COLORADO
Department of Labor and Employment

Division of Labor Standards and Statistics
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Interpretive Notice & Formal Opinion ("INFO") # 5:

Public Health Emergency Whistleblower ("PHEW") Law

Overview

This INFO #5 covers rights and responsibilities under Colorado's public health emergency whistleblower law (HB 20-1415, July 11, 2020) ("PHEW"), as implemented by the Colorado Whistleblower, Anti-Retaliation, Non-interference, and Notice-Giving ("Colorado WARNING") Rules, 7 CCR 1103-11. A Spanish version of this INFO #5 is also available.

Workers and Entities Covered

Most Colorado labor laws cover only "employers" and "employees," but PHEW covers any "worker" (not just "employees") for any "principal" (not just "employers"):

- **Covered "principals" are:** (A) "employers," as defined in existing Colorado wage law;[1] (B) any "entity that contracts with five or more independent contractors in the state each year"; and (C) state and local government employers (but not the federal government).[2]
- **Covered "workers" are:** (A) "employees," as defined in existing Colorado wage law; and (B) any person "who works for an entity that contracts with five or more independent contractors in the state each year."[3]

Worker concerns, opposition, and participation that are protected

A principal cannot retaliate against, or interfere with, the following worker activities:[4]

- **Concerns**: raising a "reasonable concern about workplace violations of government health or safety rules, or about an otherwise significant workplace threat to health or safety, related to a public health emergency."
- **Opposition**: "opposing any practice the worker reasonably believes is unlawful" under PHEW.
- **Participation**: "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" under PHEW.

Those protections come with the following limits and conditions.

- **Public health emergency**: Protection applies only to activities related to either (A) "a public health order issued by a state or local public health agency" or (B) "a disaster emergency declared by the governor based on a public health concern."[5]
- **Reasonableness**: Workers are protected even if they are incorrect about a claimed violation, if their belief was "reasonable" and in "good faith." Workers are *not* protected for communications (A) that are "knowingly false," or are made "with reckless disregard for the truth or falsity of the information," or (B) that "share individual health information that is otherwise prohibited from disclosure" by state or federal law.[6]

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[1] *See* C.R.S. § 8-4-101(6).

[2] C.R.S. § 8-14.4-101(3).

[3] C.R.S. § 8-14.4-101(5).

[4] C.R.S. §§ 8-14.4-102(1),(4); *see* WARNING Rule 5.1 concerning protected activity.

[5] C.R.S. § 8-14.4-101(4).

[6] C.R.S. §§ 8-14.4-102(5)-(6).

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- **Principal need not *agree* with or *act on* incorrect concerns**: If a worker's concern is reasonable but incorrect, the principal is not required to agree with it, or to take any action the worker requests. It just cannot fire or otherwise act against the worker for raising that concern (for example, with a demotion, discipline, a cut in pay or hours, or an undesired transfer or shift change).
- **Principal control, and communication to others**: Where the protected activity is raising a "concern" (rather than opposition or participation), it is protected only (A) if made to "to the principal, the principal's agent, other workers, a government agency, or the public"; (B) if the worker states what action, condition, or situation constitutes a qualifying violation or threat; and (C) as to a principal that "controls the workplace conditions giving rise to the threat or violation."[7]

Worker Use of Personal Protective Equipment That is Protected

A principal must allow, and cannot act against a worker for, "voluntarily wearing at the worker's workplace the worker's own personal protective equipment, such as a mask, faceguard, or gloves" ("PPE") — with these limits and conditions on the PPE that the worker has a right to wear:[8]

- only PPE that "provides a higher level of protection than the equipment provided by the principal," which requires that it (A) does not provide less protection for others (*e.g.* a mask with a vent) and (B) is cleaned or replaced if the principal-provided PPE is cleaned or replaced;
- only PPE that "is recommended by a federal, state, or local public health agency with jurisdiction over the worker's workplace"; and
- only PPE that "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."

> **Examples**: If a principal provides a worker *no* face covering when a face covering is needed due to an airborne pathogen, or required by a health order, any worker-supplied face covering is considered to satisfy all of the above requirements, unless the principal proves that the worker's face covering is worse than none at all. If a principal provides PPE that satisfies all applicable health agency recommendations *and* is acquired from a known, reliable provider, then a worker's PPE of the same type must also come from a reliable provider.[9]

Non-Disclosure Agreements Restricting Protected Activity Are Unlawful And Unenforceable

A principal may have otherwise valid agreements or policies requiring non-disclosure or confidentiality, but under PHEW, a principal "shall not require or attempt to require":

- an agreement that "would limit or prevent the worker from disclosing information about workplace health and safety practices or hazards related to a public health emergency"; or
- a "workplace policy that would limit or prevent such disclosures."

Under PHEW, any such provisions are "void and unenforceable as contrary to the public policy of this state," and a principal's "attempt to impose" one "is an adverse action in violation" of PHEW.[10]

Worker Complaint Rights

A worker can file a complaint of retaliation or interference with PHEW rights with the Division, but cannot file a lawsuit in court without first filing with the Division. Unlike laws requiring the Division to investigate all *unpaid wage* claims, PHEW and other laws don't require the Division to investigate all *retaliation or interference*

[7] C.R.S. § 8-14.4-102(1) and WARNING Rule 5.1.2.

[8] C.R.S. § 8-14.4-102(3) and WARNING Rule 5.2.

[9] WARNING Rule 5.2.3 (covering both of these examples as "Special Cases" under the PPE rules).

[10] C.R.S. § 8-14.4-102(2).

claims. After receiving a retaliation or interference complaint, the Division will review it, and may preliminarily investigate it, to decide whether to fully investigate, in light of the Division's resources and other workload.

- If the Division decides to fully investigate a complaint, it will do so with notification to all parties.
- If the Division decides not to fully investigate a complaint, it will inform the worker of the decision within 30 days of receipt of the complaint, which serves to "authorize" the worker to pursue a lawsuit in court.

If the worker proves unlawful retaliation or interference (after a Division investigation, or in a lawsuit), then depending on how it affected the worker, the principal may be ordered to pay the worker past and future lost pay (if a firing, cut in pay or hours, etc., is found to be a violation), to reinstate the worker (if the violation cost the worker their job), to cease any ongoing violation, and/or to pay fines or penalties that statutes authorize for non-compliance. A lawsuit in court may provide the worker additional damages as well.[11]

Posting Duties of Principals[12]

Principals must "post notice of a worker's rights" under PHEW using the Division's Colorado Workplace Public Health Rights Poster, which will be updated annually in December, or using their own poster with the same substantive information. If workers have limited English language ability, principals must use a Poster in every language spoken by at least 5% of the workforce. The Division's poster is available in Spanish and many other languages, and principals may ask the Division for additional translations.

The poster must be "in a conspicuous location" where workers can read it at every work site. If the work site or other conditions make a physical posting impractical (including remote work), the principal must provide a copy of the poster to each employee or worker within their first month of work

Additional Information

Visit the Division's website, call 303-318-8441, or email cdle_labor_standards@state.co.us.

[11] C.R.S. §§ 8-14.4-105, 106.

[12] *See* WARNING Rule 4 for posting requirements generally.