to expedite the action of the Commission and the Division and to effectuate the purposes of the Law.
- (B) Application to the law. These rules are not intended to set forth a complete procedure, but rather to supplement and clarify the Law. These rules are not designed to be jurisdictional and where not otherwise inconsistent with law, any of these rules may be modified in exceptional cases to meet emergencies or avoid substantial injustice or great hardship.
- (C) Whenever possible, the interpretation of the Law shall follow the interpretations and guidance established in State and Federal law, regulations, and guidelines; and such interpretations shall be given weight and found to be persuasive in any administrative proceedings.

GENERAL PROVISIONS

Rule 20.1 – Anti-Discrimination Notices in Employment and Places of Public Accommodation.

Every employer, employment agency, labor organization, and place of public accommodation shall post and maintain at its establishment a notice that summarizes the discriminatory or unfair practices prohibited by the Law in employment and places of public accommodation. The Division shall make a notice available for printing on its website or provide a copy upon request.

- (A) With respect to employers and employment agencies, such notices must be posted conspicuously in easily accessible and well-lit places customarily frequented by employees and applicants for employment, and at or near each location where services of employees are performed.
- (B) With respect to labor organizations, such notices must be posted conspicuously in easily accessible and well-lit places customarily frequented by members and applicants for membership.
- (C) With respect to places of public accommodation, such notices must be posted conspicuously in easily accessible and well-lit places customarily frequented by people seeking services, purchases, facilities, privileges, advantages, or accommodations offered to the general public.

Rule 81.6 – Sexual Orientation Harassment.

- (A) Unlawful harassment is ~~severe or pervasive~~ conduct that ~~which~~ creates an environment that is subjectively and objectively hostile, intimidating, or offensive on the basis of sexual orientation. Prohibited conduct includes, but is not limited to, the following:
- (1) Asking unwelcome personal questions about an individual's sexual orientation;
 - (2) Intentionally causing distress to an individual by disclosing to others the individual's sexual orientation;
 - (3) Using offensive names or terminology regarding an individual's sexual orientation;
 - (4) Deliberately misusing an individual's preferred name, form of address, or gender-related pronoun; or
 - (5) Harassing, subjecting to differential treatment, discharging, demoting, or denying promotion opportunities or employment benefits to an individual because of open discussion or other communication or presentation related to an individual's gender expression, gender identity, or sexual orientation.
- (B) An individual alleging harassment based upon sexual orientation ~~must~~ may take advantage of any corrective or remedial measures made available by a covered entity, ~~unless pursuing such a complaint would be futile or impractical~~. A covered entity shall initiate a reasonable investigation and take prompt and effective remedial action, if appropriate.

WORK PLACE HARASSMENT

Rule 85.1 – Harassment Based Upon Protected Classes in the Workplace Prohibited.

- (A) It shall be a discriminatory or unfair employment practice for an employer, employment agency, labor organization, or its agents or ~~supervisory~~ employees, to harass, with or without loss of income or other tangible employment action, a person during the course of employment, based upon an individual's protected class status. Harassment occurs if the discriminatory treatment is unwelcome ~~severe or pervasive~~; and has the effect of creating a work environment in which the conduct or communication is that is objectively and subjectively offensive to the employee alleging discrimination and objectively offensive to a reasonable individual who is a member of the same protective class, ~~hostile, intimidating or offensive~~.
- (B) With respect to discriminatory harassment in the scope of employment, an employer is responsible for acts of harassment in the workplace where an employer knows or should have known of the conduct.
- ~~(C) With respect to discriminatory harassment by a coworker, an employee is required to make a complaint of discriminatory harassment to an individual with supervisory authority and must take advantage of any remedial action offered by an employer.~~
- ~~(D) With respect to discriminatory harassment by a person with actual or apparent supervisory authority, an employer is strictly liable for the discriminatory harassment and the employee is not required to complain to the employer.~~
- ~~(E)~~ (C) An employer may also be responsible for the acts of non-employees with respect to workplace harassment of its employees where the employer (or its agents or ~~supervisory~~ employees) knows or should have known of the conduct and fails to take immediate and appropriate remedial action.
- ~~(F)~~ (D) This Rule 85 also applies to harassment based on retaliation for engaging in a protected activity, pursuant to § 24-34-402(1)(e), C.R.S.
- ~~(G) In the event of alleged workplace harassment, a defending employer may raise an affirmative defense to liability to a victimized employee. Such defense is that: (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the victimized employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. This affirmative defense may be established by a demonstration that the employer had promulgated an anti-harassment policy providing for a complaint procedure which was disseminated in the workplace prior to the occurrence of the offensive conduct, and that the employee failed to report the offensive conduct to the appropriate authority in compliance with that complaint procedure. If the alleged harasser is the employer's ultimate authority, then the affirmative defense may not be raised.~~
- (E) In the event of alleged workplace harassment of an employee by a supervisor, an defending employer may raise an affirmative defense to liability to a victimized employee. Such defense is that: (1) the employer has established a program that is reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment; (2) the employer has communicated the existence and details of the program to both its supervisory and nonsupervisory employees; and (3) the employee has unreasonably failed to take advantage of the employer's program. As part of an employer's program, the employer must involve the employer taking prompt, reasonable action to investigate or address alleged discriminatory or unfair employment practices; and the employer must take prompt, reasonable remedial actions, when warranted, in response to complaints of discriminatory or unfair employment practices.

Adopted January 27, 2023; effective March 30, 2023

Statutory Authority

The amendments to these parts are adopted by the Colorado civil rights commission ("commission") pursuant to its authority at section 24-34-305(1)(a), C.R.S., to adopt rules for the implementation of parts 3 through 7 of article 34 of title 24.

Adopted November 17, 2023; effective December 30, 2023

Purpose

The purpose of these revisions is to remove part 10.7, which has expired, and to harmonize the rules to statutory changes introduced in SB 23-172, including making modification to Rule 85.1, Work Place Harassment, and adding "marital status" as a protected class.

Factual and Policy Issues

The factual and policy issues encountered when developing these amendments include:

In 2023, the Colorado General Assembly revised section 24-34-402 to include specific definitions of "harass" and "harassment" that exclude that conduct in the workplace need not be "severe or pervasive" to constitute a discriminatory or unfair employment practice. Further, SB 23-172 added "marital status" as a protected class in part 4 of section 34 of title 24.

The commission, therefore, needed to update its rules to reflect the changes in the law, revise additional sections, and make consistent applications to its rules where necessary.

As clean-up and for clarity, the commission made additional edits to its rules, including removing Part 10.7, which had expired in August 2022, and re-numbering the remainder of Part 10's sub-parts.