

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

Prevailing Wage and Residency (PWR) Rules, 7 CCR 1103-6 (2023), adopted November 10, 2022.

I. BASIS: The Director (“Director”) of the Division of Labor Standards and Statistics (“Division”) has authority to adopt rules and regulations on wage-and-hour and workplace conditions, under the authority listed in Part II, which is incorporated into Part I as well.

II. SPECIFIC STATUTORY AUTHORITY: These Rules are issued under the authority, and as enforcement, of Articles 1, 4 and 17 of C.R.S. (Colorado Revised Statutes) Title 8 (2022), and Article 92 of C.R.S. Title 24, including but not limited to statutes listed in the Prevailing Wage and Residency Rules (PWR), Rule 1.1 (incorporated into this Part II), and are intended to be consistent with the State Administrative Procedures Act, C.R.S. § 24-4-101, et seq.

III. FINDINGS, JUSTIFICATIONS, AND REASONS FOR ADOPTION. Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds as follows: **(A)** demonstrated need exists for these rules, as detailed in the findings in Part IV, which are incorporated into this finding as well; **(B)** proper statutory authority exists for the rules, as detailed in the list of statutory authority in Part II, which is incorporated into this finding as well; **(C)** to the extent practicable, the rules are clearly stated so that their meaning will be understood by any party required to comply; **(D)** the rules do not conflict with other provisions of law; and **(E)** any duplicating or overlapping has been minimized and is explained by the Division.

IV. SPECIFIC FINDINGS FOR ADOPTION. Pursuant to C.R.S. § 24-4-103(6), the Director finds as follows. The “Prevailing Wage and Residency (PWR) Rules” is a revised rule set combining existing rules on the Keep Jobs in Colorado Act (“KJICA”), C.R.S. § 8-17-101 et seq. (previously, the “Keep Jobs in Colorado Act Rules”), with new rules on the Colorado Quality Apprenticeship Training Act of 2019 (the “Prevailing Wage Act,” or “PWA”), C.R.S. § 24-92-201 et seq. Below are findings and explanations on the nature and basis of the rules proposed to satisfy the Division’s statutory charge.

A. Rule 1: Statement of Purpose, Authority, and Construction; and Definitions

Rules 1.1, 1.2, and 1.4 detail the relationship of these rules to other applicable rules and statutes, and the intent that these Rules remain in effect to the maximum extent possible if any portion is held invalid. Because the Department of Personnel and Administration (“DPA”) may have additional rules applicable to rights and responsibilities under C.R.S. Title 24, Article 92, Part 2, C.R.S. § 24-92-202(3), and because federal or local law may address prevailing wages, Rule 1.3 provides that “[w]henver employers are subject to both Colorado and federal and/or local law, the law providing the greater protection or setting the higher standard shall apply” — as is generally true when multiple labor laws from different jurisdictions or sources apply — including that while the Division has jurisdiction “over all questions arising with respect to the administration and interpretation of these Rules,” in light of the remedial purposes of the PWA, in the event of differences between rules from this Division, DPA, or other sources, “the rule providing greater protection for the rights of employees shall govern.”

B. Rule 2: Definitions

Rule 2 defines key terms separately and jointly for the two Acts: some are statutory (e.g., Rules 2.3 and 2.10 incorporate the PWA and KJICA definitions of “employee” and “public project”); others are specific to these rules (e.g.: “contractor”; “site of the project”; “wage determination”; “willful violation”). Rule 2.3.1 was amended to adopt the prior definition from the KJICA rules, which has been in existence since 2014. The “reckless disregard” example in Rule 2.14 “willful violation” is verbatim from the FLSA definition at 29 C.F.R. 578.3(c)(3). Rule 2.9’s definition of fringe benefit, Rule 2.11’s definition of site of the project, and Rule 2.13’s definition of “wage determination” are verbatim from Davis-Bacon regulatory definitions of those terms, 29 CFR § 5.2 (2022), some of which already existed in the prior KJICA rules.

C. Rule 3: KJICA’s “80% Colorado Labor” Requirement; Contractor Obligations

Rule 3 combines, consolidates, and simplifies several rules from the prior “Keep Jobs in Colorado Act Rules.” Rule 3.1 describes KJICA’s substantive requirement, at C.R.S. § 8-17-101(1), that workers meeting the Rule 2.3 definition of “Colorado labor” perform at least eighty percent of the work on public projects undertaken in the state of Colorado and financed in whole or in part by funds of the state of Colorado or its counties, school districts, or municipalities, unless the requirement is waived by the governmental body financing the public works project.

Rule 3.2 details how Rule 3.1 compliance is assessed: “measured over the entirety of the completed project, and ...

determined using the total taxable wages and fringe benefits paid to covered workers, minus any per diem payments.”

Rule 3.3 describes the kinds of residency documentation that contractors may rely on to assess whether workers meet the “Colorado labor” requirement.

Rule 3.4 restates statutory language (*i.e.*, C.R.S. § 8-17-101) that the government body may waive the 80% requirement if reasonable evidence demonstrates insufficient Colorado labor to perform the work, and compliance would create an undue burden that would substantially prevent completion of a project. Rule 3.5 restates statutory language (*i.e.*, C.R.S. § 8-17-102) that contracts for public works projects shall contain provisions for the preference of Colorado labor.

D. Rule 4: Contractor Obligations Under the PWA; Multiple Prevailing Wage Rates

Rule 4.1 contains the basic PWA requirement, that all contractors and subcontractors must pay employees all wages owed under the PWA, C.R.S. § 24-92-202, on no less than a weekly basis, defined by the rule as “at least once every consecutive seven calendar days, not workdays.”

Rule 4.2 explains how contractors and subcontractors can meet their wage obligations under the PWA, providing that a contractor or subcontractor must pay all employees the full amount listed contained in a wage determination.

Rule 4.3 provides that if employees perform multiple positions with differing prevailing wage rates or classifications, they may be compensated at the rates specified for each classification.

E. Rule 5: Complaints

Rule 5 describes how complaints under the KJICA or the PWA can be heard; Rule 5.1 applies to KJICA complaints, and Rule 5.2 applies to PWA complaints.

Rule 5.1, which combined previously numbered rules 8 through 11 under the prior Keep Jobs in Colorado Act Rules, provides information about the complaint process for KJICA complaints.

Rule 5.2.1 details how PWA complaints can be brought either directly to the Division or to a contracting agency; the latter must bring the complaint to the Division if it is not remedied in 15 days, or if it appears to be a willful violation.

Rule 5.2.2 explains the process for a complaining employee or former employee to file a private lawsuit under the PWA: specifically, if a complaint is not resolved by either the contracting agency, or the Division, the complaining employee or former employee may file suit within 120 days from the later of: (1) the employee’s complaint to the contracting agency, if it is not resolved under Rule 5.2.1(C) or reported to the Division under Rule 5.2.1(D) of these Rules in that time; or (2) the Division’s determination, made pursuant to Rule 5 of the Wage Protection Rules, 7 CCR 1103-7.

F. Rule 6: Determinations and Fines

Rule 6.1 details the fine schedule for knowing violations of KJICA; it also provides that if the Division has imposed three or more KJICA fines on a contractor within the past five years and finds the violations to be egregious, it may initiate a process to debar the contractor pursuant to C.R.S. § 24-109-105.

Rule 6.2 details the fine schedule for PWA violations, and provides if the Division reaches a determination pursuant to Rule 5 of the Wage Protection Rules, 7 CCR 1103-7, that a willful violation of the PWA occurred, and also provides that the Division shall order restitution of applicable back pay for the impacted employees.

G. Rule 7: Retaliation Prohibited

Rule 7.1 recites and restates existing retaliation prohibitions in statutes and rules applicable to prevailing wages.

H. Rule 8: Appeals

Rule 8 states that a complainant or respondent filing a KJICA or a PWA complaint may appeal the Division’s determination pursuant to the appeals process in Rule 6 of the Wage Protection Rules, 7 CCR 1103-7.

V. EFFECTIVE DATE. These rules take effect January 1, 2023.



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

November 10, 2022
Date