COLORADO MUNICIPAL LEAGUE

AUGUST 2025

Knowledge

KNOWLEDGE NOW — PRACTICAL RESEARCH ON TIMELY TOPICS

PROPWA

Protections for Public Workers Act

Key Points

- PROPWA grants broad rights relating to public employees' abilities to associate with each other and discuss matters relating to their employment.
- Cities and towns should evaluate their training programs and written policies to ensure compliance with PROPWA.
- PROPWA's broad and often undefined language likely will result in confusion and disagreement as to the scope of protections.

By **Taylor McGaughey**, law clerk at Dufford Waldeck & former CML law clerk

Colorado municipalities are entering uncharted waters with the enactment of Colorado Senate Bill 23-111, the Protections for Public Workers Act (PROPWA), codified at C.R.S. §§ 29-33-101 to -105. Public entities, including municipalities, are excluded from many national and state labor laws, such as the National Labor Relations Act (NLRA) and the Colorado Labor Peace Act. Only a handful of Colorado municipalities have recognized employee organizations that represent and advocate for employees.

CONTINUED ON PAGE 2

Colorado Municipal League
1144 Sherman St. • Denver, CO • 80203
303 831 6411 / 866 578 0936
www.cml.org

PROPWA grants broad rights relating to public employees' abilities to associate with each other and discuss matters relating to their employment, matters typically covered by the First Amendment to the United States Constitution and the NLRA. PROPWA's coverage expands public employee protections beyond the scope of constitutional protections and federal labor laws. PROPWA's protections are not absolute, as discussed below.

Although public employee speech rights might seem familiar, municipalities should evaluate their training programs and written policies to ensure compliance with PROPWA and the implementing regulations issued by the Colorado Department of Labor and Employment, Division of Labor Standards and Statistics (CDLE) (7 CCR 1103-17). *See also* Interpretive Notice & Formal Opinion ("INFO") #15C (published prior to the PROPWA rules). Keep in mind that PROPWA and CDLE's regulations and guidance remain untested and may be subject to legal challenges.

PROPWA's Coverage

PROPWA's protections extend to most employees of municipalities. "Confidential public employees" and "managerial public employees" receive somewhat limited protections. C.R.S. § 29-33-103(5)(a); 7 CCR 1103-17(2.7). PROPWA does not protect elected officials.

Confidential public employees are employees whose duties relate to the employer's positions on employer-employee relations. Notably, "employer-employee relations" is not defined in PROPWA or the regulations. These employees develop or present the employer's positions, contribute significantly to decision-making relating to them, or access confidential information (such as non-public strategy or planning) in connection with their development, presentation, or decision-making of the employer's positions. The employer's attorney relating to PROPWA or any labor relations matter is a confidential employee.

Managerial public employees are executive-level, policy-making employees. They have significant decision-making authority like developing policies or programs or administering parts of the employer's organization. An employee that simply supervises or directs other employees is not a managerial public employee. CDLE's rules use the term "policy-level employee" to refer to managerial public employees. 7 CCR 1103-17(2.7.2).

Whether a public employee is "confidential" or "managerial" and exempt from PROPWA protections is a fact specific inquiry. Confidential public employees likely include city or town managers, department leadership, public information officers, and some human resource professionals, finance officials, and attorneys. Managerial public employees likely cover a narrower range of employees limited to more senior officials, depending on the size and complexity of the organization.

PROPWA Rights

PROPWA establishes five statutory rights for public employees. CDLE has characterized them as either "expressive activity" or "concerted activity." 7 CCR 1103-17(4.2) & (4.3). Although expressed as an employer prohibition in PROPWA, CDLE defines another category relating to exercising PROPWA rights or complaining, reporting, or testifying in good faith about PROPWA violations. C.R.S. § 29-33-104(3)(c); 7 CCR 1103-17(4.1.1)(E).

PROPWA rights are not absolute and do not extend to every aspect of labor relations. Employers can restrain expressive or concerted activity to the extent allowed by law. Public employee rights can also be restrained to the extent necessary to maintain the nonpartisan role of the employer's nonpartisan legislative, judicial, or election-related staff. 7 CCR 1103-17(4.4.5).

Either direct employer actions or policies that improperly interfere with or respond to protected activities can be deemed "unfair labor practices" under PROPWA. C.R.S. § 29-33-104(3); 7 CCR 1103-17(4.4). Public employers cannot discriminate against, coerce, intimidate, interfere with, or impose reprisals against (or threaten to do any of that) a public employee for engaging in protected activities or dominate the employee organization. Public employers cannot interfere in the administration of an employee organization.

CDLE's regulations attempt to harmonize PROPWA with traditional First Amendment principles as far as would be consistent with the law. Unfortunately, PROPWA's broad and often undefined language likely will result in confusion and disagreement as to the scope of the protections. Note that employee conduct can fall within multiple categories and be subject to different limitations.

PROPWA Expressive Activity

PROPWA expressive activity includes two categories of employee actions typically associated with free speech protections. All public employees receive protection for PROPWA expressive activities, including confidential and managerial employees, but some restrictions apply.

What is PROPWA expressive activity?

First, a public employee has the right to discuss or express the public employee's views regarding public employee representation, workplace issues, or the rights granted to the public employee by PROPWA. C.R.S. § 29-33-104(1)(a); 7 CCR 1103-17(4.1.1)(A) (describing "Sec. 103(1)(a) activity"). PROPWA does not define these concepts, but they could include a broad range of actions, such as talking about forming a union, asking for a raise, asking to fix work equipment, meeting with a union official about improving work conditions, or criticizing the employer's response to safety issues like a lack of training. Where the line is drawn on what constitutes "workplace issues" remains to be seen.

Second, a public employee may fully participate in the political process while off duty and not in uniform. C.R.S. § 29-33-104(1)(c); 7 CCR 1103-17(4.1.1)(C) (describing "Sec. 103(1)(c) activity"). The "political process" includes speaking with a governing body on terms and conditions of employment and any matter of public concern, as well as engaging in "other political activities" like any other Colorado citizen. PROPWA does not define these concepts further. Presumably, "public concern" includes anything of political, social, or other general concern or value to the community, as defined in First Amendment case law. "Political activities" may include things like voting, running for office, participating in partisan activities, making campaign contributions, protesting, letter writing, and more.

Whether a particular employee's expressive activity is protected by PROPWA will be intensely fact-dependent. Political participation is not protected if the activity would be contrary to the duties that qualify the individual as a policy-level employee. 7 CCR 1103-17(4.2.4).

Limits on PROPWA expressive activity

Employee duties: Like the First Amendment, PROPWA does not protect expressive activities that are done as part of duties that the public employee either (1) is paid by their public employer to perform; or (2) otherwise has a responsibility to perform under a directive from their public employer. 7 CCR 1103-17(4.2.2)(A)-(B). Here, PROPWA relies on and potentially expands concepts established in First Amendment case law. The First Amendment protects the private speech of public employees on matters of public concern but does not protect private or public speech of a public employee in the exercise of their duties. *See, e.g., Garcetti v. Ceballos,* 547 U.S. 410, 421-22 (2006). The employer in the latter case has a justification for limiting speech.

Disruptive activity: Similarly, disruptive activity is not protected. 7 CCR 1103-17(4.2.1). An employer can justify limiting expressive activity based on a material impairment of significant interests caused by the activity. Examples of interests include the need to provide public services, maintain confidentiality, or fulfill obligations; maintaining trust between a governing body and policy-level or confidential employees; and the maintenance of professional relationships to perform an employee's duties.

This disruption will be measured against how clearly the activity is protected, both by subject matter and form of communication. Disagreement with the viewpoint of the activity will not justify an employer's restrictions.

Time, place, & manner limits: Finally, PROPWA recognizes that public employers can impose reasonable "time, place, and manner restrictions" on employee speech, generally following First Amendment case law for the similar concept. In public forums, the limits must be set and enforced on a content- and viewpoint-neutral basis (i.e., without regard to the subject or view of the speaker). The limits must be narrowly tailored to serve a significant government interest and leave open ample alternative channels for the activity. Public forums include places traditionally or specifically opened to the public for speech.

Expressive activity is more limited outside of public forums. The employer's limits must only be viewpoint-neutral and be reasonable in light of the purpose of the forum. They can be based on content. For example, a municipality may prevent an employee from discussing a labor issue at a re-zoning hearing without a connection to the labor issue. INFO #15C, Example 7. Such a restriction is permissible because the hearing is a limited public forum and the restriction is reasonable considering the purpose of the public hearing is to hear public comment on re-zoning. However, a municipality at a council meeting concerning whether the city should adopt a collective bargaining agreement may not stop an employee from speaking critically about city management when others are permitted to talk positively about city management (note: whether the subject can be restricted at all is another question). INFO # 15C, Example 8. Such a restriction is not permissible because such speech discussed a matter of public concern, the speech was related to the purpose of the meeting, and the restriction was based off viewpoint because pro management speakers were allowed to speak.

PROPWA Concerted Activity

The concept of PROPWA concerted activity is typically associated with labor organizations and associational protections. There is substantial ambiguity about the scope of these protections and a high potential for conflict with home rule municipal charters.

What is PROPWA concerted activity?

PROPWA gives employees (other than a confidential or managerial employee) the right to engage in "protected, concerted activity for the purpose of mutual aid or protection." C.R.S. § 29-33-104(1)(b); 7 CCR 1103-17(4.1.1)(B) (describing "Sec. 103(1)(b) activity"). PROPWA avoids defining "protected, concerted activity for the purpose of mutual aid and protection" and incorporates the concept from the NLRA, except for collective bargaining. C.R.S. § 29-33-104(1)(b)(II). Generally, the concept is understood as embracing activities of employees who have joined together to achieve common goals. *See, e.g., NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822, 830 (1984). Such activities include employees sharing information or a petition on pay, work safety, or other work conditions; employees talking together about work issues, themselves, or to an employer or others.

Finally, PROPWA allows any public employee (including confidential and managerial employees) to organize, form, join, or assist an employee organization or refrain from organizing, forming, joining, or assisting an employee organization. C.R.S. § 29-33-104(1)(d); 7 CCR 1103-17(4.1.1)(D) (describing "Sec. 103(1)(d) activity").

Limits on PROPWA concerted activity

As with expressive activity, disruptive PROPWA concerted activity is not protected if the employer's interests outweigh the concerted activity. 7 CCR 1103-17(4.3.2). Concerted activity is less likely to be protected if employee conduct is attenuated from the concerted activity. The employer's interests in delivering public services, maintaining legally required confidentiality, or fulfilling legal obligations must be materially impaired by the activity. The materiality of impairment can be measured by many factors, including how the location of the activity disrupts delivery of services, the nature of the employee's conduct in light of workplace rules (like prohibitions on harassment) and responsibilities of confidentiality, provocation, and consistency with an employee's duties as a confidential or policy-level employee.

Collective bargaining

Unlike in the NLRA, municipalities do not have to recognize unions or negotiate collective bargaining agreements. PROPWA explicitly states: "Nothing in [PROPWA] shall be

construed to mean the right or obligation to recognize or to negotiate a collective agreement." C.R.S. § 29-33-103(7). Additionally, the statute specifically disclaims application of NLRA standards relating to bargaining, stating, "'protected, concerted activity for the purpose of mutual aid and protection' does not include the right or obligation to recognize or negotiate a collective bargaining agreement." C.R.S. § 29-33-104(1)(b)(II).

Strike

PROPWA does not directly address the right to strike, but other statutes do. Whether PROPWA permits public employees (at least in home rule municipalities) to strike probably can only be answered by the courts. Some home rule charters and ordinances expressly prohibit public employees from striking. Home rule municipalities should consider whether PROPWA, CDLE's rules, and other statutes improperly conflict with their authority under Article XX, Section 6 of the Colorado Constitution. Further, the Colorado Firefighter Safety Act prohibits firefighters from striking. C.R.S. § 29-5-211.

As amended in 2024, PROPWA suggests that a strike is possible as a form of "protected, concerted activity" because the NLRA considers a strike to be such an activity. PROPWA prohibits an employer from claiming that a "material disruption" occurs based on disagreement the viewpoint expressed through a strike. C.R.S. § 29-33-104(2)(b).

CDLE's INFO #15C clearly states: "Strikes are a form of concerted activity both protected and limited by other laws." CDLE and PROPWA's proponents point to the Industrial Relations Act, C.R.S. § 8-1-126, a 1915 statute that applies to most Colorado employees and employers, including cities and towns. That law prohibits strikes only during CDLE's intervention in disputes regarding conditions of employment or wages, subject to class 2 misdemeanor penalties; employer lockouts are similarly restricted. Courts have not determined whether the law applies to home rule municipalities.

Can employees talk about organizing during work time?

Yes, with some limitations. PROPWA's broad definition of "protected, concerted activity" and reliance on the NLRA means that employees can talk about rights protected by PROPWA.

CDLE's regulations allow restrictions on soliciting or distributing written materials related to an employee organization during work time, but only if the restriction is not

imposed (or is "disproportionately imposed") at least in part "to discriminate against, interfere with, or otherwise deter protected activity." 7 CCR 1103-17(4.3.2)(B). CDLE suggests that "working time" is time "interacting directly with customers," but does not discuss whether other paid time is "working time." Impermissible interference can arise by taking an action intended to interfere with or retaliate against the activity. An overly broad or vague rule could be viewed as impermissible interference in light of past practices, the nature of the workplace, and the field of work. 7 CCR 1103-17(4.4.2).

This could mean that, if employees are allowed to discuss non-work matters or solicit for fundraisers during work hours, those policies must apply equally to discussion of employee organizations. Employers can restrict solicitation or distribution of written materials "during any working time" if the restriction does not discriminate or retaliate against or interfere with the protected activity.

Can employees use employer resources for engaging in organizing or other protected, concerted activity?

Possibly. PROPWA is silent about the use the employer resources, like meeting rooms, bulletin boards, and e-mail systems, for engaging in concerted activity. Other public employee labor statutes that do not apply to municipalities expressly permit similar activities. See C.R.S. § 8-3.3-103(2). The NLRA generally prohibits an employer's complete ban on solicitation and literature distribution in the workplace during nonworking hours, which in some circumstances allows for the use of meeting rooms for concerted activity during nonworking hours. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 805 (1945). However, the National Labor Relations Board (NLRB) currently interprets the NLRA to not provide a statutory right to use employer equipment for concerted activity, specifically in the context of email systems. *Ceasars Entm't,* 368 N.L.R.B. 143 (2019). This current interpretation of the NLRA provides an exception for cases where an employer's email system furnishes the only reasonable means for employees to communicate with one another. *Id.* It should be noted that NLRB decisions are non-binding and vary significantly.

Any employer restrictions on the use of employer resources would be evaluated against other employer policies for consistent application and improper purpose. A policy that expressly limits communication concerning protected, concerted activity may be questionable as a content-based limitation. *See* 7 CCR 1103-17(4.3.2(B)). For example, if an employer allows non-work-related emails but prohibits union-related emails, this would be considered unlawful interference. INFO #15C, Example 27.

A rule implemented to respond to concerted activity is likely suspect. 7 CCR 1103-17(4.4.2)(A). An overly broad or vague rule could be viewed as impermissible interference in light of past practices, the nature of the workplace, and the field of work. 7 CCR 1103-17(4.4.2).

Other laws may be relevant, such as the Fair Campaign Practices Act and its restriction on the use of public resources related to ballot questions, if an election is involved. C.R.S. § 1-45-117(1)(a).

Can the employer discuss employee organizing and collective bargaining with employees?

Yes, employers can engage in some expressive activity regarding the advantages and disadvantages of employee organizations and collective bargaining. 7 CCR 1103-17(4.4.3). Such expression may include "general views on employee organizations" or predict the effects of unionization on the employer, if based "in objective fact as demonstrably probable causes beyond employer control." There are no similar restrictions on employee speech or expression by employee organizations.

Employer expression on these matters cannot include or involve actions "reasonably tending to discriminate against, interfere with, or otherwise deter protected activity." These could include threats, promises of benefits for not engaging in protected activity, or creating an impression of surveillance.

For example, a permissible statement regarding unions would be, "With a union, pay would need to be set by collective bargaining, with no guarantee of a raise, and an employee couldn't negotiate their own personal raise." INFO #15C, Example 30. A public employer may not say, "your pay probably will be lower, due to smaller or no raises, if there's a union." INFO #15C, Example 31. An employer can express preference for a particular union but cannot benefit one at the expense of another or pressure employee choice. INFO #15C, Example 28.

Can an employee engage in concerted activity alone?

Yes, CDLE views "concerted activity" as being actions "by one or more public employees" from the same or a different public employer. 7 CCR 1103-17(4.3.1). The critical aspect is whether the action is "for the purpose of mutual aid or protection," and will likely be considered in light of the totality of the circumstances. The personal motivations of an employee are irrelevant. This may be a departure from the NLRA, which generally requires authority from others

or an intent to bring group complaints to the employer or to induce or prepare for group action.

Are we required to recognize an employee union?

PROPWA does not require that municipalities recognize an employee organization. Municipalities do not commit an "unfair labor practice" by declining to recognize a bargaining agreement. C.R.S. § 29-33-103(7). CDLE has declared that employers can decline to recognize a union without violating PROPWA. INFO #15C, p. 11. Further, employees have no right to an election for union representation.

Are we required to allow union representatives in disciplinary interviews?

It is not clear whether PROPWA requires that employees be permitted to have a representative of a recognized union present at interviews that the employee reasonably believes could lead to discipline, known as *Weingarten* rights under the NLRA. Those rights arise from the NLRA's prohibition on interfering with rights guaranteed by the law, which is like PROPWA's standard. However, although the NLRA's view of concerted, protected activity is largely incorporated in PROPWA, municipalities do not commit a PROPWA "unfair labor practice" by declining to recognize a bargaining agreement or union. C.R.S. § 29-33-103(7); INFO #15C, p. 11.

What if we already recognize a union or have a bargaining agreement?

PROPWA adds additional complexity to municipalities that voluntarily recognize employee organizations or have collective bargaining agreements. Special attention should be paid to employee rights, including communication with elected officials and the rights of employees on the bargaining team, and limits on employer expressive activity. PROPWA also may complicate the process of collective bargaining, including ensuring confidentiality, establishing ground rules for negotiation, and maintaining management independence from undue interference by elected officials. For example, CDLE believes that an employee who "bangs the table" and calls a management official an "[expletive] liar" engages in protected concerted activity; it is unclear whether ground rules could address that conduct.

PROPWA & Firefighters

When a public employee is a firefighter, PROPWA must be considered in context with the Firefighter Safety Act.

C.R.S. §§ 29-5-201 to -215. That law also purports to grant rights to firefighters that do not extend to other municipal employees. Further, PROPWA amended this law to permit firefighters to have "all the rights and protections" under PROPWA. C.R.S. § 29-5-515. However, some of PROPWA's "rights and protections" directly contradict and would undermine the Firefighter Safety Act.

As discussed above, PROPWA may permit public employees to strike, but that is expressly forbidden by the Firefighter Safety Act. The Firefighter Safety Act also restricts the nature of concerted activity, C.R.S. § 29-5-204(1)(b-c); excludes chiefs and other senior officials from certain concerted activity rights, C.R.S. § 29-5-203(15); and limits the nature of participation in the political process, C.R.S. § 29-5-204(1)(e). That law's constitutionality under Article XX, Section 6 also has not been determined by the courts.

PROPWA Enforcement

A public employee may file a complaint with CDLE within six months after the date on which the charging party knew or reasonably should have known of the alleged unfair labor practices. C.R.S. § 29-33-105(1); 7 CCR 1103-17(5.1.1). CDLE can investigate complaints or other leads that the director decides warrant investigation, in their good faith discretion and judgment. C.R.S. § 29-33-105(2); 7 CCR 1103-17(5.1.2).

The PROPWA rules establish a process for notifying municipalities of complaints and answering the allegations. 7 CCR 1103-17(5.2). Answers must be provided within 21 days or possibly less, if required by CDLE. Upon receipt of a complaint or notice of investigation, a municipality must preserve relevant documents. 7 CCR 1103-17(5.3.4). CDLE does not need to reveal the identity of the complainant if not necessary to resolve the complaint. 7 CCR 1103-17(5.1)(F).

CDLE can conduct additional investigation, including interviews, and make a determination. 7 CCR 1103-17(5.3). PROPWA allows CDLE to use alternative dispute resolution procedures outlined in the Labor Peace Act, C.R.S. §§ 8-3-101 to -123, such as voluntary binding arbitration or non-binding mediation. C.R.S. § 29-33-105(2)(b).

A party can request a hearing before the director within 35 days of the decision. The director's decision or, if no hearing is requested, CDLE's determination is a final agency action for purposes of judicial review. 7 CCR 1103-17(5.3.8) & (5.3.9). The Colorado Court of Appeals reviews a CDLE decision directly and subject to a lenient standard of review. C.R.S. § 29-33-105(5). A CDLE decision will be overturned only if arbitrary, capricious, an abuse of discretion, or not in accordance with law.

PROPWA Remedies

PROPWA grants broad powers to CDLE to define other remedies for unfair labor practices. C.R.S. § 29-33-105(6). The General Assembly delegated authority to CDLE to define "appropriate administrative remedies" with guidance only include a remedy "to address any loss suffered by a public employee or group of employees." Home rule municipalities should consider whether this delegation of authority or CDLE's rules improperly conflict with their authority under Article XX, Section 6 of the Colorado Constitution.

The PROPWA rules outline a wide range of remedies, including monetary damages like backpay for employees or lost union dues for employee organizations, reinstatement or front pay, and administrative orders that could involve modifying or rescinding policies. 7 CCR 1103-17(5.4.2). CDLE also assigned itself authority to use any other relief authorized by other statutes that the division enforces or administers.

ADDITIONAL RESOURCES

- PROPWA Rules, 7 CCR 1103-17, effective July 1, 2024, is online at CDLE
- Interpretive Notice & Formal Opinion #15C is online at CDLE
- National Labor Relations Act, 29 U.S.C. §§ 151-169 is online at NLRB
- National Labor Relations Act Regulations, 29 C.F.R. Part 102 is online at the National Archives
- National Labor Relations Board Case Search is online at NLRB

CML COLORADO MUNICIPAL LEAGUE