COLORADO
Department of
Labor and Employment

Division of Labor Standards and Statistics
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NOTICE OF ADOPTION AS TEMPORARY OR EMERGENCY RULES

Direct Investigation Rules, 7 CCR 1103-8 (Sept. 21, 2020)

I. Adopted Temporary Rules. As authorized by the Colorado Administrative Procedure Act, C.R.S. § 24-4-103, and C.R.S. Title 8, Articles 1, 2, 4-6, 12, 13.3, and 14.4, notice is hereby given of the adoption on a temporary basis of the following rules, the text of which accompanies this notice:

Direct Investigation Rules, 7 CCR 1103-8 (Sept. 21, 2020).

II. Basis, Purpose, and Specific Statutory Authority for Adoption of Temporary Rules. A Statement of Basis, Purpose, Specific Statutory Authority, and Findings accompanies this notice and is incorporated by reference.

III. Findings, Justifications, and Reasons for Adoption of Temporary Rules. The Findings, Justifications, and Reasons for Adoption as Temporary Rules, within the incorporated Statement of Basis, Purpose, Specific Statutory Authority, and Findings, are incorporated by reference.

IV. Effective Date of Adopted Temporary Rules. These rules are being adopted as temporary rules on September 21, 2020, replacing the existing Wage and Hour Direct Investigation Rules, 7 CCR 1103-8, effective immediately upon adoption on September 21, 2020, pursuant to C.R.S. § 24-4-103(6), and remaining in effect for whichever is sooner of: (A) 120 days after adoption, *i.e.*, through January 19, 2021; or (B) the date that permanent versions of these Rules proposed in September 2020 take effect.

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

September 21, 2020
Date

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STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY, AND FINDINGS FOR ADOPTION AS TEMPORARY OR EMERGENCY RULES

Direct Investigation Rules, 7 CCR 1103-8 (Sept 21, 2020)

(1) BASIS. These rules conform the Direct Investigation Rules, 7 CCR 1103-8, to multiple recently and/or imminently effective additions and changes to labor standards law in C.R.S. Title 8, including but not limited to the Public Health Emergency Whistleblower Act, C.R.S. § 8-14.4-101 et seq. (effective July 11, 2020), the Healthy Families and Workplaces Act, C.R.S. § 8-13.3-401 et seq. (effective July 14, 2020), and the Equal Pay for Equal Work Act, C.R.S. §§ 8-5-201 to 8-5-203 (effective January 1, 2021), and serve important public needs that the Director of the Division of Labor Standards and Statistics (hereinafter, "Director" and "Division," respectively) finds are best served by these rule updates, amendments, and supplements.

(2) SPECIFIC STATUTORY AUTHORITY. The Director is authorized to adopt rules and regulations to enforce, execute, implement, apply, and interpret Articles 1, 2, 4-6, 12, 13.3, and 14.4 of C.R.S. Title 8, and all rules, regulations, investigations, and proceedings thereunder, by the Administrative Procedure Act, C.R.S. § 24-4-103, and provisions of the above-listed Articles, including but not limited to: C.R.S. §§ 8-1-101, -103, -107, -108, -111, -130; 8-2-130; 8-4-111; 8-5-203; 8-6-102, -104, -105, -106, -108, -109, -111, -116, -117; 8-12-115; 8-13.3-403, -407, -408, -410; and 8-14.4-103, -105, -108.

(3) TEMPORARY RULES. Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds that: **(A)** demonstrated need exists for these rules, as detailed in Part 4, which this finding incorporates; **(B)** proper statutory authority exists for the rules, as detailed in Part 2, which this finding incorporates; **(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.

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

(A) Broad Purpose of Various Amendments

Until recently, the overwhelming majority of Division investigations were of 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

[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).

Division with labor standards enforcement that is not limited to ordering wages paid, *e.g.*: investigating circumstances of and motivations for employee terminations, to determine whether they constituted unlawful retaliation or interference with rights;[2] ordering reinstatement of such workers found to be unlawfully terminated;[3] awarding lost pay for such unlawful terminations, which may require estimating future lost earnings;[4] issuing compliance orders to modify workplace policies that unlawfully restrict, or to adopt policies comporting with, statutory rights;[5] ordering changes to job postings with unlawful content;[6] and mandating posters and written notice to employees and workers of these and other rights.[7] Various new statutes grant authority to issue such orders,[8] and such authority pre-existed in the C.R.S. Title 8, Article 1, provisions granting investigation and enforcement powers to the Division.[9] 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.

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

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

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

[5] *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 issuance of notice to employees and certain record-keeping policies); PHEW, (disallowing policies against, and non-disclosure policies restricting, certain worker expressions of concern as to a public health emergency; and mandating that workers be permitted to use personal protective equipment of their choosing in certain circumstances); Equal Pay for Equal Work Act, C.R.S. §§ 8-5-201, -202 (mandating certain contents for job postings; and requiring certain record-keeping policies).

[6] *E.g.*, Equal Pay for Equal Work Act, C.R.S. § 8-5-201 (mandating certain contents for job postings); Chance to Compete Act, C.R.S. § 8-2-130 (barring most job postings from inquiring about applicants' criminal records).

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

[8] *E.g.*, HWFA, 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").

[9] *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").

Accordingly, the words "Wage and Hour" are deleted from the title of these rules, and many of the below-detailed specific amendments conform these rules to the broader scope of labor standards law that now provides a basis for Division investigations, determinations, and orders.

(B) Rules 1.1, 1.4, 2.2, 2.3, 2.9 & 3.1.3: Incorporating Recent Enactments and Developments

Rule 1.4 is amended to incorporate the broader range of Articles in C.R.S. Title 8 that the Division may investigate (which Articles include all 2019 and 2020 statutory amendments to Title 8 detailed in Part (4)(A) above), along with key Division rules promulgated under those Articles. Rule 1.1 is amended to list the key specific statutory sections within those Articles granting rulemaking, investigation, enforcement, and other related authority applicable to these Rules. In accord with those changes to Rules 1.1 and 1.4, Rule 2.9 is amended to clarify and define "labor standards law" to include the same range of labor laws, and Rule 3.1.3 is amended to include additional relevant types of labor standards violations under that full range of labor standards law. These amendments are necessary to ensure that these Rules reflect the authority and statutory mandate of the Division's Direct Investigations Unit to investigate alleged violations of, enforce, and otherwise implement labor standards law. Rule 2.2 and 2.3 are amended to incorporate all definitions of those covered -- as "employees" and "employers," or as non-employee "workers" and the non-employer "principals" who retain them -- under applicable labor standards law, including but not limited to the laws detailed in Part (4)(A) above, several of which adopted new definitions of those terms, as listed in Rule 2.2 and Rule 2.3.

(C) Rules 3.13 & 6.14: Investigation Termination; Investigation or Appeal Sequencing

Rules 3.13 and 6.14 are amended to state expressly two aspects of procedural discretion: that the Division may terminate an investigation at any time prior to issuing a final determination, without prejudice (Rule 3.13); and that an investigation, determination, or appeal may be sequenced (*e.g.*, bifurcated) into stages, so as to yield one or more phases and/or decisions (Rule 6.14).

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 (4)(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.

(D) Rule 4.1: Preliminary Findings

The wording in Rule 4.1 is amended in various parts to indicate that, as detailed in Part (4)(A) above, remedies for Division Investigations may include not only wages, along with penalties and/or fines under Colorado wage law, but also other remedies authorized by other labor standards law. Rule 4.1.3 is also amended to delete "proof of payment of some or all of the identified wages that appear to be owed, or some combination of both." Per already-adopted rule amendments earlier this year, a Notice of Preliminary Finding is no longer a written demand, and thus no proof of payment is required.

Rule 4.1 is further amended to provide that a Notice of Preliminary Findings ("NPF") "may," rather than "shall," be sent to an employer. The NPF rule has applied since only late spring 2020;[10] from

[10] The Direct Investigations program began operations in late 2019, but began issuing determinations once investigations

these initial months of experience, the Division now finds that in many cases, the NPF stage, which commonly can take 1-2 months, has not proven useful or necessary for providing notice and opportunity to submit evidence and arguments, nor for changing case outcomes. The NPF stage thus has proven not to be worth the burden on the employer, or the significant delay that backlogs the Division's docket. Thus, the Division finds that an NPF should not be required in *all* cases -- and that the negative repercussions of delays imposed by an NPF mandate have been significantly increased by new laws.

As detailed in Part (4)(A) above, new workplace health and safety laws -- most notably, on paid sick leave, whistleblowing, and PPE-use -- charge the Division with ordering new remedies, including but not limited to reinstating individuals terminated unlawfully, and issuing compliance orders to reform unlawful policies. Where an employment policy violates a legislative mandate to protect workplace health and safety, delaying a remedy by months risks letting a workplace health and safety threat continue.[11] Where retaliation or interference costs a worker their livelihood, delaying a remedy by months (*e.g.*, reinstatement and lost pay) risks letting an unlawful termination cause irreparable harm, such as when a worker cannot pay rent or provide basic family necessities, or when prolonged unemployment harms re-employment odds. Such harms from delay are significant, and thus unwarranted unless genuinely necessary -- and, as just noted, the NPF mandate has proven *not* to be necessary.

Sending draft findings is neither required by statute nor generally mandated in administrative proceedings, so there is no legal need to impose it where not useful. However, the Division believes NPFs do have value as a non-mandatory tool, available for cases in which they may assist employers or the Division. For example, in certain cases, the Division may see a realistic prospect for an employer to redress a violation and/or offer a settlement upon being notified of proposed findings. In others, the Division, after investigation, may see value in sharing proposed findings and/or soliciting more input from the employer before reaching a final determination -- akin to a court, after a trial but before entering a final judgment, soliciting further submissions or scheduling another hearing. Thus, the Division is not eliminating the NPF stage, but instead making it discretionary, changing "shall" to "may," with other technical edits to conform to that change (including deleting Rule 4.2, which already made fines-only NPFs optional), and otherwise leaving unchanged the nature and contents of an NPF.[12]

(E) Rule 5: Determination

Rule 5.1.3 is amended to delete the following: "If a Notice of Assessment names an employee who is owed wages or penalties, the division will make all reasonable efforts to send a copy of the Citation and that Notice of Assessment to the named employee." Direct Investigations typically do not arise from individual worker complaints mandated to be investigated, but rather are prompted by discretionary and strategic Division initiatives, and commonly span dozens or hundreds of workers, or more. While unpaid wage determinations require sending each employee a *payment*, that does not necessarily require sending each employee *case documents*, which can yield burden and delay. However, there are cases in which sending each worker a copy of the Citation and Notice of Assessment

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were concluded only as of May 2020.

[11] *E.g., Mazurkiewicz v. Nw. Mem. Hosp.*, No. 2020 L 3511 (Ill., Cook Cnty. Ct., Sept. 15, 2020) (in case of termination for sending email about inadequate workplace PPE, noting the the state "has a clearly mandated public policy of stopping the spread of COVID-19 and protecting the health and safety of its citizens, and that public policy is clearly implicated by the use of facemasks by ... workers," and a complaint about inadequate workplace PPE "relates to the spread of COVID-19 within her … work environment and therefore … has 'an impact on the general welfare of … citizens as a whole'").

[12] An NPF still will be issued in all cases with Notices of Investigation sent *before* the September 21st effective date of this rule.

will be useful. Accordingly, the Division finds that this step should be discretionary, rather than mandatory.

Rule 5.1.4 is amended to indicate that an employer may be sent a Notice of Assessment (NOA) inclusive of all owed wages, penalties, fines, and/or other remedies assessed upon the employer. This clarifies that an inclusive NOA may indicate totals due for all employees in one document. Previous rules implied that employers will receive separate NOAs for each affected employee, which could prove burdensome and confusing in cases with dozens or hundreds of affected employees, without adding any greater clarity than having the same information appear in a single NOA covering all employees.

Rule 5.1.7 is amended to provide that the Division may reduce penalties and waive fines if payment is made within 14 days of a Citation's issuance and there was a prior written demand. Because the Direct Investigation rules were amended in May of 2020 to provide that the Citation, and not the Notice of Preliminary Findings, constitutes the Division's written demand to the employer, this amendment is necessary to make Rule 5.1.7 conform to the Division's May 2020 amendment.

(F) Rule 6.1.1: Appeal

Rule 6.1.1 is amended to include "or other grounds" for an appeal -- to make clear that while an employer can appeal by arguing that there was clear error in a determination, they also can appeal by arguing any other grounds on which they wish to base an appeal. This does not imply that all appeal grounds will be accepted as valid, only that the Division does not intend for any particular standard of review to limit the grounds that an employer may argue on appeal.

(G) Rule 9: Discrimination and Reprisal Prohibited

Rule 9 is amended to include, given the new laws detailed in Part (4)(A) above, the broader range of retaliation, interference, and/or discrimination prohibitions applicable to direct investigations.

(H) The Need for Temporary or Emergency Rulemaking

Temporary or emergency rules are necessary because of various developments, including the new laws and accompanying new mandates for the Division's work detailed above in Part (4)(a) (which is incorporated into this Part as well, because it is part of the basis for the need for temporary or emergency rulemaking). These new developments require imminent adjustment of rules for the Division to fulfill its statutorily mandated duty to enforce, execute, implement, apply, and interpret labor standards laws contained in Articles 1, 4-6, 13.3, and 14.4 of C.R.S. Title 8. Further, various labor standards laws that the Division enforces, particularly the various recently enacted ones, are necessary for protection of public health and safety, because they:

- protect workplaces and their customers from contagious disease by implementing rights and responsibilities for ill workers to take leave from work;[13]
- protect workers and their family members who require paid leave from work not only due to the worker's or a family member's illness, but also because they were the victims of domestic violence, sexual assault, or stalking;[14]
- protect whistleblowing on workplace health or safety threats related to a public health

[13] Healthy Families and Workplaces Act, 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 for COVID-19 in 2020, and for other illnesses in 2021).

[14] *Id.*

emergency;[15]

- protect workers' rights to wear their own personal protective equipment if workplace equipment is lacking, which in turn protects co-workers, customers, and the public;[16]
- guard against unlawful employment practices that cost workers their livelihoods, such as retaliatory terminations for exercising paid sick, whistleblowing, and protective equipment rights -- unlawful terminations that not only hurt the workers losing jobs, but also cause broader social harm by making their "children and families suffer";[17] and/or
- guard against the sort of systemic wage theft -- paying sub-minimum wages, or refusing to pay workers at all -- that are the types of violations the Division's direct investigations unit most commonly targets because the legislature has long declared such violations to "have a pernicious effect on [workers'] health" and thus to be "a matter of statewide concern" that "[t]he welfare of the state of Colorado demands" to be addressed.[18]

The Division therefore finds, consistent with the standard for adopting temporary or emergency rules, that immediate adoption of these rules is imperatively necessary for the preservation of public health, safety, or welfare, and that compliance with permanent rulemaking provisions before adoption would be contrary to the public interest -- the requirement for a "temporary or emergency" rule, effective immediately and for up to 120 days, under the Administrative Procedure Act:

> A temporary or emergency rule may be adopted without compliance with the [ordinary rulemaking] procedures … and with less than the twenty days' notice prescribed … , or where circumstances imperatively require, without notice, only if the agency finds that immediate adoption of the rule is *imperatively necessary to comply* with a state or federal law or federal regulation *or* for the preservation of *public health, safety, or welfare* and compliance with the requirements of this section would be *contrary to the public interest* and makes such a finding on the record. Such findings and a statement of the reasons for the action shall be published with the rule. … A temporary or emergency rule shall become effective on adoption or on such later date as is stated in the rule, shall be published promptly, and shall have effect for not more than one hundred twenty days ….

(C.R.S. § 24-4-103(6)(a) (emphasis added).) The Division finds that the above-detailed reasons easily

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[15] Public Health Emergency Whistleblowing Act, H.B. 20-1415, C.R.S. §§ 8-14.4-101 et seq. (enacted and effective July 11, 2020) (protecting the right to, and prohibiting retaliation based on, whistleblowing related to a public health emergency).

[16] *Id*. (also protecting the right to, and prohibiting retaliation based on, wearing certain personal protective equipment).

[17] H.B. 19-1025, Chance to Compete Act (May 28, 2019) (limiting job applicant criminal history inquiries, but with more broadly applicable legislative findings on the significant negative social effects of unlawful practices that cost individuals jobs: "Children and families suffer when people … are unable to work or work at jobs that are below their potential given their education and skills; people … who experience unemployment or underemployment struggle to provide for their families and are more likely to depend on public assistance; and children are less likely to receive financial support").

[18] C.R.S. §§ 8-4-101 ("(1) The welfare of the state of Colorado demands that workers be protected from conditions of labor that have a pernicious effect on their health and morals, and it is therefore declared, in the exercise of the police and sovereign power of the state of Colorado, that inadequate wages and unsanitary conditions of labor exert such pernicious effect. (2) The general assembly hereby finds and determines that issues related to the wages of workers in Colorado have important statewide ramifications for the labor force in this state. The general assembly, therefore, declares that the minimum wages of workers in this state are a matter of statewide concern"), -104 ("It is unlawful to employ workers … [in] the state of Colorado for wages which are inadequate to supply the necessary cost of living and to maintain the health of the workers so employed.").

exceed various justifications that have been found sufficient for "temporary or emergency" rules.[19]

(5) EFFECTIVE DATE. These rules are being adopted as temporary rules on September 21, 2020, replacing the existing Wage and Hour Direct Investigation Rules, 7 CCR 1103-8, effective immediately upon adoption on September 21, 2020, pursuant to C.R.S. § 24-4-103(6), and remaining in effect for 120 days after adoption, through January 19, 2021, or the date that permanent versions of these rules proposed in September 2020 go into effect, whichever is sooner.

Scott Moss
Director
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[19] *E.g.*, *Elizondo v. Motor Vehicle Div.*, 570 P.2d 518, 523 (Colo. 1977) (holding that helping applicants obtain probationary driver's licenses, more quickly than regular rulemaking allows, sufficiently justified "temporary or emergency" rules); *Colo. Health Care Ass'n v. Dep't of Soc. Servs.*, 598 F. Supp. 1400 (D. Colo. 1984), *aff'd*, 842 F.2d 1158 (10th Cir. 1988) (holding "budgetary emergency" was sufficient justification, even if the budget problem was known "long before," and without strict need for "specific, objective data," as long as "the reasoning process that leads to the rule's adoption [was] defensible").