



STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY, AND FINDINGS

Wage Protection Rules, 7 CCR 1103-7 (2021), as adopted November 10, 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. These rules update the existing Wage Protection Act Rules, 7 CCR 1103-7, to include the Division’s additional authority to investigate employee claims alleging denial of paid leave, and retaliation or interference with such rights, under the Healthy Families and Workplaces Act (HFWA), C.R.S. § 8-13.3-401 et seq.

II. SPECIFIC STATUTORY AUTHORITY: The Director is authorized to adopt and amend rules and regulations to enforce, execute, apply, and interpret Articles 1, 4, 6, and 13.3 of Title 8, C.R.S. (2021), and all rules, regulations, investigations, and other proceedings of any kind thereunder, by the Administrative Procedure Act, C.R.S. § 24-4-103, and provisions of Articles 1, 4, 6, and 13.3, including §§ 8-1-101, -103, -107, -108, -111, -130; § 8-4-111; §§ 8-6-102, -104, -105, -106, -108, -109, -111, -116, -117; § 8-12-115; and §§ 8-13.3-401, -403 to -405, -407 to -411, and -416.

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 these 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.

(A) Broad Purpose of Various Amendments

Until recently, the overwhelming majority of Division investigations were under the Wage Protection Act as to unpaid wages, requiring only a monetary award to the claimant, plus possible penalties and fines. However, the Division now investigates a much broader range of labor standards laws, and more often investigates systemic issues, due mainly to a half-dozen legislative enactments since mid-2019, including three with effective dates from July 11, 2020, to January 1, 2021.¹ Many provisions of such new laws task the Division with labor standards enforcement that is not limited to ordering payment of traditional wages, *e.g.*: (1) investigating alleged violations of access to paid leave under HFWA, and issuing orders regarding such leave, which qualifies as “wages,”² but the denial of which may not deprive employees of “wages” and thus would require different remedies (*e.g.*, a violation involving an employer compelling an employee to work rather than allowing the employee to take leave for a qualifying condition);³ (2) issuing compliance orders, including orders to modify workplace policies that unlawfully restrict statutory rights and/or adopt policies comporting with statutory rights;⁴ (3) investigating circumstances surrounding, and motivations for, job terminations, to determine whether they constituted unlawful retaliation or interference with rights, and then ordering reinstatement and lost pay if workers

¹ Healthy Families and Workplaces Act (HFWA), S.B. 20-205, C.R.S. §§ 8-13.3-401 et seq. (enacted and effective July 14, 2020) (requiring employers to provide paid sick days; prohibiting interference with or retaliation for exercising HFWA rights; and requiring employers to provide written notice of HFWA rights); Public Health Emergency Whistleblowing Act (“PHEW”), H.B. 20-1415, C.R.S. §§ 8-14.4-101 et seq. (enacted and effective July 11, 2020) (requiring employers to allow employee use of personal protective equipment in certain circumstances; prohibiting retaliation for such PPE use or for certain whistleblowing related to a public health emergency; and requiring employers to provide written notice of PHEW rights); Equal Pay for Equal Work Act, S.B. 19-085, C.R.S. §§ 8-5-101 et seq. (enacted May 22, 2019, effective January 1, 2021) (requiring certain content for job postings, notification to employees of job openings, and record-keeping related to compensation); Chance to Compete Act, H.B. 19-1025, C.R.S. § 8-2-130 (enacted May 28, 2019, and effective August 2, 2019) (barring certain inquiries into the criminal histories of job applicants).

² HFWA C.R.S. §§ 8-13.3-402(8)(b) (“‘Paid sick leave’ is ‘wages’ as defined in section 8-4-101(14).”).

³ *E.g.*, HFWA C.R.S. §§ 8-13.3-402(10) (disallowing “the denial of any right guaranteed under” HFWA); -407(4) (“the division shall investigate each claim of denial of paid sick leave in violation of” HFWA).

⁴ *E.g.*, HFWA, C.R.S. § 8-13.3-403 to -409 (mandating certain contents for paid leave policies; disallowing policies that diminish, interfere with, or retaliate based on the exercise of HFWA rights; and requiring notice to employees and certain record-keeping).

were found to have been unlawfully terminated;⁵ and (4) mandating posters and written notice to employees and workers of these and other rights.⁶ Various new statutes grant new authority to issue such orders,⁷ and such authority pre-existed in the C.R.S. Title 8, Article 1, provisions granting investigation and enforcement powers to the Division.⁸ But because the narrower prior scope of Division work rarely implicated such powers, prior versions of these and other Division rules did not detail procedures, rights, and responsibilities as to such powers.

Because these rules are now required to address not only Division investigations, determinations, and orders as to alleged violations of the Colorado Wage Act (CWA) and Wage Protection Act (WPA), but also the statutory authority newly provided to the Division to investigate, make determinations about, and issue orders regarding alleged HFWA violations, the word “Act” was deleted from the title of these rules, which are now the “Wage Protection Rules,” not “Wage Protection Act Rules.” Many of the below-detailed amendments conform these rules to the broader scope of statutory authority under HFWA that now provides a basis for Division investigations, determinations, and orders.

(B) Non-Substantive Rule Changes

Throughout these rules, the Division has capitalized the words “division,” “rule,” “rules,” and “determination,” as well as added “C.R.S.” before relevant statutory cites, and made other similar non-substantive changes.

(C) Rule 1: Statement of Purpose and Authority

Rules 1.1-1.2 are amended to list and incorporate HFWA provisions in Article 13.3 of Title 8, and to note expressly that the Division is now enforcing multiple “wage” statutes under these rules. Rule 1.2 also now clarifies that while 2021 statutes are generally relied upon in these rules that take effect in 2021, a claim based on events in 2020 or earlier would apply whatever prior year’s version of statutes or rules applied during those events. To avoid any interpretation of a conflict due to incorporations or cited sources, Rule 1.2 also adds that if any such sources differ from these rules, then provisions of these rules govern. The Division also added a clause to clarify that the Division’s rules do not trump Colorado statutory or constitutional provisions. These amendments are necessary to ensure that the rules reflect the full authority and statutory mandate of the Division to investigate alleged violations of, enforce, and otherwise implement HFWA, CWA, and WPA, and to provide more robust guidance in the event of possible conflict. Rule 1.3 has been amended for clarity and to conform the rule to Rule 8.8 of the Colorado Overtime and Minimum Pay Standards

⁵ *E.g.*, HFWA, C.R.S. § 8-13.3-407; PHEW, C.R.S. § 8-14.4-105.

⁶ *E.g.*, HFWA, C.R.S. § 8-13.3-408 (requiring both posters and written notice to employees of HFWA rights; authorizing fines for violations); PHEW, C.R.S. § 8-14.4-103 (requiring posting of PHEW rights; authorizing fines for violations).

⁷ *E.g.*, HFWA, C.R.S. §§ 8-13.3-410, -411 (410, Division “may coordinate implementation and enforcement of this part 4 and adopt rules as necessary for such purposes”; 411, “(1) The director and the division have jurisdiction over the enforcement of this part 4 and may exercise all powers granted under article 1 of this title 8 to enforce this part 4. (2) The division may enforce the requirements of this part 4. (3) Pursuant to section 8-1-130, any findings, awards, or orders issued by the director with respect to enforcement of this part 4 constitute final agency action.”); PHEW, 8-14.4-105, -108 (105, “Enforcement by the division”; 108, “The division may promulgate rules necessary to implement this article 14.4”).

⁸ *E.g.*, C.R.S. §§ 8-1-107(2) (Division “duty and the power to ... (b) Inquire into and supervise the enforcement, with respect to relations between employer and employee, of ... all other laws protecting the life, health, and safety of employees in employments and places of employment; ... [and] (p) Adopt reasonable and proper rules and regulations relative to the exercise of [these] powers and ... to govern the proceedings of the division and to regulate the manner of investigations and hearings”); 8-1-108(3) (“All orders of the division shall be valid and in force and prima facie reasonable and lawful until they are found otherwise in an action brought for that purpose, pursuant to the provisions of this article...”); 8-1-111 (Division “vested with the power and jurisdiction to have such supervision of every employment and place of employment ... as may be necessary adequately to ascertain and determine the conditions under which the employees labor, and the manner and extent of the obedience by the employer to all laws and all lawful orders requiring such employment and places of employment to be safe, and requiring the protection of the life, health, and safety of every employee ... , and to enforce all provisions of law relating thereto,” and “vested with power and jurisdiction to administer all provisions of this article with respect to the relations between employer and employee and to do all other acts and things convenient and necessary to accomplish the purposes of this article”); 8-4-111(1),(6) (“[Division] duty ... to inquire diligently for any violation of this article, and to institute the actions for penalties or fines provided for in this article ... [it] may deem proper, and to enforce generally the provisions of this article”; and “right of the division to pursue any action available with respect to an employee ... identified as a result of a wage complaint or ... an employer in the absence of a wage complaint”); 8-6-104 to -106 (104, “It is unlawful to employ workers in any occupation ... under conditions of labor detrimental to their health or morals”; 105, “[Division] duty ... to inquire ... into the conditions of labor surrounding ... employees in any occupation ... if the [Division] ... has reason to believe that said conditions of labor are detrimental to the health or morals of said employees”; 106, “[Division] shall determine ... standards of conditions of labor ... not detrimental to health or morals for workers”).

(COMPS) Order, 7 CCR 1103-1, on the same subject matter. Rule 1.4 has added relevant Article 13.3 (HFWA) authority.

(D) Rule 2: Definitions

Rule 2.1 is amended to incorporate necessary HFWA statutory references. Rule 2.6 and 2.7 are amended to include two sub-rules each, to incorporate the definitions of “employee” and “employer” under HFWA, C.R.S. § 8-13.3-402(4)-(5), which the Division will apply in HFWA investigations, determinations, and orders, and which vary slightly from the definitions applied under the Colorado Wage Act (CWA), *see* C.R.S. § 8-4-101(5)-(6). Rules 2.6-2.7 are also edited to remove obsolete footnotes and reference to the COMPS Order.

Rule 2.7.3 is added to provide the statutory definition of a “successor employer,” C.R.S. § 8-13.3-402(12), and to clarify that an employer acquires “substantially all of the assets” of another employer for the purposes of C.R.S. § 8-13.3-402(12) if it fulfills the standard applied by the Internal Revenue Service (IRS) in determining whether a corporate acquisition constitutes a tax-free reorganization, *i.e.*, the acquiring corporation must acquire “substantially all of the properties of” the target corporation, which the IRS has defined as a sale in which the assets sold represent at least 90% of the fair market value of the net assets, or at least 70% of the fair market value of the gross assets, held by the target corporation immediately prior to the sale. *See* 26 U.S.C. § 368(a)(1)(C); Rev. Proc. 77-37, § 3.01. The Division finds that, to give independent meaning to the term “*substantially* all of the assets” in the HFWA provision defining a successor employer — *i.e.*, an employer “becomes an employer subject to” HFWA both when it “acquires *all of an organization*, a trade, or a business,” but also when it “acquires...*substantially all of the assets of one or more employers* subject to this part 4,” C.R.S. § 8-13.3-402(12) (emphasis added) — the legislature indicated no intent to depart from existing understandings of what defines a “successor employer,” and that the already-known IRS definition is apt.⁹

Additionally, the definition of when a particular employer is a “successor employer” with obligations under HFWA is identical to language defining when a “successor employer” has the same “experience rating” for purposes of determining its unemployment insurance taxation rate under the Colorado Employment Security Act (CESA); the latter provides that an “employing unit” that “becomes an employer” subject to the CESA “because *it acquires all of the organization, trade, or business or substantially all of the assets of one or more employers*...shall succeed to the entire experience rating record of the predecessor employer” for the purpose of determining the successor’s unemployment compensation tax rate. C.R.S. § 8-76-104(1)(a) (emphasis added). *Dos Almas LLC v. Indus. Claim Appeals Office of Colo.*, 2018 COA 145, ¶ 1, 434 P.3d 777, 778 (Colo. Ct. App. 2018), affirmed a determination that an employing unit became a “successor employer” for purposes of unemployment compensation tax rate liability under C.R.S. § 8-76-104(1)(a), when that employer purchased approximately 90% of the other employer’s assets, but retained none of the prior company’s employees. *Id.* Because the second employer was determined to be a “successor employer” under the criteria set forth in C.R.S. § 8-76-104(1)(a), concerning acquisition of “substantially all of the assets” of a predecessor employer, whether the employer retained employees, or failed to retain employees, was “irrelevant to the successor issues because a predecessor employees are simply not ‘assets’ under the plain meaning of that statutory term,” and

[e]mployee retention is a factor under other statutory provisions in CESA that govern alternative ways in which an entity can become a successor employer for unemployment compensation tax rate liability purposes.... [A]n entity can also become a successor employer under separate criteria in ... 8-76-104(1)(a) by acquiring “all of the organization, trade, or business” of a predecessor employer, and ... 8-76-104(1)(c) defines “trade” or “business” as including “an employer’s workforce.” Employee retention can also provide an alternative way ... an entity can become a successor employer under ... 8-76-104(9).

Id. Given the identical statutory language in the HFWA definition of a “successor employer,” and the CESA provision governing obligations of a successor employer (*see* C.R.S. §§ 8-76-104(1)(a), -104(9)), Rule 2.7.3 also defines “a trade”

⁹ *See Rocky Mtn. Gun Owners v. Polis*, 2020 CO 66, ¶ 72, 467 P.3d 314, 330-331 (Colo. 2020) (internal citations and quotation marks omitted) (“We decline to presume that the legislature used language idly and with no intent that meaning should be given to its language. Instead, we must interpret a statute to give effect to all its parts”); *Colo. Med. Bd. v. Office of Admin. Cts.*, 333 P.3d 70, 74 (Colo. 2014) (“In interpreting the words [of a statute], we presume that the legislature did not use language idly.... Rather, the use of different terms signals the General Assembly’s intent to afford those terms different meanings. If the General Assembly did not intend for ‘subpoena’ to have a meaning distinct from its use in discovery, its use here would be mere surplusage”) (citing *Bennett Bear Creek Farm Water & Sanitation Dist. v. City & Cnty. of Denver*, 928 P.2d 1254, 1262-64 (Colo. 1996) (“We must give effect to the meaning, as well as every word of a statute if possible”)); *Teller Cnty. v. Woodland Park*, 2014 CO 35, ¶ 10 (same); *Lombard v. Colo. Outdoor Educ. Ctr.*, 187 P.3d 565, 571 (Colo. 2008) (“[W]hen examining a statute’s language, we give effect to every word and render none superfluous...Thus, we cannot conclude that ‘should have known’ is merely redundant of the phrase ‘actually knew’”).

or “a business” under C.R.S. § 8-13.3-402(12) as including “an employer’s workforce,” in line with identical language defining a “trade” or “business” in the CESA, C.R.S. § 8-76-104(1)(11)(c). *See Pella Windows v. Ind. Claims Appeals Office*, 2020 COA 9, ¶ 38, 458 P.3d 128 (holding that the same framework derived from CESA cases also applied to determinations of whether a worker is an independent contractor or employee under the Workers’ Compensation Act (WCA), even though the statutory language from the CESA and the WCA was similar, but not identical).

After clarifying the definition, Rule 2.7.3 details that when an employer is considered a “successor employer” under C.R.S. § 8-13.3-402(12), employees’ paid leave entitlements remain as they were under the prior employer; the successor employer is responsible for an acquired employer’s HFWA obligations, including but not limited to accrued, requested, or in-progress leave. *See* 29 C.F.R. § 825.107 (FMLA “successor employer” regulations).¹⁰ These amendments are necessary to fully clarify and effectuate the statutory language of C.R.S. § 8-13.3-402(12).¹¹

Newly added Rule 2.7.4 also explains the method for determining whether an employer meets the 16-employee threshold for HFWA coverage in 2021 pursuant to C.R.S. § 8-13.3-403(1)(b)). In drafting Rule 2.7.4, the Division examined other state rules and regulations relating to employer size determinations and paid sick leave requirements, including regulations implementing the Massachusetts Earned Sick Time Law, [940 CMR § 33.04](#), and the Minneapolis Sick and Safe Time Ordinance, [Minneapolis Mun. Code, 40-3-40.200](#); federal regulations promulgated under the Family and Medical Leave Act (FMLA), which has a 50-employee threshold for employer coverage, *see* 29 C.F.R. § 825.104; and the Families First Coronavirus Response Act’s Emergency Paid Sick Leave Act (EPSLA), which also determines coverage based on employer size, exempting employers with more than 500 employees, *see* 29 C.F.R. § 826.40.

After careful study, the Division determined that because the FMLA applies a well-known method, used by employers for decades, it would be least burdensome to adopt a Rule applying that same method to determining employer size under HFWA. Accordingly, Rule 2.7.4 provides that for the 16-employee HFWA threshold, an employer, as under the FMLA, must count all full-time and part-time employees who are or were employed by any establishment or division of the employer in the United States for each working day during each of 20 or more calendar workweeks (not necessarily consecutive workweeks), in either the current or preceding calendar year. *See* 29 C.F.R. §§ 825.104-105.

Rule 2.9 was renumbered to Rule 2.20, and Rule 2.15 was renumbered to 2.19, both without substantive change, to avoid more renumbering than necessary as HFWA-specific definitions were added. Rule 2.15 provides not only that “[w]ages’ or ‘compensation’ has the same meaning as in C.R.S. § 8-4-101(14),” but also that under C.R.S. § 8-13.3-402(8), HFWA “paid sick leave” constitutes C.R.S. § 8-4-101(14) “wages” and thus is covered by Article 4 of Title 8, and these rules. The Division deleted provisions on compensation for “paid sick leave,” because that subject is addressed more fully in Rules 3.5.1-3.5.2. Rule 2.18 adds clarification that “willful,” a term in both the CWA and HFWA¹² has the same meaning as in current federal FLSA statutory¹³ and regulatory¹⁴ provisions. Rule 2.21 non-substantively

¹⁰ 29 C.F.R. § 825.107(c) (emphasis added):

When an employer is a successor in interest, *employees’ entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer....* [A] successor ... must grant leave for eligible employees who had provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor, including maintenance of group health benefits during the leave and job restoration.... A successor which meets FMLA’s coverage criteria must count periods of employment and hours of service with the predecessor for purposes of ... eligibility for FMLA....

¹¹ Though the FMLA subject matter is arguably more analogous to HFWA than the Internal Revenue Code, FMLA successor in interest regulations are not consistent with the “successor” employer definition in C.R.S. § 8-13.3-402(12). *See* 29 C.F.R. § 825.107(a) (emphasis added) (“[I]n determining whether an employer is covered because it is a “successor in interest” to a covered employer, *the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans’ Adjustment Act will be considered.* ... The factors to be considered include: (1) Substantial continuity of the same business operations; (2) Use of the same plant; (3) Continuity of the work force; (4) Similarity of jobs and working conditions; (5) Similarity of supervisory personnel; (6) Similarity in machinery, equipment, and production methods; (7) Similarity of products or services; and (8) The ability of the predecessor to provide relief.”).

¹² C.R.S. §§ 8-4-109(3)(c), 8-4-122, 8-13.3-408(4)(a), 8-13.3-408(4)(b).

¹³ 29 U.S.C § 255(a) (unpaid wage claims “may be commenced within two years ... except that a cause of action arising out of a willful violation may be commenced within three years....”).

¹⁴ 29 C.F.R. § 578.3(c) (“[A] violation ... shall be deemed to be ‘willful’ ... where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account.... [C]onduct shall be deemed knowing, among other situations, if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful.... [C]onduct shall be deemed to be in reckless disregard ... , among other situations, if the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry.”).

clarifies that the Rules are “to read in conjunction with other rules ... [of] the Division with additional requirements,” including but not limited to the COMPS Order, 7 CCR 1103-1, and the Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving Rules (“Colorado WARNING Rules”), 7 CCR 1103-11.

(E) Rule 3: Filing a Wage Complaint Under HFWA; Permissible Employer Policies Under HFWA

Rules 3.1.6, 3.3, and 3.4 add various non-substantive changes and HFWA citations. Rule 3.1.6 clarifies that an anonymous complaint is not a “wage complaint” of the sort that HFWA and pre-existing wage law require the Division to investigate, while preserving the current Rule language that the Division “may choose to address an anonymous complaint outside of the administrative procedure.” Rule 3.3 is amended to require an employee’s withdrawal of a wage complaint to be “in writing,” to assure written confirmation of such actions. Rule 3.4 is amended to state expressly an aspect of the Division’s procedural discretion: an investigation may be sequenced (*e.g.*, bifurcated) into stages, to yield one or more phases and/or decisions. These are matters as to which the Division already had discretion, since no statute or rule disallows terminating an investigation, or disallows sequencing proceedings as appropriate. The Division believes that such aspects of its discretion now have increased relevance due to the newly broadened range of Division investigations: not just ordering wages, but also, where appropriate, issuing compliance orders to change policies, ordering reinstatement of employees or workers, and other forms of relief (detailed in Part (IV)(A) above). The more complex or multi-faceted an investigation is, the more value there is in (A) terminating it part-way through if it becomes clear that there is no violation, or a readily correctable one, and (B) sequencing it to allow certain threshold matters to be examined first.

Rule 3.5 contains numerous HFWA-specific rules. Rule 3.5.1 covers accrual of paid leave under C.R.S. §§ 8-13.3-403(2) and -405, and, in accord with the effective dates of C.R.S. §§ 8-13.3-403 and -405, provides that paid leave begins to accrue at the commencement of employment or on January 1, 2021, whichever is later. HFWA leave accrual is based on “hours worked” under C.R.S. § 8-13.3-403(2) (“one hour of paid sick leave for every thirty hours worked”), but to avoid needing a HFWA-specific rule as to what counts as “hours worked,” Rule 3.5.1(A) references and adopts the existing “time worked” definition of COMPS Order Rule 1.9, 7 CCR 1103-1.

Rule 3.5.1(B) provides hours accrual rules for fee-for-service employees, including the special case of higher education adjunct faculty. C.R.S. § 8-13.3-403(9). After careful study, the Division finds that even if there may be variance among faculty and courses, a total of three hours worked per classroom hour is a reasonable and accepted estimate, in paid leave accrual rules in other jurisdictions¹⁵ and in statements in the industry outside the context of paid leave,¹⁶ and that the alternative, mandating hours-tracking for higher education adjunct teaching, is not a superior option.

Rule 3.5.1(C) explains that on the first day a public health emergency is declared,¹⁷ employers must provide employees with access to additional paid sick leave for immediate use by way of a one-time provision of supplemental paid leave under C.R.S. § 8-13.3-405(1), with elaboration as to how many supplemental hours are needed for employees whose weekly hours are (1) forty or more, or (2) under forty. Rule 3.5.1(D) provides special rules applicable to the use of paid sick leave during the course of the public health emergency. First, employers are required to permit employees to use both (A) the amount of their accrued paid leave pursuant to C.R.S. § 8-13.3-403(2)(a) (for any of the qualifying reasons provided in C.R.S. § 8-13.3-404(1)), and (B) the amount of supplemental paid leave provided to the employee pursuant to C.R.S. § 8-13.3-405(3), on the date of the Governor’s declaration of a public health emergency (for any of the qualifying reasons provided in C.R.S. § 8-13.3-405(3)). Additionally, the Division further clarified that leave under Section 405 is available for employees’ use from the date the public health emergency is declared until four weeks after the official

¹⁵ *E.g.*, [940 CMR § 33.03\(7\)](#) (Massachusetts paid sick leave rules: “Adjunct faculty compensated on a fee-for-service or ‘per-course’ basis shall be deemed to work 3 hours for each ‘classroom hour’ worked”); [Vermont Earned Sick Time Rules, § 6\(f\)](#) (same).

¹⁶ *E.g.*, Cecile Neidig, [“Adjuncts Demand Better Working Conditions,”](#) *The Fordham Observer*, Sept. 29, 2016 (adjunct faculty for Fordham University courses meeting three hours weekly are considered to spend “three hours teaching, four hours preparing and grading, and two hours holding office hours”); Huntington University, [Handbook for Adjunct Faculty](#), 2010 (“Salaries for part-time instructors are based nominally on the base for salaries for full-time instructors, reflecting the expectation that class preparation and grading require approximately three hours for each hour of lecture”).

¹⁷ The Division amended Rule 3.5.1(C) to remove a reference to the “Governor’s declaration”; the rule now includes all situations constituting a public health emergency under C.R.S. § 8-13.3-402(9). See *id.* (emphasis added) (defining a “public health emergency” as “[a]n act of bioterrorism, a pandemic influenza, or an epidemic caused by a novel and highly infectious agent, for which (1) an emergency is declared by a federal, state, or local public health agency, or (2) a disaster emergency is declared by the Governor;” or “A highly infectious illness or agent with epidemic or pandemic potential for which a disaster emergency is declared by the Governor.”

suspension or termination of the public health emergency,¹⁸ and at the end of the public health emergency, employers are still required to provide employees with access to the leave those employees accrued under C.R.S. § 8-13.3-403(2)(a), up to 48 hours per benefit year. The Division made this clarification in response to a comment from the Workplace Policy Institute (WPI), which contended that proposed Rule 3.5.1 did not “address what happens if an employee takes 80 hours of PHEL [Public Health Emergency Leave under C.R.S. § 8-13.3-405(3)], while still being eligible to accrue PSST [paid sick and safe time] for the calendar year,” including whether “employees continue to accrue up to 48 hours of PSST even though they have already taken 80 hours of PHEL,” and whether “if the public health emergency ends, are the 80 hours of unused PHEL that ‘employees immediately accrue’ forfeited.”¹⁹ Second, the Rule provides that employers remain subject to the minimum accrual requirements of C.R.S. § 8-13.3-403(2)(a), and employees continue to accrue paid leave (up to 48 hours per benefit year). Third, the Division added a new sub-part to the Rule to clarify that, with regard to the sequencing of leave types, if an employee required or requested leave in circumstances that qualify under both Section 404(1) and Section 405(3) (e.g., if an employee is experiencing symptoms of a communicable illness that was the subject of the declaration of a public health emergency and needs to obtain testing and treatment), an employer must permit the employee to use the supplementary public health emergency-related provided leave under C.R.S. § 8-13.3-405(1) prior to requiring employees to use the leave they accrued under C.R.S. § 8-13.3-403(2)(a) prior to the date the public health emergency was declared.

Rule 3.5.1(E) explains carryover of paid leave from one benefit year to the next under C.R.S. § 18-13.3-403(3)(b), and provides that, for purposes of carryover of unused paid leave from year-to-year, a “year” is defined as a “a regular and consecutive twelve-month period as determined by an employer,” C.R.S. § 18-13.3-402(13), and that unless an employer establishes otherwise in a written policy, a “year” will be defined as the calendar year. Rule 3.5.1(E) also states that an employer is not required to, but may, permit an employee to carry forward more than forty-eight (48) hours of unused paid leave from one benefit year to the next. C.R.S. §§ 18-13.3-403(3)(b), -413. The rule also clarifies that if an employer transitions from one type of “benefit year” to another (for example, calendar year to fiscal year), it must ensure that the transition maintains all HFWA rights, and must notify employees in writing of any such changes to the applicable year.

Rule 3.5.2 clarifies the applicable pay rate for HFWA leave, and when leave is available. Rule 3.5.2(A) provides that for leave to be paid “at the same rate and with the same benefits, including health benefits, as the employee normally earns during hours worked, not including overtime, bonuses, or holiday pay” under C.R.S. § 8-13.3-402(8)(a)(1), such leave must be paid on the same schedule as regular wages. The rule also provides that the pay rate for leave must be at least the applicable minimum wage, C.R.S. § 8-13.3-402(8), and for employees with non-hourly pay, the pay rate for sick leave must be the “regular rate” as defined by COMPS Order, Rule 1.9, 7 CCR 1101-1, and consistent with Rule 3.5.1(B) for employees covered by that rule. Rule 3.5.2(B) provides that employees may take paid leave for the number of hours it is reasonably anticipated they would have worked during the leave period, based on: (1) their regular schedule of hours actually worked; (2) or, if leave is during a period the employee was anticipated to depart from a regular schedule, then the number of hours anticipated for that period; (3) or, if the number of hours the employee would have worked for during the period cannot be reasonably anticipated, then their average hours worked during their most recent month of work.

As to proposed Rule 3.5.2, the Colorado Competitive Council commented as follows:

The phrase “same rate” does not make clear what compensation might be included in the definition of “the same.” ... [I]t is unclear whether premium pay, shift differentials or other forms of compensation tied to particular shifts are part of the inclusions or exclusions. Shift differentials are often not automatic, making them more similar to bonuses than an employee’s hourly rate. Holiday pay for working a holiday, overnight shifts and surge periods are all example[s] of shift differentials that are fact specific and not likely ... what an employee “normally earns.” An employee “normally earns” a base rate and we request ... specifically stat[ing]

¹⁸ As proposed, Rule 3.5.1(C) described employer obligations with regard to providing supplemental leave “[d]uring a public health emergency, upon the triggering of a condition listed in C.R.S. § 8-13.3-405(3).” Because the Act requires employers to make supplemental paid leave available for use *immediately*, Rule 3.5.1(C) removed reference to a “triggering condition”; the rule now says employers must provide supplemental leave hours under § 405 as follows: “[o]n the day a public health emergency is declared, employers are required to immediately provide each employee with accrue supplemental additional hours of paid leave — whatever the employee has accrued prior to the declaration of the public health emergency at the regular HFWA rate (*i.e.*, one hour per 30 worked, up to a maximum of 48 per benefit year), in addition to a one-time supplement...” The Division also removed the explanation as to how leave continues to accrue during a public health emergency, and included it (with additional detail) in new Rule 3.5.1(D)(2).

¹⁹ Written Comment, WPI, Nov. 3, 2020 at 2.

that “normally earns” means the base rate and any shift differential pay be specifically added to the exclusions in this section ... to clarify that any required leave may be paid at the base rate, rather than [the] same rate.²⁰

A distinction between an employee’s “base rate” and what an employee “normally earns” with shift differentials, may be important in some contexts, but is not a material difference in how the plain language of the statute applies. An employee is not paid “*at the same rate...as the employee normally earns during hours worked, not including overtime, bonuses, or holiday pay*” if they do not receive *all* pay they “normally earn[] during hours worked” simply because they were absent due to leave-qualifying condition and therefore unable to work a particular shift receiving a shift differential. C.R.S. § 8-13.3-402(8)(a)(1). In accordance with Section 402(8)(a)(1), Rule 3.5.2(A) provides that for employees with non-hourly pay, what an employee “normally earns” is defined as the employee’s “regular rate” under Rule 1.8 of the COMPS Order, which “*includes all compensation paid to an employee, including set hourly rates, shift differentials, minimum wage tip credits, nondiscretionary bonuses, production bonuses, and commissions used for calculating hourly overtime rates for non-exempt employees. Business expenses, bona fide gifts, discretionary bonuses, employer investment contributions, vacation pay, holiday pay, sick leave, jury duty, or other pay for non-work hours may be excluded from regular rates.*” Accordingly, the Division did not adopt the proposed shift differential amendment to Rule 3.5.2(A).

Rule 3.5.3(A) provides that employees may use HFWA leave immediately upon accrual, but an employer may, in the ordinary course of business and in good faith, verify employee hours within a month after work is performed and adjust accrued leave to correct any inaccuracy, provided the employee is notified in writing. The Division finds that this adjustment mechanism accommodates how some employers verify hours on a regular basis and, after doing so, may adjust accrued leave hours if the employer finds that an employee worked fewer — or more — hours than initially scheduled.

Rule 3.5.3(B) provides that employees may use HFWA leave in a minimum of hourly increments, that an employer may require or allow smaller increments, and that if an employer does not specify the minimum leave increment in writing, employees may use leave in increments of, but for administrability reasons no smaller than, a tenth of an hour (*i.e.*, six-minute increments). Rule 3.5.3(C) provides that pursuant to C.R.S. § 8-13.3-407(2)(b), an employer cannot apply an absence or attendance policy to an employee’s HFWA-qualifying leave use if doing so could result in adverse action against the employee, including discipline, as defined in C.R.S. § 8-13.3-407(2)(b). However, after an employee exhausts all HFWA leave, an employer can apply an absence or attendance policy to any absences taken thereafter.

Rule 3.5.4(A) provides that under C.R.S. § 8-13.3-403(4), an employer may have a general “paid time off” (PTO) policy providing fully paid leave for both HFWA and non-HFWA purposes (*e.g.*, sick leave and vacation), as long as it notifies employees, in a writing distributed before an actual or anticipated leave request, that a policy will not provide additional HFWA leave after an employee uses PTO for non-HFWA reasons (*e.g.*, vacation), and a policy provides PTO:

- (1) in at least an amount sufficient to satisfy HFWA and applicable rules;
- (2) for all the same purposes covered by HFWA and applicable rules, not a narrower set of purposes; and
- (3) under all the same conditions as under HFWA and applicable rules, not stricter or more onerous conditions (including but not limited to matters such as accrual, use, payment, annual carryover, notice, documentation, and anti-retaliation and anti-interference rights).

The adopted Rule provides additional clarification that for condition (1), above, a general PTO policy must provide the supplemental amount of leave required to satisfy C.R.S. § 8-13.3-405(1) and Rule 3.5.1(C) to comply with HFWA.

Rule 3.5.4(B) provides a general rule that if an employer provides a PTO policy as outlined in Rule 3.5.4, it need not provide additional HFWA leave if an employee has already used all of their PTO for non-HFWA-qualifying reasons (*e.g.*, vacation). C.R.S. § 8-13.3-403(4). Per C.R.S. §§ 8-13.3-403(4) and -405(1), the Division added language to the proposed rule to clarify an exception to the general rule; *i.e.*, if a public health emergency is declared under C.R.S. § 8-13.3-405(1) after an employee uses some or all of their available PTO for the applicable benefit year, the employer must supplement the employee’s current total of accrued, unused leave as described in Rule 3.5.1(C), without deduction for the hours the employer has already provided to the employee through its existing PTO policy.

Rule 3.5.5 covers permissible policies by which employers may require employees to give notice of a need to take HFWA leave under C.R.S. § 8-13.3-404(2). Rule 3.5.5(A) provides that, pursuant to C.R.S. § 8-13.3-404(2) (“an

²⁰ Written comments by Lauren Masias, Colorado Competitive Council, Nov. 5, 2020.

employer may provide a written policy that contains reasonable procedures for the employee to provide notice when the use of paid sick leave taken under this section is foreseeable”), an employee may request leave in advance or notify an employer of a need to take such leave orally (for example, by phone), in writing, or electronically (for example, by email or text message). Rule 3.5.5(A) also provides that although an employer may choose acceptable, additional methods of receiving paid leave requests and notifications, it shall not restrict any method that notifies the employer effectively.

Rule 3.5.5(B) provides that as to “foreseeable” HFWA leave for any health or safety-qualifying reason within C.R.S. § 8-13.3-404, an employee shall make a good-faith effort to provide advance notice and a reasonable effort to schedule leave in a manner that does not unduly disrupt employer operations. The rule also clarifies that an employer may by written policy require reasonable procedures to provide notice of foreseeable leave, but shall not deny leave based on noncompliance with such a policy, under C.R.S. §§ 8-13.3-404(2),(5). Rule 3.5.5(C) provides that if leave is “related to [a] public health emergency,” an employee shall notify their employer of a need for leave as soon as practicable if (1) the need for leave is foreseeable and (2) the employer’s place of business is not closed. C.R.S. §§ 8-13.3-405(3),(4).

Rule 3.5.6 clarifies what documentation employers can require from employees for HFWA leave. Rule 3.5.6(A) explains the circumstances under which employers may permissibly request documentation from employees to substantiate their need to take paid leave for a HFWA-qualifying reason, as well as the forms of documentation that are sufficient under the statutory provision requiring such documentation, C.R.S. § 8-13.3-404(6). Rule 3.5.6(A) provides that pursuant to C.R.S. § 8-13.3-404(6), an employer may require “reasonable documentation” that leave is for a HFWA-qualifying purpose, but only for leave of “four or more consecutive work days”; because the statute says “consecutive *work* days” rather than “consecutive days,” the rule defines that term as “four or more consecutive days on which the employee would have worked, not four or more consecutive calendar days.”

Rule 3.5.6(C) also notes that an employer may not require *any* documentation from employees to substantiate leave “related to [a] public health emergency” under C.R.S. § 8-13.3-405(3)-(4). In a written comment, Littler Mendelson’s Workplace Policy Institute (WPI) argued that Rule 3.5.1’s “prohibition on employer’s [sic] being able to seek any documentation whatsoever substantiating” that an employee took public health emergency-related leave for a qualifying purpose, regardless of whether the documentation is requested before or after the leave was taken or whether the leave was foreseeable “goes further than the text of the HFWA,” as the text of Section 405(4)(b)

only provides that “[d]ocumentation is not required to take” PHEL. C.R.S. § 8-13.3-405(4)(b). Proposed Rule 3.5.6 removes entirely the ability of an employer to verify whether an employee has legitimately taken PHEL. This renders PHEL a recipe for fraud and abuse, by providing ... two weeks of paid sick leave available simply upon request, with no way for employers to verify whether the time off was used for a covered reason.

WPI also suggested that the Division amend Rule 3.5.6 to provide that “while documentation is not required to take PHEL, it can be required as soon as the employee reasonably can provide it after leave begins.”²¹

This is not a reasonable construction of Section 405(4)(b), when the Act’s plain language is considered as a whole and read to provide consistent effect to the same statutory terms. *See Rooftop Restoration, Inc. v. Am. Family Mut. Ins. Co.*, 2018 CO 44, P12, 418 P.3d 1173, 1176 (Colo. 2018) (citation and quotation marks omitted) (when interpreting a statute, the “objective is to effectuate the legislature’s intent. We begin with the statutory language itself ... [a]nd we consider the statutory text as a whole, giving consistent, harmonious, and sensible effect to all of its parts and avoiding constructions that would render any words or phrases superfluous... We aim to ascribe the same meaning to words or phrases used throughout a statutory scheme, absent any manifest indication to the contrary”); *Rocky Mtn. Gun Owners v. Polis*, 2020 CO 66, ¶ 72, 467 P.3d 314, 330-331 (Colo. 2020) (internal citations and quotation marks omitted) (rejecting a suggested interpretation because “it would render meaningless the limiting words” in the statutory text and explaining that “[w]e decline to presume that the legislature used language idly and with no intent that meaning should be given to its language. Instead, we must interpret a statute to give effect to all its parts”).

Section 405(1) provides that upon the declaration of a public health emergency, each employer in the state “*shall supplement* each employee’s accrued paid sick leave as necessary *to ensure that an employee may take* the following [additional] amounts of *paid* sick leave...,” and Section 405(4)(b) provides that “*notwithstanding any other provision in this part 4... [d]ocumentation is not required to take paid* sick leave under this section.” C.R.S. § 8-13.3-405(1), (4)(b)

²¹ Written comment, WPI, Nov. 3, 2020 at 3.

(emphasis added). WPI's construction is implausibly narrow and fails to give effect to the full statutory language; it provides that an employer's duty to "ensure than an employee may take...[additional] amounts of paid sick leave" under § 405 begins and ends with the Act's duty not to retaliate against or interfere with an employee's right to be absent from work for § 405's qualifying conditions (*i.e.*, employers have the duty to provide *unpaid* leave), and does not require an employer to actually provide the statutory benefit at issue — *i.e.*, to provide compensation for the "paid sick leave" — unless and until the employee provides sufficient documentation to substantiate that the leave was taken for a qualifying purpose. But the Act does not say this; it plainly provides that employers have a duty not only to allow employees with qualifying conditions to be absent from work without pay, but also to pay those employees for qualifying absences. Section 405 provides that employers must "supplement" any then-available (accrued) leave as necessary to "ensure that an employee *may take* ... [additional] amounts of *paid* leave," and that "documentation is not required *to take paid sick leave*" under § 405. C.R.S. §§ 8-13.3-405(1), (4)(b) (emphasis added). The Act also defines "paid sick leave" as "*time that is compensated* at the same hourly rate or salary and with the same benefits," and makes no mention of qualifying conditions (*e.g.*, providing an employer substantiating documents) for such compensation. C.R.S. § 8-13.3-402(8)(a)(1) (emphasis added) (defining "paid sick leave" as "time off from work that is compensated at the same hourly rate or salary and with the same benefits, including health care benefits, as the employee normally earns during hours worked; and (B) provided by an employer to an employee for one or more of the purposes ... [in] 8-13.3-404 to 8-13.3-406").

Moreover, Section 405(4)(b)'s full language, including its preliminary clause, reads as follows: "[N]otwithstanding any other provision in this part 4...documentation is not required to take paid sick leave under this section." C.R.S. § 8-13.3-405(4)(b) (emphasis added). Part 4, in turn, provides that "*notwithstanding section 8-13.3-405(4)(b)*, for paid sick leave of four or more consecutive work days, an employer may require reasonable documentation that the paid sick leave is for a purpose authorized by this part 4." C.R.S. § 8-13.3-404(6) (emphasis added). When Sections 405(1) and 405(4)(a) are read in conjunction and in harmony with Sections 404(6) and the 402(8) (the definition of "paid sick leave"), it is clear that for qualifying conditions that occur during a public health emergency under Section 405, employers must provide additional, compensated time to employees, and employees are not required to provide any documentation in order to receive payment for their qualifying absences — unlike when they are taking "ordinary" paid leave under Section 404 — even when those absences are for four or more consecutive work days. Finally, the way in which the language regarding an employer's duty to "ensure employees *may take*" paid leave is used throughout the Act indicates that such language should be interpreted as being synonymous with an employer's duty to "allow employees *to use*" paid leave, and for an employer to "ensure" employees can "use" paid sick leave in any meaningful sense, an employer must actually compensate them for qualifying absences. C.R.S. §§ 8-13.3-404(3) (emphasis added) (employee "*must use* paid sick leave in hourly increments unless the ... employer *allows* paid sick leave *to be taken* in smaller increments of time"); -404(2) ("an employer may provide a written policy that contains reasonable procedures for the employee to provide notice *when the use of* paid sick time *taken* under this section is foreseeable"); Black's Law Dictionary (11th ed. 2019) (emphasis added) (defining "use" to include "*application or employment of* something., esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional," "a *purpose or end served* <the tool had several uses," and "a *benefit or profit*, esp., the right to take profits from land owned or and possessed by another.")

Rule 3.5.6(A) also defines "reasonable documentation" as documentation that is "not more than is needed to show a HFWA-qualifying reason for leave, as described" in the documentation requirements, and notes that, pursuant to C.R.S. § 8-13.3-412(1), an employer shall not require disclosure of "details" regarding the employee's or the employee's family member's "health...information" or the safety-related information pertaining to the domestic violence, sexual assault, or criminal stalking that is the basis for HFWA leave.

Rule 3.5.6(B) explains that, for purposes of C.R.S. § 8-13.3-404(6), in order for employees to provide sufficient documentation to show that they took HFWA-qualifying leave for a health-related need under C.R.S. § 8-13.3-404(1)(a)-(b), they can provide a document from a health or social services provider from whom the employee received any services for a qualifying health condition. Alternatively, if the employee did not receive services from a health or social services provider for a HFWA-qualifying condition or need, or if the employee cannot obtain a document from such a provider without added expense or delay, the employee can provide a writing self-attesting to a HFWA-qualifying purpose for the leave. In light of health care costs, for those employees who lack access to affordable

health care (*i.e.*, health care that does not require the employee to pay significant amounts out-of-pocket),²² obtaining documentation from a healthcare provider regardless of the circumstance would reduce the amount of pay they receive for HFWA leave, and the amount of time they can actually use as “leave,” if to obtain documentation to qualify for leave, they must pay extra money, wait longer than is viable to receive such documentation, or engage in a visit to a provider that is not otherwise necessary (for example, if the employee has a flu or another relatively short-term illness requiring time off, but not a visit to a health care provider). In addition to placing unnecessary burdens on Colorado’s health care system, for this same reason, requiring such documentation from a medical provider could also deter lower-wage employees from using paid sick leave, defeating a central intent underlying the Act — to encourage ill employees who could not otherwise afford to do so to stay home from work and recover from their illness, which reduces the severity of public health emergencies.²³ In addition to considering the statutory text and legislative intent, and the impact of the cost of seeing a health care provider on low- to mid-income employees’ ability to actually access leave, the Division reviewed rules implementing the Massachusetts Earned Sick Time Law, which provide that:

[E]mployees who do not have health care coverage through a private insurer, the Massachusetts Healthcare Connector and related insurers, or an employer that provides health insurance to employees may provide a signed, written statement evidencing the need for the use of the earned sick time, without being required to explain the nature of the illness, in lieu of documentation by a health care provider

[940 CMR § 33.06\(6\)](#). After careful study of the above, the Division finds that permitting employees to submit documents either from medical or social services providers they saw such a provider for treatment, or to self-attest to a medical condition if obtaining documentation from a provider would be costly or require an unnecessary provider visit, or when documentation could not be obtained in a timely manner, strikes the right balance, by letting employers require documents if feasible and when a provider was seen, and to allow a record created by the employee in other situations.

Rule 3.5.6(C) similarly provides that, to substantiate under C.R.S. § 8-13.3-404(6) that leave was for a covered safety-related need (*i.e.*, domestic abuse, sexual assault, or criminal harassment, C.R.S. § 8-13.3-404(1)(c)), an employee can provide (1) a document from a health provider or a non-health provider of legal services, shelter services, social work, or similar services; (2) a legal document indicating a safety-related need that was the reason for the leave (*e.g.*, a restraining order, other court order, or police report); or (3) their own writing attesting to their need for safety-related leave. Several advocates for victims of domestic abuse, assault, and criminal harassment explained that it was critical for victims of such crimes to be able to obtain paid leave without onerous documentation or verification requirements, as legal and other

²² According to the Colorado Health Institute (CHI), approximately 6.5% of Coloradans had no health insurance whatsoever in 2019, and “nearly nine in 10 uninsured Coloradans (89.6%) cited cost as their reason for not having coverage in 2019, up from 78.4% in 2017.” [CHI’s 2019 Colorado Health Access Survey](#). For those individuals who are insured, the CHI survey indicates that high out-of-pocket costs remain a significant barrier in accessing necessary health care. In 2019, “affordability of healthcare remains a challenge, with one in five (20.2%) Coloradans forgoing doctor, specialist, or prescription services due to cost. Mid- to low-income Coloradans are more likely to face this barrier.” *Id.*

²³ HFWA sponsor Senator Stephen Fenberg explained this statutory purpose in committee testimony:

About 40% of Coloradoans actually don’t have access to a single day of paid sick leave. And that is what this bill is about...This is a bill that ensures that everybody has a very basic level of access to paid sick leave. And the reason why this is important is not just because, generally speaking, people should be able to take a day off to take care of themselves if they’re sick, or take care of their child if their child is sick, but probably more importantly, this is for the state’s economy and for our workplaces in general, and frankly for consumers, who go to a lot of these workplaces. And that’s because we know that if an employee does not have access to paid sick leave, they are much less likely to stay home when they are sick. And if there is anything that we’ve learned in these last few months, it’s that we really need people to stay home when they are sick, with something that’s contagious especially. And that is true in the world we live in right now with COVID-19, but frankly that’s also true in flu season, that’s true in many different situations. If someone can stay home, it means they are not getting their colleagues sick, they are not getting customers sick, and it means that our economy potentially is not going to have a virus spread as fast as we’ve seen it. And we do know that if more people stayed home earlier, at the beginning of this crisis, we do know that this virus would not be as severe and would have spread slower.

Senate State, Veterans, and Military Affairs Committee, June 3, 2020 (Emphasis added). This intent was echoed at same committee hearing by another HFWA sponsor, Senator Jeff Bridges:

There are articles with all sorts of studies saying that paid sick leave reduces the severity of pandemics like this [COVID-19 pandemic]. This is a response to the situation we’re in right now, and it revealed a hole that we had in our system. No one wants burgers or fries with a side of COVID; but for folks who are living on the edge, they need that paycheck, and if they’re feeling ill, a little under the weather, they may go to work in order to get that paycheck. This bill simply says that you should have 48 hours a year... This is something we know that we know keeps employees safe, it keeps co-workers safe, it keeps customers safe, and it is good for the public health of the state of Colorado. [Emphasis added.]

forms of documentation substantiating such crimes can be difficult, if not impossible, for many victims to obtain. Indeed, many victims do not feel safe reporting that they were victims of crimes to legal authorities. For example, in written comments, Lydia Waligorski, the Public Policy Director of Violence Free Colorado, explained that

The term ‘reasonable’ used in the bill is not clearly defined... *[W]ithout a strong departmental rule, there is risk the safe time provision may become inaccessible to those it was created to help... [R]eporting [to law enforcement] may not be a safe choice for many people [and there are] physical and bureaucratic barriers involved in getting ... documents even if someone reported right away. In the time of COVID, even a letter from an advocate, which requires informed consent and a signed release to be generated, is reliant upon a survivor not only having a same-day or week appointment...but being able to access the technology needed to secure it. Not everyone has smartphones and home printers. Police reports are often not accessible to survivors while an investigation is ongoing and can take months and money to access once the case is over. Courts who are meeting virtually at this time do not always hand a paper copy of a protection [order] to victims even when sessions are held in person. We would also be concerned and strongly reject the sentiment that an employer should be able to demand evidence of physical injury or a medical note as documentation of abuse and violence. Again with the necessary rise in telehealth, and the lack of insurance coverage faced by many, [it] would be grossly unfair to require an employee to pay out of pocket to be seen at an urgent care or another facility Self-attestation should be enough to use an earned sick day benefit.²⁴*

Similarly, Brie Franklin, the Executive Director of the Colorado Coalition Against Sexual Assault, noted in written comments as follows:

According to the CDC, 1 in 2 women and 1 in 4 men in Colorado have experienced sexually violent crimes in their lifetime...Victims of sexual violence face both immediate and chronic physical, psychological, social, and economic consequences....Workers who are paid low wages often do not have the time or money to access medical care, contact the appropriate authorities or obtain a protective order when they experience violence...*Vast research has consistently found that sexual assaults are reported at alarmingly low rates. It is estimated that over 63% of sexual assaults are not reported to police and, therefore, would not have documentation of a police report.* For this reason, more accessible standards in the verification process, such as limiting the type of documentation employers can request to allow victims to provide their own affidavit or self-attestation in lieu of any “official” documents (e.g., police report, protection order, or other government documentation), are necessary to truly provide access to paid leave for victims.²⁵

These comments, from well-informed stakeholders working directly with victims of domestic abuse, sexual assault, and criminal harassment, along with HFWA’s requirement that an employer cannot ask for “details” of an employee’s “health or safety information,” C.R.S. § 8-13.3-412(1), indicate that Rule 3.5.6(D)’s flexibility — in allowing an employee who require safety-related leave to provide a writing to the employer self-attesting to the need for such leave — are necessary to preserve the clear legislative intent that employees who qualify for such leave should be able to take it without onerous documentation requirements and without putting their own lives in danger, and onerous documentation or verification requirements could discourage employees from taking leave to which they are statutorily entitled.

Rule 3.5.6(D) also clarifies HFWA’s “reasonable documentation” requirement under C.R.S. § 8-13.3-404(6) by providing that employee submission of any required documentation to an employer may be provided (1) by any reasonable method, including but not limited to electronic transmission, (2) at any time until whichever is sooner of employee’s return from leave (or termination of employment, if the employee does not return), and, (3) with or without the employee’s signature, notarization, and any other particular document format.

Rule 3.5.6(E) provides that pursuant to C.R.S. § 8-13.3-412(2), any information an employer possesses regarding the health of an employee or the employee’s family member, or regarding domestic abuse, sexual assault, or criminal

²⁴ Written comments by Lydia Waligorski, Public Policy Director, Violence Free Colorado, Aug. 21, 2020.

²⁵ Written comments by Brie Franklin, Executive Director, Colorado Coalition Against Sexual Assault, Aug. 20, 2020, and by Sterling Harris, Chief Deputy Director, Colorado Organization for Victim Assistance (COVA), Aug. 20, 2020 (COVA “supports the ability for survivors of domestic violence, sexual assault, and harassment to access paid leave by their own self-attestation. Victims and survivors of these types of interpersonal violence experience hardships that go far beyond the direct incidents. Financial instability and the ability to access paid time off is a serious challenge for survivors in Colorado. Reducing the barriers for survivors to access paid time off by allowing them to self-attest to their experience is an important step towards creating supportive workplace policies”).

harassment affecting an employee or employee's family member, shall be treated as confidential and employers are not permitted to disclose such information to any other individual, except if the affected employee provides written permission prior to disclosure. C.R.S. § 8-13.3-412(2)(c). The rule also provides that if the information is in writing, whether on hard copy (paper) or in electronic form, it shall be maintained on a separate form and in a separate file from other personnel information, and shall be treated as a confidential medical record. C.R.S. § 8-13.3-412(2)(a)-(b).

Rule 3.5.6(F) provides that, pursuant to C.R.S. § 8-13.3-404(6), if an employer reasonably deems an employee's documentation deficient, without imposing a requirement of more documentation than HFWA or applicable rules permit, then the employer must, before denying leave, (1) notify the employee within seven days of either receiving the documentation or the employee's return to work (or termination of employment, if the employee does not return), and (2) provide the employee an opportunity to cure the deficiency within seven days of being notified that the employer deems the existing documentation inadequate. The Rule is needed to clarify an employer's obligations in the case of deficient documentation, due to the fact that employers must pay HFWA-qualifying leave in certain circumstances, subject to anti-retaliation provisions, but also may discipline employees for improper use of sick pay leave, *see* C.R.S. § 8-13.3-418, and are not required to grant sick pay leave for non-qualifying conditions.

Rule 3.5.7 covers employer recordkeeping of paid leave under C.R.S. § 8-13.3-409(1). Rule 3.5.7 derived in part from a similar sick leave ordinance adopted in Minneapolis, but adapted to HFWA.²⁶ Rule 3.5.7 provides that, pursuant to C.R.S. § 8-13.3-409(1), an employer "shall retain records for each employee for a two-year period, documenting hours worked, paid sick leave accrued, and paid sick leave used" (C.R.S. § 8-13.3-409(1)), except that two-year limit does not diminish the obligation to retain pay statement records for three years (C.R.S. § 8-4-103(4.5)). To ensure employees have the ability to meaningfully use and access HFWA leave, the rule also provides that, upon an employee's request, an employer must provide, in writing or electronically, documents sufficient to show, or a dated statement containing, the employee's then-current amount of (1) available paid leave (including accrued leave), and (2) used paid leave, including including information as to any supplemental leave provided and used subject to C.R.S. § 8-13.3-405(3). The rule limits such requests to no more than once per month, except that employees may make an additional request when any need for HFWA leave arises. Additionally, the rule provides that employers may choose a reasonable system for fulfilling such requests, including but not limited to listing such information on each pay stub, using an electronic system where employees can access their own information, or providing the necessary information in a letter or an e-mail.

Rule 3.5.8 details rules as to the HFWA provisions for collective bargaining agreements ("CBA") that already provide equivalent or more generous paid sick leave, C.R.S. §§ 8-13.3-415(2),(3). The Division initially heard plausible views that Section 415 renders *all* of HFWA inapplicable to those with CBAs, based on its language that HFWA "does not apply" if a CBA provides "equivalent or more generous paid sick leave," and that Section 415 applies to both CBAs pre-dating HFWA and those after HFWA "if the requirements of [HFWA] are expressly waived" in the CBA. After careful study of the text and the legislative history, the Division finds that Section 415 actually has a more limited impact.

Because Section 415 was a late addition to the legislation, no committee hearings addressed it, but there is informative legislative history: Senate floor remarks by Senator Jeff Bridges, one of two Senate sponsors of HFWA, expressly explaining Section 415, and doing so in the presence of nearly the entire Senate, without rebuttal.

Senator Bridges: "Thank you Mr. President. And just, actually, since it came up here, *I want to establish one more time the legislative intent* on this. It is *not that you can waive out in your collective bargaining agreement any of the protections* that are in this bill. It's that you can only accept more generous terms than are in this bill. So only if — *so for instance, the bill requires 1 hour earned for every thirty hours worked, you can waive out of that and instead get one hour earned for every 15 hours worked.* I believe there was already language in the bill that made this acceptable, but we want to make it really clear that, similar to a minimum wage increase, *you don't need to open up your collective bargaining agreement to increase the wages of folks making less than that new wage, this is simply something that goes on top of existing collective bargaining agreements.*"

[The Senate President then noted that there was "no further discussion," and then held the vote on the

²⁶ [Minneapolis Mun. Code, 40-3-40.270.](#)

motion “for the re-passage of Senate Bill 205,” which then passed.]²⁷

This intent clarifies, and comports with, what the Division finds to be a sound reading of the text of Section 415, for several reasons. First, Section 415 contains separate subparts (2) and (3) to impose a requirement of “express waiver” on post-HFWA CBAs, while not so requiring for pre-HFWA CBAs — corroborating that a key purpose of Section 415 is, as Senator Bridges explained, to make “clear that ... you don’t need to open up your [existing] collective bargaining agreement” because what HFWA requires “simply ... goes on top of existing collective bargaining agreements.”

Second, Section 415 does not use the term “exempt” or “exemption,” because it is not a true “exemption.” Rather, it requires that CBAs provide “equivalent or more generous” leave than what HFWA requires. Because a CBA cannot satisfy Section 415 without actually providing what the statute requires, Section 415 is not an exemption from the statute.

Third, the Section 415 requirement of “equivalent or more generous paid sick leave” cannot be read in isolation, because the text of the statute does far more than require a number of leave hours; instead, it robustly protects and effectuates employee rights to actually benefit from those leave hours — with, for example: restrictions on what documentation and notice employees can be required to provide; protection of unused accrued leave via carryover year to year; rights to use smaller increments of leave than an entire workday when an employee needs only one or a few hours of leave; rights to notice in multiple languages and through multiple means (*i.e.*, a poster and individual written notice); and broad definitions of, and broad remedies for, unlawful retaliation based on, or interference with, exercising HFWA rights.

Fourth, the text of Section 415 notably does not say a compliant CBA renders HFWA inapplicable to *employers*, only that such a CBA makes HFWA “not apply to *employees*” (emphasis added). Given the above-detailed extensive employee protections in HFWA, the best reading of the provision that HFWA “does not apply to [CBA-covered] employees” is not that it allows lesser employee rights, protections, or enforcement. Rather, Section 415 assures that HFWA does not require *additional* paid leave to those already receiving enough — *i.e.*, the HFWA requirement that an employee receive 48 hours of paid leave does not apply to an employee *already* receiving 48 hours of paid leave via CBA. That is the sponsors’ reading that Senator Bridges elaborated: that the effect of Section 415 is “not that you can waive out in your collective bargaining agreement any of the protections that are in this bill. It’s that you can only accept more generous terms than are in this bill. So only if — so for instance, the bill requires 1 hour earned for every thirty hours worked, you can waive out of that and instead get one hour earned for every 15 hours worked.”

(F) Rule 4: Investigations

Rule 4.4.5 adds a preservation requirement consistent with other Division rules.²⁸ This rule requires employers to preserve relevant records upon filing or commencement of a claim, complaint, or investigation under the Rules. Without a rule, employers *still* would have preservation duties, because failure to preserve relevant records may yield varied negative consequences and adverse inferences, some expressly provided in statutes the Rules enforce,²⁹ and others simply within the discretion of the factfinder who must decide issues in the case in the absence of preserved documents.³⁰ The

²⁷ [Audio, Colorado Senate, June 15, 2020](#) (at 21:10-22:40; tally at end showed 31 of 35 Senators present and voting; emphases added).

²⁸ See Equal Pay Transparency Rule 3.4.4, 7 CCR 1103-13; Colorado WARNING Rule 3.3.5, 7 CCR 1103-11.

²⁹ *E.g.*, Colorado Wage Act, C.R.S. § 8-4-103(4.5) (“An employer shall retain records reflecting the information contained in an employee’s itemized pay statement as described in subsection (4) ... [for] at least three years after the wages or compensation were due. The records shall be available for inspection by the division, and the employer shall provide copies of the records upon request by the division or the employee. The director may impose a fine of up to two hundred fifty dollars per employee per month on an employer who violates this subsection (4.5) up to a maximum ... of seven thousand five hundred”); HFWA, C.R.S. 8-13.3-409:

(1) An employer shall retain records for each employee for a two-year period, documenting hours worked, paid sick leave accrued, and paid sick leave used. Upon appropriate notice and at a mutually agreeable time, the employer shall allow the division access to the records for purposes of monitoring compliance with this part 4. (2) If an issue arises as to an employee's right to paid sick leave and the employer has not maintained or retained adequate records for that employee or does not allow the division reasonable access to the records, the employer shall be presumed to have violated this part 4 unless the employer demonstrates compliance by a preponderance of the evidence.

³⁰ *E.g.*, *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 687-88 (1946) (“Where the employer’s records [of time worked] are inaccurate or inadequate ... an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.”); *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 109 (2d Cir. 2001) (“where ... a party has violated an EEOC record-retention regulation, a violation of that regulation can amount to a breach of duty necessary to justify a spoliation inference in an employment discrimination action”); *He v. Home on 8th Corp.*, No. 09 CV 5630, 2014 U.S. Dist. LEXIS 114605, at *17-18 (S.D.N.Y. Aug. 13, 2014) (holding employer not entitled to tip credit due to failure to hang required poster: “Defendant was unable to

Division thus finds that (A) a preservation rule is needed to state the relevant preservation duties more clearly and predictably than they would exist, with more variance in application, without a rule, and (B) that such a rule imposes no new or undue burden on employers, given the preexisting preservation rules in statutes the Rules enforce. Finally, Rules 4.7(D) and 4.8.2(D) were added to Rule 4.8, to incorporate HFWA retaliation and interference provisions.

(G) Rule 5: Determination

Rule 5.1 reiterates and codifies the applicability to claims under these rules of other statutes and rules. Rule 5.1.4, which other Division rules are being amended to mirror, aims to clarify remedies the Division may order. Until recently, the overwhelming majority of Division investigations were individual unpaid wage claims requiring only a monetary award to a claimant, plus possible penalties and fines, but the Division now investigates a much broader range of labor standards issues, requiring a much broader range of remedies, as Part IV(A) above details. Various new statutory provisions provide authority to issue applicable orders,³¹ but such authority long has existed in the Article 1 of Title 8 provisions establishing Division investigation and enforcement powers.³² Rule 5.1.4 thus aims to detail, and catalogue in one place, the applicable range of remedies authorized by a number of different statutes.

(H) Rule 6: Appeals

Rule 6.10 is amended, like Rule 3.4, to state expressly an aspect of the Division's procedural discretion, that an appeal may be sequenced (*e.g.*, bifurcated) into stages, to yield two or more phases and/or decisions. These are matters on which the Division already had discretion, since no statute or rule disallows sequencing proceedings as appropriate. The Division believes that such aspects of its discretion now have increased relevance due to the newly broadened range of Division appeals: not just ordering wages, but also, where appropriate, compliance orders to change policies, ordering reinstatement of employees or workers, and other forms of relief (detailed in Part (IV)(A) above). The more complex or multi-faceted an appeal is, the more value there is in sequencing it to allow certain threshold matters to be examined first.

V. EFFECTIVE DATE. These rules take effect January 1, 2021.



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

November 10, 2020

Date

produce any poster—or even a picture of such a poster hanging on the wall. Defendant's failure to produce any poster that he claims he hung before this lawsuit was filed weighs in Plaintiffs' favor, especially because someone being sued for failing to comply with federal and state minimum wage laws likely would have a strong incentive to preserve all documents relating to his compliance.”)

³¹ *E.g.*, C.R.S. §§ 8-13.3-410 (“coordinate implementation and enforcement of this part 4 and adopt rules as necessary for such purposes”), 411 (“(1) The director and the division have jurisdiction over the enforcement of this part 4 and may exercise all powers granted under article 1 ... to enforce this part 4. (2) The division may enforce the requirements of this part 4. (3) Pursuant to section 8-1-130, any findings, awards, or orders issued by the director with respect to enforcement of this part 4 constitute final agency action.”).

³² *E.g.*, C.R.S. §§ 8-1-107(2) (Division has “duty and the power to ... (b) Inquire into and supervise the enforcement, with respect to relations between employer and employee, of ... all other laws protecting the life, health, and safety of employees in employments and places of employment; ... [and] (p) Adopt reasonable and proper rules and regulations relative to the exercise of [these] powers and ... to govern the proceedings of the division and to regulate the manner of investigations and hearings”); 8-1-108(3) (“All orders of the division shall be valid and in force and prima facie reasonable and lawful until they are found otherwise in an action brought for that purpose, pursuant to the provisions of this article...”); 8-1-111 (Division “vested with the power and jurisdiction to have such supervision of every employment and place of employment ... as may be necessary adequately to ascertain and determine the conditions under which the employees labor, and the manner and extent of the obedience by the employer to all laws and all lawful orders requiring such employment and places of employment to be safe, and requiring the protection of the life, health, and safety of every employee in such employment or place of employment, and to enforce all provisions of law relating thereto”; “vested with power and jurisdiction to administer all provisions of this article with respect to the relations between employer and employee and to do all other acts and things convenient and necessary to accomplish the purposes of this article”); 8-4-111(1),(6) (“[Division] duty ... to inquire diligently for any violation of this article, and to institute the actions for penalties or fines ... in this article in such cases as ... [it] deem[s] proper, and to enforce generally the provisions of this article”; and “right of the division to pursue any action available with respect to an employee ... identified as a result of a wage complaint or ... an employer in the absence of a wage complaint”); 8-6-104 to -106 (104, “It is unlawful to employ workers in any occupation ... under conditions of labor detrimental to their health or morals”; -105, “[Division] duty ... to inquire ... into the conditions of labor surrounding ... employees in any occupation ... if the [Division] ... has reason to believe that said conditions of labor are detrimental to the health or morals of said employees”; -106, “[Division] shall determine ... standards of conditions of labor ... not detrimental to health or morals for workers”).