COLORADO
Department of
Labor and Employment

Division of Labor Standards and Statistics
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COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT
DIVISION OF LABOR STANDARDS AND STATISTICS

NOTICE OF PUBLIC HEARING CONCERNING PROPOSED RULES:

(1) COLORADO OVERTIME AND MINIMUM PAY STANDARDS ("COMPS") ORDER #37, 7 CCR 1103-1;

(2) WAGE PROTECTION RULES, 7 CCR 1103-7;

(3) DIRECT INVESTIGATIONS RULES, 7 CCR 1103-8;

(4) COLORADO WHISTLEBLOWER, ANTI-RETALIATION, NON-INTERFERENCE, AND NOTICE-GIVING ("COLORADO WARNING") RULES, 7 CCR 1103-11;

(5) COLORADO STATE LABOR RELATIONS RULES, 7 CCR 1103-12; and

(6) EQUAL PAY TRANSPARENCY RULES, 7 CCR 1103-13.

Notice is hereby given of a public hearing to afford all interested persons an opportunity to be heard prior to the adoption of the above-listed rules, under the authority granted to the Division of Labor Standards and Statistics by the Administrative Procedure Act, C.R.S. § 24-4-103, and the provisions of C.R.S. Title 24, Article 50, and Title 8, Articles 1, 2, 3, 4, 6, 12, 13.3, 14.4, including C.R.S. §§ 8-1-101, -103, -107, -108, -111, -116, -117, -130; 8-2-130; 8-3-105; 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, -409, -410; 8-14.4-103, -105, -108; 8-14.4-103, -105, and -108; and 24-50-1103, -1106(4).

Date and Time of Hearing: **Monday, November 2, 2020, at 9:00 am**
Written Comment Deadline: **5:00 p.m. on Thursday, November 5, 2020**

The Division is administering this public hearing, and all interested persons are free to offer oral testimony and to listen to part or all of the hearing. However, due to the current public health crisis, **all participation will be by remote means**, not in-person at the Division's office. Interested persons may listen and/or testify either by phone or by computer or other internet-enabled device, as detailed below. **A recording of the hearing will be publicly posted after the hearing** on our **rulemaking page**.

Comments may be submitted through our online **form**, delivered by mail, faxed to 303-318-8400, or emailed to **michael.primo@state.co.us**. **Written comments become part of the same record as oral testimony**, and are reviewed by the same officials. Accordingly, interested persons **may submit written comments in lieu of oral testimony**, but certainly are free to participate by both means.

While not required, we request and highly recommend that **anyone interested in submitting written comments *or* oral testimony use this form**, either to submit a written comment, to RSVP to testify orally, or both. At the hearing, the first oral testimony will be by those who RSVP'd to testify. After all those who RSVP'd have testified, we will entertain any further oral testimony from others.

Instructions for Hearing Participation: Either of the below options will work to participate, but for orderly administration of participation, and to avoid possible audio feedback, please do not use both simultaneously.

(A) To Participate by Internet, *Including* Testifying:
visit this "Meet" webpage: **meet.google.com/zsy-dowb-suo**

(B) To Participate by Phone, Whether Just to Listen or to Testify:

call (US) +1 601-861-4481, and then enter this pin: 779 255 774#

You do not need to have any Google or other account to access any of the above means. This hearing is being held in accordance with the Colorado Administrative Procedure Act, C.R.S. § 24-4-101 et seq., and Colorado Open Meetings Law, C.R.S. § 24-6-401 (2020), to receive any testimony, written data, views, or arguments that interested parties may wish to submit regarding the proposed rules. There is no requirement to arrive by a particular time or stay the entire meeting.

Please contact us at michael.primo@state.co.us with any questions about how to access either the hearing or (after the hearing) its recording, or if you need accommodations or translation services to attend or participate.

Following is a summary of each set of proposed rules. Copies of the proposed sets of rules, including redlined copies showing all changes (except for new sets of rules), and a statement of basis and purpose further detailing each set of proposed rules, are available at **www.coloradolaborlaw.gov** or, by request at: **Colorado Division of Labor Standards and Statistics, 633 17th St., Denver, Colorado 80202**.

(1) Colorado Overtime and Minimum Pay Standards ("COMPS") Order #37, 7 CCR 1103-1: These amended rules are proposed to execute the annual inflation adjustment to minimum wages; to conform to amendments to legislative amendments to certain basic definitions (*e.g.*, "wages," "employee," and "employer") in the Healthy Families and Workplaces Act of 2020; to add a new sub-category to the professional exemption for creative employees; and to add other clarifying amendments to these rules.

(2) Wage Protection Rules, 7 CCR 1103-7: These amended rules are proposed to implement and enforce the Healthy Families and Workplaces Act, C.R.S. § 8-13.3-401 et seq., defining statutory paid sick leave as wages under C.R.S. § 8-4-101(14)(a)(I) to be investigated, implemented, and enforced by the Division; and to add other clarifying amendments to these rules.

(3) Direct Investigation Rules, 7 CCR 1103-8: These amended rules are proposed to conform to the broader scope of labor standards law that now provides a basis for Division investigations, determinations, and orders, and to respond to other recent developments; and to add other clarifying amendments to these rules.

(4) Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving ("Colorado WARNING") Rules, 7 CCR 1103-11: These new rules are proposed to implement and enforce multiple recent 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., the Healthy Families and Workplaces Act, C.R.S. § 8-13.3-401 et seq., the Equal Pay for Equal Work Act, C.R.S. §§ 8-5-101 et seq., and the Chance to Compete Act, C.R.S. § 8-2-130), as to anti-retaliation and non-interference with protected activity (including but not limited to public health concerns and use of personal protective equipment), and as to requirements for workplace postings, job announcements, and other notices to employees.

(5) State Labor Relations Rules, 7 CCR 1103-12: These new rules are proposed to implement and enforce the Colorado Partnership for Quality Jobs and Services Act, C.R.S. § 24-50-1101 et seq., governing certain labor-management relations in state employment.

(6) Equal Pay Transparency Rules, 7 CCR 1103-13: These new rules are proposed to implement and enforce Part 2 of the Equal Pay for Equal Work Act, C.R.S. §§ 8-5-201 to -203, as to transparency in job postings and opportunities for promotion or advancement, and related record-keeping duties.

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

Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving Rules ("Colorado WARNING Rules"), 7 CCR 1103-11, as proposed September 25, 2020; to be followed and replaced by a final Statement at the conclusion of the rulemaking process.

(1) BASIS. These Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving Rules ("Colorado WARNING Rules") implement and enforce multiple recent 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 ("PHEW"), C.R.S. § 8-14.4-101, et seq. (effective July 11, 2020), the Healthy Families and Workplaces Act ("HFWA"), C.R.S. § 8-13.3-401, et seq. (effective July 14, 2020), the Equal Pay for Equal Work Act, C.R.S. §§ 8-5-101 et seq. (effective Jan. 1, 2021), the Chance to Compete Act, C.R.S. §§ 8-2-130 (effective Aug. 2, 2019), and serve important public needs that the Director of the Division of Labor Standards and Statistics (hereinafter, "Director" and "Division") finds ybest served by these rule updates, amendments, and supplements.

(2) SPECIFIC STATUTORY AUTHORITY. The Director is authorized to adopt regulations and rules 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, -116, -117, -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, -409, -410; and 8-14.4-103, -105, and -108.

(3) FINDINGS, JUSTIFICATIONS, AND REASONS FOR ADOPTION. Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds that: **(A)** demonstrated need exists for the rules (detailed in Part 4, which this finding incorporates); **(B)** proper statutory authority exists for the rules (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.

(A) Broad Purpose of Rules

Until recently, the overwhelming majority of Division investigations were of unpaid wages, requiring only monetary awards to claimants, 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 in those laws task the 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 trace to 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

[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 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 workers to be allowed to use of personal protective equipment in certain situations; prohibiting retaliation for such PPE use or for certain whistleblowing related to a public health emergency; and requiring 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 of certain job openings, and certain record-keeping as to positions); 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 job applicants criminal history).

[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.

estimating future lost earnings;[4] issuing compliance orders to modify policies unlawfully restricting, 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 workers of these and other rights.[7] Various new statutes grant authority for such orders,[8] and such authority pre-existed in grants of Division investigation and enforcement powers in C.R.S. Title 8, Article 1.[9] But because the narrower prior scope of Division work rarely implicated such powers, prior rules did not detail procedures, rights, and responsibilities as to such powers.

More specifically, various of the above-listed new provisions: took effect immediately upon enactment in July 2020; mandate that Division enforce, execute, implement, apply, and interpret their new requirements; and, to that end, charge the Division with rulemaking, implementation, and enforcement of their new requirements, including in both HFWA[10] and PHEW.[11] The Division therefore finds that these WARNING Rules are necessary

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[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.*, 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).

[8] *E.g.*, C.R.S. §§ 8-13.3-410, -411 (410, Division "may coordinate implementation and enforcement … and adopt rules as necessary"; 411, "[T]he division ha[s] jurisdiction over the enforcement of this part 4 and may exercise all powers granted under article 1 of this title 8 to enforce.... The division may enforce the requirements of this part 4.... Pursuant to section 8-1-130, any findings, awards, or orders … with respect to enforcement … constitute final agency action."); 8-14.4-105, -108 (105, "Enforcement by the division"; 108, "division may promulgate rules necessary to implement this article").

[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").

[10] HFWA, C.R.S. §§ 8-13.3-401 et seq. (§ 403(9), Division rulemaking on paid leave compensation and accrual for certain employees; § 407(6), Division rulemaking on appeals and strategic enforcement; § 408(1), Division rulemaking on posters and written notices informing employees of HFWA rights; § 408(3), Division creation and provision of such posters and notices; § 410, Division rulemaking on HFWA implementation; § 411(1)-(2), Division enforcement of HFWA, with incorporation of all Division powers under C.R.S. Title 8, Article 1; § 411(3), Division findings, awards, and orders as "final agency action," incorporating C.R.S. 8-1-130 "full power to hear and determine all questions within [Division] jurisdiction").

[11] PHEW, C.R.S. §§ 8-14.4-101 et seq. (§103 (Division rulemaking on posting notice to workers of PHEW rights; §

to fulfill statutory duties assigned to the Division and that (as further detailed in Part (F) below) are imminently necessary for public health, safety, and welfare. The following parts detail more specific findings and explanations on particular rule provisions.

(B) Rules 1-2: Statutory Framework and Definitions

Rule 1 details the relationship of these Rules to relevant statutes, and the Division's intent for these Rules to remain in effect to the maximum extent possible if a portion is held invalid.[12] Rule 2 defines key terms. Rules 2.1-2.7 and 2.12 define terms consistently with other Division rules. Rules 2.3 and 2.10 clarify the use in these Rules of "Complainant" rather than "employee or worker," and "Respondent" rather than "employer or principal," since HFWA covers only "employees" and "employers," whereas PHEW covers those it defines as "workers" and "principals," including parties to certain non-employment independent contracting. Rules 2.8 and 2.14 then apply those definitions of whom HFWA and PHEW cover. Rule 2.9 defines "Notice of Right to Sue" as the document that the Division will use to indicate when, in its discretionary judgment as to which claims to investigate, a Complainant has satisfied the administrative exhaustion requirement of PHEW, C.R.S. § 8-14.4-104(2). Rule 2.11 clarifies that because the term "retaliation" is synonymous with the types of discrimination that HFWA and PHEW make unlawful — "discrimination" for engaging in protected activity[13] — references to "retaliation" thus include, and are interchangeable with, references to "discrimination" for protected activity. Rule 2.13 clarifies that "willful" — a term used in HFWA and other statutes committed to Division enforcement, interpretation, and rulemaking[14] — has the same meaning as in current federal Fair Labor Standards Act statutory[15] and regulatory[16] provisions. Rule 2.15 incorporates by reference any other definitions in statutes these Rules implement and enforce, so that any such terms not defined in these Rules may be interpreted consistently with those statutes.

(C) Rule 3: Complaint, Investigation, and Appeal Procedures

Rule 3 draws extensively from the wage complaint process of the Colorado Wage Act (C.R.S. Title 8, Article 4) and Wage Protection Act Rules (7 CCR 1103-7), with adjustments as needed to account for different statutory provisions (*e.g.,* in HFWA and PHEW), and different needs in the sorts of claims these Rules address. Compared to wage claims, more retaliation and interference claims require investigating a broader range of

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105(1)-(3), Division enforcement via soliciting complaints, and investigating and issuing remedial orders as appropriate); § 105(4), Division rulemaking on appeals and strategic enforcement; § 107, qui tam claims required to exhaust administrative remedies via § 105 Division enforcement procedures; § 108, Division rulemaking on any aspect of PHEW implementation).

[12] *E.g., High Gear & Toke Shop v. Beacom*, 689 P.2d 624, 633 (Colo. 1984) (Colorado general severability statute "can be used not only to sever separate sections, subsections, or sentences, but may also be used to sever words and phrases" in even statutes lacking severability provisions) (citing *Shroyer v. Sokol*, 550 P.2d 309 (1976)); *Shroyer*, 550 P.2d at 311 (after striking as unconstitutional a "40 per cent" statutory requirement" and "restrict[ing] the recall petition powers of the people to registered voters," severing so "the statute can be given legal effect" by "incorporat[ing] by implication" a different numerical threshold and eligible elector rule: a "25 per cent limitation and the electors (not necessarily registered) requirement set forth" in another provision); *see generally Regan v. Time, Inc.*, 468 U.S. 641, 642 (1984) ("presumption is in favor of severability").

[13] C.R.S. §§ 8-13.3-407 (HFWA: "Employee rights protected - retaliation prohibited. (2) (a) An employer shall not take retaliatory personnel action or discriminate … because the person has exercised, attempted to exercise, or supported the exercise of rights protected under this part 4…."), 8-14.4-102(1) (PHEW: "A principal shall not discriminate, take adverse action, or retaliate … based on the worker, in good faith, raising any reasonable concern….").

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

[15] 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….").

[16] 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]conduct 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.").

documents, witnesses, or other evidence; thus Rule 3.3.4 gives Respondents more response time than in wage claims, and Rule 3.3.5 applies a "[p]reservation of records made or kept" requirement that adapts, but largely aims to parallel, the longstanding federal requirement to preserve records relevant to various discrimination and retaliation claims. Without a rule, Respondents still would have preservation duties, because failure to preserve relevant records, depending on the case facts and the factfinder's judgment, may yield varied negative consequences and adverse inferences.[17] But with no rule, the scope of preservation duties would be highly discretionary with the factfinder in each case. The federal preservation rule has existed for almost 50 years,[18] with no substantive amendments for almost 30 years, and all substantive amendments were expansions, not contractions, of employer duties.[19] The 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) paralleling the federal preservation rule is the best means to that end, because it merely applies to new state-law claims a longstanding duty for federal-law claims that employers already had, and that the federal government has seen no need to narrow, for almost 50 years.

Rule 3.3.6 details the exhaustion of administrative remedies requirement and process required by PHEW: Complainants initiate claims by filing with the Division rather than in court; then the Division makes a discretionary decision whether to investigate or to send the Complainant a "Notice of Right to Sue" reflecting that the Division has decided not to investigate that particular claim, and thus that the Complainant has exhausted

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[17] *E.g.*, *Ramos v. Swatzell*, No. 12-1089, 2017 WL 2857523, at *7 (C.D. Cal. June 5, 2017) ("[S]anctions are warranted based on CIW/CDCR's failure to take appropriate measures to preserve, locate, and timely produce information ... [and] failure to conduct an adequate initial search for … [a] personnel file.… CIW's actions, … when CIW had control over relevant evidence and a duty to preserve it, were … gross negligence .... Having found spoliation of [the] personnel file, it is within the court's inherent power to impose sanctions.") (citations omitted), *adopted*, 2017 WL 2841695 (June 30, 2017). For a detailed example of and citations to preservation duties, *see Broccoli v. Echostar Commc'ns Corp*., 229 F.R.D. 506, 510-12 (D. Md. 2005) (imposing monetary sanctions and an "adverse spoliation of evidence" inference instruction) (citations omitted):

> A party has a duty to preserve evidence when … placed on notice that the evidence is relevant to litigation or when the party should have known that the evidence may be relevant to future litigation. The duty ... encompasses any documents or tangible items … made by individuals likely to have ... information that the disclosing party may use to support its claims or defenses. Any information relevant to the claims or defenses of any party, or … the subject matter involved … , is covered .... "'Document retention policies' … to keep certain information from getting into the hands of others ... are common in business." … However, "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." A failure to preserve … , once the duty to do so has been triggered, raises the issue of spoliation of evidence[,] … the destruction or material alteration of evidence or the failure to preserve the property for another's use as evidence in pending or reasonably foreseeable litigation. A court has discretion to impose sanctions for "the purpose of leveling the evidentiary playing field and … sanctioning the improper conduct[,]" … authorizing … adverse inferences from a party's failure to present evidence, the loss of evidence, or the destruction of evidence.…
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> Echostar plainly had a duty to preserve employment and termination documents when its management learned of Broccoli's potential Title VII claim that could result in litigation. Yet, the discovery process revealed that Broccoli's personnel file did not even include his performance evaluations, which his supervisors … testified they had conducted and documented. Nor did Echostar produce any substantial documentation of the alleged regional team dissolution that it asserted resulted in Broccoli's termination. And, Echostar failed to produce Fornelius' investigative file containing her notes from her meeting and conversations with Broccoli and his managers.
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> [N]one of the emails … between Broccoli, … supervisors, and … upper management regarding his complaints … were preserved …. Echostar admits that it never issued a company-wide instruction regarding the suspension of any data destruction policy …. Echostar did not even bother to save Broccoli's emails of the 30 days prior … upon receiving … [his] written complaint …. [These] actions prejudiced … his claims and … increased … costs.

[18] 37 FR 9219, May 6, 1972 (adopting federal rule).

[19] 77 FR 5398, Feb. 3, 2012 (without changing substance of preservation rule, adding newly enacted federal statute (Genetic Information Nondiscrimination Act of 2008) to list of federal statutes to which rule applies); 56 FR 35755, July 26, 1991 (expanding substance of preservation rule by increasing record-keeping duration, eliminating temporary/seasonal worker exemption, increasing enforcement authority, and adding newly enacted federal statute (Americans with Disabilities Act of 1990) to list of federal statutes to which rule applies); 46 FR 63268, Dec. 31, 1981 (non-substantive citation changes).

administrative remedies and may now file in court. If the Division investigates, its completed investigation culminates in a binding, appealable decision, but (A) the Division may exercise its discretion to rescind its decision to investigate, in which case it will send a Notice of Right to Sue, and (B) the Complainant may withdraw the Complaint at any time, but if the withdrawal is under 180 days from the Division's decision to investigate, then it is discretionary with the Division whether to provide a Notice of Right to Sue upon withdrawal of the Complaint.

Rule 3.4 details parties' burdens of proof and production, covering retaliation (Rule 3.4.1) separately from interference or failing to provide notice (Rule 3.4.2), because retaliation requires proof of intent, while interference and notice failure do not.[20] Under the text of many other labor statutes, "the 'requirement that an employer took adverse action "because of"' unlawful intent means … that intent 'was the "reason" that the employer decided to act,' or, in other words, … the 'but-for' cause of the … adverse decision."[21] However, neither PHEW nor HFWA uses the "because of" language that requires unlawful intent to be a "but-for" cause, rather than just one among multiple factors. PHEW defines retaliation as action "based on" protected activity.[22] Recent Colorado precedent, interpreting a different statute that, although not addressing intent, applied the same phrase ("based on") in the same title of Colorado labor statutes as PHEW (C.R.S. Title 8), held that "'based on' … does not necessarily mean 'exclusively.' … Because the legislature chose to use the broader term 'based on,' we conclude that the legislature left room for … other factors."[23] HFWA actually defines its retaliation claims akin to interference claims requiring *no* intent, only denial of an entitlement.[24] However, the Division views the legislative choice to define such HFWA claims as "retaliation," and to create "retaliation" claims essentially simultaneously under PHEW and HFWA, as supporting the same intent standard for both.[25]

Thus, the Division finds that the text chosen by the legislature requires proof that retaliatory intent was a factor motivating the challenged action, even if there were other factors as well — the same standard as for certain other intent-based labor claims, most notably Title VII discrimination (that "an unlawful employment practice is established when the complaining party demonstrates that … [discriminatory intent] was a motivating factor for any employment practice, even though other factors also motivated the practice")[26] and public employee First Amendment retaliation claims (that "[t]he protected speech was a motivating factor in the adverse employment action").[27] Under that standard, even if all elements of a violation are proven, including unlawful intent as a motivating factor, the Respondent may still prove that the complained-of action would have occurred for another lawful reason at the same time — and if so, then neither reinstatement, back pay, nor front pay can be awarded, because the Complainant would have suffered the complained-of action without the unlawful intent.[28]

Rule 3.4.2(C) adopts for "interference" claims the same definition of "interference" that applies under the

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[20] *Smith v. Diffee Ford-Lincoln-Mercury*, 298 F.3d 955, 960 (10th Cir. 2002) (under federal law: "If an employer interferes with the FMLA-created right … , deprivation of this right is a violation regardless of the employer's intent.… [I]ntent of the employer is immaterial.'"); *Bourne v. Exempla, Inc.*, No. 12-CV-01477, 2013 WL 1232139, *3 (D. Colo. Mar. 27, 2013) (same).

[21] *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013) (noting that federal retaliation and age discrimination statutes feature such "because of" language and thus require proof of "but-for" causation).

[22] C.R.S. § 8-14.4-102(1).

[23] *Pella Windows v. ICAO*, 458 P.3d 128, 136, 2020 COA 9 (Colo. Ct. App. 2020).

[24] C.R.S. § 8-13.3-402(10) (HFWA defining retaliation as *either* "denial of any right" *or* action "for exercising" any right).

[25] Final passage of PHEW by the legislature was on June 26, 2020; final passage of HFWA was on June 29, 2020.

[26] 42 U.S.C. § 2000e-2(m).

[27] *Joritz v. Gray-Little*, No. 19-3078, --- Fed. Appx. ---, 2020 WL 4280669, at *5 (10th Cir. July 27, 2020).

[28] *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 349 (2013) (under "motivating factor" rule, employee can prevail "solely on proof that race [or other unlawful reason] ... was a motivating factor … ; but the employer's proof that it would still have taken the same employment action would save it from monetary damages and a reinstatement order").

federal Family and Medical Leave Act statutory and rule provisions on interference, 29 U.S.C. § 2615(a)(1)[29] and 29 C.F.R. § 825.220(b)-(d),[30] except where state law or rule requires a different definition to interference claims under HFWA, PHEW, or any other statute or rule.

Rule 3.5, on determinations, reiterates and codifies the applicability to claims under these Rules of relevant provisions of statutes and other rules. Rule 3.5.3 in particular, which other Division rules are being amended to mirror, aims to provide clarity on remedies the Division may order. Until recently, the overwhelming majority of Division investigations were of individual claims for unpaid wages that required only a monetary award to the claimant, plus possible penalties and fines. However, the Division now investigates a much broader range of labor standards issues, and more often investigates systemic issues, due mainly to a half-dozen legislative enactments since mid-2019.[31] Many such enactments task the Division with labor standards enforcement measures that do not entail, or are not limited to, ordering wage payments — for example, reinstating workers unlawfully terminated,[32] disallowing policies unlawfully restricting statutory rights,[33] or requiring changes to job postings with unlawful content.[34] While those statutes provide authority to issue applicable orders,[35] such authority long

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[29] 29 U.S.C. § 2615(a) ("Interference with rights. (1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

[30] 29 C.F.R. § 825.220 ("Protection for employees who request leave or otherwise assert FMLA rights."):

> (b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. See § 825.400(c). Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:
>
> (1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;
>
> (2) Changing the essential functions of the job in order to preclude the taking of leave;
>
> (3) Reducing hours available to work in order to avoid employee eligibility.
>
> (c) The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. See § 825.215.
>
> (d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employer. ...

Only the first two sentences of § 825.220(d) are relevant to "interference"; the rest relates to federal Labor Department procedures, and a definition of "serious health condition under the FMLA, not relevant to PHEW or these Rules.

[31] S.B. 20-205 (HFWA, enacted and effective July 14, 2020); H.B. 20-1415 (PHEW, enacted and effective July 11, 2020); S.B. 19-085 (Equal Pay for Equal Work Act, enacted May 22, 2019, and effective January 1, 2021); H.B. 19-1025 (Chance to Compete Act, enacted May 28, 2019, and effective August 2, 2019); S.B. 19-207 Budget Package Narrative (funding increased inspection staff and auditing of systemic violations, effective as of the 2019-2020 fiscal year); H.B. 19-1267 (broadening definition of "employers" liable for wages, enacted May 16, 2019, and effective January 1, 2020).

[32] S.B. 20-205 (HFWA, authorizing reinstatement of those unlawfully terminated); H.B. 20-1415 (PHEW, same).

[33] S.B. 20-205 (HFWA, disallowing policies that diminish HFWA rights, and setting minimum standards for paid leave policies); H.B. 20-1415 (PHEW, disallowing (in certain circumstances) both policies of non-disclosure as to protected public health emergency concerns, and policies restricting worker use of personal protective equipment).

[34] H.B. 19-1025 (Chance to Compete Act, barring most job postings from inquiring about applicants' criminal records).

[35] *E.g.*, 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

has existed in the Article 1 of Title 8 provisions delineating the Division's investigation and enforcement powers.[36]

Rule 3.6 explains that a proceeding may be split into discrete questions of liability or relief, a discretionary docket management decision that was already permissible, but that the Division sees value in codifying for clarification, given that recent statutory enactments task the Division with more cases with complex relief questions — *e.g.*, damages for many individuals, or for a lost job that can be fact-specific, and/or varied non-monetary compliance orders — and thus that a discretionary decision to resolve certain questions before others may be more efficient for all parties and for the Division alike.

Rules 3.7-3.8 cover appeals and filings in court of certified copies, with no substantive differences from other Division statutory and rule provisions. Rule 3.7 provides for the filing of certified copies of Division citations, notices of assessment, and orders identically to the existing rule for such filings on wage claims, just removing references to "wage" filings and statutes to be in more general terms, reflecting that these Rules cover a range of non-wage claims and therefore may rely on not only wage law, but the Division's broader statutory authority.[37]

(D) Rule 4: Notice and Posting

Rule 4.1 covers the statutory requirements for posting notice of HFWA and PHEW rights for employees and workers, respectively, as required by C.R.S. §§ 8-13.3-408 (HFWA) and 8-14.4-103 (PHEW), respectively, which charge the Division with further detailing those requirements by rule.[38]

Rule 4.1.1 details required poster contents, and Rule 4.1.2 provides that employers and principals may satisfy all HFWA and PHEW requirements with the Division's Colorado Workplace Public Health Rights Poster, posted at www.coloradolaborlaw.gov. Other posters may be used if they satisfy applicable statute and rule

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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."); 8-14.4-105, -108 (105, "Enforcement by the division"; 108, "The division may promulgate rules necessary to implement this article 14.4").

[36] *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").

[37] *See, e.g.,* C.R.S. § 8-1-104 ("Any copy of an order, award, or record of the director under his seal shall be received in all courts as evidence as if such copy were the original thereof.").

[38] PHEW, C.R.S. § 8-14.4-103(2) ("division shall promulgate rules to establish the form of the notice required"); HFWA, C.R.S. § 8-13.3-408 (408(1), "each employer shall notify its employees that they are entitled to paid sick leave, pursuant to rules promulgated by the division"); 408(3) ("division shall create and make available to employers posters and notices that contain the information required by subsection (1) … , and employers may use the posters and notices to comply with … this section").

requirements, and do not have less substantive information than the Division poster.

Rule 4.1.3 provides that a qualifying poster must be displayed "in each establishment where employees or workers work" — *i.e.*, not just in one building, if some individuals work in one building while others work in a different one — in "a conspicuous location frequented by employees or workers where it may be easily read during the workday — such as in break rooms, on employee bulletin boards, and/or adjacent to time clocks, department entrances, and facility entrances." This language effectuates the PHEW requirement that the poster be "in a conspicuous location on the principal's premises" (C.R.S. § 8-14.4-103(1)) and HFWA requirement that it be "in a conspicuous and accessible location in each establishment where the employer's employees work" (C.R.S. § 8-13.3-408(2)(b)). It is consistent with the Colorado Overtime and Minimum Pay Standards ("COMPS") Order poster rule ("area frequented by employees where it may be easily read during the workday")[39] and analogous federal National Labor Relations Board ("NLRB") worker rights posting rules, such as to post "wherever employee … notices are customarily posted," including "employee bulletin boards, timeclocks, [or] department entrances."[40]

Rule 4.14 provides that where physical posting is impractical, a poster may be provided directly and timely to employees or workers, including by appropriate electronic means if such means are customarily used to communicate with employees and workers. This is consistent with existing Colorado poster requirements in the COMPS Order[41] and analogous federal NLRB requirements.[42] The Division finds that allowing individual notice in such circumstances is necessary given workplace realities and the goal of these PHEW and HFWA provisions: to actually notify employees of their rights.

Rule 4.2 details the requirement to provide each employee direct "written notice" of HFWA rights, as required by C.R.S. § 8-13.3-408(2)(b). Rules 4.2.1-4.2.2 clarify that notice and poster content requirements are the same, and thus that the same poster may be used as individual written notice, as long as it is actually provided to the employee, not just posted. Rule 4.2.3 allows providing the written notice along with other employment-related documents (*e.g.*, in a handbook), with certain expectations detailed to assure that employees are genuinely supplied the document and made aware of it.

Rule 4.3 requires posters and notices to be in not only English, but also "any language that is the first language spoken by at least five percent of the employer's workforce," as HFWA specifically requires (C.R.S. § 8-13.3-408(2)(A)), and for consistency as a rule under the Division's authority "to establish the form of the notice required" under PHEW, (C.R.S. § 8-14.4-103(2)).

Rule 4.4 provides that employers and principals are not compliant with HFWA and PHEW notice requirements if they "attempt to minimize the effect of posters or notices required by statute or these Rules, such as by communicating positions contrary to, or discouraging the exercise of rights covered in, the required poster or notice." Such minimization can occur either formally (*e.g.*, a written policy noncompliant with statutory requirements), or informally (*e.g.*, providing information contradicting points in posters or notices). The Division finds informative various rules for posting notices of worker rights that have been required by the NLRB rules, which are analogous to the WARNING Rules in their purpose of informing workers of statutory rights through

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[39] COMPS Order #36, 7 CCR 1103-1, Rule 7.4.1.

[40] NLRB Casehandling Manual § 10518.2.

[41] COMPS Order #36, 7 CCR 1103-1, Rule 7.4.1 ("If the work site or other conditions make a physical posting impractical (including private residences employing only one worker, and certain entirely outdoor work sites lacking an indoor area), the employer shall provide a copy of the COMPS Order or poster to each employee within his or her first month of employment, and shall make it available to employees upon request ….").

[42] *E.g.,* Nat'l Labor Relations Bd. ("NLRB") Casehandling Manual § 10132.4 ("If … a traditional posting will not effectively reach the employees …, the charged party should be required to mail the notice … at the charged party's expense."); *J&R Flooring*, 356 NLRB 11, 12 (2010) ("in determining whether electronic posting is appropriate, the relevant inquiry should be whether the respondent customarily disseminates information to employees or members through electronic means.").

workplace-posted notices.[43] One such NLRB rule has provided that "posting of a notice adjacent to a Board notice constitutes noncompliance with the posting provision if the side notice's language attempts to minimize the effect of the Board notice or where it suggests that respondent does not subscribe to any of the Board notice's statements."[44] The Division finds it desirable and important to incorporate a similar provision in Rule 4.4, to ensure clear and consistent information about HFWA and PHEW rights, and because a mandate to notify workers of their rights cannot be complied with by communicating that the rights in the notice will not be honored.

Rule 4.5 clarifies that while these Rules are in effect as of September 21, 2020, the poster and written notice requirements are statutory, thus pre-date these Rules, since PHEW and HFWA took effect upon enactment on July 11 and July 14, 2020, respectively. For the period before September 21, 2020, these Rules are not binding law, but to the extent that the Division must interpret and apply those statutory provisions, Rule 4 contains what it finds to be sound interpretations of each. Recognizing the challenge of learning and complying with notice and poster requirements that took effect immediately upon enactment, Rule 4.5 provides that "employers and principals will be deemed compliant if they executed required posting(s) and/or notice(s) within 30 days of the applicable statutory effective date."

Rule 4.6 notes the Division's authority to fine employers and principals for non-compliance with these poster and notice requirements, as set forth in applicable statutes,[45] which fines are in addition to any other applicable fines for any other violations.[46]

(E) Rule 5: Protected Activity

Rule 5.1 clarifies when "raising a[] reasonable concern" of a health or safety violation or threat is protected activity under PHEW, C.R.S. § 8-14.4-102(1). Rule 5.1 mirrors the PHEW[47] and HFWA[48] language, and established retaliation law, in providing that the activity is protected if it bases on a "reasonable" and "good faith" belief, even if the belief is mistaken.[49]

Rules 5.1.1 clarifies what sources may show that a concern is reasonable and in good faith. The Division has found variance in COVID-19 health and safety guidance, both between sources and over time,[50] showing the rapidity of changing understandings of, and responses to, a novel public health crisis, as research and information

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[43] NLRB Casehandling Manual § 10518 ("The purpose of the notice is to inform employees or members of their rights protected by the Act and to set forth publicly and in clear language the respondent's remedial obligations.").

[44] NLRB Casehandling Manual § 10518.6.

[45] *E.g.*, C.R.S. § 8-1-140(2) (fines for failing, neglecting, or refusing to obey a lawful Division order, including a lawful rule per C.R.S. § 8-1-140); C.R.S. § 8-13.3-408(4) (fines for willfully violating HFWA poster or notice requirements).

[46] Including but not limited to fines for: failure to pay wages due for HFWA leave under C.R.S. §§ 8-4-111 (for failure to pay any wages due), 8-4-113(1)(a) (where employer "without good faith legal justification fails to pay [employee] wages"); failure to respond in an investigation for wages due for HFWA leave under C.R.S. § 8-4-111(1)(b) (where employer "fails to respond to a notice of complaint" or other Division notice requiring response); retaliation or interference under HFWA, C.R.S. § 8-13.3-407(5)); and retaliation, interference, or other violations under PHEW, C.R.S. § 8-14.4-105(3).

[47] PHEW, C.R.S. § 8-14.4-102(1) ("a principal shall not discriminate, take adverse action, or retaliate against any worker based on the worker, in *good faith*, raising any *reasonable* concern about workplace violations") (emphases added).

[48] HFWA, C.R.S. § 8-13.3-407(3) ("The protections of this section apply to any person acting in *good faith* who alleges a violation of this part 4, *even if the allegation is determined to be mistaken*") (emphases added).

[49] *See, e.g., Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984) (collecting cases) ("every circuit that has considered the issue" has recognized that protected activity may be mistaken if in good faith); *Hertz v. Luzenac Am., Inc*., 370 F.3d 1014, 1016 (10th Cir. 2004) (plaintiff need not show employer committed violation he opposed; "he need only show that when he engaged in protected opposition, he had a reasonable good-faith belief that the opposed behavior was" a violation).

[50] *Compare* Center for Disease Control ("CDC") guidance as of Mar. 31, 2020 (*How to Protect Yourself*, viewed in archive Sept. 17, 2020) (recommending *against* masks if asymptomatic), *with* CDC guidance as of Aug. 27, 2020 (*How to Select, Wear, and Clean Your Mask*, viewed Sept. 17, 2020) (recommending that *everyone* wear masks with multiple layers); *see also* Erin Schumaker, *CDC and WHO offer conflicting advice on masks. An expert tells us why.*, ABC News (May 29, 2020).

unfold in real time. Under such conditions, there may be incomplete consensus among sources, especially as some lag others in adopting new information. The Division thus finds that relevant evidence of a "significant workplace threat to health or safety, related to a public health emergency" may come from a variety of reliable sources. Rule 5.1.1 lists types of government or major non-government organizations that ordinarily can be relied upon, as non-exclusive "example[s]," but the list is intended to exclude dissimilar sources, *e.g.*: non-expert opinion writings; recommendations by organizations that are not sources of expert guidance in a field or industry, or opinion polls.

Rule 5.1.2 clarifies that a worker raising a protected concern must "state what action, condition, or situation they believe constitutes a qualifying violation of a rule regarding, or significant threat to, workplace health or safety." Rule 5.1.2 also provides that a worker need not cite a specific rule or guideline supporting the violation or threat. This rule bases on the "good, faith, … reasonable"[51] standard, and other established retaliation law, providing that individuals raising concerns or otherwise engaging in protected activity need not use "magic words" citing specific rules allegedly violated, if they "convey … concern that the employer has engaged in a practice made unlawful."[52] That explanation by a court in Colorado under federal retaliation law is consistent with other laws, including the following apt interpretation of the New York "health or safety" whistleblower statute that the Division finds sound:

> The plaintiff alleges that the defendants' decision to terminate his employment constituted retaliation for complaints … regarding possible safety issues … [Under] the relevant New York State law governing such retaliation claims … [as to] danger to the public health or safety, … [a] plaintiff must show that [they] reported or threatened to report the employer's activity, policy or practice, but need not claim that [they] cited any particular law, rule or regulation at [the] time" … the plaintiff made a report…. At the pleadings stage of the case, the complaint "need not specify the actual law, rule or regulation violated ...." But the employee's complaint to the company must "identify the particular activities, policies or practices in which the employer allegedly engaged, so that the complaint provides the employer with notice of the alleged complained-of conduct."[53]

Rule 5.2 covers the PHEW requirements for workers to use their own personal protective equipment ("PPE"). Unlike retaliation rules that do not require a principal to *agree with or adopt* the worker's concern, PHEW *does require allowing* a worker to use PPE as they request. The Division therefore finds that for a worker to use their own PPE over employer objections, the worker must *actually be correct* as to the three elements PHEW requires, C.R.S. § 8-14.4-102(3) — that the PPE:

> (a) provides a higher level of protection than the equipment provided by the principal; (b) is recommended by a federal, state, or local public health agency with jurisdiction over the worker's workplace; and (c) does not render the worker incapable of performing the worker's job or prevent a worker from fulfilling the duties of the worker's position.

Rule 5.2.1(A) notes that the Rule 5.1 provision about what information can be relied on as a basis for a "good faith, … reasonable" concern under PHEW, also applies to the 102(a) requirement of higher protection. Rule 5.2.1(B) and Rule 5.2.2 allow workers to rely on outdated guidance, except when such guidance has been repealed or repudiated. As noted in the preceding section on Rule 5.1.1, the Division finds considerable variance in PPE guidance between sources and over time. This variance yields competing imperatives that Rules 5.2.1(A)-(B) and 5.2.2 aim to balance: (A) a worker cannot be faulted for relying on one reliable source rather than another, or for relying on published guidance that, while not repealed or repudiated, no longer appears on websites being regularly updated during a pandemic; at the same time, (B) a worker cannot rely on unreliable sources, or guidance that *was* repudiated or rejected by the source the worker relied upon. Rule 5.1.1 is

[51] PHEW, C.R.S. § 8-14.4-102(1).

[52] *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1203 (10th Cir. 2008).

[53] *Tonra v. Kadmon Holdings, Inc.*, 405 F. Supp. 3d 576, 586 (S.D.N.Y. 2019) (citations omitted).

incorporated into rule 5.2.1(A) as further guidance regarding what sources a worker may rely on to show that the worker's PPE is more protective; sources that may "recommend" PPE are limited by C.R.S. § 8-14.4-102(3)(b) to a "federal, state, or local public health agency with jurisdiction over the worker's workplace."

Rules 5.2.1(C)-(D) elaborate two aspects of the C.R.S. § 8-14.4-102(3)(a) requirement that worker PPE offer "a higher level of protection": if the principal's PPE of the same type is cleaned or replaced, the worker's must also be; and (C) the worker's PPE cannot be more less protective of *others* — *e.g.*, a mask with a vent releasing air that, even if highly protective of the wearer, protects *others* less.

Rule 5.2.3 covers two opposite situations. Rule 5.2.3(A) provides that if a principal provides *no* face covering during a public health emergency related to an airborne pathogen or, when recommended for the worker's occupation by a governmental public health source, then a worker using *any* face covering qualifies, without need for a further showing of the C.R.S. §§ 8-14.4-102(3)(a)-(b) requirements (higher level of protection and public health agency recommendation"), unless the principal proves that the worker's face covering is worse than none at all. The § 8-14.4-102(3)(c) inquiry into whether the face covering renders the worker "incapable" of performing may still apply, however.

Rule 5.2.3(B) provides that if a principal "(1) provides a form of PPE (*e.g.*, a mask) that complies with all applicable recommendations by federal, state, and local public health agencies with jurisdiction over the workplace, and (2) procures that PPE from a provider it knows to provide reliable product (from experience prior to obtaining the particular item it is providing to a worker wishing to use their own PPE), then (3) a worker may use their own PPE of the same type (*e.g.*, a different type of mask) only if they obtained it from a reliable provider, whether or not the principal's provider." This aims to prevent situations in which a principal carefully obtains PPE meeting all applicable standards, and wishes to prevent workers from bringing PPE that could be worse due to, however inadvertently, obtaining unreliable PPE. Also protecting principals in such situations are, as detailed above, Rules 5.2.1(C)-(D): that principals who clean or replace PPE can require the same of worker PPE; and that worker PPE is not acceptable if, though protecting the worker, it is less protective of others.

Rule 5.2.4 provides that refusing to allow PPE in violation of C.R.S. § 8-14.4-102(3) is an adverse action that may qualify as a constructive discharge if "(A) the principal fails to remedy the unlawful decision immediately; (B) working without the PPE would increase a substantial threat to health or safety for any person; and (C) the worker terminates their work for the principal because of their unwillingness to work without the PPE." A leading federal retaliation law "does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace," instead covering "employer actions that would have been materially adverse to a reasonable employee or job applicant," in "that they could well dissuade a reasonable worker from making or supporting" protected activity.[54] Statutory text varies: the Title VII anti-*discrimination* (race, sex, etc.) provision is "explicitly limit[ed]" to actions affecting "'compensation, terms, conditions, or privileges of employment'"; in contrast, "[n]o such limiting words appear in the *antiretaliation* provision" of Title VII, which more broadly bans any action "against any" covered person for "oppos[ing] any [unlawful] practice" or other protected activity — and "[t]here is strong reason to believe that Congress intended the difference":

> The antidiscrimination provision seeks a *workplace* where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The antiretaliation provision seeks to secure that primary objective by preventing an employer from *interfering (through retaliation)* with … the Act's basic guarantees.… [For] the first objective, Congress did not need to prohibit anything other than *employment-related* discrimination. But one cannot secure the second objective by focusing only upon employer actions and harm that concern employment.... An employer can effectively retaliate against an employee by taking actions not directly related to his employment *or by causing him harm*....[55]

[54] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).

[55] *Id*. at 62-63 (emphases added) (quoting 42 U.S.C. § 2000e-2(a)).

The retaliation ban in HFWA and PHEW, like the Title VII retaliation ban, proscribes any adverse action against an employee for protected activity — not just adverse *employment* terms, as in the Title VII *discrimination* ban. HFWA does not define retaliation as limited it to adversely impacting employment terms, and actually include, as examples of unlawful retaliation, various actions threatening adverse consequences to personal well-being, not to employment terms (italicized below):

> "Retaliatory personnel action" means: (a) the denial of any [HFWA] right … ; or (b) any adverse action against an employee for exercising any [HFWA] right … , including: (i) *any threat*, discipline, discharge, suspension, demotion, reduction of hours, or *reporting or threatening to report an employee's suspected citizenship or immigration status* or the suspected citizenship or immigration status *of a family member* of the employee to a federal, state, or local agency; or (ii) any *sanctions against an employee who is the recipient of public benefits* for [HFWA] rights …; or (iii) interference with or *punishment for* participating in or assisting, in any manner, an investigation, proceeding, or hearing.... [56]

PHEW similarly does not limit the retaliation it forbids to adverse employment terms:

> A principal shall not discriminate, take adverse action, or retaliate against any worker based on the worker, in good faith, raising any reasonable concern[;] … based on the worker voluntarily wearing at the worker's workplace the worker's own personal protective equipment[;] ... based on the worker opposing any practice the worker reasonably believes is unlawful … or for making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing as to any matter the worker reasonably believes to be unlawful….[57]

Disallowing PPE protected by PHEW that actually "(a) provides a higher level of protection than the equipment provided by the principal[and] (b) is recommended by a federal, state, or local public health agency"[58] subjects a worker to heightened health or safety risk. Actions "that cause an employee to fear for his own safety easily exceed the 'reasonably likely to deter' standard,"[59] many cases hold,[60] including subjecting an employee to "appreciably more dangerous conditions,"[61] and in particular "increased exposure to dangerous pathogens."[62]

Colorado law also recognizes that where a worker resigns due to intolerable conditions, the employee has been "constructively discharged" if the unlawful action "makes or allows the employee's working conditions to become so difficult or intolerable that a reasonable person in the employee's position would have no other choice

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[56] C.R.S. § 8-13.3-402(10) (emphases added).

[57] C.R.S. § 8-14.4-102(1),(3),(4).

[58] C.R.S. § 8-14.4-102(3).

[59] *Dahlia v. Rodriguez*, 735 F.3d 1060, 1079 (9th Cir. 2013); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006) (original formulation of applicable standard, as quoted and cited above).

[60] *E.g., Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 744-745 (7th Cir. 2002) (adverse action includes when "conditions … are changed in a way that subjects [employee] to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment," including cases of constructive discharge where such conditions are "unbearable" (collecting cases); *Strother v. S. Calif. Permanente Med. Grp.*, 79 F.3d 859, 864, 869 (9th Cir. 1996) ("some verbal and physical abuse" qualified: "rude and abusive phone calls"; "insulting treatment and public ridicule"; and that one doctor "once struck her with a clipboard" while another "forced her out of his office with his door"); *Elmore v. Washington*, 183 F. Supp. 3d 58, 66 (D.D.C. 2016) (subjecting employee to physical injury risk during training with dogs can qualify as adverse action: "An act intended to put an employee at risk of physical harm—even if occurring during the performance of a dangerous task within the scope of employment— … could dissuade a reasonable worker from … protected activity.").

[61] *Sherman v. Westinghouse Savannah River Co.*, 263 Fed. Appx. 357, 370 (4th Cir. 2008) ("[A]ssignment … could be deemed an 'adverse employment action' based on evidence that it subjected [employee] to … greater exposure to potentially harmful radiation — than those she faced in her previous post.") (citation omitted).

[62] *Gunten v. Maryland*, 243 F.3d 858, 868 (4th Cir. 2001) ("increased exposure to dangerous pathogens could adversely effect the terms, condition, or benefits of employment" and thus could qualify as adverse action).

but to resign."[63] That standard may be met where a worker terminates work because a principal requiring foregoing legally-protected PPE would increase a substantial threat to health or safety, as courts in Colorado have found constructive discharge proven in the highly analogous circumstance of "inadequate ventilation" for a welder,[64] and "when an employer fails to take sufficient remedial action" following a sufficiently serious violation.[65]

(4) EFFECTIVE DATE. These rules take effect on January 1, 2021, or as soon thereafter as the rule-making process is completed.

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

September 25, 2020
Date

[63] *Koinis v. Colo. Dep't of Pub. Safety*, 97 P.3d 193, 196 (Colo. App. 2003).

[64] *Liggett Indus. v. Fed. Mine Safety & Health Review Comm'n*, 923 F.2d 150, 152 (10th Cir. 1991) ("[T]he ALJ found that Begay quit his welding job because he reasonably and in good faith believed that inadequate ventilation … was hazardous to his health and that Begay had made a good faith attempt to communicate his concerns to management, who did not correct the situation. Thus, Begay was constructively discharged. [T]he ALJ's finding that Begay was constructively discharged is supported by substantial evidence."); *accord Frazier v. Merit Sys. Protection Bd.*, 672 F.2d 150, 159 n. 29 (D.C. Cir. 1982) ("improper or arbitrary transfer that would be hazardous to employee's health and [a] hardship to his family" could qualify as constructive discharge); *Linder v. Potter*, No. CV-05-0062, 2009 WL 2595552, at *10 (E.D. Wash. Aug. 18, 2009) ("Actions that might give rise to a constructive discharge claim include requiring the employee to perform unusually dangerous duties, subjecting the employee to violent acts or harassment, *or* subjecting the employee to punishment.") (emphasis added).

[65] *E.g., Scardina v. Wiegand II*, No. 2014CV31681, 2017 WL 3449238, at *17 (Colo. Dist. Ct. June 15, 2017) (on claim of hostile work environment that included secretly placing camera in women's bathroom, "Defendant's actions—or more accurately, inaction— following the discovery of the camera would have compelled any reasonable woman in the position of Ms. Scardina and Ms. Cullens to resign. They credibly testified that Mr. Wiegand's failure to take sufficient action prevented them from returning to work. … Plaintiffs have proven their claims for constructive discharge by a preponderance of the evidence."); *Liggett Indus*., 923 F.2d at 152 (key fact supporting constructive discharge finding included that "Begay had made a good faith attempt to communicate his concerns to management, who did not correct the situation").