City and County of Denver
Denver Labor
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(720) 913-5039 • www.denverauditor.org/DenverLabor

Liability Determination

Re: Active Enforcement Investigation Into Garuda Labs, Inc. d/b/a Instawork

I. INTRODUCTION AND SUMMARY OF DETERMINATION AND PENALTIES

Garuda Labs, Inc. d/b/a Instawork ("Instawork" or the "Employer") is an app-based staffing company operating in Denver and the surrounding area. Instawork provides workers—which it calls "Professionals" or "Pros"—for clients who operate in the hospitality, warehousing, and retail industries. These individuals work shifts directly for Instawork's clients, filling a variety of frontline roles as servers, bartenders, dishwashers, line and prep cooks, general laborers, and housekeepers. *See* Ex. B, DL126, 131, 186-88.

Extensive investigation by Denver Labor reveals that Instawork has violated and is violating nearly every applicable wage and hour law. Since October of 2020, Instawork broke Denver's minimum wage ordinance more than 1,000 times, failed to pay overtime more than 700 times, and did not provide nearly 3,000 workers with notice of their rights under Denver law.

There is a fundamental problem at the heart of Instawork's business model: the Employer classifies these workers as independent contractors, but under Colorado law they are Instawork's employees. In addition to the rights listed above, Instawork's employees are also 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. But all over Denver, workers who prepare and serve food and beverages and work in low-wage, entry-level jobs are denied a right that is crucial to workplace and community safety. Instawork's HFWA violations are especially harmful because it operates in industries that revolve around close-quarters interactions.

As this determination more fully explains, in Denver alone Instawork has committed more than 16,000 violations of its employees' wage and hour rights. Each of these acts also constitutes a separate violation of Denver's Civil Wage Theft Ordinance (the "Ordinance"), D.R.M.C. § 58-1 *et seq.*, which Denver Labor is obligated to enforce.

To remedy these violations, Denver Labor:

1. **Orders Instawork to cease and desist** from misclassifying the workers on its platform, and to provide paid sick leave as required by HFWA. As part of this remedy, Instawork must calculate and provide all paid sick leave time lawfully due

to all employees who have worked for and through Instawork; and

2. **Orders Instawork to pay $275,516.09 as restitution** for its overtime violations, inclusive of unpaid wages, statutory interest, and 200% damages, as detailed in the attached Exhibit A. Instawork may deduct from this total any unpaid overtime wages it has already remitted to workers and provide Denver Labor with evidence of that;

3. **Fines Instawork $86,837.05** for its overtime violations;

4. **Fines Instawork $659,750** for failing to provide paid sick leave as required by law, based on separate fines of **$50** for each of the **13,195** violations of which Denver Labor is aware;

5. **Fines Instawork $73,900** for failing to provide workers on its platform with the notices of rights required by both the Denver Minimum Wage and Civil Wage Theft Ordinances, based on separate fines of $25 for each of the 2,956 violations of which Denver Labor is aware;

6. **Orders Instawork to provide information** of jobs worked in Denver since November 17th, 2023, and to rectify any minimum wage and overtime underpayments that have not already been addressed, to include interest and 200% damages.

7. **Orders Instawork to provide Denver Labor with information** of any deductions for rest breaks imposed against workers' wages for work performed in Denver since October 16th, 2020.

Consistent with Denver Labor's established practice, Denver Labor will waive the fines described in points 3 and 5, above, if the Employer fully complies with this determination **within 30 days of its date** by adhering to all other requirements as described.

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 Instawork's violations. Nor does it assess all damages or penalties available under the Ordinance.

If Instawork does not fully comply with this Determination within **30 days of its date**, Denver Labor will take further action, including (but not limited to) imposing further penalties and assessing the full treble damages applicable under law.

II. BACKGROUND

A. Denver Labor's investigation into Instawork

On October 16th, Denver Labor opened an active enforcement investigation into Instawork to assess compliance with Denver's minimum wage and civil wage theft ordinances. Ex. C, DL234-35. Denver Labor requested payroll data for all shifts worked in Denver since October 16th, 2020. *Id.* On November 14th, 2023, Instawork (through counsel)

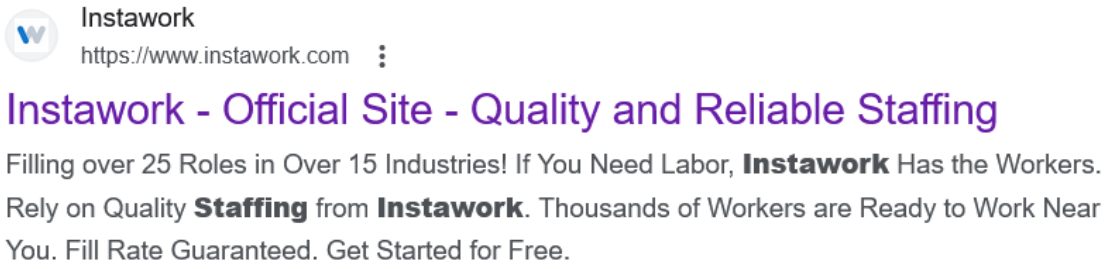
objected and refused to produce this data. Ex. C, DL003-010. It provided legal argument and analysis, asserting that the workers who operate on its platform are independent contractors who do not fall under Denver Labor's jurisdiction. Ex. C, DL236-43. On November 16th, Denver Labor responded, disputing Instawork's argument and again requesting payroll data. Ex. C, DL301-304. Instawork provided relevant information on November 22nd, 2023, which included work performed from October 16th, 2020 through November 17th, 2023. Instawork supplemented this production on January 8th, 2024, to include information about the roles people worked (e.g., General Labor; Counter Staff / Cashier; Event Setup and Takedown). With each production of payroll data, Instawork included a declaration from its Trust & Safety Manager stating that he had personally reviewed the records and they were true and accurate. Ex. C, DL308-10, 322-24.

Denver Labor also interviewed two workers who labored through Instawork's app. Investigators questioned them about their experiences, including what roles they worked, how the app operates, whether they ever had any issues with getting paid, how much control they were able to exercise over their job tasks and duties, and whether and to what extent Instawork tracks their work history and performance.

Denver Labor carefully reviewed all evidence and information it received, both from Instawork and pursuant to its own investigation.

B. **Instawork's business model**

Instawork is a staffing company that operates via a website and smartphone app. Businesses can "[c]onnect with thousands of workers near you" via Instawork. Ex. B, DL001. From the outset, Instawork assures potential clients that it can address their staffing needs for a range of positions and sectors:



To that end, "Instawork intelligently matches businesses with our vetted pool of 5 million short-term, seasonal, and temp-to-hire workers," who Instawork promises are reliable, skilled, and qualified. *See* Ex. B, DL001. For businesses "[s]truggling to find *qualified and reliable* workers . . . . Instawork's platform makes it easy to find the qualified and reliable workers you need." Ex. B, DL002 (emphasis in original). While the Employer's specific phrasing changes slightly depending on the sector it is targeting, the theme remains the same: whether clients need workers in the hospitality industry or to fill shifts in a warehouse, Instawork presents itself as a trustworthy source for labor that will streamline business operations by providing affordable, vetted, and ready-to-use workers. *See* Ex. B, DL134, 169, 178.

Instawork guarantees this reliability through a comprehensive system of setting and ensuring standards, rules, and requirements that all of its workers must follow. Through this system, Instawork plays a direct role in who works which jobs, and exercises significant control over the terms and conditions of work.

1. Instawork limits access to its platform by conducting background checks, evaluating workers' profiles, verifying their work history and qualifications, and conducting interviews for certain types of jobs.

Instawork first ensures its reliability by restricting who has access to and the ability to perform work via its platform. It vets all workers and explains that this is what sets it apart from other staffing agencies. Its FAQ for businesses states, for example:

> **How do you vet the staff?**
>
> People who sign up on Instawork have to create a detailed profile. We collect and verify over 30 skills data points, including work history, skill quizzes, professional references, and valid certifications.
>
> We're different from local temp agencies because these data points are available for you to review via their profile. Plus, once they start completing shifts through Instawork, we continue to assess their work performance with ratings, feedback, and on-time metrics.

Ex. B, DL110.

This process begins with a background check to verify a person's social security number, work history, references, and whether they have a criminal history. Ex. B, DL040-043. From "time to time," Instawork repeats these checks. *Id.* Instawork goes beyond verifying some basic details to prevent fraud and ensure safety, however. It also reviews user profiles and requires professional references. It explains:

> **Why do we review profiles?** We review each profile to ensure that our clients and partners get the best professionals working shifts. Aside from reviewing your profile and previous work experience, references are incredibly helpful.
>
> **Why do we require references?** References are a way of verifying not only work experience, but the experience of the person under review. It's easy to have a friend say something nice about you, but in order to have valuable references, you should aim for managers and colleagues to write a nice reference for you specific to the job responsibilities.
>
> Having professional references with valuable descriptions will fast track you to being activated on the platform.

Ex. B, DL086.

Instawork also imposes heightened requirements for individuals who want to work "skilled" positions, which include prep cooks, line cooks, bartenders, event servers, and others. Ex. B, DL100-101. Workers must submit an application, which requires them to:

- Add **ALL** relevant work experience to your Instawork profile.
- Upload a professional profile photo that clearly shows your face without filters or glasses.
- Provide necessary personal information, like your date of birth and address.
- Schedule a coach call after application is completed.

Ex. B, DL101. Instawork also recommends that workers obtain references from managers and coworkers; upload all relevant certificates; provide photos of themselves wearing appropriate attire; and pass relevant quizzes. *Id.* For some positions, Instawork requires workers to pass "written skills assessments" designed to evaluate their qualifications. Ex. C, DL237. Finally, Instawork has a "coach" review each applicant's work experience, and requires workers to interview with these "coaches" before they will get approved to work "skilled" positions. Ex. B, DL101; *see* Ex. C, DL237 (noting workers must interview for some jobs). This meeting with a "coach" is really just an interview, during which Instawork questions workers about their work history and skills before approving them to work "skilled" shifts.[1]

2. <u>Instawork continuously monitors and evaluates the performance and qualifications of its workers</u>

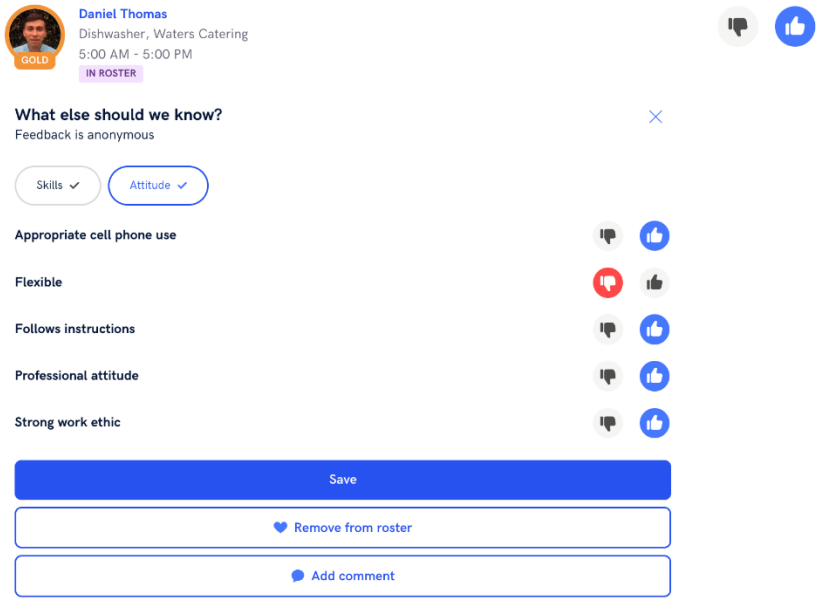
Once approved for an account or to work specific roles, Instawork continuously evaluates and re-evaluates the workers on its platform. It assures clients that "we continue to assess [workers'] work performance with ratings, feedback, and on-time metrics." Ex. B, DL109 (How do you pre-screen workers?). Ratings and feedback often come from the businesses for whom workers fill shifts. *See* Ex. B, DL137-139. But this is not always the case—Instawork also monitors people directly in a variety of ways.

For some (typically larger) staffing jobs, Instawork sends "Onsite Captains," who "are Professionals vetted by Instawork to provide logistical support and facilitate the flow of shifts." Ex. B, DL079-080. They are akin to supervisors: they do not perform labor directly alongside other workers, but "make the shift experience run more smoothly from start to finish, assist and provide feedback on other [workers], and support Partners operationally when possible." *Id.*

[1] *How do I apply to more positions with Instawork?*, available at https://help.instawork.com/en/articles/3972013-how-do-i-apply-to-more-positions-with-instawork (last visited Dec. 27th, 2023).

Captains serve as Instawork's "eyes and ears at shifts." Ex. B, DL146. The Employer instructs Captains that on a given shift, they are expected to rate 12-18% of their fellow workers with a "thumbs down," because "it is important for [Instawork] to know on a daily basis what went well during a shift, and what could be improved." Ex. B, DL147. Instawork provides extensive guidance to Captains as to what kinds of behaviors deserve a negative rating. This includes when other workers show up late, do not wear exactly the correct uniform, have a negative attitude, are disrespectful, talk too much, use their phones, have "no sense of urgency and [are] not focused on the job at hand," are not skilled enough for the work, do not "keep up" with other workers, cannot speak English for a "position that requires being able to speak English," or if the Captain decides that "this is a Pro that you do not believe the partner would be very excited to have back to work with them again." Ex. B, DL148. Captains are empowered to take further action in some situations by either sending workers home or blocking them. *Id.*

Even when Captains are not on site, Instawork receives constant feedback on work performance. It actively solicits reviews from clients, who may rate workers based on their attitude, skill, obedience, work ethic, professionalism, and more. Instawork's "Why providing feedback on Instawork Professionals is important and how to do it" page provides this example:



Ex. B, DL140. Instawork explains to its clients that "[t]he more consistently you provide ratings, the more effectively we can provide Pros that are the right fit for you." Ex. B, DL112.

Instawork's monitoring and evaluation extends beyond the ratings system in some significant ways, however. Instawork requires workers to turn on location tracking services on their phones. This is a prerequisite for using the app. Ex. B, DL081-082. The purpose of location tracking is "to ensure that [workers] will be arriving safely and on-time" to their scheduled shifts. *Id.* It allows Instawork to track how much time people spend working, and Instawork's clients may use the app to determine where scheduled workers are. Ex. B, DL098,

106-108. This is not merely a passive process. Instead, Instawork affirmatively tracks workers and provides customer support based on real-time information:

> If we identify that a professional may be arriving late to a shift, our Live Operations team will contact the professional to confirm their updated ETA (estimated time of arrival) and notify your team immediately.

Ex. B, DL088.

Workers are also required to clock-in and clock-out via the app, and may only do so when they are physically located within a certain distance of their work location and by using a code provided by either an onsite manager or shift lead/captain. Ex. B, DL095-099.

Finally, every worker must do at least two things before a shift. First, they must confirm their shift "24 to 16 hours before the start time," which Instawork prompts via text message. Ex. B, DL071-072. Second, they must "complete a health checklist 24 hours in advance while confirming their upcoming gig," which requires them to verify that they have no symptoms of COVID-19 and are not at risk of having it. *See* Ex. B, DL068-069. Instawork suspends the accounts of workers who have or have been exposed to COVID-19, and will not reactivate their accounts until they "provide documentation of negative test results." Ex. B, DL068-069.

3. <u>Instawork matches workers with clients based on shift descriptions, business preferences, and worker qualifications.</u>

Instawork does not operate as a passive online marketplace where clients merely post shifts and receive responses from—potentially—the entire body of users. Instead, the Employer takes direct action to ensure compatibility for its business clients by "automatically" and "intelligently match[ing] businesses with our vetted pool . . . of workers." Ex. B, DL001-004, 131, 176-180. It asserts that it "invest[s] in AI and other cutting edge technologies" to "use our billions of signals to optimize worker fit, increase reliability and worker retention rate." Ex. B, DL026-029.

In a November 2021 interview, Instawork's CEO and co-founder, Sumir Meghani, explained this process:

> At Instawork, we combine a high-tech, high-touch approach for convenient and reliable staffing that both companies and professionals can rely on. Our rich database of the hourly professional universe includes historical employment, certifications, education, training, personal/professional connections, and dozens of other relevant data points. Using predictive algorithms with machine learning, Instawork is able to identify the best Professionals and on-board them seamlessly and quickly into the platform. This creates a non-biased, fair, and fast experience for hourly professionals to get access to shifts that will increase their earning opportunities and also ensure our business partners experience great outcomes.

> With over a million Pros, Instawork has built a highly scalable dispatch and matching system. By leveraging AI and other technology, we are able to match the right Pro with the right Partner across a multitude of position types, geographies, and work requirements.

Preparing For The Future Of Work: Sumir Meghani Of Instawork On The Top Five Trends To Watch In The Future Of Work, Medium (Nov. 15, 2021).

Workers may still choose whether to work a shift, and may also choose which shifts to apply to. But—especially through its "Top Pro" program, explained below—Instawork's algorithm guides who sees which shifts, from which businesses, based on "billions of signals." Ex. B, DL027. In addition, it effectively recommends workers for businesses by flagging, on a month-to-month basis, which of its workers are highest performing according to its own metrics.

4. Instawork extensively incentivizes, guides, and controls workers' behavior both on and off the app, and before and during shifts.

Finally, through a carrot-and-stick approach, Instawork both incentivizes and requires a high standard of behavior for all workers on its platform. The carrot comes in the form of the company's "Top Pro" program, which "rewards those who consistently perform quality work through Instawork" in a variety of ways. Ex. B, DL092-094. Workers qualify for different "levels" of the program—Bronze, Silver, Gold, and Platinum—based on meeting minimum performance ratings and satisfying different monthly requirements, such as working a certain number of shifts and showing up as promised. Ex. B, DL058-067. In return, they receive early access to shifts; obtain special badges that appear on their profiles; have the option to get paid immediately through "instapay"; may receive shift bonuses; are eligible for an "Instawork Debit Card"; and are more likely to be invited to work as shift "captains" and "coaches." *Id.*

All workers, however, are also subject to the stick: Instawork requires them to follow an expansive set of rules and guidelines that are detailed across dozens of publications. These guidelines control workers' behavior on the app and while working, and violations result in consequences. These consequences include negative ratings, which can lead to reduced earnings and fewer work opportunities via Instawork's algorithm, and may also include Instawork suspending or deactivating workers' accounts.

Instawork's "Contractor Services Agreement" (CSA) establishes the baseline relationship between the company and its workers. Ex. B, DL213-228. The CSA contains applicable rules and restrictions, both in the document itself and by incorporating Instawork's "Community Standards." Ex. C, DL269-300; *see also* Ex. B, DL229-233 (community guidelines). Under the CSA, either party may terminate the agreement "without penalty" if the other party "materially breache[s]" it. Ex. B, DL298-99. "Material breach" explicitly includes, but is not limited to, circumstances where workers:

- Fail to maintain insurance coverage as required;

- Fail to maintain all licenses, permits, authorizations, registrations, or "other prerequisites to provide any Services" under the CSA or as required by law;

- Share accounts, or make multiple accounts;

- Fail to pass a background check;

- Fail to "reasonably cooperate with Instawork in the investigation of or respond to any claim . . . arising out of or related to" their use of Instawork's platform;

- Engage in abuse, manipulation, or fraud;

- Fail to complete a shift in the manner specified by one of Instawork's clients. Whether a worker breaches this requirement is "determined by Instawork in its sole discretion";

- Fail to provide services "in a manner consistent with Instawork's effective operation of the Instawork platform"; and

- Engage in conduct that Instawork, in its sole discretion, determines violates its Community Standards.

Ex. C, DL299. Instawork also requires workers to agree to perform all services "in a professional and workmanlike manner." Ex. B, DL226 (Section 15.1). As a catch-all in the CSA, Instawork broadly reserves the right to suspend accounts "based on any acts and/or occurrences . . . that Instawork determines, in its sole discretion, constitute a material breach of this Agreement." Ex. C, DL299 (Section 16.4). In addition, the Employer's Terms of Use grant it the right "in its sole discretion" to suspend or terminate users' access "at any time . . . without notice." Ex. C, DL259.

The Community Standards that are incorporated in the CSA set out more detailed behavior requirements. They instruct that workers, among other things:

- Are prohibited from engaging in discrimination or harassment based on any characteristic protected under relevant laws.

- Must comply with federal, state, and local food, safety, and labor regulations.

- Must "carefully execut[e]" their responsibilities every shift. (This standard is not defined.)

- Are prohibited from engaging in horseplay, scuffling, or any other activity that might impact others' safety.

- Must safely handle tools and equipment and avoid tampering with work-related materials.
- Must abstain from "intoxicating and performance impairing substances."
- Must report any illegal activities witnessed during a shift.
- Should not share any information about shifts outside of the Instawork platform. And,
- Are prohibited from using their phones "during shift hours."

Ex. B, DL229-233.

The CSA and Community Standards are extensive, but only the beginning. Instawork has also published additional guidelines and instructions for workers that control their behavior before and during their shifts.[2] Some of these standards are phrased as suggestions. On its "Earn 5-Star Ratings" page, for example, Instawork provides "some tips on how to earn 5-star ratings," and urges workers to "Smile!," "[h]ave a great attitude," "[l]eave your ego at home," and "[s]tay positive and professional." Ex. B, DL137-139. Similarly, Instawork provides clothing "tips" for workers, although these are not phrased as suggestions:

- Shirts and pants should always be wrinkle-free. Logos or prints should not be visible.
- Pants, shoes, and shirts should not have holes, be burnt, or faded
- Ties should not be glossy or have patterns
- Make sure your hair is tidy and groomed, and following Food Handler rules
- For outside events, you can wear thermals under your clothes to keep warm

Ex. B, DL084. Even where expectations are framed as suggestions, violating them results in a negative performance review from an Instawork Captain. Ex. B, DL147 (instructing Captains to issue "thumbs down" ratings for uniform problems, negativity, and having a negative attitude).

Other standards are explicitly requirements. Instawork informs workers that they "must be respectful towards your supervisor, their entire team and fellow Professionals," and elaborates by instructing workers not to discuss wages or use cellphones, and to clean up after themselves. Ex. B, DL138. Furthermore, workers are reviewed by businesses or Instawork Captains based on how well they perform under these guidelines. Ex. B, DL147.

[2] The full list of Instawork's publications, for both its employees and its clients, may be found here: https://help.instawork.com/en/.

When workers are late to a shift or do not show up at all, they face suspension or deactivation. Ex. B, DL051-53. Likewise, Instawork warns workers that calling out within 24 hours of when a shift is supposed to start "is a late cancel" that "may lead to a suspension and removal of future shifts." Ex. B, DL052. Such cancellations "can not be excused for any reason . . . even with valid documentation."[3] Even canceling outside of this 24-hour window is sanctionable and can affect a worker's "cancellation score" and "top pro level," potentially resulting in suspension.[4]

Other standards control how workers should behave prior to a shift. They are told to "make sure you have the proper attire and tools," "**Confirm your shift 24 to 16 hours before start time,**" arrive 10-15 minutes early, enter the job location 5 minutes early, and to "use the restroom *before* your shift starts." Ex. B, DL071-073, DL137-139 (emphases in originals).

5. How Instawork works.

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 Fair Labor Standards Act, staffing agencies are typically employers of workers); 29 C.F.R. § 825.106(b)(1) ("[J]oint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer."). This is not Instawork's approach, however. Instead, the Employer classifies workers as independent contractors, denies it is their employer, and states that it is not required to follow basic employment laws like the minimum wage with regard to these low-wage workers. Ex. C, DL236, 309.

To trigger work, businesses post a shift on Instawork's platform and advertise the position(s) needed, dates, times, and location of work, dress code, grooming, and other requirements, and the wages to be paid.[5] Universally, these postings are for frontline jobs that **employees** have filled for decades. These positions 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 Instawork to obtain cooks, dishwashers, bartenders, and servers. *See* Ex. B, DL165. These jobs do not require significant expertise, and workers are expected to adhere to the dress, grooming, safety, and behavioral requirements of both the business and Instawork.[6]

[3] *See Cancellation Policy*, available at: https://help.instawork.com/en/articles/2226313-cancellation-policy. This policy is also an apparent violation of HFWA, which protects employees from suffering adverse actions for using sick leave. To the extent sick workers receive a negative mark or some other sanction for calling out within 24 hours of a shift, that is likely illegal under state law.

[4] *Id.*

[5] *See Booking a shift on Instawork*, available at https://www.youtube.com/watch?v=piKwPb7Hqds (last visited December 8th, 2023).

[6] For a more detailed discussion, see Section III(A)(3), *supra* pp. 19-23.

If a business wishes to hire a worker permanently, they are required by Instawork's Online Services Agreement to pay a "direct hire fee" of $2,500; however, if the worker has already labored for the business for at least 320 hours, the direct hire fee is only $1,000.[7]

As stated, Instawork "intelligently matches" businesses with qualified workers, who then apply to fill shifts. The business selects who will work. After the shift, Instawork invoices its client. This charge consists of "an all-inclusive hourly bill rate for each shift" filled by a worker, and includes the individual's hourly rate plus a 35% markup. Ex. B, DL144-45. The markup covers taxes and fees, live platform support 7 days per week, and occupational accident insurance (OAI). Ex. B, DL144-145. Instawork pays workers through the app and keeps the fee for itself. At no time do workers have any opportunity to negotiate wages—instead, "Instawork sets a 'floor' rate for each market, city, and position depending on minimum wage requirements,[8] seasonality, and baseline position skill level," while businesses decide the final rate to offer—based on market recommendations from Instawork. Ex. B, DL144-45.

Instawork does not provide workers' compensation insurance, nor does it withhold and pay any taxes for unemployment insurance, Social Security, or Medicaid. *See* Ex. A. Neither do its clients. Instawork does provide OAI, and charges its clients for the cost. Ex. B, DL144. It also provides workers who make more than $600 in a year with a 1099 tax form. Ex. C, DL237. Under this scheme, it is workers' responsibility to accurately report earnings and pay taxes—and because they are classified as independent contractors, they pay taxes at a much higher rate than if they were employees.[9]

Instawork tracks all relevant employment information about its workers, including hours and shifts worked, performance rating, and clients served. *See* Ex. A. The Employer also has access to all communications between workers and clients, "including the date and time of the applicable call or text, and the content of the text messages." Ex. B, DL030-037. When people work either more or fewer hours than scheduled, clients and workers use Instawork's platform itself to update—or dispute—time worked. Ex. B, DL103-105.

Through this scheme, the Employer retains all necessary control over work performed through its platform. It does not behave as a "customer" or "mere placement agency"[10] that

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[7] *Can I hire an Instawork Professional for a permanent position?*, available at: https://help.instawork.com/en/articles/2475721-can-i-hire-an-instawork-professional-for-a-permanent-position (last visited Dec. 30th, 2023).

[8] In practice, this appears to be an overstatement. Instawork does not always account for applicable minimum wages. After Denver Labor opened this investigation, Instawork "identified certain instances where Denver Workers inadvertently were paid below the applicable minimum wage." Ex. C, DL308-309 (Declaration of Simon Olavarria). Since October 2020, Instawork's workers earned less than Denver's minimum wage 386 times, losing approximately $6,800. *See* Ex. A, Catch-Up Payments, Column E.

[9] *See, e.g.*, *Self-Employment Tax (Social Security and Medicare Taxes)*, Internal Revenue Service, available at: https://www.irs.gov/businesses/small-businesses-self-employed/self-employment-tax-social-security-and-medicare-taxes (last visited Dec. 27th, 2023). Employers are required to cover a significant portion of Social Security and Medicare taxes for their employees.

[10] *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:

only connects laborers with businesses and plays no meaningful role in setting standards and ensuring performance. Instead, Instawork 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 Instawork; and has the authority to discipline workers at will.[11]

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 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. To comply with the Ordinance, 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.[12] *Id.* at § 58-24(a).

"Wages" includes the money people are literally entitled to under law. This encompasses rights like the applicable minimum wage and overtime, which is paid at 1.5x a person's regular rate for all hours worked beyond 12 in a day/shift or 40 in a week. COMPS Order #39, 7 CCR 1103-1, Rule 4. Wages, however, also includes paid sick leave that is guaranteed by HFWA. 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

https://cdle.colorado.gov/infos. The CDLE issues formal guidance on questions of Colorado wage and hour law, which Denver Labor follows.

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

[12] 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.

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 unless an employer has specified a "minimum increment in writing." 7 CCR 1103-7, Rule 3.5.3(b). In other words, the standard requirement is that employees accrue paid sick leave as they work, in increments of less than an hour, and may use that leave as it is accrued.

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, Instawork has misclassified its employees as independent contractors. Second, in doing so it has violated the Ordinance more than 17,000 times by failing to pay all lawfully-earned wages. Instawork has committed more than 380 minimum wage violations, 700 overtime violations, and 13,000 paid sick leave violations. It has also failed to provide its nearly 3,000 workers with notice of their rights, as required by Denver law.

A. Under Colorado law, Instawork's "Professionals" are employees, not independent contractors.

Denver Labor first concludes that Instawork has systematically 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 and HFWA, the core factor for analysis is whether these workers perform labor or services for Instawork'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 Instawork may or does exercise over its workers, and b) the degree to which these individuals perform the primary work of Instawork. Finally, these workers are not Instawork's employees 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.[13] C.R.S. § 8-4-101(5).

1. <u>"Professionals" perform labor and services for Instawork's benefit</u>

After reviewing all evidence and Instawork's arguments, Denver Labor finds that the people who work shifts through Instawork's platform perform labor and services for the Employer's benefit.

The key facts are straightforward and largely uncontested. These workers perform frontline jobs, especially in the hospitality and warehousing industries, that they obtain through Instawork's platform; Instawork itself advertises that it provides a reliable source of qualified labor for clients; and Instawork benefits from Pros' labor. Denver Labor therefore concludes that Pros perform labor and services for Instawork's benefit.

Instawork benefits because workers' labor directly generates revenue for the company and because workers form the basis of Instawork's business model. On a shift-by-shift basis, Instawork profits directly from labor performed, charging its clients a 35% markup based on a worker's wages. This model drives revenue for the Employer. And in a broader—but not less crucial—sense, Instawork frequently benefits from the work of the people on its platform: these workers represent the company and its product to Instawork's clients. Instawork itself informs workers that they represent "the entire Instawork community." Ex. B, DL084. When workers perform well and provide reliable labor, Instawork's reputation and business grow. And, as explained in detail above, Instawork has carefully structured a system designed to ensure that workers meet the standards **it** requires to burnish its reputation as "the essential staffing app for local businesses." Ex. B, DL141.

Instawork has not contested this conclusion. Denver Labor raised this assertion with Instawork on November 16th, 2023. After articulating the relevant test of employment, Denver Labor wrote:

> Without conducting an exhaustive analysis, we note a few points. Initially, it appears that Instawork's workers perform labor for Instawork's benefit.

[13] 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 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.

> Instawork sells itself as providing staffing in the hospitality and other industries. For example, its website is titled "Instawork – Official Site – Quality and Reliable Staffing." It describes itself as "the essential flexible staffing app," which "ha[s] your HR's back on paperwork, payroll, worker compensation insurance, and compliance."
>
> [. . .]
>
> Likewise, a significant number of news articles describe Instawork as a staffing platform. The workers on Instawork's platform literally provide the staffing that Instawork offers its clients. And Instawork seems to benefit from this work because it charges its clients for labor performed through the platform.

Ex. C, DL303.

Although Denver Labor explicitly invited Instawork to elaborate on its arguments and/or substantively respond to this letter, Ex. C, DL306, Instawork declined to do so. It therefore did not dispute the core issue here. *See* Ex. C, DL305.

Prior to this November 16th letter, however, Instawork provided some relevant arguments and evidence, none of which persuasively establish that these workers do not perform labor or services for its benefit. First, it attempted to distinguish itself from its workers in a variety of ways. It contends that it is merely "a technology company that provides and maintains an online labor marketplace and mobile platform on which companies requesting service providers . . . can connect with service providers operating independent businesses to fill one-time and/or recurring local work opportunities, primarily in the hospitality and light industrial fields." Ex. C, DL236.

This claim is not consistent with the facts. Instawork advertises itself as a staffing company, operates as a staffing company, compares itself to staffing companies, and Denver Labor has little trouble concluding that it is a staffing company. It is not merely a pass-through entity or online marketplace. 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 target industries, promises clients that it can meet their staffing needs with vetted professionals, and uses an elaborate algorithm to guide who works what shift. Put simply, Instawork does not merely sell access to a hands-off marketplace for services; it sells those actual services, which workers provide, and it has evidently spent a significant amount of time and effort to streamline and improve its staffing process.

Second, while workers are fully integrated into Instawork's business, Instawork's policies deny this is the case. For example, the Terms of Use state:

> 2. **Your Relationship with Instawork**
>
> Professionals and Partners are independent contractors and are not employees of Instawork (except as otherwise expressly agreed in writing by the Parties). Nothing in these Terms or as a result of Your use of the Services shall be construed as creating a joint venture, partnership, employment, or agency agreement between Instawork and You.

Ex. C, DL245. Similarly, the CSA includes this provision:

> **4. Your Operations**
>
> You represent that You operate an independently established business providing the Services contemplated by this Agreement and satisfy all legal requirements, including having any licenses and/or permits necessary to perform any Services under this Agreement. You further agree to inform Instawork immediately in writing if You are no longer operating an independent business to provide Services under this Agreement.

Ex. C, DL270.

These statements do not bear out in practice. Regardless of whether any particular worker presents themselves as affiliated with or in a "joint venture" with Instawork, **Instawork itself** constantly establishes that this is the relationship. It does so despite its assertion that these workers are "service providers operating independent businesses." Ex. C, DL236.

For example, the Employer assures clients "If You Need Labor, Instawork Has the Workers"; that all workers are put through a "Rigorous" screening and vetting process; that Instawork provides "Quality and Reliable Staffing"; and that "[e]very shift you work is a representation of not only yourself but the entire Instawork community." Ex. B, DL025, 083-85, 158-161. For example, take this blog post written by Instawork entitled *The Top 5 On-Demand Staffing Apps for 2023*:

> Instawork stands out as the best on-demand staffing app on the market for flexible staffing. The service offers a large pool of pre-vetted workers ready to fill gaps, from one-time to longer recurring needs, in industries like hospitality and warehousing. The app is user-friendly and allows businesses to post available shifts, manage schedules, and process payments to workers seamlessly.
>
> With their rigorous screening process, Instawork ensures that only qualified and reliable workers are matched with your business. With a presence in 40+ markets across the US and Canada, and over 4 million workers signed up, they are able to fill larger volume needs than many of their competitors. They also have a large pool of skilled hospitality workers that can fit seamlessly into even higher-end hospitality operations, such as staffing stadium events.

Ex. B, DL160. Instawork simply cannot sell its product without tying itself to its "pre-vetted workers," because those workers are its product and are foundational to its enterprise. In addition to the 35% markup it charges clients based on work performed, it also requires its clients to pay a substantial "direct hire fee" if they want to bring somebody on full-time for a permanent position. This is incompatible with Instawork's claim that it operates a marketplace where properly-classified independent contractors can run their own enterprise. A true independent contractor would be able

to sell their labor and services to whomever they please, without that customer first needing permission from a third-party.

In short, Instawork's whole business model revolves around and depends upon workers' labor. They are core to the entire operation. Workers drive revenue, are fully integrated into—and in fact, **are**—Instawork's business, and without them Instawork would not exist, make money, or have anything to offer its clients. If these "service providers" were removed from the equation, Instawork's app would be rendered useless to both Instawork and its clients.

Denver Labor's conclusion might be different if these workers were truly and meaningfully operating their own distinct businesses. In that case, they would not be primarily working for Instawork'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. Their 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 the rest of this Determination explains, Pros cannot fairly be said to be operating their own business, nor are they primarily performing labor for the benefit of their own enterprise. Their labor benefits Instawork and its clients.

Finally, the conclusion that Pros labor for Instawork's benefit is consistent with—and in fact required by—established precedent from the Colorado Department of Labor and Employment. In *Doordash, Inc.*, the CDLE held that a Doordash delivery driver ("Dasher") was Doordash's employee, rather than an independent contractor. 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.[14] Like Doordash, Instawork claims it is only a "technology company" that provides a marketplace; but as in *Doordash*, the facts establish otherwise. It is a staffing company that depends upon the people who labor through its platform "to operate and earn

[14] For Instawork'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.

revenue, making [their] work both central to and fully integrated into [Instawork's] business," and it profits directly from their work. *See* Ex. D, p. 8.

Denver Labor therefore concludes that the key question of employment is met here.[15] And as explained below, the two "relevant factors" set out by the CWA also support the conclusion that workers are employees of Instawork, because they perform the primary work of the company and because Instawork exercises and reserves the right to exercise a significant amount of control over them. *See* C.R.S. § 8-4-101(5).

2. <u>These workers perform the primary work of the Employer</u>

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). Because Instawork is a staffing agency that provides labor in the hospitality industry, the workers who provide that labor perform the primary work of the Employer. This factor, therefore, weighs strongly in favor of employee status.

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. 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.

Instawork's claim that it is only a "technology company" that operates "an online labor marketplace" is not supported by the facts, including its own repeat self-descriptions. *See* Ex. C, DL236. The Employer essentially argues that workers perform hospitality, warehousing, and other staffing services, and Instawork is not a staffing company. *See* Ex. C, DL236-43. But this cannot be squared with how Instawork presents itself to clients, writes about its work, makes money, and actually operates. As described in detail above, Instawork sells itself as a staffing company, and inextricably links itself with the workers who labor through its platform. Ultimately, its success as a business depends upon somebody performing hospitality and other work for its clients, and that work is exclusively performed

[15] As explained in footnote 12, the Ordinance does not only protect employees. It protects "workers" generally. A "worker" is a natural person who performs work for an employer or other person for compensation. *See* D.R.M.C. §§ 58-1(10), (11). "Work" includes "any services." *Id.* at § 58-1(10). This language is nearly identical to the primary factor of employment under the CWA. Because Denver Labor finds that Instawork's workers perform labor or services for its benefit, Denver Labor also finds that they are statutory workers covered by the Ordinance.

by its "Professionals." They do not perform work outside of the usual course of Instawork's business, but are the whole reason Instawork can fulfill its guarantees to its clients.

Again, despite Denver Labor's invitation to do so, Instawork has not directly contested this point. On November 16th, 2023, Denver Labor asserted that that "[b]ecause Instawork is a 'staffing platform' and "the workers on Instawork's platform literally provide the staffing that Instawork offers its clients," they perform the primary work of the Employer. Ex. C, DL304. Instawork did not respond to these statements.

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

3. Instawork may and does exercise control over its Pros.

The CWA's other "relevant factor" requires decisionmakers to assess the degree of control an employer may or does exercise over a worker, 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 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 staunch reliance on control over the performance of work as a necessary precursor to an employment relationship.[16] Prior to January 1st, 2020, the CWA 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 standard, control is 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, and 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.") (emphasis in original); 29 U.S.C. §

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

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) (employer 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).

Notwithstanding its extensive rules and policies, Instawork asserts that it exercises no control at all over Pros. In its legal filings, it argued:

> Second, the [Contractor Services Agreements] make clear that Instawork will not supervise or control the manner in which Professionals perform their services for Partners. To that end, Instawork is not on-site where the Professional provides services to Partners and therefore does not supervise or control the manner in which they perform Services. Third, Instawork pays Professionals at a rate contracted-for between the Professionals and Partners. Fourth, as set forth in the Agreements, Instawork can terminate the Agreement only if a contractor violates the terms of the Agreement or fails to produce a result that meets the specifications of the contract. Fifth, Instawork does not provide any training to contractors. Sixth, Instawork does not provide tools or benefits to Professionals. Seventh, Professionals dictate the time of their performance under the Agreements, so long as the services are performed in a timely fashion with respect to the relevant Partner's requirements.
>
> [. . .]
>
> In sum, Professionals are free from Instawork's direction and control in the performance of their services booked through the Instawork Platform.

Ex. C, DL239-40 (internal citations removed).

The Employer presents a dramatically different picture than what actually exists. Instawork's argument ignores its own policies, does not account for many relevant details, and claims other facts that are just not true. For example, it asserts that "Instawork is not on-site" and "does not supervise or control the manner in which [workers] provide services." Ex. C, DL239. This is incorrect for two reasons. First, the Employer neglects its own Captain program, where its "eyes and ears" **are** on site and **do** supervise workers. Ex. B, DL146. Through this program, Instawork directly controls how individuals perform work by a) empowering Captains to observe, supervise, and report on the performance of workers, and b) instructing Captains to provide negative performance ratings for those who do not labor to Instawork's expectations. Ex. B, DL146-150. Sometimes these expectations are detailed or granular, *e.g.*, Instawork prohibits workers from discussing wages on the job or using their cellphones, and punishes people via negative reviews if they are slow, have a negative attitude, or wear wrinkled clothes. Ex. B, DL146-150.

Second, 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."). Indirect control is still control, including when it is exercised via a complex algorithm or an extensive

system 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).

In addition, Instawork suggests that workers and its clients freely negotiate the terms of work, without the Employer's input or control. *See* Ex. C, DL239. This is also inaccurate. Instawork sets a floor for wages, and while its clients decide particular rates above that floor, Instawork provides clear guidance as to market rates. Ex. B, DL144-145. In doing so, Instawork plays a role in **setting** market rates, whereas "Professionals" have no ability to negotiate their own pay. A worker's inability to dictate prices **at all** is substantial evidence that some other entity has control over their work.

It is also highly relevant that workers are paid by the hour, must clock in and out through Instawork's app, and the Employer is the entity that remits money to them. *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."). Instawork invoices its clients for the costs of labor (plus Instawork's fee), but the businesses do not pay the workers directly. Instawork keeps track of all relevant information regarding time worked and wages owed, and assures its clients that "we have your HR's back on paperwork, payroll, worker compensation insurance, and compliance."[17] *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 Instawork both **exercises** and **reserves the right to exercise** a significant amount of control over its supposed independent contractors. As an initial matter—and despite its claims—Instawork **does** have the right to terminate or suspend workers' accounts at any time, without notice or cause. Ex. B, DL023. Instawork claims that it may only do so "without penalty" for a "material breach" of the CSA, but the actual language of Instawork's agreements and its responses to Denver Labor establish that it has created an at-will relationship with its workers, and that it has full control over the details of that arrangement. First, Instawork reserves the "sole discretion" to decide when a "material breach" occurs, based on any set of facts.[18] Second, the Employer reserves the right to

[17] *How Instawork improves hospitality staffing quality*, Instawork Blog, available at: https://www.instawork.com/blog/how-instawork-improves-hospitality-staffing-quality (last visited December 28th, 2023).

[18] This fact comes from two sources. First, Instawork's Terms of Use, which the CSA explicitly incorporates. Ex. B, DL023 (Terms of Use, Section 21); Ex. B, DL214 (CSA, Section 3.3). Second, while Instawork produced three versions of the CSA, Section 16.4 of the current one (available on the

"amend, modify, and/or supplement from time to time and without notice" the terms of the CSA. Ex. C, DL270, 287. Third, the CSA explicitly incorporates Instawork's Terms of Use, which grant the Employer the unequivocal right to deactivate user accounts. The Terms of Use state, in relevant part:

> 21. **Term and Termination**
>
> These Terms are effective until terminated by You or Instawork as described below. Your rights under these Terms will terminate automatically without notice from Instawork if You fail to comply with any of these Terms (including by violating any license restriction contained in these Terms). In addition, Instawork may in its sole discretion terminate Your user account on the Service or suspend or terminate Your access to the Service at any time without notice. We also reserve the right to modify or discontinue the Service at any time (including by limiting or discontinuing certain features of the Service) without notice to You. We will have no liability whatsoever on account of any change to the Service or any suspension or termination of Your access to or use of the Service.

Ex. C, DL259.[19] Finally, Instawork admits that there are no substantive remedies available if it deactivates an account in the absence of a material breach. Ex. B, DL023; Ex. C, DL319-20.[20]

Instawork has created an at-will relationship that is governed by an extensive set of rules and provides no just cause protections for the hourly workers who labor for the Employer's benefit. "The 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).[21] 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*, 807 P.2d at 1220; *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

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Employer's website: https://app.instawork.com/legal/gigs-contractor-services-agreement) reserves to Instawork the right to suspend access based on its sole discretion that a material breach has occurred.

[19] These Terms of Use are also available online at: https://app.instawork.com/legal/instawork-terms-of-use (last visited Jan. 9th, 2024).

[20] On December 11th, 2023, Denver Labor asked Instawork: "Is there any possible penalty for Instawork in the event it terminates access without any material breach?" Ex. C, DL319. On January 8th, 2024, Instawork responded. It did not identify any potential penalties. It explained that "[t]here are no contractual provisions regarding liquidated damages," and that "[t]he resolution of any claims . . . would be handled through individual arbitration in the same manner as any other breach of contract claim." Ex. C, DL320.

[21] 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.

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 arrangement for a final product prevents consequence-free termination, because ending such an agreement early and without cause gives rise to damages based on breach of contract. In contrast, employment in America is largely defined by its at-will nature. So too for Instawork's misclassified employees.

In a wide variety of other ways, and as detailed at length in Section II, *supra*, Instawork controls and reserves the right to control workers' behavior and performance.

Significantly, Instawork restricts workers from doing many of the things that have traditionally defined independent businesses. They may not share accounts, transfer ownership, or assign work without Instawork's written consent. Ex. C, DL299-300. Across three years and nearly 3,000 Denver-area workers, Instawork has never received nor granted a request to share an account or subcontract work. Ex. C, DL320. 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 its workers from transferring their accounts or delegating labor without permission, Instawork has removed any chance they ever had to operate as truly independent parties.

Finally, the workers who labor for Instawork provided statements that support these conclusions. They explained that the Employer collects a significant amount of data about their timeliness and work performance, and takes action to ensure timeliness by enforcing its cancellation policy. Additionally, while on-site, they are required to take direction from both a client's supervisor **and** any shift lead or captain that Instawork provides.

Instawork does not take the hands-off approach it claims. It may, and does, exercise a significant degree control over Pros. This factor also weighs strongly in favor of employment status.

4. <u>"Professionals" are not customarily engaged in an independent trade, occupation, profession, or business.</u>

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 Instawork's assertions, Denver Labor further finds that these workers are not customarily engaged in an independent business.[22] The idea that such workers operate an independent trade runs contrary to the facts present here—including that Instawork and its workers are inextricably intertwined.

[22] At least for non-Captain shifts, it is Instawork's clients who would provide direct supervision of Pros during a shift. As a matter of common sense, and based upon interviews with workers, Denver Labor deems it highly unlikely that people laboring as dishwashers, bartenders, prep cooks, general laborers, and other similar jobs would go to a restaurant or warehouse and be effectively unsupervised. But this question need not be definitively answered here, given the rest of the analysis.

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 the Employer provides labor for frontline, hourly jobs in the hospitality and warehousing industries is highly relevant. For decades (or longer) these have been the kinds of positions that employees have filled. And still, under Instawork's model, these roles are worked by low-wage, hourly workers who obtain shifts through Instawork's app, work for Instawork's clients, and labor under Instawork's rules, performing work that does not require significant training or learning.

Analyzing all of the facts, these workers 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). CESA lists nine factors for consideration, C.R.S. § 8-70-115(1)(c), which ask whether:

1. Instawork requires its workers to work exclusively for Instawork;

2. Instawork establishes quality standards for workers;

3. Workers are paid a fixed or contract rate, rather than salaried or by the hour;

4. Instawork 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. Instawork provides more than minimal training;

6. Instawork provides tools or benefits;

7. Instawork dictates the time of performance of work;

8. Individuals are paid directly, as opposed to through a separate trade or business; and

9. Instawork combines its business operations in any way with its workers' alleged businesses, or keeps the operations as separate and distinct.

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

These questions are only a starting point, though. 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 the 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 the CESA. The CWA 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.[23]

Second, the CWA puts its thumb on the scale as to how certain factors should be weighed. It specifically emphasizes the sub-factors discussed above: whether a worker is free

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

from direction and control in the performance of their work, both under their contract and in fact, and 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 Instawork's workers are independent contractors who are customarily engaged in an independent occupation. Workers arguably do not receive tools from Instawork; Instawork does not require workers to labor exclusively for it; workers may select which shifts they work, and how often they work; and some or many workers do not work full time through Instawork.[24] In addition, while Instawork provides some training through online videos and guides,[25] it is fair to say it does not provide meticulous or detailed training.[26]

But most of the factors, including those emphasized by the CWA, mandate Denver Labor's conclusion that these workers are not customarily engaged in an independent trade or business.[27] As noted in Section III(A)(3), *infra*, the Employer's degree of control is significant—and enough to find 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:

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[24] In its response, Instawork asserted to Denver Labor that workers labor, on average, about 14 hours per week through the app, and work on the app for approximately 98 days. Ex. C, DL241. At the same time, Instawork failed to pay overtime more than 700 times when workers labored for it for more than 40 hours in a week. To the extent Instawork asserts that part-time or short-term workers are more likely to be independent contractors, longstanding employment laws, including 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, both a temporary staffing agency and the entity that directly utilizes its workers are typically employers); 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…."); INFO #10.

[25] *Training with Instawork*, available at: https://help.instawork.com/en/collections/2664488-training-with-instawork (last visited December 11, 2023).

[26] The Employer also argues that the adhesive contracts between it and its workers states that they are independent contractors. Ex. C, DL242-43. But whether a person is an employee or an independent contractor is a question of fact.

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

- As discussed at length, Pros are not free from direction and control. Instawork exercises and reserves control by setting standards, restricting access, and promising discipline for a wide range of behaviors, and in its sole discretion. And again, these workers 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 Instawork's clients explicitly have the power under Instawork's system to fire workers from a shift, provide evaluations, and report them to Instawork for unacceptable behavior. *See* Ex. B, DL111-115. So too do Instawork's Captains.

- These workers are inextricably intertwined with Instawork's business. They perform work that is the primary work of Instawork.

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

- Instawork finds and provides all clients, works with clients to set prices, and works with clients to holistically evaluate workers' performance.

- Workers find shifts through Instawork's app, get paid exclusively through Instawork's app, and receive ratings and evaluations on that platform.[28]

- Workers are individuals, not businesses; human beings, rather than LLCs, apply for, work, and get paid for shifts. *Doordash, Inc.*, p. 24.

- No workers have apparently registered their putative business with the Colorado Secretary of State, nor do they apparently hold themselves out as operating an independent business.[29] *Doordash, Inc.*, p. 24.

- Workers have no ability to negotiate their own rates or set their own prices, but may only accept or decline shifts.

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[28] Arguably, Instawork **does** provide its employees with the most important tool of all: its application, without which these workers could not perform their labor, regardless of the shift.

[29] Instawork appears to admit that the workers on its platform do not have any of the traditional indicia of an independent business, including business cards, business phone numbers, business addresses, or registered legal entities. Ex. C, DL241. It argues that these facts are "essentially irrelevant in the 'internet age,'" citing *Varsity Tutors LLC v. Industrial Claims Appeal Office*, 488 P.3d 258 (Colo. Ct. App. 2017). Instawork misreads and overstates *Varsity Tutors*. The court explained that while a worker may not have business cards, separate addresses or phone numbers, or a dedicated office, "none of these things mean that they cannot be independent contractors, particularly under [the] totality-of-the-circumstances analysis." *Id.* at 266. Put another way, the court decided that these factors are not determinative, not that they are "irrelevant."

Furthermore, *Varsity Tutors* and the other cases upon which Instawork relies are of limited use because they do not apply the test set by the latest version of the CWA.

- Workers earn money by the hour rather than the task. *Dana's Housekeeping v.*

- Instawork pays workers directly, and does so based on the amount of time they work.

- Instawork extensively monitors workers through its app. It knows where they are, when they work, and how well they perform. It compiles an extensive amount of information into overall metrics, which it uses to decide who gets offered which shifts, whether discipline is appropriate, and whether (and at what level) a worker qualifies for the Top Pro program. *See Doordash*, *Inc.*, p. 11.

- Individuals 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 like other employees they may only really increase their earnings by working more hours.[30]

  Instawork argues, however, that "Professionals are engaged in an independent trade or business" because they "make their own investment into their business in the form of equipment and licensing necessary for their roles." Ex. C, DL242. Instawork overstates the significance of workers' investment, which is minor. The "equipment" in question includes items like pens, knives, and wine keys. Ex. B, DL117-118. And while some 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 project related to their investment in their putative businesses. *See Softrock*, 325 P.3d at 565. 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 workers are authorized to serve alcohol or certified as bartenders is not significant, and also pales in comparison to the investment that Instawork—and its clients—have made.

- Instawork's workers 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 assistants, Ex. C, DL320, and are broadly prohibited by contract and policy from delegating work or transferring their accounts, *id.* at DL 299-300.

[30] 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).

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).

- Instawork provides occupational accident insurance for those who labor through its platform. This shows that Instawork 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* Ex. D, *Doordash*, pp. 10-11 (applying this logic). Furthermore, while Instawork points out that it does not provide its workers with benefits normally due to employees, this is of limited value to the Employer's argument; it instead reflects that they have been misclassified.

- Despite its claims, the reality is that Instawork may terminate the relationship at will, based on its own judgment and discretion, without penalty.

- While workers may choose what shifts to apply for, once they do Instawork and its clients dictate the time and place of performance, and workers are subject to negative feedback and/or discipline if they cancel, are late, do not perform as and when they are required to, or violate any one of Instawork's many expectations and/or rules of conduct.

Finally, workers explained to Denver Labor that, in fact, they have effectively **no control whatsoever** over how they perform their work. Instawork's clients provide close, direct supervision, consistent with the nature of frontline, entry-level jobs. In addition, when an Instawork captain or shift lead is on-site, they provide supervision and direction as well. One worker stated that "We are always under the supervision of a shift supervisor," that they had no ability to make decisions, and that "We're little robots. We do exactly what [supervisors] tell us to." Another explained that working for Instawork:

> It's the same as if I were working for a regular, W-2 employer. You are an employee. You have a supervisor there. You don't have the autonomy to say 'Hey, this is what we need done." They're actually going to control how you're going to do it. You need to be at this particular point here to clock in. . . . You need to check in with this person. You're going to work with this person. It's the same.

This worker emphasized that shift postings on Instawork even state whether rest and meal breaks are allowed,[31] and that they have been instructed while working not to use their phone, not to go outside, and not to "talk about money."

These facts are flatly inconsistent with the idea that these workers are independent contractors customarily engaged in a separate business for themselves. The evidence overwhelmingly establishes that in a wide variety of ways, they do not have any meaningful ability to control even the most basic aspects of their work. Instead, while the Employer shares control with its clients, Instawork itself retains all necessary control over its enterprise. And while a few factors support Instawork's argument, short-term, flexible, or contingent workers are still employees if the standards of Colorado law are otherwise met. Here, they are.

B. Instawork has violated the Ordinance more than 16,000 times.

To reiterate, employees in Colorado are entitled to certain basic rights. This includes the rights to be paid minimum wage and overtime, and the right to earn paid sick leave based on hours worked. This paid 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). When employers do not allow employees to earn the paid sick leave that the law guarantees, they commit wage theft because they fail to provide employees with all of the wages lawfully due to them.

In addition, "workers" in Denver are entitled to certain rights, including the right to earn at least Denver's minimum wage and to be informed of their rights under Denver law. Employers have been required to share an Auditor-approved notice of rights since Denver's Minimum Wage Ordinance went into effect on January 1st, 2020, and are still required to do so under Denver's Civil Wage Theft Ordinance. *See* D.R.M.C. § 58-2(a).[32]

Employers violate Denver's Civil Wage Theft Ordinance when they fail to provide this notice of rights and when they do not provide all earned wages as required by law, including applicable state law. *See* Denver Labor Civil Wage Theft Rule 1.3 (defining civil wage theft). Denver Labor is empowered to fine employers up to $25,000 per violation. D.R.M.C. § 58-26(e)(1). 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, as required by law. *See* Denver Labor's Civil Wage Theft Rule 10.2(B).

The Employer states that it tracks a standard workweek of Sunday-Saturday, pays workers the following Thursday, and that this has always been the case during the relevant time period. Ex. C, DL320. Instawork's policies also state that some workers are paid

[31] The Employer has explicit guidance and policies about rest and meal breaks, and exercises at least some control over whether they occur and are paid. *See Am I Required to give Instawork Professionals a break?*, available at: https://help.instawork.com/en/articles/2062208-am-i-required-to-give-instawork-professionals-a-break (last visited Jan. 5, 2024).

[32] Prior to City Council passing the Civil Wage Theft Ordinance, D.R.M.C. § 58-17(a)(3) contained this requirement.

immediately.[33] To simplify calculations, assess violations, and grant Instawork the benefit of the doubt, Denver Labor has assumed that all workers are subject to the longer one-week pay period that ends each Sunday. Denver Labor adopts this pay period for the purpose of calculating overtime and paid sick leave violations, as well as restitution owed. *See* Ex. A, DL – PT of Wages and Hours; DL – Restitution Owed; DL – Total Workweeks**.**

Based on the Employer's certified payroll information, Denver Labor finds that Instawork failed to pay overtime **731 times** to **324 workers**.[34] This analysis likely undercounts the true number of violations, because it only includes situations where individuals worked more than 40 hours in a week in Denver. There may be other circumstances where employees worked weekly overtime in the broader Denver metro area, which would not necessarily be captured here.

Instawork provided a response regarding unpaid overtime on January 8th, 2024. In a sworn declaration, its Trust & Safety Manager asserted that:

> While overtime requirements do not apply to Instawork's independent contractors, Instawork nevertheless has a business practice of ensuring Denver Workers are compensated at overtime rates for all time worked over 12 hours in a single shift and for all time worked over 40 hours in a single workweek.

Ex. C, DL323. The Employer also provided updated payroll information reflecting that on January 5th, 2024, it paid more than 200 workers approximately $38,800 in unpaid overtime.

There are two significant problems with Instawork's response to the issue of unpaid overtime. First, Instawork did not explain its work or show its math, and Denver Labor is unable to replicate it. This is particularly noteworthy because Denver Labor's own analysis of Instawork's certified payroll data concludes that weekly overtime violations amount to approximately $86,000 total, excluding damages and interest. Second, it is plainly not the case that Instawork has a business practice of ensuring overtime payments for Denver workers. *See* Ex. C, DL323. Until this investigation, the Employer had apparently **never** paid overtime, consistent with its model of misclassifying its employees. Denver Labor concludes

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[33] *Guide to Instawork Top Pro Program*, available at: https://help.instawork.com/en/articles/5506254-guide-to-instawork-top-pro-program (discussing "Instapay," which allows workers to "get paid within hours after a 1099 shift").

[34] Denver Labor's calculations on this issue may be found in two worksheets contained within Exhibit A. The DL – PT of Wages & Hours contains a pivot table that organizes Instawork's data about time worked. It groups shifts into Instawork's Sunday-Saturday workweek, beginning with Sunday, October 18th, 2020; organizes these dates of work by worker; and filters out all weeks in which workers labored fewer than 40.1 hours. It also displays total wages earned by workweek.

The DL – Restitution Owed worksheet incorporates this data and uses formulae to calculate overtime hours worked; workers' regular rates of pay for the week; unpaid overtime wages; 200% damages; and 12% annual interest, based on the standard pay practices Instawork provided. In total, unpaid wages amount to $86,837.65; damages equal $173,675.30; and statutory interest totals $15,003.13.

As stated in the Introduction, *supra*, these numbers are subject to change depending on the Employer's compliance with this order.

that for more than three years, Instawork's business practice has been the exact opposite of what it now claims (under penalty of perjury).

Furthermore, based on the number of workers affected and the number of pay periods in which people actually labored without earning paid sick leave as required by HFWA, Instawork violated the Ordinance an additional 13,195 times.[35]

Finally, Instawork engaged 2,956 workers in Denver during the relevant time period, and did not provide any with their notice of rights. *See* Ex. A, DL – Total Workers. Denver Labor raised this issue in its October 16th, 2023 notice of investigation. Ex. C, DL235 ("Denver law requires that you post a wage notice in an area easily accessible to your workers. . . ."). On December 11th, 2023, Denver Labor again raised the notice requirement with Instawork. Ex. C, DL313. Instawork initially linked Denver Labor to a page in its online Help Center that **now** contains the required poster, *id.* at DL320, but later admitted that it did not include the Auditor's Office's poster until December 13th, 2023. The fact that it violated the Ordinance's notice requirement for three years and almost 3,000 workers remains. This violation is particularly problematic here; not only did Instawork deny its workers their basic rights, it denied them the opportunity to learn about them.

In total: Excluding Instawork's now-rectified minimum wage violations, the Employer violated the Ordinance 16,882 times between October 16th, 2020 and November 17th, 2023.[36]

C. Significant penalties are necessary to rectify the size, scope, and harm of Instawork's violations.

The Employer's systemic embrace of illegal practices requires meaningful penalties. In this case, the harm of Instawork's illegal business model is exacerbated by the fact that its employees are low-income and, according to Instawork's own data, dependent on the platform to survive. In a July 2023 interview, Instawork's Chief Economist explained:

> [N]ow, you know, we're seeing with rising prices and rising interest rates in this economy there are a lot of people who want to do extra work. Maybe it's just a couple of shifts a month just to make ends meet, and when we surveyed workers on our platform who are doing in-person, flexible work, about three-quarters of them say that they're doing this kind of work to pay for essentials. It's not just

[35] Denver Labor's calculations on this issue may be found in the DL – Total Workweeks (HFWA) sheet contained within Exhibit A. Using Instawork's Sunday-Saturday workweek, Denver Labor created a pivot table to collect an accurate count of how many workers labored in how many workweeks since January 1st, 2021—the the first date the Employer was obligated to adhere to HFWA's paid sick leave requirements.

Denver Labor excluded from this calculation any violations that occurred during the workweek running from December 27th, 2020 – January 2nd, 2021. And, although instawork was **also** required during much of this time to provide supplemental paid sick leave related specifically to COVID-19 and (later) other respiratory illnesses, Denver Labor has elected not to include that failure in its calculations.

[36] Including its failures to follow Denver's minimum wage requirements, Instawork committed approximately 18,000 violations of applicable wage and hour laws in roughly three years.

to save for a rainy day, or something like that. They really need this money to make ends meet.[37]

Extensive research highlights how harmful wage theft is. When low-income people are denied their wages, they often suffer a series of economic and personal harms. They struggle to pay for rent, food, utilities, transportation, and the other necessities of modern life. They face hard choices about which bills to prioritize and which to try to ignore. Instawork's wholesale repudiation of its employees' basic workplace rights is significant, and worsened by the fact that those employees are economically insecure.

There is no dispute that, over the course of three years, Instawork failed to pay minimum wage and overtime, and did not provide its workers with notice of their rights. Regarding paid sick leave, however, Instawork suggests that because "they have not received any requests for sick leave from any Professionals using their platform to perform work in Denver," there has been no harm done for its widespread HFWA violations. Ex. C, DL311.

The Employer misses the point entirely. Given the timeframe and number of employees covered by this determination, Denver Labor concludes that it is exceedingly likely that some—and probably many—employees **would have** used sick leave, if allowed.[38] But they were not. Instead, Instawork told employees that they were independent contractors, refused to allow them to accrue leave, and warned them that canceling a shift within 24 hours "can not be excused for any reason . . . even with valid documentation."[39] These policies interfere with workers' ability to exercise their basic rights, and are a declaration by the Employer of its disregard for the protections of HFWA and its desire to chill protected activity. It is no surprise that people who were actively denied and threatened against using a right did not (according to the Employer) attempt to invoke that right.

In consideration of the entire context of Instawork's model and this investigation, Denver Labor imposes penalties of **$86,837.05** for Instawork's overtime violations, **$659,750** for its paid sick leave violations, and **$73,900** for its notice violations, as described in the Introduction to this Determination.[40] In addition, Instawork must pay restitution to all employees whom it denied overtime pay. To rectify the harm of this wage theft, this

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[37] *Talking Shift: Staffing up for Peak with The New Warehouse's Kevin Lawton* at 5:20-5:47, available at: https://www.youtube.com/watch?v=BoJspuFkVuE (July 28th, 2023).

[38] The United States Bureau of Labor Statistics has released empirical evidence of this point. Survey data from 2017-18 found that in an average week, 5% of workers used sick leave, and another 3% needed to but could not. U.S. BLS, *Access to and Use of Leave Summary* (Aug. 29, 2019), available at: https://www.bls.gov/news.release/leave.nr0.htm.

[39] *See Cancellation Policy*, available at: https://help.instawork.com/en/articles/2226313-cancellation-policy. This policy is also an apparent violation of HFWA, which protects employees from suffering adverse actions for using sick leave. To the extent sick workers receive a negative mark or some other sanction for calling out within 24 hours of a shift, that is likely illegal under state law.

[40] The Ordinance allows Denver Labor to fine employers up to $25,000 per violation. The maximum fines technically available here for Instawork's HFWA violations alone amount to more than $325,000,000.

restitution must include statutory interest and 200% unpaid wages as damages, as detailed in Exhibit A.

This approach to Instawork's violations is minor compared to the possible consequences: the Ordinance (and the minimum wage ordinance before it) allows for $1,000 per violation of the notice requirement, while each act of wage theft carries up to a $25,000 fine. *See* D.R.M.C. §§ 58-4(c)(4); 58-26(e)(1). In addition, Denver Labor is empowered to order treble damages.

The sanctions for Instawork's HFWA violations are similar to, but much 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 id.* § 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 significantly less likely to take time off when they are ill.[41] This increases the risk that they will pass on sickness to those around them, a danger that is especially acute in hospitality.

However, Denver Labor believes at this time that assessing only a small fraction of the maximum possible fines allowable under the Ordinance will be sufficient to redress the harm present and achieve compliance.

IV. CONCLUSION

Instawork has misclassified nearly 3,000 employees as independent contractors and, in doing so, has violated nearly every applicable wage and hour law. **Instawork must:**

1. **Cease and desist** from misclassifying the workers on its platform, and provide paid sick leave as required by HFWA. As part of this remedy, Instawork must calculate and provide all paid sick leave time lawfully due to all employees who have worked for and through Instawork; and

2. **Pay restitution** as detailed in Exhibit A (DL – PT of Restitution). Instawork may deduct from these amounts any unpaid overtime wages it has already remitted to workers and provide Denver Labor with evidence of that;

[41] *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.

3. **Pay $820,487.05 in fines** to the City and County of Denver. However, if Instawork fully complies with this determination within 30 days, this amount shall be reduced to **$659,750**;

4. **Provide Denver Labor with information** of jobs worked in Denver since November 17th, 2023, and rectify any minimum wage and overtime underpayments that have not already been addressed, to include interest and 200% damages.

5. **Provide Denver Labor with information** of any deductions for rest breaks imposed against workers' wages for work performed in Denver since October 16th, 2020.

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 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.

Dated January 16th, 2024

Denver Labor

Denver Auditor's Office

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