COLORADO
Department of
Labor and Employment

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

Wage Protection Act Rules, 7 CCR 1103-7 (March 16, 2020)

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

Wage Protection Act Rules, 7 CCR 1103-7 (March 16, 2020)

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

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

IV. Effective Date of Adopted Temporary Rules. These rules are being adopted as temporary rules on March 16, 2020, effective immediately on March 16, 2020, pursuant to C.R.S. § 24-4-103(6), and remaining in effect for 120 days after adoption, through July 14, 2020.

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

March 16, 2020
Date

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

Wage Protection Act Rules, 7 CCR 1103-7 (March 16, 2020)

(1) BASIS. These rules conform the Wage Protection Act ("WPA") Rules, 7 CCR 1103-7, to statutory changes to C.R.S. Title 8, Article 4 and serve important public needs that the Director of the Division of Labor Standards and Statistics (hereinafter, "Director" and "Division," respectively) finds are best served by these rule updates, amendments, and supplements.

(2) SPECIFIC STATUTORY AUTHORITY. The Director of the Division of Labor Standards and Statistics is authorized to adopt and amend rules and regulations to enforce, execute, apply, and interpret Articles 1, 4, and 6 of Title 8, C.R.S. (2019), as well as all rules, regulations, investigations, and other proceedings of any kind pursued thereunder, by the provisions of Articles 1, 4, and 6, including, inter alia: § 8-1-103(1),(3), § 8-1-107(2)(p), § 8-1-111; § 8-1-112; § 8-1-122(2); § 8-1-130; § 8-4-111; § 8-4-111.5; § 8-4-118; § 8-4-120; § 8-6-102; § 8-6-105 to -112; § 8-6-115 to -117; § 8-6-119. Authority also derives from the Administrative Procedure Act, C.R.S. § 24-4-103, including the temporary rules provisions of § 24-4-103(6).

(3) TEMPORARY RULES. Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds as follows:

(A) Demonstrated need exists for the rules. The specific findings in Part (4) below are hereby incorporated into this finding as well.

(B) Proper statutory authority exists for the rules. The specific statutory authority in Part (2) above is hereby incorporated into this finding as well.

(C) To the extent practicable, the rules are clearly stated so that their meaning will be understood by any party required to comply.

(D) The rules do not conflict with other provisions of law.

(E) Any duplicating or overlapping of the regulation is explained by the agency.

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

(A) Joint Employment: This amendment freezes the status quo standard for "joint employment" under Colorado wage and hour law, pending planned upcoming permanent rulemaking.

(1) The existing doctrine under federal law.

For over 70 years, the "joint employment" rule under federal wage law, the Fair Labor Standards Act ("FLSA"), has defined when employers are responsible for illegal wages paid by contractors with which they share control over the work, corporate ties, or other linkages. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (noting that the FLSA's definitions are "broad" because they "derive[] from the child labor statutes" and holding "de-boning" meat workers were employed by both (A) the

labor contractor who hired and paid them, and (B) the meat company where they did their slaughterhouse work). After *Rutherford Food* and other cases, the United States Department of Labor ("USDOL") promulgated the basic standard as a regulation in 1958 that has remained with little change:

> § 791.2 Joint employment.
>
> (a) A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act.[4] On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek.[5] In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.
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> [4] *Walling v. Friend, et al.*, 156 F. 2d 429 (C. A. 8).
>
> [5] Both the statutory language (section 3(d) defining "employer" to include anyone acting directly or indirectly in the interest or an employer in relation to an employee) and the Congressional purpose as expressed in section 2 of the Act, require that employees generally should be paid overtime for working more than the number of hours specified in section 7(a), irrespective of the number of employers they have. Of course, an employer should not be held responsible for an employee's action in seeking, independently, additional part-time employment. But where two or more employers stand in the position of "joint employers" and permit or require the employee to work more than the number of hours specified in section 7(a), both the letter and the spirit of the statute require payment of overtime.
>
> (b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:
>
> (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees;[6] or

> [6] *Mid-Continent Pipeline Co., et al. v. Hargrave*, 129 F. 2d 655 (C.A. 10); *Slover v. Wathen*, 140 F. 2d 258 (C.A. 4); *Mitchell v. Bowman*, 131 F. Supp., 520 (M.D. Ala. 1954); *Mitchell v. Thompson Materials & Construction Co., et al.*, 27 Labor Cases Para. 68, 888; 12 WH Cases 367 (S.D. Calif. 1954).

(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee;[7] or

> [7] Section 3(d) of the Act; *Greenberg v. Arsenal Building Corp., et al*., 144 F. 2d 292 (C.A. 2).

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.[8]

> [8] *Dolan v. Day & Zimmerman, Inc.*, et al., 65 F. Supp. 923 (D. Mass. 1946); *McComb v. Midwest Rust Proof Co*., et al., 16 Labor Cases Para. 64, 927; 8 WH Cases 460 (E.D. Mo. 1948); *Durkin v. Waldron., et al.*, 130 F. Supp., 501 (W.D. La. 1955). *See also Wabash Radio Corp. v. Walling*, 162 F. 2d 391 (C.A. 6).

29 C.F.R. § 791.2.

Caselaw and commentary have evolved in the decades since, but without substantial change; the doctrine has remained robust, preventing evasion of wage obligations and redressing the problem of often-insolvent contractors being deemed the only "employer." Two sources have been the leading guidance of recent years. First, USDOL promulgated an "Administrator's Interpretation" in 2016 with a highly detailed analysis of different forms of joint employment:

> [T]he Department of Labor's Wage and Hour Division (WHD) regularly encounters situations where more than one business is involved in the work being performed and where workers may have two or more employers. More and more, businesses are varying organizational and staffing models by, for instance, sharing employees or using third-party management companies, independent contractors, staffing agencies, or labor providers. As a result, the traditional employment relationship of one employer employing one employee is less prevalent. … The growing variety and number of business models and labor arrangements have made joint employment more common. …
>
> Horizontal joint employment exists where the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee. The analysis focuses on the relationship of the employers to each other. … [G]uidance provided in the FLSA joint employment regulation — which focuses on the relationship between potential joint employers — is useful when analyzing potential horizontal joint employment cases.
>
> Vertical joint employment exists where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and the economic realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work. This other

> employer, who typically contracts with the intermediary employer to receive the benefit of the employee's labor, would be the potential joint employer. Where there is potential vertical joint employment, the analysis focuses on the economic realities of the working relationship between the employee and the potential joint employer. … [G]uidance provided in the MSPA [Migrant and Seasonal Agricultural Worker Protection Act] joint employment regulation [29 C.F.R. § 500.20(h)(5)(iii)] is useful when analyzing potential vertical joint employment.
>
> The structure and nature of the relationship(s) at issue in the case, reflecting potentially horizontal or vertical joint employment or both, should determine how each case is analyzed.

USDOL Wage & Hour Division, "Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act" (Administrator's Interpretation 2016-1, Jan. 20, 2016) (footnotes omitted) (detailing separate multi-factor tests for horizontal and vertical joint employment).

Second, *Salinas v. Commercial Interiors, Inc.,* surveyed the caselaw since *Rutherford Foods*, examined the joint employment regulation, and noted that:

> in amending the FLSA in 1988, Congress recognized the "FLSA joint employment rule," explaining that "there are some situations in which an employee who works for two separate employers or in two separate jobs for the same employer has all of the hours worked credited to one employer for purposes of determining overtime liability." [Citing 1985 legislative history.] Congress also endorsed the FLSA's joint employment doctrine in enacting the Migrant and Seasonal Agricultural Workers Protection Act, … which uses the same definition of "employ" as the FLSA. [Citing 1982 legislative history that in adopting MSPA, Congress adopted ''[t]he exact same principles to define the term 'employ' in … joint employment situations as are used under FLSA'.']

848 F.3d 125, 135 (4th Cir. 2017). *Salinas* then detailed a multi-factor test to analyze joint employment:

> (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
>
> (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment;
>
> (3) The degree of permanency and duration of the relationship between the putative joint employers;
>
> (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;

> (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
>
> (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.
>
> We emphasize that these six factors do not constitute an exhaustive list of all potentially relevant considerations. To the extent that facts not captured by these factors speak to the fundamental threshold question that must be resolved in every joint employment case—whether a purported joint employer shares or codetermines the essential terms and conditions of a worker's employment—courts must consider those facts as well.

848 F.3d 125, 141-142 (4th Cir. 2017).

Salinas quickly became a leading national case on joint employment, including in Colorado. Multiple courts in Colorado followed *Salinas*; none rejected it. *E.g., Merrill v. Pathway Leasing LLC*, 2018 WL 2214471 (D. Colo. May 14, 2018) ("[T]he Court agrees … [that] [t]he *Hall-Salinas* test properly determines whether more than one person or entity are putative joint employers…. The Court therefore utilizes the *Hall-Salinas* test below in determining whether Defendants are joint employers.") (citing *Sanchez v. Simply Right, Inc.*, 2017 WL 2222601 (D. Colo. May 22, 2017) ("The Court … agrees ... that the test set forth in *Salinas* focuses upon the relevant relationship….")); *Valverde v. Xclusive Staffing, Inc.*, 2017 WL 3866769 (D. Colo. Sept. 5, 2017) (citing only *Salinas* as joint employment authority, framing the issue as follows: "*if* Defendants are joint employers and *if* such joint employment renders them jointly and severally liable, *see Salinas*").

(2) The new U.S. Department of Labor policy and regulation.

The above state of affairs has been upset, and thrown into substantial uncertainty, by the U.S. Department of Labor's repudiation of the existing Administrator's interpretation and, more recently, its promulgation of a new regulation that abrogates essentially all existing joint employment law. 85 Fed. Reg. 2820, 2820-21 (published Jan. 16, 2020, effective March 16, 2020) (revising 29 C.F.R. §§ 791.1-791.2). As noted by an article in the Society for Human Resources Management, USDOL's new rule "narrow[s]" when employers are responsible for ensuring wages are legal, because it repeals the long-established "right to control" factor; under the new rule, unlike in the past, the "right to control the employee's working conditions would not be enough to show that a business is a joint employer; the company would have to actually exert that control … day-to-day." Lisa Nagele-Piazza, "Labor Department Releases Final Joint-Employer Rule," (SHRM, Jan 13, 2020). USDOL acknowledged that its new rule "may reduce the number of persons who are joint employers in one scenario and as a result, employees will have the legal right to collect wages due under the Act from fewer employers," and that "there may be transfers from employees to employers" — but USDOL claimed it "lacks the data needed to calculate the potential amount or frequency of these transfers." 85 Fed. Reg. at 2821, 2853. However, the Economic Policy Institute, in an analysis co-authored by the former Chief Economist of USDOL, estimates that the new rule could cost workers more than a billion dollars a year, both from encouraging more employers to outsource work, and from increased wage theft:

> First, this rule would incentivize workplace "fissuring," … reliance on contractors,

> temporary help agencies, and franchises rather than hiring employees directly. Research shows that these business models suppress wages…. [W]hile DOL states that it "does not expect this rule to generate transfers … from workers that currently have one or more joint employers," it neglects to account for the reduction in wages … as more employers are incentivized to … boost their reliance on domestic outsourcing. We … estimate that in the long run, the increase in workplace fissuring … would result in a transfer of at least $954.4 million from workers to employers annually….
>
> Second, this rule would increase … wage theft .... [USDOL] hints that it understands that … when it states that "*assuming that all employers always fulfill their legal obligations*, … [the rule] would not result in any reduction in wages received ...." However, rather than performing a careful analysis of … [when] the assumption that all employers always fulfill their legal obligations … does not hold, … the Department remarkably ends any discussion of the impact of wage theft with the assumption that it does not occur. We conservatively estimate that … wage theft as a result of the rule will … transfer at least $138.6 million from workers to employers annually.
>
> Putting together these two estimates—more than $954.4 million lost … due to an increase in workplace fissuring and more than $138.6 million in losses … as a result of wage theft—we estimate that each year workers will lose more than a billion dollars as a result of this rule….

Celine McNicholas & Heidi Shierholz, "EPI comments regarding the Department of Labor's proposed joint-employer standard" (June 25, 2019) (emphases added).

The State of Colorado on February 26, 2020, filed a federal lawsuit against USDOL, in collaboration with 17 other states, arguing that the new USDOL rule was unlawfully adopted and an improper policy change at odds with core FLSA principles, and therefore should be enjoined to prevent its alteration of the pre-existing "joint employer" standards in caselaw and regulations.

In sum, USDOL's promulgation of its new rule threw well-established joint employment law into uncertainty, adopted a standard so narrow that it will deny redress to workers paid unlawful wages, and in the judgment of the State of Colorado was improper both procedurally and substantively.

(3) The state of joint employment under Colorado wage and hour law.

Last May, Colorado enacted HB 19-1267, declaring that under state wage law, "employer … has the same meaning as set forth in the federal 'Fair Labor Standards Act', 29 U.S.C. Sec. 203(d)." C.R.S. § 8-4-101(6). In adopting the new "employer" definition in May 2019, Colorado expressly referenced the FLSA statutory definition, making clear it was codifying FLSA law as it existed at that point in time — which is a well-established rule of Colorado statutory interpretation as well:

> When a statute specifically incorporates enumerated provisions of another statute, in contrast to referring to another law in general terms, the General Assembly is considered to be adopting the contents of the other provision *as of the time of the adoption*. … [A]bsent express legislative declaration to the contrary, subsequent amendments to the adopted statute will not affect the terms originally adopted.

Ball Corp. v. Fisher, 51 P.3d 1053, 1058 (Colo. App. 2001) (emphasis added; citation and quotation marks omitted); *see Sch. Dist. No. 1 in Arapahoe Cnty. v. Hastings*, 220 P.2d 361, 364 (Colo. 1950) ("It

is a general rule that when a statute adopts a part or all of another statute ... by a specific and descriptive reference thereto, the adoption takes the statute as it exists at that time, *and does not include subsequent additions or modifications of the adopted statute*, where it is not expressly so declared") (emphasis added; quotation marks omitted); *Accord Brizzee v. Fred Meyer Stores, Inc.*, No. CV04-1566-ST, 2006 WL 2045857, at *11–12 (D. Or. July 17, 2006) (a state statute "cannot incorporate future federal regulations not yet promulgated at the time of the enactment"; doing so amounts to an unconstitutional delegation of power to amend state statutes to federal regulatory authorities, and Oregon legislature did not intend to "empower the [US]DOL to fill in any gaps in the [Oregon Family Leave Act]. Instead, it authorized … the Oregon Bureau of Labor and Industries"); *State v. Rodriquez*, 365 So. 2d 157, 160 (Fla. 1978) (Florida Legislature intended "to incorporate federal law and regulations in effect at the time [the law] was enacted"; "to adopt in advance any federal act or ruling of any federal administrative body which may be adopted in the future would amount to an unlawful delegation of legislative authority"); *Advocates for Effective Regulation v. City of Eugene*, 1981 P.2d 368, 379 (Or. App. 1999) ("A state statute … cannot incorporate future federal regulations not yet promulgated at the time of enactment; the effect of doing so is to delegate the power to amend the statute to the federal regulatory authority").

Thus, Colorado law follows FLSA caselaw and regulations as they existed in May 2019, not the new USDOL regulation adopted in 2020. However, without further elaboration, confusion could result. A Colorado statute stating that "employer … has the same meaning as set forth in the federal 'Fair Labor Standards Act'" could lead a reader interpreting Colorado law to assume that the *current* state of all FLSA law, including the new USDOL regulation adopted in 2020, applies. At least one attorney has already expressed that view to the Division, and while the Division provides guidance to any employer, employee, attorney, or other stakeholder who asks, the Division cannot assume that all stakeholders will contact the Division, rather than make the mistaken assumption that the new USDOL joint employment regulation applies to Colorado wage and hour law.

(4) The present need for joint employment rulemaking under Colorado law.

Based on the above, the Division sees a need to promulgate an immediate rule to clarify that the new USDOL joint employment regulation does not apply to Colorado wage and hour law. The Division will carefully consider exactly what joint employment rule to adopt. Many different views were expressed in a stakeholder meeting the Division held before adopting this temporary or emergency rule; there is not a clear consensus, and there are many complex sources of guidance to consider, including *Salinas*, the 2016 Administrator's Interpretation, the longstanding prior USDOL joint employment regulation, and other sources of law and of interpretive guidance. The Division therefore is taking time to research the issue exhaustively, and whatever rule it proposes may well see change in the rulemaking process, when the Division — as it did with the COMPS Order — genuinely listens to stakeholder comments, and considers changing its proposed rules based on informed input from stakeholders in the rulemaking process.

Because the Division is open to changing whatever joint employment rule it proposes, it does not codify one specific legal standard in this temporary or emergency rule — because that could codify one rule for the next 3-4 months, only to be replaced by a different rule when and if stakeholder feedback justifies changing the permanent rule. This temporary or emergency rule therefore simply freezes the status quo, by providing:

> "Joint employment under Colorado wage and hour law shall continue to be analyzed under the versions of the federal Fair Labor Standards Act and applicable FLSA

> regulations that were in effect as of the enactment of H.B. 19-1267 by the State of Colorado on May 16, 2019."

This definition is added to new Rules 2.6 and 2.7, which simply repeat the statutory definitions of "employee" and "employer" in C.R.S. §§ 8-4-101(5) and 8-4-101(6), respectively — with the above-quoted sentence on "joint employment" added at the end of the Rule 2.7 "employer" definition.

This assures no immediate change to joint employment under Colorado wage and hour law, because the January 2020 COMPS Findings — citing *Salinas* and other caselaw citing the longstanding FLSA joint employment regulation as it existed before the new USDOL joint employment regulation — explained: "Joint employment is … provided for by amended C.R.S. § 8-4-101(6) because under FLSA law as it stood upon enactment of H.B. 19-1267, '[s]eparate persons or entities that share control … may be deemed joint employers under the FLSA.'" (January 2020 COMPS Findings, p. 9; citation omitted).

The Division will notice a proposed permanent joint employment rule within 30 days of this temporary or permanent rule, which will begin the formal notice and comment process on joint employment rulemaking. Until then, this temporary or emergency rule simply avoids confusion by assuring that USDOL's new rule will create no sudden change or uncertainty as to joint employment under Colorado wage and hour law.

(B) The need for temporary or emergency rulemaking. The above developments came to the Division's attention recently, after it finalized COMPS Order #36 in January 2020 and finalized the Wage Protection Act rules in late 2019. The Division finds, consistent with the standard for adopting temporary or emergency rules, that immediate adoption of these rules is imperatively necessary for the preservation of public health, safety, or welfare, and that compliance with permanent rulemaking provisions before adoption would be contrary to the public interest. These rules will prevent and redress the harms noted above, and the legislature has repeatedly issued findings that preventing and redressing unlawful wage non-payment prevents and redresses significant harms to public health, safety, and welfare. For example:

- The Wage Protection Act of 2014, which created the Division's authority and requirement to rule-make on, investigate, and issue determinations on all wage complaints it receives, included the following findings as to the importance of compliance with, and enforcement of violations of, state wage payment laws: "The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety." (Colorado S.B. 14-005, § 11, enacted May 29, 2014.)

- The 2019 statute adopting the current "employer" standard under Colorado law found that adopting a broader "employer" definition under Colorado law was necessary because "[e]xisting law … does not provide sufficient protections for workers and their families; and … to protect all workers, it is necessary to close loopholes that allow for the exploitation of human labor for profit." (Colorado H.B. 19-1267, § 1(3)(b)-(c), enacted May 16, 2019.)

- The 2019 Colorado Chance to Compete Act, which limited the screening of job applicants based on criminal history, included the following findings that are more broadly relevant to the problem of workers being under-paid: that when people "work at jobs that are below their potential" or otherwise suffer "underemployment," they

> "struggle to provide for their families," and "[c]hildren and families suffer." (Colorado H.B. 19-1025, § 1, enacted May 28, 2019.)

Consequently, a "temporary or emergency" rule is appropriate for the up to 120-day period permitted under the Administrative Procedure Act:

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

(C.R.S. 24-4-103(6)(a).)

The above-detailed risks these temporary or emergency rules redress — of costly legal uncertainty, and of weakened wage rights that would cost workers substantial lost wages — easily exceed various justifications that have been found sufficient for "temporary or emergency" rules:

- helping applicants get probationary driver's licenses, more quickly than regular rulemaking allows, was sufficient justification for a "temporary or emergency" rule in *Elizondo v. Motor Vehicle Division*, 570 P.2d 518, 523 (Colo. 1977); and

- a "budgetary emergency" was sufficient justification, even if the budget problem was known "long before," without strict need for "specific, objective data," as long as "the reasoning process that leads to the rule's adoption [was] defensible," in *Colorado Health Care Ass'n v. Dep't of Social Services*, 598 F. Supp. 1400 (D. Colo. 1984), *affirmed*, 842 F.2d 1158 (10th Cir. 1988).

(5) EFFECTIVE DATE. These rules are being adopted as temporary rules on March 16, 2020, effective immediately on March 16, 2020, pursuant to § 24-4-103(6), and remaining in effect for 120 days after adoption, through July 14, 2020.

March 16, 2020

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

Date