DEPARTMENT OF LABOR AND EMPLOYMENT

Division of Labor Standards and Statistics

WAGE PROTECTION ACT RULES

7 CCR 1103-7

As proposed on April 15, 2020.~~Adopted and Effective on March 16, 2020.~~

Rule 1. Statement of Purpose and Authority

1.1 The general purpose of these Wage Protection Act Rules is to implement the Wage Protection Act of 2014. These rules are adopted pursuant to the division's authority in C.R.S. § 8-1-103(3), § 8-1-107(2)(p), § 8-1-111, and § 8-4-101, et seq.

1.2 Title 8, Article 4 of the Colorado Revised Statutes (2016) is hereby incorporated by reference into this rule for claims predating January 1, 2020, except that the 2019 amendments to C.R.S. § 8-4-103(6) are incorporated by reference. For claims as of January 1, 2020, Title 8, Article 4 of the Colorado Revised Statutes (2020) is hereby incorporated by reference. Such incorporation excludes later amendments to or editions of the statutes. These statutes are available for public inspection at the Colorado Department of Labor and Employment, Division of Labor Standards & Statistics, 633 17th Street, Suite 600, Denver CO 80202. Copies may be obtained from the Division of Labor Standards & Statistics at a reasonable charge. These statutes can be accessed electronically from the website of the Colorado Secretary of State. Pursuant to C.R.S. § 24-4-103(12.5)(b), the agency shall provide certified copies of the statutes incorporated at cost upon request or shall provide the requestor with information on how to obtain a certified copy of the material incorporated by reference from the agency originally issuing the statutes.

1.3 These rules are severable. If any section, sentence, clause, or phrase of these rules, or any application thereof, is for any reason held to be invalid or unenforceable, that holding shall not affect the validity of the remaining rules.

1.4 The Director of the Division of Labor Standards and Statistics in the Department of Labor and Employment has the authority to enforce § 8-4-101, et seq. and these rules.

Rule 2. Definitions and Clarifications

2.1 "Administrative procedure" means the process used by the division to investigate wage complaints in accordance with § 8-4-111.

2.2 "Authorized representative" means a person designated by a party to a wage complaint to represent the party during the division's administrative procedure. To designate an authorized representative, the party must comply with the requirements of rule 4.3.

2.3 "Average daily earnings," as used in § 8-4-109(3)(b), will be calculated as follows, unless the division identifies a legitimate reason to use a different method of calculation:

2.3.1 The most recent typical workweek or pay period will generally be used to calculate the average daily earnings. The total gross amount of wages and compensation will be divided by the number of days worked.

2.3.2 If an employee is entitled to and has been paid less than the Colorado minimum wage, and has not earned more than the Colorado minimum wage, then the Colorado minimum wage will be used to calculate average daily earnings.

2.3.3 All compensation paid to employees including the hourly rate, shift differential, minimum wage tip credit, regularly occurring non-discretionary bonuses, commissions, and overtime may be included in the average daily earnings calculation.

2.4 "Certified copy," as used in § 8-4-113, means a copy of a final division decision (issued by a compliance investigator or hearing officer) signed by the director of the division, or his or her designee, certifying that the document is a true and accurate copy of the final decision. A certified copy must be requested in writing. A division decision (issued by a compliance investigator or hearing officer) will not be certified unless: either (1) all appeal deadlines have passed and no appeal has been filed or (2) if an appeal was timely filed, the decision was not superseded on appeal. A certified copy will not be issued in the event of termination pursuant to § 8-4-111(3).

2.5 "Determination" means a decision issued by a compliance investigator upon the conclusion of a wage complaint investigation. "Determination" includes: Citation and Notice of Assessment, Determination of Compliance, and Notice of Dismissal, if that Notice of Dismissal is issued after the Division initiated the administrative procedure as described in rule 4.4.

2.6 "Employee," as defined by C.R.S. § 8-4-101(5), means any person, including a migratory laborer, performing labor or services for the benefit of an employer. For the purpose of the COMPS Order, relevant factors in determining whether a person is an employee include the degree of control the employer may or does exercise over the person and the degree to which the person performs work that is the primary work of the employer; except that an individual primarily free from control and direction in the performance of the service, both under his or her contract for the performance of service and in fact, and who is customarily engaged in an independent trade, occupation, profession, or business related to the service performed is not an "employee".[1]

1 The Rule 2.6 definition of employee parallels the statutory amendment to the "employee" definition enacted by Colorado 2019 House Bill (H.B.) 19-1267, effective January 1, 2020.

2.7 "Employer," as defined by C.R.S. § 8-4-101(6), has the same meaning as in the federal Fair Labor Standards Act at 29 U.S.C. § 203 (d), and includes a foreign labor contractor and a migratory field labor contractor or crew leader; except that the provisions of the COMPS Order do not apply to the state or its agencies or entities, counties, cities and counties, municipal corporations, quasi-municipal corporations, school districts, and irrigation, reservoir, or drainage conservation companies or districts organized and existing under the laws of Colorado.[2] "Foreign labor contractor" and "field labor contractor" have the definitions in C.R.S. §§ 8-4-101(7), (8.5).

2 The Rule 2.7 definition of employer parallels the statutory amendment to the "employer" definition enacted by Colorado H.B. 19-1267, effective January 1, 2020.

2.7.1 Joint employment. A worker may qualify as an employee of two or more employers at the same time. If two or more employers act independently and are disassociated as to a worker who works for those employers during the same workweek, then each employer may disregard work performed for the other(s) in determining its own responsibilities; an employee in such a situation has multiple separate jobs. But if the worker is jointly employed by multiple employers in one employment, such an arrangement is permissible, but it must not diminish wage and hour rights; accordingly, hours worked for

each employer are aggregated to determine wage and hour obligations, and each employer is jointly and severally liable for wage compliance, though each may take credit for payments to the employee by another of the joint employers.

A. Non-exclusive list of relevant factors. To answer the ultimate joint employment question -- whether more than one person or entity meets the legal definition of being an “employer” of a worker -- factors to consider include, but are not limited to:

(1) the potential joint employer’s power to control or supervise the worker, beyond a reasonable degree of general oversight of contract performance;

(2) the potential joint employer’s power to set pay or other employment terms or conditions, or to hire or fire;

(3) the extent to which work is integral to the business of the potential joint employer;

(4) the extent to which work is performed on-premises of the potential joint employer, or is done with equipment, supplies, or tools of the trade that either are owned by the potential joint employer or for which the potential joint employer must reimburse the worker;

(5) the duration and extent of the relationship between the potential joint employers;

(6) the duration and extent of the relationship between the worker and the potential joint employer; and

(7) the economic dependence of the worker on the potential joint employer, as shown by the nature of the work (*e.g.*, low-skill or low-training) or other facts.[3]

3 These factors derive from *Administrator’s Interpretation 2016-1* (U.S. Department of Labor, Wage & Hour Division, 2016) and *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017). Application of the factors should be guided by those sources, as explained in the accompanying Statement of Basis, Purpose, Authority, and Findings.

B. Economic realities as focus of inquiry. The subpart (A) factors are analyzed based on the economic realities, not solely on contractual language that may or may not reflect the economic realities. Consequently, any relevant factors, including but not limited to those in subpart (A) (*e.g.*, control, power, relationship, integral, dependence) may be direct or indirect, may be express or implied, and may be based on exercised or reserved authority.

C. Totality of circumstances, not an exclusive list of factors. The subpart (A) factors are not exclusive, and are not a checklist requiring a particular number of factors. Rather, any joint employment analysis must encompass the totality of all relevant facts and circumstances relevant to whether the economic realities do or do not indicate that more than one person or entity meets the legal definition of being an “employer” under C.R.S.§ 8-4-101(6).

D. Subordinate intermediaries as joint employers. In wage claims alleging that a potential joint employer employs workers procured through a second employer

serving as an intermediary: If the intermediary employer is an individual who qualifies as an employee of the potential joint employer, or is otherwise sufficiently highly controlled to effectively function as a department or division of that potential joint employer, then the intermediary employer's employees will qualify as employees of the potential joint employer, without need to analyze joint employment further with the multi-factor, totality-of-circumstances analysis of subparts (A)-(C).

2.8~~7~~ The "employer's correct address," as used in § 8-4-101(15), can include, but is not limited to, the employer's email address, the employer's address on file with the Colorado Secretary of State, and the address of the employer's registered agent on file with the Colorado Secretary of State.

2.9~~8~~ A wage complaint or an appeal is considered "filed" with the division when it is received by the division via mail, fax, email, online submission, or personal delivery. Any wage complaint, appeal, or termination received after 11:59pm Mountain Time is considered filed the next business day.

2.10~~9~~ When considering whether there is "good cause" for an extension of time, as used in § 8-4-113(1)(b), the division will determine whether the employer's reason is substantial and reasonable and must take into account all available information and circumstances pertaining to the specific complaint.

2.11~~10~~ "Post," as used in § 8-4-107, may include electronic posting in a place readily accessible to all employees.

2.12~~11~~ "Records reflecting the information contained in an employee's itemized pay statement," as used in § 8-4-103(4.5), may be kept electronically. The records are not required to be copies of the pay statements but must reflect all information contained in the pay statements.

2.13~~12~~ "Terminated employee," as used in § 8-4-105(1)(e), includes any employee separated from employment, whether the separation occurs by volition of the employer or the employee.

2.14~~13~~ The division may enforce the gratuity provisions described in § 8-4-103(6) through the administrative procedure described in § 8-4-111. The legal treatment of "tips," "gratuities," or other monies paid on a similar basis, in any source of law, is identical regardless of the terminology used.

2.15~~14~~ § 8-4-103(1)(b) describes circumstances under which employers are "subject to the penalties specified in section 8-4-113(1)." Despite use of the word "penalty" in this section, this language does refer to the fine described in § 8-4-113(1) and is payable to the division.

2.16~~15~~ A "written demand," as used in § 8-4-101(15), can be sent to the employer by electronic means, including but not limited to email and text message. Wages must be owed at the time of sending for the written demand to be considered valid.

2.17~~16~~ "Vacation pay," as defined in C.R.S. § 8-4-101(14)(a)(III), includes in the definition of "'[w]ages' or compensation'":

> "Vacation pay earned in accordance with the terms of any agreement. If an employer provides paid vacation for an employee, the employer shall pay upon separation from employment all vacation pay earned and determinable in accordance with the terms of any agreement between the employer and the employee."

The "earned and determinable in accordance with the terms" provision does not allow a forfeiture of any earned (accrued) vacation pay, but does allow agreements on matters such as: (1) whether there is any vacation pay at all; (2) the amount of vacation pay per year or other period;

(3) whether vacation pay accrues all at once, proportionally each week, month, or other period; and (4) whether there is a cap of one year's worth (or more) of vacation pay. Thus, employers may have policies that cap employees at a year's worth of vacation pay, but that do not forfeit any of that year's worth.

For example, an agreement for ten paid vacation days per year:

(a) *may* provide that employees can accrue more than ten days, by allowing carryover of vacation from year to year;

(b) *may* cap employees at ten days; but

(c) may not diminish an employee's number of days (other than due to use by the employee).

Rule 3. Filing A Wage Complaint

3.1 An employee who wishes to file a wage complaint with the division shall use the division-approved form(s).

3.1.1 A wage complaint may only be filed by the employee who did not receive his or her wages or compensation.

3.1.2 A wage complaint shall include the employee's signature, employee's contact information, employer's contact information, and basis for the wage complaint. Failure to include this information on the wage complaint form may result in dismissal of the wage complaint.

3.1.3 The failure of an employee to respond in a timely manner to informational or investigatory requests by the division may result in dismissal of the wage complaint.

3.1.4 If a wage complaint is dismissed before a Notice of Complaint is sent to the employer because the employee failed to respond to a division request for information, the complaint may be reopened if the employee provides the requested information or documentation to the division within 35 days of the division's request for information. Employees may be required to file a new complaint if the employee's response is received more than 35 days after the division's request for information.

3.1.5 The division shall not accept wage complaints for amounts exceeding $7,500.

3.1.6 An anonymous complaint is not a wage complaint within the meaning of § 8-4-111 and will not be investigated using the division's administrative procedure. The division may choose to address an anonymous complaint outside of the administrative procedure.

3.2 An employee may pursue a wage complaint through either the court system or the division's administrative procedure.

3.2.1 Employees are not required to use the division's administrative procedure in order to pursue a wage complaint in court.

3.2.2 The division does not have jurisdiction over any wage complaint that has been adjudicated or is currently being adjudicated by a court of competent jurisdiction.

3.2.3 As provided by C.R.S. § 8-4-113(2), a certified copy of any citation, notice of assessment, or order imposing wages due, fines, or penalties pursuant to this article may be filed with

the clerk of any court having jurisdiction over the parties at any time after the entry of the order. Such a filing thus can be in a county or district court, and will thereby have the effect of a judgment from which execution may issue.

3.3 The employee may withdraw the wage complaint at any time prior to issuance of a determination by notifying the division.

Rule 4. Investigation

4.1 Wage complaints shall be assigned to division compliance investigators. Investigatory methods used by the division may include:

A. Interviews of the employer, employee, and other parties;

B. Information gathering, fact-finding, and reviews of written submissions; and

C. Any other lawful techniques that enable the division to assess the employer's compliance.

4.2 The division will evaluate wage complaints under the following burden of proof structure:

4.2.1 To initiate a wage complaint, an employee must provide an explanation of the basis for the complaint that is clear, specific, and shows the employee is entitled to relief. The employee must provide sufficient evidence from which both a violation of Colorado wage and hour laws and an estimate of wages due may be reasonably inferred.

4.2.2 The burden then shifts to the employer to prove, by a preponderance of the evidence, that the employee is not entitled to the claimed relief. If the employer fails to meet its burden, the division may award wages and/or penalties to the employee based on the employee's evidence.

4.2.3 If the division concludes that wages are owed to the employee, but cannot calculate the precise amount of wages due, then the division may award a reasonable estimate of wages due.

4.3 Any party to a wage complaint may designate an authorized representative to represent the party during the division's administrative procedure.

4.3.1 The party may designate an authorized representative by filing the division-approved form with the division.

4.3.2 If not using the division-approved form, and the authorized representative is a licensed attorney or accountant, the party or the authorized representative must provide written notice to the division that the authorized representative will represent the party during the division's administrative procedure.

4.3.3 If not using the division-approved form, and the authorized representative is not a licensed attorney or accountant, the party must provide a signed written notice to the division that the authorized representative will represent the party during the division's administrative procedure.

4.3.4 The party may revoke the authorized representative's authority by contacting the division in writing.

4.4 After receipt of a wage complaint that states a claim for relief, the division will initiate the administrative procedure by sending a Notice of Complaint to the employer, along with any relevant supporting documentation submitted by the employee, via U.S. postal mail, electronic means, or personal delivery.

4.4.1 If the Notice of Complaint cannot be delivered, the administrative procedure has not been initiated. If a proper address is located or provided, the division will resend the Notice of Complaint, and the employer's deadline to respond will be calculated from the date of the subsequent notice.

4.4.2 If the division cannot determine the employer's correct address, it may contact the employee to request the employer's address. The division may dismiss the wage complaint if neither the employee nor the division can determine the employer's correct address.

4.4.3 The employer's response to the Notice of Complaint must include the completed division Employer Response Form, as well as any additional information or documentation requested by the division. An insufficient response from the employer may be considered a failure to respond under § 8-4-113(1)(b).

4.4.4 If an employer obtains a good cause extension to respond under § 8-4-113(1)(b), the extension does not waive or reduce penalties owed to the employee pursuant to § 8-4-109(3)(b) if the employer fails to pay the employee's wages within fourteen days after the Notice of Complaint is sent.

4.5 After receipt and review of the employer's response, the division may contact the employee for additional documentation or information. If the employer denies, in whole or in part, the allegations in the Notice of Complaint, and the division determines further investigation would be beneficial, the division shall send to the employee any relevant supporting documentation submitted by the employer. If the employee does not respond to the request for additional documentation or information by the deadline given, the division will make a determination based on the information in the record.

4.6 All parties to a wage complaint are responsible for ensuring the division has current contact information.

4.6.1 All parties must promptly notify the division of any change in contact information, including mailing address, email address, and phone number.

4.6.2 Parties should not rely on the U.S. Postal Service to forward mail. Failure to respond to a notice because mail was not forwarded to a new address will not be excused.

4.7 In any division investigation, proceeding, or other action, if information is provided to the division by a source requesting confidentiality, and that information is used only as a basis for procuring other evidence, not offered as evidence itself, then the source shall remain confidential. Any such confidential source is unlawful to disclose (unless the source consents) in any administrative or judicial proceeding, in response to any records or information request, or in any other manner, in order to effectuate statutory requirements including but not limited to the following:

A. If information is properly treated as confidential, the division "shall provide a physical environment and establish policies and procedures to ensure confidentiality for all information regarding any employer, employee, or person pertaining to any action pursuant to articles 1 to 13" (C.R.S. § 8-1-115);

B. "No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any employee who has filed any complaint or instituted or caused to be instituted any proceeding under this article or related law or who has testified or may testify in any proceeding on behalf of himself, herself, or another regarding afforded protections under this article (C.R.S. § 8-4-120); and

C. It is unlawful to "discharge[] or threaten[] to discharge[], or in any other way discriminate[] against an employee" because s/he "may testify in any investigation or proceeding relative to enforcement of this article" (C.R.S. § 8-6-115).

4.8 Immigration status is irrelevant to wage rights and responsibilities, and the division shall assure that wage rights and responsibilities apply regardless of immigration status, including but not limited to as follows.

4.8.1 The division will not voluntarily provide any person or entity information concerning the immigration status of (a) a party to a wage claim, (b) a person offering information concerning a wage claim, or (c) a person with a relationship with anyone in categories (a) or (b).

4.8.2 Any effort to use a person's immigration status to negatively impact the wage and hour law rights, responsibilities, or proceedings of any person or entity is an unlawful act of obstruction, retaliation, and/or extortion, based on statutory provisions including but not limited to the following that make it unlawful:

A. For "any person" to "hinder[] or obstruct[] the director or any such person authorized by the director in the exercise of any power conferred by this article," including but not limited to wage investigations, rulemakings, or adjudicative or judicial proceedings (C.R.S. § 8-1-116(2));

B. For an employer to "intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any employee who has filed any complaint or instituted or caused to be instituted any proceeding under this article or related law or who has testified or may testify in any proceeding on behalf of himself, herself, or another regarding afforded protections under this article" (C.R.S. § 8-4-120); and

C. For any person to "threaten[] to report to law enforcement officials the immigration status of the threatened person or another person" to "induce another person" to give up money "or another item of value" (C.R.S. § 18-3-207(1.5)), including inducing the surrender of any "tangible and intangible personal property, contract rights, choses in action, [or] services … , and any rights of use or enjoyment connected therewith" (C.R.S. § 18-1-901).

Rule 5. Determination

5.1 Upon conclusion of the investigation of a wage complaint, the division will issue a determination.

5.1.1 The division shall send the determination to all parties via U.S. postal mail, electronic means, or personal delivery on the date the determination is issued by the division's compliance investigator. The division shall notify the parties of their termination and any appeal rights pursuant to § 8-4-111(3) and § 8-4-111.5(1).

5.1.2 The date of "issuance" of the division's determination, as used in § 8-4-111(3), is the date the division's determination is "sent," as used in § 8-4-111.5(1). Both the termination and

appeal deadlines are calculated from the date the division's determination is originally issued and sent to the parties.

5.1.3 If any copies of the decision are sent to the parties after the date the division's determination is originally issued and sent to the parties, those copies are provided only as a courtesy and do not change the thirty-five day appeal and termination deadlines.

Rule 6. Appeal

6.1 Any party to the claim may appeal the division's determination.

6.1.1 Parties are encouraged, though not required, to use the division's appeal form. A valid appeal is a written statement that is timely filed with the division, explains the clear error in the determination that is the basis for the appeal, and has been signed by the party or the party's authorized representative.

6.1.2 No appeal will be heard and no hearing will be held unless the appeal is received by the division within thirty-five calendar days of the date the determination is sent. It is the responsibility of the party filing the appeal to ensure the appeal is received by the division within the thirty-five day filing deadline.

6.1.3 Upon receipt of the appeal, the division will notify the parties of the date of the hearing and any interim deadlines via U.S. postal mail, electronic means, or personal delivery.

6.1.4 Upon receipt of the appeal, the division will send a copy of the appeal and a copy of the record of its investigation to the parties via U.S. postal mail, electronic means, or personal delivery. All evidence submitted to the division as part of the investigation is part of the record on appeal and need not be resubmitted.

6.2 Parties who timely file a valid appeal of the division's determination will be afforded an administrative appeal hearing before a division hearing officer. Parties may appear by telephone.

~~6.2.1~~

6.3 The parties may submit new testimonial evidence to the hearing officer in accordance with deadlines imposed by the division. The parties may submit new documentary or other non-testimonial evidence in accordance with deadlines imposed by the division and upon showing "good cause," which may be assessed based on any relevant factors, including but not limited to:

6.3.1 That the new evidence was previously not known or obtainable, despite diligent evidence-gathering efforts by the party offering the new evidence;

6.3.2 That the party failed to receive fair notice of the investigation or of a key filing by another party or by the Division to which the new evidence is responsive;

6.3.3 That factors outside the control of the party prevented a timely action or interfered with the opportunity to act, except that the acts and omissions of a party's authorized representative are considered the acts and omissions of the party and are not considered to be a factor outside the party's control as intended by this rule;

6.3.4 That a determination raised a new issue or argument that cannot be responded to adequately without the new evidence;

6.3.5 That, at the investigation stage, the party offering new evidence requested more time to submit evidence, yet was denied, and in the hearing officer's judgment (a) the need for

more time was legitimate and did not reflect neglect by the party, (b) the denial of the request for more time was unwarranted, and (c) exclusion of the evidence would cause substantial injustice to the party; and/or

6.3.6 That failure to admit the evidence otherwise would cause substantial injustice and did not arise from neglect by the party.

6.4 ~~2.2~~ New evidence must be sent to all other parties to the appeal. Failure to send all new evidence to all other parties to the appeal may result in the evidence being excluded from the record.

6.5 ~~2.3~~ If the party who filed the appeal does not participate in the hearing, the appeal may be dismissed.

6.6 ~~2.4~~ All testimony at a hearing must be recorded by the division but need not be transcribed unless the hearing officer's decision is appealed.

6.7 ~~2.5~~ The hearing officer may, upon the application of any party or on his or her own motion, convene a prehearing conference to discuss the issues on appeal, the evidence to be presented, and any other relevant matters that may simplify further proceedings.

6.8 ~~2.6~~ The hearing officer will decide whether the division's determination is based on a clear error of fact or law.

6.9 ~~2.7~~ The hearing officer shall not engage in ex parte communication with any party to an appeal.

6.10 ~~3~~ The hearing officer's decision constitutes a final agency action pursuant to C.R.S. § 24-4-106. The division shall promptly provide all parties with a copy of the hearing officer's decision via U.S. postal mail, electronic means, or personal delivery. The division shall notify the parties of their appeal rights pursuant to § 8-4-111.5(5).