COLORADO
Department of
Labor and Employment

**Division of Labor Standards and Statistics**
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# STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY, AND FINDINGS

## Wage and Hour Direct Investigation Rules, 7 CCR 1103-8 (2020), as adopted May 25, 2020

**I. BASIS:** The Director ("Director") of the Division of Labor Standards and Statistics ("Division") has authority to adopt rules and regulations on wage-and-hour and workplace conditions, under the authority listed in Part II, which is incorporated into Part I as well.

**II. SPECIFIC STATUTORY AUTHORITY:** The Director is authorized to adopt and amend rules and regulations to enforce, execute, apply, and interpret Articles 1, 4, and 6 of Title 8, C.R.S. (2020), and all rules, regulations, investigations, and other proceedings of any kind pursued thereunder, by the Administrative Procedure Act, C.R.S. § 24-4-103, and provisions of Articles 1, 4, and 6, including C.R.S. §§ 8-1-101, 8-1-103, 8-1-107, 8-1-108, 8-1-111, 8-1-130, 8-4-111, 8-6-102, 8-6-104, 8-6-105, 8-6-106, 8-6-108, 8-6-109, 8-6-111, 8-6-116, 8-6-117, and 8-12-115..

**III. FINDINGS, JUSTIFICATIONS, AND REASONS FOR ADOPTION.** Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds as follows: **(A)** demonstrated need exists for these rules, as detailed in the findings in Part IV, which are incorporated into this finding as well; **(B)** proper statutory authority exists for the rules, as detailed in the list of statutory authority in Part II, which is incorporated into this finding as well; **(C)** to the extent practicable, the rules are clearly stated so that their meaning will be understood by any party required to comply; **(D)** the rules do not conflict with other provisions of law; and **(E)** any duplicating or overlapping has been minimized and is explained by the Division.

**IV. SPECIFIC FINDINGS FOR ADOPTION.** Pursuant to C.R.S.§ 24-4-103(6), the Director finds as follows.

### (A) Rule 4.3 & Rule 5.1.6: Written Demand in a Direct Investigation

These rules add Rule 5.1.6, and remove Rule 4.3, to amend what constitutes a written demand in a wage and hour direct investigation, by: (1) designating the Citation and Notice of Assessment as a written demand, for purposes of penalty liability; and (2) removing from the Notice of Preliminary Findings its status as a written demand. This amendment provides investigated employers with a more reasonable opportunity to respond to the findings and methodology described in the Notice of Preliminary Findings.

The Division originally saw the Notice of Preliminary Findings as an analogy to the C.R.S. § 8-4-111(2)(a) Notice of Complaint, as used in the Division's individual complaint administrative procedure, insofar as both notices detail how much wages appear to be owed, for what, and to whom. Because of its similarity to the Notice of Complaint, which constitutes a written demand pursuant to C.R.S. § 8-4-101(15), the Division found it reasonable to designate the Notice of Preliminary Findings as a written demand. However, an employer who fails to pay all owed wages within fourteen days of a written demand is liable for penalties in addition to any owed wages. While 14 days is a reasonable time for employers to analyze liability for typical wage claims, the Division found that additional time would be beneficial for direct investigations. With this change, the Division can grant reasonable response deadline extensions for employers to respond to the Notice of Preliminary Findings, and avoid circumstances where an employer is left choosing whether to (1) pay wages, and not review in detail the analysis, or (2) take the time necessary to analyze the findings, at a potentially large cost.

### (B) Rule 6.5: New Evidence in Appeals

Rule 6.5 amends when and under what circumstances parties to Division appeals may offer new documentary or other non-testimonial evidence that they had not offered during the investigation stage. Any party to an appeal already, before issuance of the determination they are appealing, had the right to notice and opportunity to be heard at the investigation stage – including a right to present any and all evidence they wish. In the investigation stage, the vast majority of parties do offer arguments and/or evidence, which not only assures their opportunity to be heard, but also helps the investigation. However, a small minority of parties do not offer any arguments or evidence at the investigation

stage, yet then appeal an adverse determination and order, supporting their appeal with new arguments and evidence they chose not to present at the investigation stage. Other parties do present evidence and arguments at the investigation stage, yet then present additional evidence and arguments on appeal. The Division wishes to preserve a reasonable opportunity for parties to present new evidence and arguments on appeal, while also clarifying an expectation that parties should submit all their evidence and arguments at the investigation stage, for their own benefit as well as for the benefit of the investigation.

Accordingly, Rule 6.5 provides that new documentary or other non-testimonial evidence may be submitted on appeal only (a) in accordance with deadlines imposed by the Division (which was in the existing rule) and (b) upon showing "good cause," which may be assessed based on any relevant factors, including several that are delineated in the rule. The list of factors that may constitute "good cause" is long, aiming to include reasonable circumstances in which a party who did not neglect the investigation may still have new evidence to offer on appeal.

The rule does not restrict testimonial evidence, only documentary and other non-testimonial evidence, to assure that restrictions on new evidence do not undercut parties' rights to present arguments on appeal. However, a party cannot use the lack of a restriction on oral testimony to circumvent an applicable restriction on documentary or other non-testimonial testimony. For example, if a new document is excluded, a party cannot simply read it into the record as oral testimony, because that would not actually be oral testimony, it would be a hearsay presentation of documentary evidence. While hearsay is not categorically excluded in these administrative proceedings, it cannot be a vehicle for circumventing the Division's evidence deadlines and rules.

This rule that new evidence on appeal requires compliance with applicable deadlines and a "good cause" requirement closely parallels similar rules in the vast majority of courts: That virtually all litigation parties face evidence-production deadlines, in discovery and then as trial approaches – so if they want to produce new evidence after the lapsing of those evidence-production deadlines, they need to show good cause. This rule is far more permissive than the rules in courts of appeals, in which new evidence on appeal is extraordinarily rarely permitted.

**V. EFFECTIVE DATE.** These rules take effect on July 15, 2020.

Scott Moss
Director
Division of Labor Standards and Statistics
Colorado Department of Labor and Employment

May 25, 2020
Date