City and County of Denver

Denver Labor

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Liability Determination

Re: Active Enforcement Investigation Into Gigpro, Inc.

I. INTRODUCTION AND SUMMARY OF DETERMINATION AND PENALTIES

Gigpro, Inc. ("Gigpro") is an app-based staffing company operating in Denver and the surrounding area. Gigpro provides workers—called "Pros"—for clients in the hospitality industry, including hotels, restaurants, and caterers. Pros fill "gigs," working a variety of frontline hospitality jobs as servers, bartenders, dishwashers, line and prep cooks, and housekeepers. *See* Ex. A, Column J. For both Gigpro and its clients, these workers are classified as independent contractors.

Extensive investigation by Denver Labor reveals that Gigpro's model has violated nearly every applicable wage and hour law. Workers suffered minimum wage violations; did not receive the Auditor's Office-required notice of rights; and have been subject to policies that prohibited them from engaging in certain protected activity. Gigpro has rectified each of these specific problems and Denver Labor exercises its discretion to take no further action on them.

However, a more fundamental problem remains: these workers are classified as independent contractors, but under Colorado law they are employees. Among other rights, Gigpro's workers are entitled to accrue paid sick leave under the Colorado Healthy Families and Workplaces Act (HFWA). C.R.S. § 8-13.3-401 *et seq.* During the COVID-19 pandemic, Colorado passed one of the most protective paid sick leave laws in the country. *See* C.R.S. § 8-13.3-401 *et seq.* In doing so, the state legislature recognized that paid sick leave is a key workplace benefit that contributes to a healthy society and passed one of the most progressive paid sick leave laws in the country. But all over Denver, the workers who prepare and serve food and beverages are being denied a right that is crucial to workplace and social safety. Gigpro's HFWA violations are especially harmful because it operates in industries that revolve around close-quarters interactions that are, otherwise, ripe for transmitting illness.

As this determination more fully explains, in Denver alone Gigpro has violated Denver's Civil Wage Theft Ordinance (the "Ordinance") nearly 1,000 times since July 2022. *See* D.R.M.C. § 58-1 *et seq.* Gigpro has violated HFWA more than four hundred fifty times by denying its workers the right to accrue paid sick leave based on time worked, and has unlawfully passed on the costs of workers' compensation insurance to Pros by deducting $.38 per hour of work for Occupational Accident Insurance (OAI). Because the law defines paid sick leave as "wages" and prohibits employers from imposing on employees the costs of

workers' compensation insurance, each of these acts also constitutes a violation of the Ordinance.

To remedy these violations, Denver Labor:

1. **Orders Gigpro to cease and desist** from misclassifying the workers on its platform, and to
   a. Provide paid sick leave as required by HFWA, including by calculating and providing all paid sick leave time lawfully due to all employees who have worked for and through Gigpro; and

   b. Pay restitution of **$3,453.51** to workers for their actual costs of OAI plus 200% of those costs as damages, as detailed in Exhibit E;

2. **Fines Gigpro $23,900** for failing to provide paid sick leave as required by law, based on separate fines of $50 for each of the 478 violations of which Denver Labor is aware;

3. **Fines Gigpro $23,900** for illegally deducting the costs of insurance from its employees' wages, based on separate fines of $50 for each of the 478 violations of which Denver Labor is aware; and

4. **Orders Gigpro to provide information** of jobs worked in Denver since August 30th, 2023, and to rectify any minimum wage and/or overtime underpayments that have not already been addressed, to include interest and 200% damages.

This Determination does not fully resolve this case. It contains final, appealable conclusions and orders, but does not include fines for the full range of violations, nor all damages available under the Ordinance. Denver Labor also does not, at this time, address the issue of whether Gigpro's clients are employers of the Pros who work for them, but reserves the right to do so at a later date.

If Gigpro does not fully comply with this Determination within **thirty days of its date**, Denver Labor will take action to address any continuing violations of law, including by imposing further penalties and damages.

II. BACKGROUND

A. Denver Labor's investigation into Gigpro

On July 15th, 2023, Denver Labor received a complaint from a worker alleging that they had not been paid for a gig shift worked through Gigpro. On July 26th, after researching Gigpro and reviewing its business model, Denver Labor opened an active enforcement investigation into Gigpro to assess compliance with Denver's minimum wage and civil wage theft ordinances. Ex. C, DL0070-72.[1] Denver Labor requested payroll data for all gigs worked in

[1] Denver Labor's first notice of investigation, dated July 26th, erroneously stated that it had opened a complaint-based investigation. It sent a letter of clarification on July 31st. Ex. C, DL0070-72.

Denver since January 1st, 2021. Gigpro provided this information on September 6th, 2023, which included work through August 30th, 2023.

Between July 26th and November 20th, Denver Labor also opened investigations into more than a dozen of Gigpro's clients, seeking and reviewing information for workers obtained through Gigpro. Gigpro and Denver Labor also engaged in several conversations regarding Denver Labor's investigation. As part of these discussions, Gigpro's counsel provided legal arguments and evidence, and Gigpro adjusted some of its business practices to ensure compliance with various aspects of Denver and Colorado law.

Finally, Denver Labor interviewed a worker who labored through Gigpro's app. This individual provided information about their experiences, including what roles they worked, how the app operates, and whether they ever had any difficulty getting paid.

Denver Labor carefully reviewed the evidence and information it has received from Gigpro, Gigpro's clients, and pursuant to its own investigations.

B. **Gigpro's business model**

Gigpro is a staffing company that operates via a website and smartphone app. It advertises that businesses can "Transform hiring with Gigpro," which is "The Leading Hospitality Staffing Solution." Ex. B, DL 0001-2. To that end, "Gigpro provides short to long term staffing solutions for the hospitality industry and a variety of opportunities for workers," and promises businesses that "we've got the help you need." *Id.* at DL0002, 0005. While Gigpro's specific phrasing changes slightly depending on the target of its messaging, the theme remains the same: Gigpro presents itself as a trustworthy source for labor in the hospitality industry that will streamline business operations by providing affordable, vetted, and ready-to-use workers. *See* Ex. B, DL0001-2, 5, 15-16.

Staffing agencies are typically considered employers of the workers who labor for their clients. *E.g.*, *New York v. Scalia*, 490 F. Supp. 3d 748, 776-77 (S.D.N.Y. Sept. 8, 2020) (under the FLSA, staffing agencies are typically employers of workers); 29 C.F.R. § 825.106(b)(1); *see* Colo. Rev. Stat. § 8-4-101(6) (adopting the definition of "employer" from the Fair Labor Standards Act). This is not Gigpro's approach, however. Although in normal circumstances both a staffing company and its clients are employers of temporary workers, Gigpro attempts the opposite approach: Pros are classified as independent contractors, and Gigpro asserts that neither it nor its clients are employers. Ex. C, DL0079.

To trigger work, businesses post a "gig" shift and advertise the position, dates, location, time of work, dress code, grooming, appearance, and other requirements, and the wages to be paid.[2] For example, here is a sample from December of 2023:

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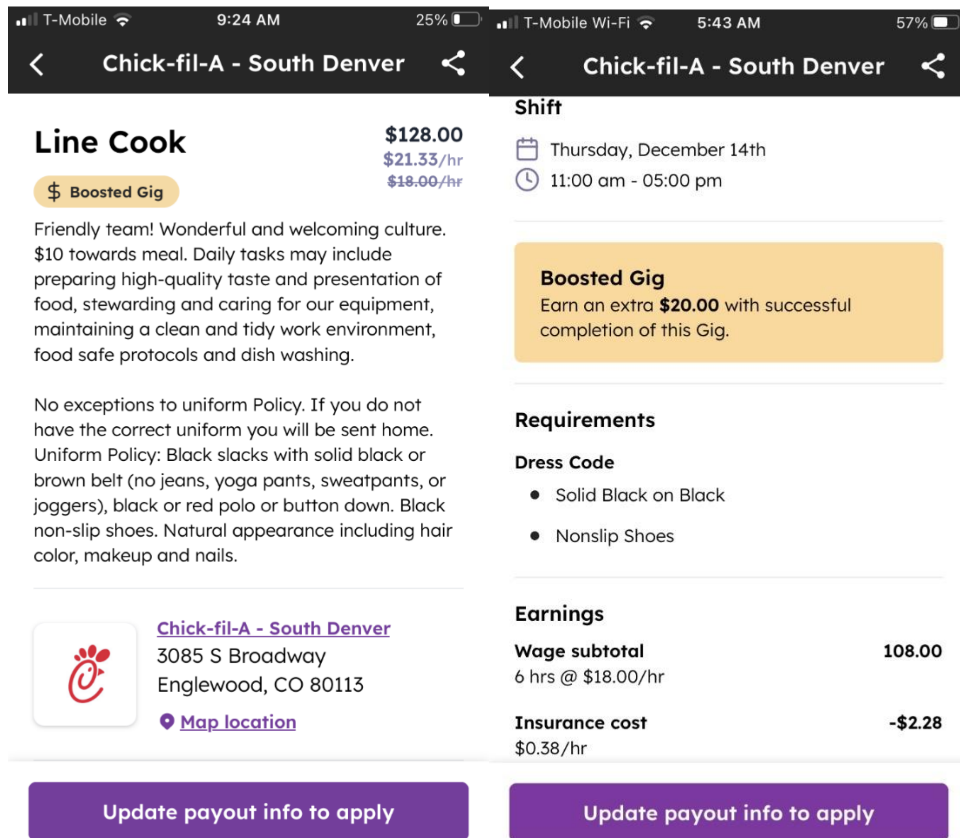
[2] *How Gigpro Works*, available at: https://support.gigpro.com/hc/en-us/articles/10406927323412-How-Gigpro-Works (last visited Dec. 12th, 2023).



Universally, these postings are for frontline hospitality jobs that **employees** have filled for decades. These shifts pay an hourly rate at or modestly above Denver's minimum wage, *see* Ex. A, and the job duties are core to the operation of the client business. Restaurants, for example, use Gigpro to obtain cooks, dishwashers, bartenders, and servers. *See* Ex. A; Ex. B, DL0015. These jobs do not require significant skill or expertise, and workers are expected to adhere to the dress, safety, and behavioral requirements of the business.[3]

Using Gigpro's app, workers apply to fill shifts. The business then selects who will work. After the shift, Gigpro invoices its client. This invoice consists of the worker's wages plus a 22.5% "connection fee." Ex. B, DL0024-25. Gigpro pays workers through the app and keeps the connection fee for itself. At no time do Pros have any opportunity to negotiate wages—instead, Gigpro sets a floor for each market through "a feature on its platform that prevents businesses from posting any gigs for any amount below the [applicable] minimum wage." Ex. C, DL0079. Above this floor, businesses decide the final rate to offer.

Gigpro does not provide workers' compensation insurance, nor does it withhold and pay any taxes for unemployment insurance, Social Security, or Medicaid. *See* Ex. A. Instead, Gigpro requires all workers to pay $.38 per hour for Occupational Accident Insurance (OAI). Ex. B, DL0033. In the event somebody gets injured on the job—for example, if a prep cook slices their hand open with a knife—they are instructed to "notify the Manager on Duty at the

[3] For a more detailed discussion, see Section III(A)(3), *supra* pp. 14-18.

Gig immediately and go to the Dr or ER to get treatment," and then to file an insurance claim. Ex. B, DL0061. Gigpro provides workers who make more than $600 in a year with a 1099-NEC tax form, and instructs Pros that it is their responsibility to accurately report earnings and pay taxes. *Id.* at DL0034, 39.

In practice, Gigpro's clients do not themselves track information about the workers who fill shifts.[4] Some of the clients who responded to Denver Labor could not provide any records establishing who had worked, what roles they had fulfilled, or how long they had labored. Others provided records obtained directly from Gigpro, which collects and keeps this information. *See* Ex. A.

Gigpro has created a comprehensive system to ensure the reliability of its services. To start, it controls who has the right and ability to access and use its app. It promises clients that "All Pros on the platform are vetted by our team," Ex. B, DL0016, which includes verifying their identity and conducting a comprehensive background check. This background check is extensive and detailed. It "may include, but is not limited to":

> verification of Social Security number; current and previous residences; employment history, including all personnel files; education; references; credit history and reports; criminal history, including records from any criminal justice agency in any or all federal, state or county jurisdictions; birth records; motor vehicle records, including traffic citations and registration; and any other public records.

Ex. B, DL0040. This vetting process also includes consistent data collection and feedback. Gigpro a) tracks a Pro's "completion rate," which is "the stat that shows how reliable a Pro is,"[5] and b) receives continual feedback from clients, who rate Pros on a 1-5 scale. *See* Ex. A, Column AC; Ex. B, DL0017. In addition, Pros receive an automatic rating for certain behavior: a 3 if they cancel a gig within 24 hours; a 2 if they cancel within 12 hours; and a 1 if they fail to show.[6] Gigpro does not contest that this functions as a performance review.[7]

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[4] Some clients do not apparently understand how Gigpro operates, and instead believe that Pros are already classified as employees. One explained: "When we need temporary help in our kitchens, we will utilize GigPro's platform to create an assignment. The temporary worker who is an employee of GigPro will then elect to submit their availability, we approve the worker to fill the assignment. Once the assignment has been completed, we get a notification from GigPro's platform that the worker has completed the assignment and asks us to approve the pay. The payment is approved . . . . In turn, GigPro is responsible for paying their employee." Ex. F.

[5] *Completion Rates Explained*, available at: https://support.gigpro.com/hc/en-us/articles/10408467885972 (last visited Dec. 11, 2023).

[6] *Pro Profile Ratings Explained*, available at https://support.gigpro.com/hc/en-us/articles/10408513767444-Pro-Profile-Ratings-Explained (last visited Dec. 11, 2023).

[7] On October 21st, 2023, Denver Labor made this assertion to Gigpro. Ex. C, DL0081-82. Gigpro did not disagree.

Once a Pro has an account, Gigpro requires them to maintain "accurate, complete, and up-to-date information in your Account," restricts Pros to one account each, and forbids Pros from sharing or transferring ownership of accounts. Ex. B, DL0040-41.

Gigpro effectively has the power to hire, fire, and discipline Pros by approving, suspending, and deactivating their accounts. Through its Terms of Service and policies, Gigpro controls Pros' behavior in a variety of ways, including by:

- Requiring Pros to "use your best efforts to perform [a] Gig such that the Pro services meet the requirements and specifications of the Business for whom the Gig was created," Ex. B, DL0041;

- Prohibiting Pros from causing "nuisance, annoyance, inconvenience, or property damage . . . to a Pro, a Business, to the [Gigpro] Platform or to any party," *id.*;

- Requiring Pros to show up on time for all shifts, *id.* at DL0065;

- Requiring Pros "to maintain accurate, complete, and up-to-date Account information," *id.* at DL0040;

- Restricting Pros from cancelling a shift less than 24 hours before it is set to begin;

- Restricting the possession, sale, receipt, and use of drugs and alcohol during a shift, *id.* at 0042; and

- Mandating compliance with all applicable laws and regulations, *id.*

In addition, until Denver Labor's investigation Gigpro also instructed Pros not to contact a business directly regarding pay issues, and warned that doing so "can result in your profile being deactivated." *Id.* at 0032. While Gigpro has now removed this rule and asserts that it does not enforce it, it still broadly threatens discipline for violations of its policies and "any provision of" its Terms of Service. *Id.* at DL0046.

Through published guidance, Gigpro expands upon its expectations and requirements, and provides more detail about what disciplinary sanctions may result from violations. For example, its "Gig Cancellation Policy" page states:

> If a Pro cancels a Confirmed Gig within 24 hours of the Gig Start Time, the pro may be suspended from the platform for 7 days or more and have all future confirmed Gigs and applications cancelled.
>
> If a Pro fails to show up for a Gig with no notice the pro may be suspended from the platform for 30 days or more and have all future confirmed Gigs and applications removed.

> ***If a Pro has never worked a Gig before and they are suspended for NCNS/Call Out, their Profile will stay deactivated until they reach out to support for assistance.***

Ex. B, DL0063 (emphasis in original). Similarly, its "Late to Gig Policy" states:

> Confirming a Gig means the Pro is committing to working the Gig and being on time for the start of the Gig. If a Pro is late to a Gig, even if the Pro messages the business via the in-app chat feature that they are "running late" or "on the way," the business has the right to send the Pro away and not allow the Pro to work.
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> If a Pro is late to a Gig and the business sends the Pro away, whatever dismissal category (Call Out, No Call No Show) the business files the dismissal under will stand, and whatever penalties associated with that category will be enforced.

Ex. B, DL0065.

Finally, Gigpro's explicit policies and requirements are not exhaustive, and do not cover the entirety of the relationship between it and its workers. As a catch-all, Gigpro reserves the right to "terminate or suspend your account at any time without notice if we believe that you have breached these Terms [of Use], or for any other reason, with or without cause, in our sole discretion." *Id.* at DL0047.

Through this scheme, Gigpro retains all necessary control over work performed through its platform. It does not behave as a "customer" or "mere placement agency"[8] that only connects laborers with businesses and plays no meaningful role in setting standards and ensuring performance. Instead, Gigpro provides all clients, and coordinates with them directly; requires workers to show up at a certain time and place, once they agree to work a shift; directs how workers must generally perform work; consistently monitors performance through its review system; enforces policies and standards that go far beyond legal and regulatory requirements; plays a role in setting prices; retains all meaningful opportunity for profit and loss; holds out Pros as representatives of Gigpro; and has the authority to discipline workers at will.[9]

C. The Denver Civil Wage Theft Ordinance, the Colorado Wage Act, and the Healthy Families and Workplaces Act.

Denver Labor has the authority and obligation to enforce Denver's Civil Wage Theft Ordinance, D.R.M.C. § 58-1 *et seq.* (the "Ordinance"). The Ordinance requires Denver Labor to investigate, remedy, and deter wage theft against workers who work in the City and County of Denver. Wage theft occurs whenever a person "does not receive the wages to which they are legally entitled, as promised and required by law, including applicable local, state, and

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[8] *See Who Is and Isn't An Employee?*, Colorado Department of Labor & Employment (CDLE) Interpretive Notice and Formal Opinion (INFO) #10 (Sept. 1, 2023), available at: https://cdle.colorado.gov/infos. The CDLE issues formal guidance on questions of Colorado wage and hour law, which Denver Labor follows.

[9] *See id.* at 2-3.a

federal law, under contract, or based on any other enforceable standard." Denver Labor Civil Wage Theft Rule 1.3.

The Ordinance builds upon and incorporates existing wage-related rights. Employers are required to "ensure full payment of all wages lawfully due to a worker by the date required by a lawful agreement or by state or federal law." D.R.M.C. § 58-24(a). "Wages" is defined broadly. It has the same meaning as under the Colorado Wage Act (CWA) "except that it shall apply to all workers, as defined in this article." D.R.M.C. § 58-23; *see also* C.R.S. § 8-4-101(14). Whenever an "employer or any other person who is regularly engaged in business or commercial activity" fails to provide all earned wages in accordance with Colorado law, they violate the Ordinance.[10] *Id.* at § 58-24(a).

"Wages" includes the paid sick leave that is guaranteed to employees by state law. C.R.S. §§ 8-13.3-402(8)(b); 8-4-101(14)(a)(IV). The Colorado Department of Labor and Employment (CDLE) bears primary responsibility for enforcing both the CWA and HFWA, and has interpreted and clarified these statutes' requirements through rulemaking and published guidance. *See* COMPS Order #38, 7 CCR 1103-1; Wage Protection Rules, 7 CCR 1103-7; Interpretive Notice and Formal Opinion (INFO) #6B. All employees "earn" paid sick leave "starting their first day of work," at a rate of one hour per thirty hours worked. INFO #6B, p. 2. Employees "may use accrued paid sick leave as it is accrued," C.R.S. § 8-13.3-403(3)(a), and by default may use it in six-minute increments. 7 CCR 1103-7, Rule 3.5.3. In other words, the standard requirement is that employees accrue six minutes of paid sick leave for every three hours of work.

More broadly, "wages" encompasses the money people earn for labor, and the Colorado Wage Act limits what deductions an employer may apply. *See* C.R.S. § 8-4-105. When an employer makes illegal deductions from wages, that also constitutes a violation of the Ordinance. The Colorado Workers' Compensation Act makes it illegal for "any employer . . . to require an employee to pay all or any part of the cost of" mandatory workers' compensation insurance. C.R.S. § 8-44-101(d)(2).

All who perform labor for money in Colorado are presumed to be employees, and employers bear the burden of establishing otherwise. The rights guaranteed to employees/workers under both CDLE and Denver Labor's rules, however, are to be liberally construed, with exceptions and exemptions narrowly construed. COMPS #38, 7 CCR 1103-1, Rule 8.7(A); Denver Labor Civil Wage Theft Rule 2.5.

III. Analysis

Denver Labor reaches two related conclusions: First, Gigpro has misclassified its employees as independent contractors. Second, in doing so it has violated the Ordinance

[10] The Ordinance requires full payment of all lawfully-earned wages to all "workers," rather than "employees." "Workers" is a broader category than "employees," and encompasses at least some people who are classified (properly or not) as independent contractors. But the Ordinance does not extend **employee-only** wage rights to this broader group of workers; rather, when Denver Labor enforces employee-only wage rights, such as the right to paid sick leave, it first must determine whether the workers in question are also employees.

nearly 1000 times. Specifically, it has failed to pay Pros all lawfully-earned wages by a) denying them the accrual of paid sick leave and b) imposing illegal deductions from earned wages by shifting the costs of workers' compensation insurance onto Pros.

A. Under Colorado law, Pros are employees of Gigpro, not independent contractors.

Denver Labor first concludes that Gigpro has misclassified its workers, who are employees under Colorado law. HFWA and the CWA adopt the same definition of "employee":

> "Employee" means any person, including a migratory laborer, performing labor or services for the benefit of an employer. For the purpose of this article 4, relevant factors in determining whether a person is an employee include the degree of control the employer may or does exercise over the person and the degree to which the person performs work that is the primary work of the employer; except that an individual primarily free from control and direction in the performance of the service, both under his or her contract for the performance of service and in fact, and who is customarily engaged in an independent trade, occupation, profession, or business related to the service performed is not an "employee".

C.R.S. §§ 8-4-101(5); 8-13.3-402(4).

This is a broad definition—and it is one that the state legislature expanded in 2019, effective January 1st, 2020. In doing so, the Colorado General Assembly specifically rejected a narrower test that would have required either that the employer could "command when, where, and how much labor or services are performed," or that the individual performed work "that is an integral part of the employer's business." Ex. D, *Doordash, Inc.*, p. 6 n.4 (CDLE Decision No. 4803-20, July 12, 2021); *see also* C.R.S. § 8-4-101(5) (2019) (an employer is one who "may command when, where, and how much labor or services shall be performed").

Under the CWA, the core factor for analysis is whether Pros perform labor or services for Gigpro's benefit. As CDLE has explained, "the current definition does not require more than that an individual 'perform[s] labor or services for the benefit of an employer.'" *Id.* Relevant **sub-factors** that shed light on this question include a) the degree of control Gigpro may or does exercise over Pros, and b) the degree to which Pros perform work that is the primary work of Gigpro.[11] Finally, Pros are not employees of Gigpro if they are both a) primarily free from control or direction in the performance of the service, both under contract and in fact, and b) customarily engaged in an independent trade, occupation, profession, or business.[12] C.R.S. § 8-4-101(5).

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[11] Denver's Civil Wage Theft and Minimum Wage Ordinances protect "workers," a broader category of people than "employees." Under Denver law, a worker is simply a natural person who performs services on behalf of or for the benefit of an employer or other person for compensation. D.R.M.C. §§ 58-1(10), (11). The legislative history of the Civil Wage Theft Ordinance reflects that at least some people who may be independent contractors under state law are also workers under Denver law.

[12] Throughout this determination, Denver Labor cites to decisions analyzing the question of employment under a variety of laws. While some of these cases do not involve the precise legal

1. <u>Pros perform labor and services for Gigpro's benefit</u>

After reviewing all of the evidence and Gigpro's arguments, Denver Labor finds that Pros are employees of Gigpro, not independent contractors.

The key facts are straightforward and largely uncontested. Pros perform hospitality jobs obtained through Gigpro's platform; Gigpro is itself a staffing company providing labor in the hospitality industry; and Gigpro directly benefits from Pros' labor. Denver Labor therefore concludes that Pros perform labor and services for Gigpro's benefit—a conclusion that Gigpro does not dispute. *See* Ex. C, DL0081-82, 89.

Although Gigpro's initial legal response asserted that Gigpro is only "a marketplace to connect hospitality contractors to hospitality businesses," Ex. C, DL0079, it later acknowledged that "Gigpro is a staffing company," *id.* at DL0089. This description is consistent with how Gigpro advertises and operates. *See infra* Section II(B). Gigpro is not merely a pass-through entity or online marketplace, like Ebay, Etsy, or Craigslist. Nor is it just a headhunting firm to which businesses outsource their hiring and which retains no further control once the hiring is executed. It is, and holds itself out to be, a source for labor in the hospitality industry, and it promises clients that it can meet their staffing needs with vetted professionals who never fully leave Gigpro's control, monitoring, and go-between role. *E.g.*, Ex. B, DL003, 5, 16. Put simply, Gigpro does not merely sell access to a hands-off marketplace for services; it sells those actual services, which Pros provide.[13]

Gigpro benefits because Pros' labor directly generates revenue for the company and because workers form the basis of Gigpro's business model. On a shift-by-shift basis, Gigpro benefits directly from Pros' labor, charging its clients a 22.5% connection fee based on the total value of a posted shift. And in a broader—but not less crucial—sense, Gigpro frequently benefits from the work of its Pros: notwithstanding the company's disclaimers, the Pros represent the company and its product to Gigpro's clients. When they perform well and provide reliable labor, Gigpro's reputation and business grow. And, as explained throughout this Determination, Gigpro has carefully structured a system designed to ensure that Pros meet the standards it requires to burnish its reputation as "the leading hospitality staffing solution." Ex. B, DL0002.

In addition, Pros are fully integrated into Gigpro's business. At various points, Gigpro's Terms of Service deny this is the case. For example:

> **4. INDEPENDENT CONTRACTOR RELATIONSHIP**
>
> A. You and Gigpro agree that no partnership, joint venture, employee, or employer relationship is intended by these Terms. You agree not to hold yourself out as in any way sponsored by,

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standard applicable under the CWA, they are nevertheless informative to the extent they address staffing agencies or the same relevant factors—*e.g.*, control—that the CWA incorporates.

[13] Put another way, Pros perform the primary work of Gigpro. *See* C.R.S. § 8-4-101(5); CDLE INFO #10 at 3 (analyzing the "primary work" factor). Denver Labor further analyzes this issue in Section III(A)(2), *infra*.

> affiliated with, endorsed by, in partnership or venture with, nor as an employee or employer of us, any of our Partners, affiliates, or service providers. . . . Pros agree not to hold themselves out as in any way sponsored by, or affiliated with, endorsed by, in partnership or venture with, nor as an employee or employer or any Business, its affiliates, or any service providers as a result of providing the Pro Services.
>
> [. . .]
>
> J. Gigpro does not combine its business operations in any way with the Pro's business, but instead maintains such operations as separate and distinct.

Ex. B, DL0037-38.

These statements do not bear out in practice. Regardless of whether any particular Pro presents themselves as "affiliated with" or "in partnership or venture with" Gigpro, **Gigpro itself** constantly establishes that this is the relationship. It does so despite its assertion that its business is not "combine[d] . . . in any way with the Pro's" work. Ex. B, DL0038. Gigpro assures clients that Pros are "vetted," that Gigpro is the "staffing solution" for the hospitality industry, and that Gigpro is a source for labor that "businesses can count on." Ex. B, DL0001-2, 16, 59. Gigpro's About Us page, for example, describes its mission:

> We hope to end short-staffing so owners and managers can focus on the parts of running their business that truly drive them, secure in the knowledge that they have workers they can count on. The Pros on our platform have filled over 150,000 shifts, and thousands have found full time job placement on the platform. While the last couple years have been difficult for the world and for the hospitality industry in particular, we're proud to be offering an innovative and on-demand solution to the staffing crisis that our hospitality industry deals with on a daily basis.

Ex. B, DL0059.

In addition, Gigpro frequently makes public statements in which it embraces the fact that Pros are crucial to and inseparable from the company and its model. For example, it tweeted the following in November of 2023:

Gigpro has even named Pros after itself, highlighting the extent to which Gigpro and its workers are intertwined. Gigpro simply cannot sell its product without tying itself to Pros, because they are its product and are foundational to its enterprise.

In short, Gigpro's whole business model revolves around and depends upon Pros' labor. Pros drive revenue, are fully integrated into—and in fact, **are**—Gigpro's business, and without them Gigpro would not exist, make money, or have anything to offer its clients. If Pros were removed from the equation, Gigpro's app would be rendered useless to both Gigpro and its clients.

Denver Labor's conclusion would be different if Pros were truly and meaningfully operating their own distinct businesses. In that case, they would not be primarily working for Gigpro's benefit, but for the benefit of their own enterprise. For example, when a restaurant hires a plumber to fix a leaky pipe, the plumber is not performing labor or services for the restaurant's benefit such that they are an employee under the CWA; while the restaurant does benefit from the work, the plumber is really working to help themselves and their business. They set their rate and broadly choose how to perform the work, which is within their area of expertise and core to their own enterprise—and not the restaurant's. The plumber's labor will result in money for their business; expand and solidify their client base; improve their reputation; and (hopefully) lead to future recommendations. But as Section III(A)(4) of this Determination explains, Pros cannot fairly be said to be operating their own independent business, nor are they primarily performing labor for the benefit of their own enterprise. Their labor benefits Gigpro and its clients.

Finally, the conclusion that Pros labor for Gigpro's benefit is consistent with—and in fact required by—established precedent from the Colorado Department of Labor and Employment. In *Doordash, Inc.*, CDLE held that a Doordash delivery driver ("Dasher") was Doordash's employee, rather than an independent contractor.[14] It concluded that the Dasher performed labor or services for Doordash's benefit, based on its findings that:

1. Doordash is a food delivery company that "emphasized the centrality to its business of food and food delivery";

2. Dashers provide food delivery services, which Doordash depends upon "to operate and earn revenue, making Dashers' delivery work both central to and fully integrated into the employer's business";

3. Doordash "directly received monetary benefits" from Dashers' work and controlled how much revenue it earned based on that work.

Ex. D, pp. 6-9. In fact, the analysis is more straightforward here, because unlike Doordash Gigpro does not claim that it is a "technology company," but agrees it is in the business of staffing. *Compare* Ex. D, p. 6 and Ex. C, DL0089.

Denver Labor concludes that the key question of employment is met here: Pros perform labor and services for Gigpro's benefit. And as explained below, the two "relevant factors" set out by the CWA also support the conclusion that Pros are Gigpro's employees. *See* C.R.S. § 8-4-101(5).

2. Pros perform the primary work of Gigpro

The CWA also instructs decisionmakers to consider the extent to which they perform work that is the primary work of the employer. C.R.S. § 8-4-101(5). Gigpro is a staffing agency that provides labor in the hospitality industry. Pros are that labor. They perform the primary work of Gigpro. This first factor strongly weighs in favor of employee status.

Gigpro argues otherwise, asserting:

> Additionally, the work performed is not the primary work of Gigpro. Gigpro is not in the hospitality industry. Gigpro is a staffing company. A staffing company is not in the industry simply because it connects pros with businesses in a certain industry.

Ex. C, DL0089.

This argument does not accurately fit the facts or reflect the proper legal analysis. Under other tests of employment, courts have long analyzed whether "the work is an integral part of the alleged employer's business," and whether "the worker performs work that is outside the usual course of the hiring entity's business." *Baker v. Flint Engineering & Constr.*

[14] For Gigpro's convenience, Denver Labor has attached the CDLE's *Doordash* decision as Exhibit D to this Determination. It is also published on the CDLE's website, available at: https://drive.google.com/file/d/1nrugPZAZU2soYh-nSxAUzumHYxTlSjW9/view.

Co., 137 F.3d 1436, 1440 (10th Cir. 1998). The Ninth Circuit has explained that courts assess if the work in question "is necessary to or merely incidental to that of the hiring entity, whether the work of the employee is continuously performed for the hiring entity, and what business the hiring entity proclaims to be in." *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 986 F.3d 1106, 1125 (9th Cir. 2021). Sometimes, these questions may be answered "through a common-sense observation of the nature of the business." *Id.*

In simpler terms, this factor is designed to assess a) what a company provides or produces, as a matter of fact and advertisement, and b) whether and to what extent the workers in question perform labor that is necessary for and/or closely related to the employer's product or services.[15]

Gigpro argues that Pros perform hospitality services, and Gigpro is not a hospitality company. But this parses the analysis too thinly, and is an unreasonably narrow description of Gigpro's business. Gigpro is a staffing company; it provides labor in the hospitality industry, and advertises that it provides labor for hospitality clients. Ultimately, its success as a business depends upon somebody performing hospitality work for its clients, and that work is exclusively performed by Pros. They are, in a very real sense, Gigpro's product. They are thus necessary to Gigpro's entire model. Pros do not perform work outside of the usual course of Gigpro's business, but are the whole reason Gigpro can fulfill its promises to its clients.

This first sub-factor therefore weighs strongly in favor of employee status.

3. <u>Gigpro may and does exercise a meaningful amount of control over its Pros.</u>

The CWA's other "relevant factor" requires decisionmakers to assess the degree of control an employer may or does exercise over the person, both under the contract and in fact. C.R.S. § 8-4-101(5). Employment tests have long focused on the question of "control." The traditional common law test of employment emphasizes "the right to control the manner and means by which the [work] is accomplished" as the focal point of analysis. *E.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992). The Fair Labor Standards Act's (FLSA) economic realities test, while broader than the common law standard, also features "the degree of control which the putative employer has over the manner in which the work is performed" as one of several factors. *Heath v. Perdue Farms, Inc.*, 87 F. Supp. 2d 452, 457 (D. Md. Feb. 24, 2000); *accord Brock v. Superior Court*, 840 F.2d 1054, 1058-59 (2d Cir. 1988).

The current version of the CWA, however, de-emphasizes the importance of this factor. This reflects a deliberate conceptual departure from the narrower tests of employment found in the common law and the FLSA, 29 U.S.C. § 201 *et seq.* As a matter of policy, Colorado's legislature has rejected reliance on control over the performance of work as a necessary precursor to an employment relationship.[16] Prior to January 1, 2020, the CWA

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[15] *See also* CDLE INFO #10 at 3.

[16] While Colorado has not gone so far as states like California in adopting the "ABC" test of employment, there are similarities between the ABC test and the standard found in the CWA. Both reflect a departure from the idea that control, or at least extensive control, is necessarily required for

defined an employee as "any person . . . performing labor or services for the benefit of an employer **in which the employer may command when, where, and how much labor or services shall be performed**." C.R.S. § 8-4-101(5) (2019) (emphasis added). The Colorado legislature removed this bolded language when amending the law in 2019.

Under Colorado's current standard, control is only a sub-factor designed to aid analysis of the core question: does the worker perform labor or services for the benefit of the employer?

Even under narrower statutes, **direct control** is not required. Statutory employers do not need to be literally on-site to exert control over workers. *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060 (2d Cir. 1988) ("An employer does not need to look over his workers' shoulders every day in order to exercise control.").

Instead, the existence of **indirect control** or the **reserved right to exercise control** weigh in favor of finding an employment relationship. *See* CDLE INFO #10 at 2 ("Look to how much **authority** to control a worker the business had, not just how much it **used** its authority. For example, authority to discipline is relevant, even if discipline is never needed."); 29 U.S.C. § 203(d) (Under the FLSA, "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee...."); 29 C.F.R. § 825.106(a)(3) (employment status may be established by indirect control); *McFeeley v. Jackson Street Enterprises*, 825 F.3d 235, 242 (4th Cir. 2016) (an employer's "potential power" to enforce rules is a form of control relevant to the analysis). **Indirect control** is still control, including when it is exercised via a detailed and expansive set of expectations, requirements, monitoring, and sanctions. *Baystate Alternative Staffing Co. v. Herman*, 164 F.3d 668, 671, 675-76 (1st Cir. 1998) (finding staffing agency was employer under the FLSA based, in part, on the fact that it created a system of rules that controlled working conditions, decided who to hire and fire, tracked hours worked, screened workers, and instructed workers about dress and work habits).

Gigpro asserts that it exercises no control at all over Pros. In its legal filings, it argued:

> Gigpro exercises no control whatsoever over the work performed, including exercising no control over the final work product. Gigpro simply acts as an intermediary between pros and businesses to facilitate the contracted services performed for the businesses. . . . The pros have full choice in which gigs they choose, and are never required to accept a gig.
>
> [. . .]
>
> [T]he workers perform work subject to the gig posting, but the workers are responsible for the manner in which the work is performed. Further, Gigpro does not compensate workers by the time or by the job; businesses are responsible

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a person to be an employee. *See Vazquez*, 986 F.3d at 1123-24. Nevertheless, Denver Labor finds meaningful control present here.

> for paying the workers. Gigpro also furnishes no tools, equipment, or clothing to workers, nor are the businesses expected to do so.
>
> [. . .]
>
> Gigpro is not on site, and has no say whatsoever in how work is performed. Gigpro provides no instructions on performing the work. Further, you mention that Gigpro performs background checks. This has nothing to do with control, and many businesses conduct background checks on independent contractors. Confirming that someone does not have a violent criminal history does not mean that Gigpro controls how the work is actually performed.

Ex. C, DL0079, 89.

Gigpro's argument is not persuasive. Initially, Gigpro asserted that under the common law, Pros are not employees. *Id.* at DL0078-80. This is an irrelevant standard, however, because the CWA supersedes the common law. While Gigpro's arguments were not themselves entirely irrelevant, they were constructed around a standard that does not apply.

Beyond that, Gigpro's description does not account for many relevant facts. For example, its background check is thorough. It is not limited to "[c]onfirming that someone does not have a violent criminal history," but may include identity verification; checking a Pro's employment, education, credit, and residential history; speaking to references; evaluating motor vehicle records; and, as a catch-all, looking at "any other public records." Ex. B, DL0040. If Gigpro did not conduct this kind of extensive background check, it could not promise its clients that Pros are vetted.

Likewise, contrary to Gigpro's suggestions, Gigpro itself pays Pros by the hour, invoices its clients for the costs of labor (plus its connection fee), and tracks all relevant work-related information. These are highly relevant facts. *See Dana's Housekeeping v. Butterfield*, 807 P.2d 1218, 1221 (Colo. Ct. App. 1990) ("The fact, however, that claimant was compensated . . . on an hourly basis is significant in determining that claimant had an employee status."); *see Baystate*, 163 F.3d at 676 (finding staffing agency was statutory employer under the FLSA and noting that "it is undisputed that Baystate maintained the workers' employment records, and in fact represented to clients in its promotional materials that it would 'handle all the burdensome paperwork, bookkeeping, record keeping, payroll costs, and government reporting.'"); CDLE INFO #10 at 2 (a business is more likely to be a statutory employer where it sets prices customers pay for labor and pays by time, rather than project).

Reviewing all of the facts shows that Gigpro both **exercises** and **reserves the right to exercise** a meaningful amount of control over Pros. It is significant that Gigpro reserves the right to "terminate or suspend" Pros' accounts "at any time without notice," "for any . . . reason, with or without cause, in our sole discretion." Ex. B, DL0047. This is a classic at-will framing of the relationship, and "[t]he right to terminate at will, without cause, is strong evidence in support of an employment relationship." *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067,

1076 (N.D. Cal. Mar. 11, 2015) (cleaned up).[17] That is because "[t]he right to discharge someone without liability inherently involves the right to control and is inconsistent with the concept of independent contractor." *Dana's Housekeeping v. Butterfield*, 807 P.2d 1218, 1220 (Colo. Ct. App. 1990); *Indus. Comm'n of Colo. v. Bonfils*, 78 Colo. 306, 308 (Colo. 1925) ("By virtue of its power to discharge, the company could, at any moment, direct the minutest detail and method of the work."). In fact, the most important factor to "control over the terms and conditions of an employment relationship is the right to terminate it . . . ." *Bristol v. Bd. of Cnty. Comm'rs of Cnty. of Clear Creek*, 312 F.3d 1213, 1219 (10th Cir. 2002). Often, when a true independent contractor relationship exists, the contractual agreement for a final product prevents consequence-free termination, because ending such an agreement early and without cause gives rise to damages. In contrast, employment in America is largely defined by its at-will nature.

In a wide variety of other ways, Gigpro controls and reserves the right to control Pros' behavior and work performance by binding them to its non-negotiable Terms of Service, which dictate standards of conduct. Pros are explicitly prohibited from "perform[ing] any driving or delivery services or any pick-up services of goods or services" in the course of their work. Ex. B, DL0039. Nor may they operate "heavy machinery." *Id.* They are required to maintain OAI, *id.*, and are restricted from using, receiving, possessing, or selling any illegal drugs or alcohol while working, *id.* at DL0042. Highlighting the fact that Pros are inextricably linked with Gigpro's image and model, Gigpro promises to deactivate or suspend the accounts of Pros who are late, fail to show up, or cancel a shift within 24 hours. Ex. B, DL0050. There are apparently no exceptions to this 24-hour prohibition.[18]

In addition, Pros do not negotiate or set their own wages. Gigpro sets a floor, and its clients decide particular rates. *See* Ex. C, DL0079 (explaining "Gigpro . . . prevents businesses from posting any gigs for any amount below the . . . minimum wage"). These workers have no ability to negotiate their own rate of pay for any particular job—and certainly they do not set their own prices, like bona fide independent contractors. A worker's inability to set prices **at all** is substantial evidence that some other entity has control over the performance of work, even where the other entity merely sets minimum requirements.[19]

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[17] While this case involved California law, *Cotter* applied the standards that existed before the state adopted the ABC test. *Cotter*'s analysis was based on a narrower, more traditional conception of employment, where the "principal question" was "whether the person or company to whom service is rendered has the right to control the manner and means of accomplishing the result desired." 60 F. Supp. 3d at 1075.

[18] This policy is also likely a violation of HFWA, which protects the right of employees to use paid sick leave without suffering any retaliatory personnel actions. C.R.S. § 8-13.3-407(2). a

[19] *E.g.*, *Reich v. Circle C Investments, Inc.*, 998 F.2d 324, 328 (5th Cir. 1993) (instructing workers to charge minimum prices for services indicates control); *Hurst v. Youngelson*, 354 F. Supp. 3d 1362, 1371-72 (N.D. Ga. Jan. 28, 2019) (strip club set minimum prices for dancers, which weighed in favor of employee status); *Rafferty v. Howard*, 2010 WL 11681512, at *2 (S.D. Miss. Aug. 30, 2010) (considering whether putative employer "has the power to fix the price in payment for work"); *Karnes v. Happy Trails RV Park, LLC*, 361 F. Supp. 3d 921, 926 (W.D. Mo. Jan. 8, 2019) (managers of RV park and campsite were employees based, in part, on the fact that employer controlled prices).

Significantly, Gigpro restricts Pros from doing many of the things that have traditionally defined independent businesses. It labels them as independent contractors, but denies them meaningful economic independence. Pros may not share accounts, nor transfer ownership. Ex. B, DL0040-41. They also "may not accept a Gig and have someone perform in [your] place." *Id.* One of the hallmarks of an independent contractor, however, is that they own their own business; this includes the right to sell it or assign work. By explicitly prohibiting Pros from selling their accounts and delegating labor, Gigpro has removed any chance Pros ever had to operate as truly independent parties.

Pros are also required by Gigpro "to comply with all applicable local, state, federal and international laws," as well as "all other regulatory requirements." *Id.* at DL0042. Obligations imposed by third parties are of limited use for establishing control, but Gigpro's restrictions go beyond external requirements. Pros are prohibited from "caus[ing] nuisance, annoyance, [and] inconvenience" to any person or party. *Id.* at DL0041. These terms are not defined, but their breadth could conceivably encompass a wide variety of acts by Pros, such as: showing up late; performing work slowly or poorly; cursing on the job; challenging the wisdom of work orders; wearing the wrong shoes; taking too many smoke breaks; discussing wages; spilling drinks or food; or any one of a myriad of other things that might annoy or inconvenience Gigpro's clients and reflect poorly on Gigpro itself.

Similarly, Gigpro requires Pros to perform work according to the requirements and specifications of clients. Ex. B, DL0041. Again, this broad obligation can lead to sanctions for a wide variety of acts. The gig posting from Chick-fil-A produced on page 4 of this Determination, for example, states that workers must have a "[n]atural appearance including hair color, makeup and nails." If a Pro worked this shift with dyed hair or extensions, they would apparently be in breach of their contract with Gigpro and subject to suspension, deactivation, or a negative performance rating.

To summarize, Gigpro both specifically prohibits Pros from engaging in certain actions and restricts and controls the behavior of Pros through broad prohibitions on allowable behavior. The vagueness of these requirements, paired with Gigpro's right to suspend or deactivate accounts for any reason and in its "sole discretion," emphasizes that Gigpro does not take the hands-off approach it claims. Gigpro may, and does, exercise a meaningful degree control over Pros.

4. Pros are not customarily engaged in an independent trade, occupation, profession, or business.

As a final point of clarification, Section 8-4-101(5) of the CWA states that a person is not an employee if they are both primarily free from control and direction in the performance of their work and also customarily engaged in an independent trade, occupation, profession, or business. Notwithstanding Gigpro's assertions, Denver Labor further finds that Pros are not customarily engaged in an independent business.[20] The idea

[20] It is Gigpro's clients who would provide direct supervision of Pros during a shift. Based on the nature of the jobs in question, worker statements, the context of the hospitality industry, and common sense, Denver Labor deems it highly unlikely that people working as dishwashers, bartenders, prep

that such workers operate an independent trade runs contrary to the fact that Gigpro and its Pros are inextricably intertwined.

Initially, it is noteworthy that none of the positions in question here are of a type that has ever qualified as an independent trade or profession. The CDLE has distinguished work that is a "trade, occupation, profession, or business" from "labor not requiring as much training or learning." INFO #10 at 3. That Gigpro's workers perform frontline jobs in the hospitality industry, then, is highly relevant. For decades—or longer—these have been the kinds of positions that employees fill. And still, under Gigpro's model, these roles are worked by low-wage, hourly workers who obtain shifts through Gigpro's app, work for Gigpro's clients, and labor under Gigpro's rules. Fundamentally, this case involves people who have **never** occupied a traditionally independent field of work.

Analyzing all of the facts, Pros are not engaged in an independent profession. The Colorado Supreme Court, interpreting a similar—but not identical—standard under the Colorado Employment Security Act (CESA), has explained that whether an individual is customarily engaged in an independent profession must be determined based on "a totality of the circumstances test that evaluates the dynamics of the relationship between the putative employee and the employer." *Indus. Claims Appeals Office v. Softrock Geological Servs.*, 325 P.3d 560, 562 (Colo. 2014). The CESA lists nine factors for consideration, C.R.S. § 8-70-115(1)(c), which CDLE has adapted for the CWA. *See* INFO #10. The CESA factors ask whether:

1. Gigpro requires its workers to work exclusively for Gigpro;
2. Gigpro establishes quality standards for workers;
3. Workers are paid a fixed or contract rate, rather than salaried or by the hour;
4. Gigpro may terminate the work at-will, unless the worker violates the terms of the contract or fails to produce a result meeting contract specifications;
5. Gigpro provides more than minimal training;
6. Gigpro provides tools or benefits;
7. Gigpro dictates the time of performance of work;
8. Individuals are paid directly, as opposed to through a separate trade or business; and
9. Gigpro combines its business operations in any way with its workers' alleged businesses, or keeps the operations as separate and distinct.

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cooks, and other similar jobs would go to a restaurant or hotel and be effectively unsupervised. But this question need not be definitively answered here, given the rest of the analysis.

Softrock, 325 P.3d at 564-65.

These questions are only a starting point. A "wide array of factors . . . could be relevant," including "any other information relevant to the nature of the work and the relationship between the employer and the individual." *Id.* at 565. In *Industrial Claims Appeals Office v. Softrock Geological Services*, the Colorado Supreme Court specifically raised, for example, whether a worker:

> maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance.

Id.

This language guides Denver Labor's analysis. However, cases interpreting the CESA are not directly on point for addressing questions under the CWA and other statutes that adopt its definition of "employee." They are informative because the two statutes have some identical language. They both state that a person is not an employee if they are "primarily free from control and direction in the performance of the service, both under his or her contract for the performance of service and in fact," and "customarily engaged in an independent trade, occupation, profession, or business related to the service performed…." C.R.S. §§ 8-4-101(5), 8-70-115(1)(b). But when the Colorado legislature amended the CWA in 2019, it did not merely adopt the same language found in CESA. It changed that language in significant ways to direct decisionmakers' attention to certain aspects of the work relationship.

Similar language should generally be interpreted in the same manner because legislatures are presumed to be aware of judicial interpretations when they intentionally incorporate language from one statute into another. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). At the same time, Colorado law "presume[s] that the legislature understands the legal import of the words it uses and does not use language idly, but rather intends that meaning should be given to each word." *Young v. Brighton School Dist.*, 325 P.3d 571, 579 (Colo. 2014). Consistent with this, exclusions from statutes must be interpreted as deliberate choices, rather than omissions. *Specialty Restaurants Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010). When the General Assembly chooses to explicitly include some language and exclude other language, that reflects "a statement of legislative intent." *Id.*

Applying these principles here, the language differences between the CWA and the CESA reflect deliberate choices by the legislature that render the CWA's analysis somewhat different than that required by CESA. Section 8-4-101(5) calls out three relevant factors **in particular** that shape how questions of employment must be analyzed under the CWA. First, as already described in detail, the primary question under the CWA is whether an individual performs labor or services for the benefit of an employer. The CESA uses similar, but not identical language; it presumes employment where services are "performed by an individual for another." C.R.S. § 8-70-115(1)(a). The CWA speaks in broader terms: an individual need not

perform services "for another," but may be an employee where their labor or services merely **benefit another**, even indirectly.[21]

Second, the CWA puts its thumb on the scale as to the importance of two factors. It specifically emphasizes a) whether a worker is free from direction and control in the performance of their work, both under their contract and in fact, and b) the extent to which they perform work that is the primary work of the employer. C.R.S. § 8-4-101(5). These issues are both subsumed within the CESA's framework of analysis, *id.* at 8-70-115(1)(c), but the state legislature distinguished them under the CWA. Denver Labor concludes that the point of this was to lend them greater weight in the analysis—especially since the CDLE has recognized these differences. In INFO #10, it acknowledged that "unemployment insurance" uses "similar, but not identical definitions" as the CWA. *Id.* at 1 n.2. Through particular reference to the "control" and "primary work" questions, the CDLE has adapted and modified the CESA framework and factors for the CWA. *See generally* INFO #10.

With this framework in mind, a few factors support the argument that Pros are independent contractors who are customarily engaged in an independent occupation. Pros do not receive tools from Gigpro; Gigpro does not train Pros; Gigpro does not require Pros to work exclusively for it; Pros may select which shifts they work, and how often they work; and some or many Pros do not work full time through Gigpro.

But most of the factors, including those emphasized by the CWA, mandate Denver Labor's conclusion that Pros are not customarily engaged in an independent trade or business.[22] As noted in Section III(A)(3), *infra*, Gigpro's degree of control is significant—and enough to militate in favor of Pros being employees. That analysis makes all the more clear that these workers are not "primarily free" of control. To reiterate and elaborate upon this analysis:

- As discussed at length, Pros are not free from direction and control. Gigpro exercises and reserves control by setting standards, restricting access, and promising discipline for a wide range of behaviors or for no reason at all. And again, Pros do not perform the types of jobs that involve them laboring based on their own initiative and expertise; rather, dishwashers, servers, and the like are jobs that require direction, and Gigpro's clients explicitly have the power under Gigpro's system to fire Pros from a shift, provide evaluations, and report them to Gigpro for unacceptable behavior. *See* Ex. B, DL0065-67.

- Pros are inextricably intertwined with Gigpro's business. They perform work that is the primary work of Gigpro.

[21] Even under CESA, the question of indirect control is presumably relevant. But the language difference embraced by the General Assembly strongly implies that under the CWA, it is yet **more** relevant.

[22] For this reason, Denver Labor would reach the same conclusion even if the CWA used identical language to CESA.

- Gigpro's policies remove the ability of Pros to operate their own businesses by prohibiting them from delegating work, sharing account access, or selling accounts.

- Pros find shifts through Gigpro's app, get paid exclusively through Gigpro's app for the work they perform, and receive ratings and evaluations on that platform.

- Pros are individuals, not businesses; human beings, rather than LLCs, apply for, work, and get paid for shifts. *Doordash, Inc.*, p. 24. No Pros apparently run their own separate business.

- Pros have no ability to negotiate their own rates or set their own prices, but may only accept or decline shift opportunities.

- Pros earn money by the hour rather than the task. *See* Ex. A; *Dana's Housekeeping v. Butterfield*, 807 P.2d 1218, 1221 (Colo. Ct. App. 1990) ("The fact, however, that claimant was compensated . . . on an hourly basis is significant in determining that claimant had an employee status."). Gigpro—not the client businesses—primarily tracks the hours Pros work and pays them.

- Pros do not have any meaningful financial investment in the work such that there is a risk of suffering a loss on a shift. *See Softrock*, 325 P.3d at 565. Workers earn money based on the time they work, and they may only really increase their earnings by working more hours.[23]

  While workers may spend some time or money obtaining mandatory certifications to work as servers or bartenders, they have no risk of suffering a loss on a particular shift related to their investment in their putative businesses. *See Softrock*, 325 P.3d at 565 (stating this standard). Millions of people in this country are properly classified as employees where they work jobs that require certifications or qualifications—including professionals like lawyers and doctors, but also frontline hospitality workers like the ones present here. That Pros are authorized to serve alcohol or certified as bartenders is insignificant to the question, and also pales in comparison to the investment that Gigpro—and its clients—have made.

- Gigpro has invested significantly more in the business than have Pros. Pros' primary investment consists of the time they spend working. Gigpro, on the other hand, has created an entire app and website, spends money on advertising, has salespersons who solicit clients, and a team that provides support to Pros and clients alike. Any investment made by Pros is simply dwarfed by Gigpro's enterprise.

[23] In another context, the argument that employees are independent contractors because they can "hustle" to increase earnings has been "universally rejected." *Shaw v. Set Enterprises, Inc.*, 241 F. Supp. 3d 1318, 1325-26 (S.D. Fla. Mar. 17, 2017) (collecting cases rejecting this argument regarding dancers at strip clubs).

- Pros have no opportunity for profit or loss based on their managerial decisions, because they do not—and cannot—make any. In evaluating this question, decisionmakers focus on "the worker's contribution to managerial decision-making and investment relative to the company." *McFeeley*, 825 F.3d at 244. These workers do not hire helpers or assistant and are broadly prohibited by contract and policy from delegating work or transferring their accounts.

  This circumstance, then, is qualitatively different from situations in which individuals can meaningfully affect their profit margins through managerial and investment choices, such as expanding their operations by hiring assistants or purchasing equipment to improve productivity. *E.g.*, *Daskam v. Allstate Corp.*, 2012 WL 4420069, at *2 (W.D. Wash. Sept. 24, 2012) (finding workers were independent contractors, based in part on the fact that they could employ assistants and grow their own businesses through advertising, and some "were able to amass large books of business that generated significant profits…."); *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093 (9th Cir. 2014) (truck drivers were employees, even though they formed their own businesses and hired helpers and secondary drivers, because trucking company retained all necessary control over the operation as a whole).

- Pros obtain accident insurance through Gigpro's platform. This shows that Gigpro is aware that it may be subject to liability for workplace injuries, and that it bears responsibility for ensuring safety and security for its Pros. *See Doordash, Inc.*, pp. 10-11 (applying this logic). Furthermore, that Gigpro does not provide Pros with paid sick leave or other benefits normally due to employees is of limited value to Gigpro's argument; it instead reflects that they have been misclassified.

- Until recently, Gigpro expressly forbade Pros from contacting businesses "for any reason outside of the in-app messaging feature." Ex. B, DL0030. This policy only changed in response to Denver Labor's assertion that it unlawfully prevented workers from asking about their wages, a right that the Ordinance expressly protects. D.R.M.C. § 58-2(b).

- Gigpro may terminate the relationship at will, for any reason or no reason, with or without notice. Ex. B, DL0047.

- While Pros may choose what shifts to accept, once they do Gigpro and its clients dictate the time and place of performance, and Pros are subject to discipline if they do not perform as and when they are required to. Put another way, Pros are flexible workers with a degree of autonomy, but when they do work they do so for Gigpro's benefit, as part of Gigpro's business, and are under Gigpro's control. *See Johnson v. Houston KP, LLC*, 588 F. Supp. 3d 738, 744-45 (S.D. Tex. Mar. 1, 2022) (dancers at strip club were employees notwithstanding evidence that they could "come and go at will, as well as set their own schedule," because when they did work the club exercised meaningful control);

These facts are flatly inconsistent with the idea that Pros are independent contractors, customarily engaged in a separate business for themselves. During this investigation, Gigpro asserted that Pros work for multiple businesses and that they choose when and where to work. Depending on the circumstances, such facts could tend to support classifying workers as independent contractors. But short-term, flexible, or contingent workers are still employees if the standards of Colorado law are otherwise met.[24] Here, they are.

B. Gigpro has violated the Ordinance nearly 1000 times.

To reiterate, under HFWA employees earn paid sick leave based on hours worked. INFO #6B, p. 2. This leave begins to accrue when employees first start working, and constitutes "wages" under Colorado law. *Id.*; C.R.S. § 8-4-101(14)(a)(IV). Under the CWA and the Colorado Workers' Compensation Act, employers may not deduct the costs of mandatory workers' compensation insurance from their employees' earnings. C.R.S. § 8-44-101(d)(2).

Employers violate Denver's Civil Wage Theft Ordinance when they do not provide all earned wages, as required by law, including by failing to provide accrued paid sick leave. Denver Labor is empowered to fine employers up to $25,000 per violation. A new violation occurs each time a distinct legal right is violated, each pay period in which a violation occurs, and every time a worker does not receive all earned wages. *See* Denver Labor's Civil Wage Theft Rule 10.2(B).

Denver Labor has calculated the number of violations based on the number of Pros and the number of shifts worked, because each shift is its own distinct pay period. Pros are paid after each shift; businesses are supposed to render payment within forty-eight hours of shift completion, and if this does not occur, Pros may take action through Gigpro to obtain unpaid wages. Ex. B, DL0038.[25] Based on Gigpro's policies and practices, Denver Labor finds that each shift is its own pay period; consequently, each shift worked in which Pros did not accrue paid sick leave and experienced the illegal deduction amounts to two separate violations, because each individual act is a distinct denial of payment of all earned wages. As of August 30th, 2023, Gigpro violated HFWA and the Ordinance 956 times. Ex. A.

Given the timeframe and number of employees covered by this determination, Denver Labor concludes that it is highly likely that at least some employees **would have** used sick

[24] Both the FLSA and the CWA have always contemplated part-time, temporary, and seasonal **employees**. *New York v. Scalia*, 490 F. Supp. 3d 748, 776-77 (S.D.N.Y. Sept. 8, 2020) (under the FLSA, a temporary staffing agency is typically an employer of its workers); COMPS Order #38, 7 CCR 1103-1 (discussing, at various points, the rights of seasonal and temporary employees); *see also Baystate*, 163 F.3d 668; *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976 (10th Cir. 2002) (genuine issue of material fact existed as to whether workers were employees under the Americans with Disabilities Act, notwithstanding the fact that they were temporary workers); 29 C.F.R. § 825.106 (employers who utilize staffing agencies are "also responsible for compliance with the prohibited acts provisions [of the Family and Medical Leave Act] with respect to [their] temporary/leased employees....").

[25] While some portions of this particular policy have changed, the forty-eight hour standard has not. *Unpaid or Underpaid Gigs*, available at https://support.gigpro.com/hc/en-us/articles/12517921498644-Unpaid-or-Underpaid-Gigs (last visited Nov. 24, 2023).

leave, if allowed. But they were not. Instead, Gigpro told employees that they were independent contractors, refused to allow them to accrue leave, and warned them that if they canceled a confirmed shift within 24 hours of its start time, they "may be suspended from the platform for 7 days or more and have all future Gigs and applications canceled." Ex. B, DL0063. These policies interfere with workers' ability to exercise their basic rights, and are a declaration by Gigpro of its disregard for the protections of HFWA and its desire to chill protected activity.

Such a systemic embrace of illegal practices deserves significant penalties, but not to the maximum extent allowable by law.[26] Instead, Denver Labor finds it appropriate at this time to impose penalties of $23,900 for Gigpro's denials of paid sick leave and $23,900 for its illegal deductions. s

This approach to sanctions is similar to, but significantly more lenient than, the penalty structure that applies to violations of Denver's Minimum Wage Ordinance, which imposes fines of $0-100 based on the number of violations, affected workers, and days that pass. *See* D.R.M.C. § 58-16(d). For four violations or more, the statute lays out penalties of $2500-5000, plus $50-$100 per affected worker per day. *Id.* at § 58-16(d)(1)(c).

Like the Minimum Wage Ordinance, HFWA establishes a core right that is necessary to safeguard the health and well-being of both individual workers and the broader community. Systematic violations of HFWA threaten harms that reverberate beyond the mere denial of earned wages. When low-wage workers are denied the right to use paid sick leave, they are far less likely to take time off when they are ill.[27] This increases the risk that they will pass on sickness to those around them, a danger that is especially acute in the hospitality industry.

Likewise, Colorado's Workers' Compensation Act establishes important and necessary workplace protections. It explicitly puts responsibility on employers to provide this benefit, and prohibits them from requiring employees to pay its costs. C.R.S. § 8-44-101(d)(2).

The scope and seriousness of these violations, therefore, warrant penalties. At this time, however, given Gigpro's willingness to address Denver Labor's other concerns, imposing penalties that are a fraction of the maximum should be sufficient to correct these violations.

IV. CONCLUSION

[26] The Ordinance allows Denver Labor to fine employers up to $25,000 per violation. The maximum fines technically available here amount to approximately $24,000,000.

[27] *E.g.*, LeaAnne Derigne et al., *Workers Without Paid Sick Leave Less Likely To Take Time Off For Illness Or Injury Compared To Those With Paid Sick Leave*, 35 HEALTH AFFAIRS No. 3, available at: https://www.healthaffairs.org/doi/10.1377/hlthaff.2015.0965. The authors found that those without paid sick leave were three times more likely to forgo medical care for themselves and 1.6 times more likely to forgo medical care for their family compared to working adults with paid sick leave benefits. These findings track by income, with the lowest-income people being at the highest risk of delaying and forgoing medical care.

Denver Labor finds that Gigpro has misclassified its employees as independent contractors and, in doing so, has violated the Ordinance hundreds of times. Within **30 days, Gigpro must:**

1. Pay to the City and County of Denver penalties totaling **$47,800**;

2. Pay restitution of **$3,453.51** to employees as listed in Exhibit E;

3. Calculate the paid sick leave to which each of Gigpro's employees is entitled based on time worked, and accrue that amount of sick leave to employees;

4. Provide information to Denver Labor regarding shifts worked since August 30th, 2023, to ensure no other violations are present;

5. Rectify any acts of wage theft that have occurred since August 30th, 2023, to include interest and 200% damages;

6. Cease and desist from further violations of the Ordinance.

Because this Determination contains information and guidance that may be useful to other employers and workers in the City and County of Denver, Denver Labor will make it publicly available, with any personally identifying information redacted. This limited release does not otherwise waive privileges or protections that apply under the Colorado Open Records Act, Generally Accepted Government Auditing Standards, or any other applicable statute, standard, rule, regulation, code of conduct, or guideline.

Date January 16th, 2024

Denver Labor

Denver Auditor's Office

Sent via first-class mail and e-mail to the parties this same date.