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October 6, 2025

Tracy Marshall, Director
Division of Family and Medical Leave Insurance
Department of Labor and Employment
633 17th Street
Denver, CO 80202

Dear Director Marshall:

RE: Proposed Rule: Regulations Concerning Employee Job Protection, Anti-Retaliation and Anti-Interference, Published in the Colorado Register of September 25, 2025.

The National Federation of Independent Business (NFIB)[1] submits these comments in response to the Division of Family and Medical Leave Insurance ("Division") proposed rule titled "Regulations Concerning Employee Job Protection, Anti-Retaliation and Anti-Interference," published in the Code of Colorado Regulations eDocket on September 15, 2025 and in the Colorado Register of September 25, 2025.[2] For the reasons set forth below, NFIB recommends that the proposed rule be rescinded.

The proposed rule exceeds the statute's authority, adding requirements for reinstatement that are not authorized by law and making it extremely difficult for small businesses to reinstate employees. The Division must work diligently to prevent placing unnecessary burdens on the shoulders of small business owners.

The Proposed Rule's Subject Matter Exceeds the Division's Cited Rulemaking Authority

[1] NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty States hear the voice of small business as they formulate public policies.

[2] 48 CR 18.

The Paid Family and Medical Leave Insurance Act, CRS § 8-13.3-501, *et. seq.*, provides that covered employees who take paid family and medical leave "shall be entitled, upon return from that leave, to be restored by the employer to the position held by the covered individual when the leave commenced, or to be restored to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment."[3]

The proposed 7 CCR 1107-7 exceeds the limited requirements of that provision. The rule defines an "equivalent position" as "a position that is nearly identical to the employee's former position" including "pay, benefits and working conditions, privileges, perks, location, and status" and "must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority."[4]

The rule takes a simple three-factor test for a proper reinstatement—*equivalent* 1) benefits; 2) pay; and 3) other terms and conditions—and turns it into a complicated thirteen-factor test—*identical* 1) pay; 2) benefits; 3) working conditions; 4) privileges; 5) perks; 6) location; 7) status; 8) duties; 9) responsibilities, requiring equivalent 10) skill; 11) effort; 12) responsibility; and 13) authority. The rule exceeds the statutory requirements without any authority to do so.

The Division asserts that it derives its authority to promulgate this rule from C.R.S. § 8-13.3-509(7).[5] But that provision does not authorize the Division to make changes to the relevant statutory provisions. Instead, it merely authorizes the Division to "establish a fine structure for employers who violate this section, with a maximum fine of $500 per violation" and establish "a process for the determination, assessment, and appeal of fines under this subsection."[6] The Division is merely empowered to establish a process and a fine structure, not to make substantive changes to what the Legislature enacted.

As the Colorado Supreme Court has stated, "state agencies are creatures of statute and have 'only those powers expressly conferred by the legislature.'"[7] As the proposed rule exceeds the prescribed authority, it must be rescinded and reintroduced with content that comports with what the legislature instructed—which is to say, a structure and process for fines.

<u>The Proposed Rule Conflicts with the Statute and Will Confuse Small Business Owners</u>

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[3] CRS § 8-13.3-509(1).

[4] Proposed 7 CCR 1107-7.2.4.

[5] Proposed 7 CCR 1107-7.1.2.

[6] C.R.S. § 8-13.3-509(7).

[7] *Pawnee Well Users, Inc. v. Wolfe,* 320 P.3d 320, 326 (Colo.2013), quoting *Hawes v. Colo. Div. of Ins.*, 65 P.3d 1008, 1016 (Colo.2003).

Not only does the proposed rule lack the statutory authority necessary for its promulgation, but it also runs counter to the text of the statute, introducing provisions that are difficult to apply and harmful to small businesses.

First, the statute does not demand restoration to a "nearly identical position"[8], as the proposed rule has it—merely one that is "equivalent" as it pertains to pay, benefits, and terms and conditions.[9] The difference between equivalence and identicality is vast. A nearly identical position essentially means that an employer must have two of the same roles. In contrast, a position with equivalent employment benefits, pay, and other terms and conditions of employment may still appear quite different from the original position. For instance, a cashier and a fry cook working at a fast-food restaurant may receive the same rate of pay, the same benefits, are subject to the same rules, and may even work the same schedule. Still, their roles cannot be described as "nearly identical" because the jobs entail different types of work—theirs are not "substantially similar duties and responsibilities."[10] The rule does not seem to allow for one's reinstatement into the other's role, while the text of the statute clearly would.

Though pay, benefits, and working conditions are terms used consistently in both the rule and the statute, "privileges, perks, location, and status"[11] are unique to the rule and are found nowhere within the statute. Nor does the rule attempt to explain what it means by the terms "privilege" or "perk."[12] Both are nebulous terms that could conceivably include workplace trifles as banal as having a desk with a view or a preferred delivery route. Indeed, the proposed rule gives credence to the idea that employee quibbles could materially affect a position's equivalence by adding to its definition of "equivalent position" a section regarding "approximate shift times."[13] The proposed rule indicates that employers may be required to change their employee shift schedules to accommodate a returning employee's preferred shift, without considering the needs of the business, the other employees, or the customers, and not doing so could be taken as an inference of retaliation.[14] There is no easy way for regulated entities, especially

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[8] *See* proposed 7 CCR 1107-7.2.4.

[9] *See* CRS § 8-13.3-509(1).

[10] *See* proposed 7 CCR 1107-7.2.4.

[11] *Id.*

[12] Elsewhere in the rule, "location" is defined more fully as "proximate location," proposed 7 CCR 1107-7.3.4(C), and "status," refers to whether an employee is full-time, part-time, seasonal, or permanent, *see* proposed 7 CCR 1107-7.3.4(E); proposed 7 CCR 1107-7.3.1(C). Both go beyond the language of the statute and thus should not be included in the definition of "equivalent position." In particular, the inclusion of location undermines the statute and indeed the rule itself. If, for instance, an employer is able to provide not just an equivalent or nearly identical position but the same exact position at a different location, thus exceeding the requirements of the statute and rule, it is as if the employer has satisfied neither. This will discourage small businesses, especially franchisees, from using their available resources to find equivalent jobs for employees without having to create duplicative roles.

[13] *See* proposed 7 CCR 1107-7.3.4(D).

[14] *See id.*

small businesses, to determine the distinction between what is permitted and what is forbidden when virtually every employee preference could be—and likely will be—argued to be a protected perk or privilege. Furthermore, the Division has muddied the waters by mischaracterizing shift times as indicative of whether a position is equivalent, thereby leaving open the door for countless frivolous claims against small business owners over workplace minutiae.

The rest of the definition for "equivalent position" makes matters worse. The equivalent position "must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority."[15] As stated above, requiring that the job duties in the new position be "substantially similar" to the original position severely limits an employer's ability to reinstate an employee in an equivalent position. Further, that the duties and responsibilities themselves must entail the same skill, effort, responsibility, and authority poses an even greater challenge, because these terms are just as vague as a "privilege" or a "perk." Returning to the previous example of a fry cook and a cashier, it could be argued that either position requires a higher level of skill or effort based on an employee's subjective aptitudes and familiarity with the necessary equipment or technology. This reduces everything to the subjective and makes it impossible for a business owner to determine what is an equivalent position.

It is understandable that the Division would want to avoid a situation where an employee who was a manager before taking leave is reinstated as a subordinate after its conclusion. However, the inclusion of the terms "substantially equivalent skill, effort, responsibility, and authority" is unnecessary and does not contribute toward that goal given that the statute already requires equivalent pay, which more often than not will coincide with positions of greater skill, effort, responsibility and authority. Instead, what this section of the rule—and the proposed rule as a whole—accomplishes is the addition of more uncertainty, subjectivity, and difficulty in reinstating employees.

Finally, Section 7.3.4 of the proposed rule will lead to even more confusion because it adds a list of additional or supplemental factors to the definition of "equivalent position" and then states that the definition "includes, but is not limited to," these factors. By refusing to clearly state an exhaustive list of factors, the Division has not laid out a clear definition. This places businesses in the position of having to guess at the Division's intent, which will carry with it significant legal risk.

The Division has no authority to promulgate this rule in the first place, and the confusion it sows through vague and incomplete definitions at best, and harmful additions at worst, serves as an insult to injury for Colorado's small businesses. Recission would be justified on these grounds alone, even if the Division did have a statutory basis to promulgate them.

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[15] Proposed 7 CCR 1107-7.2.4.

The Rule Forces Small Businesses to Create Duplicative Jobs

Employers under the Paid Family and Medical Leave Insurance Act are required only to reinstate employees into the employee's same position or an equivalent position.[16] In fact, the statute expressly does not require anything further. As CRS § 8-13.3-509(1) provides, "[n]othing in this section entitles any restored employee to . . . (b) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." Employees are not entitled to an identical, duplicate position that has been newly created specifically for them.

However, the proposed rule will force employers to create new jobs for employees who have already been replaced. As Section 7.3.11 provides, an employee who has been on leave "is entitled to reinstatement even if the employee has been replaced or the employee's position has been restructured to accommodate the employee's absence unless the employer can demonstrate the circumstances fall within Sections 7.3.2 or 7.3.3." In other words, unless the employer eliminates the position due to "legitimate downsizing or reorganization"[17]—two terms which go undefined in the proposed rule—or other extenuating circumstances, the employer will have to reinstate an employee who has been out of work for up to sixteen weeks and has already been replaced. When considering the rule's many restrictions on what defines an "equivalent" position that are not supported by the statute, it will be almost impossible for an employer to find an open, nearly identical role for a returning employee. Instead, businesses will need to create a duplicate role if the employee's original job is no longer available.

This may be easily done for large businesses that have the resources to create duplicative jobs, but small businesses cannot afford to do so. They are often bare-bones operations with few employees—often as little as one—and if their employees are out of work for significant lengths of time, they must hire someone new in that role to avoid losses that could lead to the business's closure. When the employee returns from leave, small business owners are left with the unenviable choice of either firing the new employee or creating a redundant role for the old one. For many who cannot afford an additional employee, it is no choice at all.

If the Division manages to obtain statutory authority to engage in rulemaking on these topics in the future, the rule should be clear that small businesses are not required to create new jobs for returning employees whose roles have been filled out of business necessity, and that filling such roles is a legitimate, protected "reorganization" practice.

Conclusion

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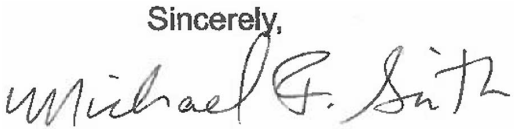
[16] *See* CRS § 8-13.3-509(1).

[17] Proposed 7 CCR 1107-7.3.2(E).

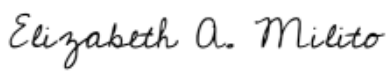
The Division lacks the statutory authority to promulgate the proposed rule, which is needlessly complicated, vague, confusing, and requires small business owners to undertake burdensome steps to reinstate employees. To prevent this, NFIB recommends withdrawing the proposed rule.

NFIB appreciates the opportunity to comment on the proposed rule and hopes that the Division will take seriously its obligation to provide clarity and stability for Colorado's small businesses. Withdrawing the proposed rule will be a strong step toward that goal.

Sincerely,



Michael Smith
Colorado State Director, NFIB



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