

BEFORE THE COLORADO AIR QUALITY CONTROL COMMISSION

IN THE MATTER OF THE COLORADO AIR QUALITY CONTROL COMMISSION'S RULEMAKING ON
PROPOSED MODIFICATIONS TO REGULATIONS NUMBER 11, 20, AND 22, 5 CCR 1001-13, 5 CCR
1001-24, AND 5 CCR 1001-26

PREHEARING STATEMENT OF
NATIONAL FEDERATION OF INDEPENDENT BUSINESS COLORADO

NFIB Colorado, by and through its undersigned representative, respectfully submits this Prehearing Statement to the Air Quality Control Commission ("AQCC" or "Commission") regarding proposed modifications to Regulations Number 11, 20, and 22, 5 CCR 1001-13, 5 CCR 1001-24, and 5 CCR 1001-26.

I. Background

NFIB Colorado is the voice of approximately 7,000 small business members across Colorado, advocating for their right to own, operate, and grow their businesses. Founded in 1943, NFIB represents approximately 300,000 small businesses across the United States. Employees of small businesses account for 48.1% of the states' employees. In 2019, small businesses in Colorado added 33,618 new jobs.

A. NFIB Colorado's Position

NFIB Colorado opposes the proposed regulatory modifications constituting the "Employee Trip Reduction Program" ("ETRP"). The ETRP raises serious legal, policy, and practical issues, which the AQCC has not sufficiently considered or addressed prior to proposing this program. NFIB Colorado therefore urges the AQCC to reconsider its planned adoption of this program, or in the alternative, make compliance voluntary.

NFIB Colorado joins in support of the Colorado Automobile Dealers Association and the Colorado Motor Carriers Association.

B. Air Quality Control Commission's Proposed Modifications

On May 30, 2019, Governor Polis signed House Bill 19-1261, thereby enacting into law an aggressive plan to reduce greenhouse gas pollution over the next decade.¹ Section 1 lists goals for the reduction of greenhouse gas emissions:

- 26% reduction by 2025
- 50% reduction by 2030
- 90% reduction by 2050²

¹ See 2019 Colo. Sess. Laws 3262-69.

² *Id.* at 3264.

Section 3 charges the AQCC with “promulgating such rules and regulations as are consistent with the legislative declaration” of the Act and listed in Colorado Revised Statutes § 25-7-102. Section 3 further stipulates that in the course of its work, the Commission must consider a host of relevant factors, including “the costs of compliance; economic and job impacts and opportunities and the time necessary for compliance.”³

This past January, to further the legislative purposes of HB 19–1261, Governor Polis released his GHG Pollution Reduction Roadmap (“Roadmap”).⁴ The Roadmap identified transportation as one of the largest greenhouse gas emission sources, with “making changes to transportation planning and infrastructure to reduce the growth in driving” being a key step to reaching the emission reduction goals set forth in HB 19–1261.⁵

Fast forward, and the Air Pollution Control Division is proposing to the AQCC a transportation rule package to assist the state in meeting its greenhouse gas reduction goals. One aspect of this plan is the ETRP. The ETRP requires employers within the Ozone Nonattainment Area to “develop and implement a plan to reduce SOV employee commuting to and from a worksite” by enacting policies like remote work, flexible scheduling, ridesharing, or public transportation. The ETRP further requires employers to “identify an Employee Transportation Coordinator” and survey employees on commuting practices. Employers must complete both the survey and final plan for reducing single occupancy vehicle commuting, by mid-2022. Finally, the ETRP limits its current application to “employers with 100 or more employees at a single worksite within the Ozone Nonattainment Area (NAA).” The Ozone Nonattainment Area refers to the Denver Metropolitan and Northern Front Range areas.

II. Legal, Policy, and Factual Concerns of NFIB Colorado

- A. The basic liberty of individuals to travel to places of their employment, and back home, in the way they see fit, safe and secure should not be infringed. An individual should be free to travel in a manner which works for their individual circumstances. The ETRP fails to account for a myriad of individual considerations that go into the independent decision about how to commute to and from one’s place of employment.
- B. The proposed rule fails to provide a definition of employee consistent with current Colorado Department of Labor standards classifying Independent Contractors as free from direct control of the party retaining services. The Commission should adopt the revised definition submitted by NCLA-BAERS?
- C. From a practical perspective, the ETRP does not identify whether employers will be required to pay commuting time since they are mandating a certain mode of commute. Additionally, if the

³ *Id.* at 3266.

⁴ See GOVERNOR JARED POLIS, COLORADO GREENHOUSE GAS POLLUTION REDUCTION ROADMAP (Jan. 14, 2021), <https://energyoffice.colorado.gov/climate-energy/ghg-pollution-reduction-roadmap>.

⁵ *Id.* at 32.

employer requires an individual to pick-up other employee(s) in order to comply with the ETRP, does this entail part of the employee's responsibilities for which they must receive pay?

- D. The requirement of carpooling exposes employers to enormous liability. If the employer's plan requires carpool in an attempt to satisfy the ETRP standards, will this commute and carpooling be in the "scope of employment" sufficient to render the employer vicariously liable for any accident or injuries occurring not only to employees, but also to third-parties, during the commute? *See Raleigh v. Performance Plumbing and Heating*, 130 P.3d 1011, 1019 (Co. 2006) ("Well-established in Colorado law, the doctrine of respondeat superior is based on the theory that the employee acts on behalf of the employer when the employee is within the scope of his or her employment. In such circumstances, the employer is vicariously liable for the employee's negligent acts." (citation omitted)).
 - E. ETRP imposes an undue financial and administrative burden on large employers in Colorado, who will be required to register with the state, and hire a transportation coordinator to micromanage their workers' commutes. Many small businesses rely on a working relationship with large businesses impacted by an ETRP. This could present a clear and present danger of economic consequences to those small businesses and the Colorado economy. Negative impacts on employment, economic growth, and the ability of Colorado to attract new businesses to the State are assured.
 - F. The ETRP is impractical for many sectors of the economy who would be affected by its implementation, such as manufacturing, health care, airports, large retail, agriculture, and other segments which do not lend themselves to a work-from-home model. The impracticality will be exacerbated in the many cases of large businesses that are not conveniently located near a light rail station, or otherwise have limited access to public transit or other alternatives.
 - G. As one of the "success stories" justifying the ETRP rule, the program fact sheet cites Nike's reduction of SOV commuters by 26%. It should go without saying that not all employers, large or small, have the same financial resources as Nike—a multinational corporation valued at almost 40 billion dollars. While Nike may be in a unique position to "reward employee[]" participation with "Nike Bucks and prizes,"⁶ not all businesses have the luxury to redistribute money away from essential business operations.
 - H. All these negative consequences and impacts will be multiplied if the ETRP is expanded to include other urban areas of the state, or to be imposed statewide on businesses with less than 100 employees, or if it is again made mandatory and civil penalties are attached.
- III. List of Witnesses: **A.F. Tony Gagliardi, State Director, NFIB Colorado**, Testimony will be directed to the general state of Colorado's small business economy and how, as the cost of regulation and compliance rise, that segment of the economy is affected. Government regulation of the U.S. economy has expanded exponentially prompting business complaints that interventions impede

⁶ Case Study, Oregon Sustainable Transportation Initiative, Westside Transportation Alliance & Nike, *2 (2011), <https://www.oregon.gov/ODOT/Planning/Documents/Case-Study-Westside-Transportation-Alliance-Nike.pdf>.

growth and efficiency. Proponents of intervention say it's necessary to mitigate the adverse impacts of unregulated commerce, which range from environmental damage to labor abuses. Testimony will also cover the need to align the definition of employee with standard definition contained in the Colorado Wage and House law. A clear line needs to be established to protect the status of Independent Contractor. It should be stated that if one is independent of control by the hiring party, that person meets the term of Independent Contractor.

NFIB Colorado remains opposed to the ETRP and would request if the Commission chooses to move forward the program be made voluntary.

Eric Wallace, Co-Founder and President, Lefthand Brewing Co.,

Testimony will cover factors addressing the need for a "Root Cause Analysis." A root cause is defined as a factor that caused a nonconformance and should be permanently eliminated through process improvement. The root cause is the core issue—the highest-level cause—that sets in motion the entire cause-and-effect reaction that ultimately leads to the problem(s). The Commission should consider addressing the Single Occupancy Vehicle (SOV) rate from a root cause rather than treat an ad hoc symptom. Employees without access to affordable housing in close proximity to the workplace and who are unable to access reliable and affordable public transportation have no choice but to commute by a SOV. Employers find that the farther an employee resides from the workplace the less likely that employee will remain with the employer. Employees desire to reside close to their place of work, however, for many it is impossible due to the lack of affordable housing.

Time requested: 30 minutes

IV. Conclusion

NFIB Colorado requests that the AQCC's proposed ETRP regulatory modifications be recommendations allowing for voluntary, instead of compulsory, compliance by businesses. This will provide far more efficient results, without the economic detriments of additional hires and costly mitigatory measures in dragging along unenthusiastic large employers for minimum facial compliance.

Respectfully submitted this 8th day of July 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 8th day of July 8, 2021, electronic copies of the PREHEARING STATEMENT OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS COLORADO were served on all listed parties below:

CERTIFICATE OF SERVICE LIST

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