



TO: Colorado Department of Regulatory Agencies (DORA)
FROM: Colorado Association of Commerce & Industry Labor & Employment Council
DATE: June 15, 2017
RE: Comments Regarding Sunset Review of Colorado Civil Rights Division Rules

The Colorado Association of Commerce & Industry (CACI) is the state's Chamber of Commerce and represents hundreds of businesses of all sizes across the state, as well as numerous trade associations, economic development organizations, and local chambers of commerce in Colorado. CACI's Labor & Employment Council is one of CACI's six policy councils and is represented by members who bring an expertise in labor and employment issues. The Council hereby submits comments to the Department of Regulatory Agencies (DORA) in response to its sunset review process of the Civil Rights Commission (CCRD). These comments include recommendations for changes to existing rules promulgated by the Division:

Rule 10.4(D)(4): This Rule states that the date of an alleged discriminatory act “is the date that the Charging Party first received notice of the adverse employment action at issue.” We believe that statement is not consistent with the statute. The statute sets time limits for filing actions under Part 4 as within six months after the alleged act “occurred.”

Recommendation: Amend the Rule to state that the date of an alleged discriminatory act is the date the act occurred. It could also make exceptions to that date based on court decisions about tolling of the statute of limitations in certain situations.

Rule 10.4(F): This Rule states that charges may be amended, among other reasons, for a failure of a party to “sign or verify a charge.” That provision contradicts Rule 10.4(B), which states that “only a signed and verified charge ... shall be accepted and filed as a charge of discrimination.” In other words, a charge that is not signed and verified cannot be amended, because only an accepted charge can be amended. Instead, the Charging Party must refile a charge that was not signed and verified when initially submitted.

Recommendation: Delete “including failure to sign or verify a charge” from this Rule.

Rule 10.6(A)(4): This Rule allows the Commission or its authorized designee to grant an extension for good cause for submittal of an appeal of a decision of the Director.

Recommendation: A maximum period of the allowable extension should be added to the Rule; such as 20 days.

Rule 10.7(B): While this Rule lists factors the Commission, a Commissioner, or an Administrative Law Judge must consider in determining whether “good cause” for granting an extension exists, it does not include any consideration of a lack of a good reason why the party requesting the extension should be granted the extension.

Recommendation: Amend the Rule to add that a lack of a good reason why the party requesting the extension should be granted the extension is grounds for determining that “good cause” does not exist.

Rule 20.1(A): This Rule specifies that notices of unfair practices prohibited by law must be posted at or near “each location where services of employees are performed.” The reference to “each location” is vague and/or overbroad. It could be interpreted as meaning several locations within the same store, restaurant, or other facility; whereas it should mean each store, restaurant, or other facility location.

Recommendation: Amend this Rule to add words such as “business, organizational, or other entity” between “each” and “location.”

Rule 20.2: In addition to real estate brokers or agents, home builders, and home mortgage lenders, this Rule requires “all other persons” who “transfer, rent, or finance real estate” to post and maintain in all places where these activities occur a notice summarizing discriminatory or unfair practices. The notice must be posted in places “ordinarily frequented by prospective buyers, renters, borrowers, and the general public.” The inclusion of “all other persons” is overbroad. The term “persons” includes an individual not in business of renting, selling, or financing real estate such as homeowner who also has a house they rent.

Recommendation: This Rule should be clarified.

Rule 60.3(B)(3)(a): This Rule allows an employer to condition an offer of employment on the results of a medical examination if “all entering employees are subject to an examination regardless of disability.”

Recommendation: This Rule should be amended to read as follows: “...all entering employees within the same job or job category are subject to such an examination regardless of disability.”

Explanation: An employer should be able to require medical examinations only of prospective employees for certain jobs or categories of jobs; not all jobs. That would make this Rule consistent with federal disability law.

Rule 60.4(A): This Rule states that refusing or denying equal terms, conditions, or privileges of housing, rental, or financing of housing because of use by the person with disability of “any auxiliary aid and/or assistance animal” is a violation of the Rule. The term “assistance animal” is inconsistent with the statute and reflects an improper broadening of the law by the Division. The statute refers to a “service animal,” which is a specific kind of trained animal, and which differs from an “assistance animal.”

Recommendation: Revise this Rule from “assistance animal” to “service animal.”

Rule 60.6(A)(1): This Rule states the requirement that an employer give a reasonable accommodation to a qualified applicant for employment or an employee who is disabled, unless the accommodation would impose an undue hardship or require an additional expense not otherwise incurred.

Recommendation: Amend Rule to also make an exception to the requirement of a reasonable accommodation if the individual would pose a direct threat to the health or safety of that individual or others in the workplace. This proposed change would make the Rule consistent with federal disability law.

Rule 75.4: This Rule states how the determination of whether a worker is free from control or direction, as one of the two basic elements of independent contractor status, is made. While the following Rule has many factors listed for determining whether a worker is engaged in an independent trade, occupation, etc., this Rule has only three factors related to control or direction.

Recommendation: Amend this Rule to add more factors indicating control or direction, or the lack of control or direction.

Rule 80.6(A): This Rule states that it is unlawful for an employer to exclude an individual from employment because of pregnancy; or to discharge or demote an employee because of pregnancy, pregnancy-related conditions, childbirth, or recovery from them.

Recommendation: Amend this Rule to ensure that is consistent with C.R.S. § 24-34-402.3, which refers to reasonable accommodations, accommodations not required, and undue hardship related to an employee with a health condition related to pregnancy or the physical recovery from childbirth.

Rule 85.1(D) and Rule 85.1(G): Rule 85.1(D) is not an accurate statement of the law; and it contradicts Rule 85.1(G). Rule 85.1(D) states that an “employer is strictly liable for the discriminatory harassment of a supervisor; and the employee is not required to complain to the employer.” However, Rule 85.1(G) states the affirmative defense that is available to the employer—except if the alleged harasser is the employer’s ultimate authority. Not all supervisors are the employer’s ultimate authority. As such, except if the alleged harasser is the employer’s ultimate authority, the employer is not strictly liable for harassment by a supervisor of an employee; and the employer may have a defense to liability if before filing a charge the employee does not inform the employer of the harassment, and therefore, give the employer an opportunity to take reasonable action to stop the harassment.

Recommendation: Delete Rule 85.1(D).

We appreciate the Department’s consideration of the CACI Labor & Employment Council’s comments to existing CCRD rules as it develops its sunset review recommendations. It is our hope that these recommendations will be incorporated into the Department’s recommendations. Please contact Loren Furman at lfurman@cochamber.com or at 303-866-9642 if you should have any questions regarding the comments provided above.