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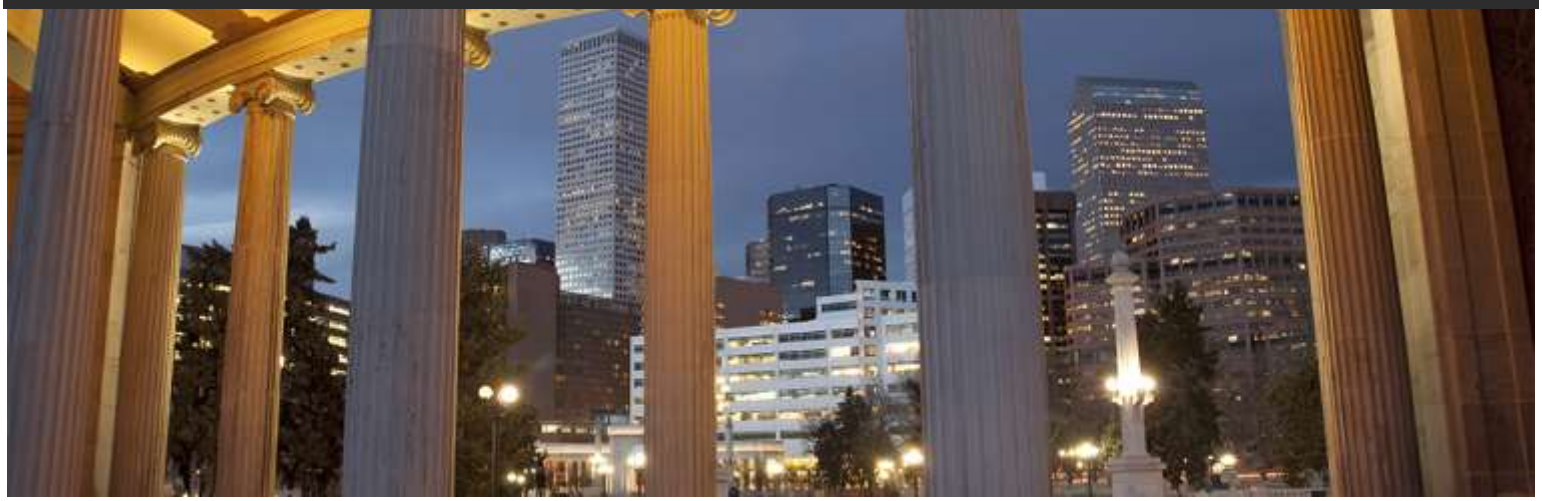
Alert | Labor & Employment



June 2023

New Act Expands Colorado Anti-Discrimination Law and Limits Non-Disclosure Agreements

On Aug. 7, 2023, Colorado employers' workplace obligations will change due to the passage of the Protecting Opportunities and Workers' Rights Act (the POWR Act). The POWR Act, which Governor Polis signed after its passage during the most recent legislative session, changes key legal standards related to workplace harassment and non-disclosure agreements with employees, among other changes, including:

- Eliminating the well-established common law requirement that workplace harassment be "severe or pervasive" to be unlawful under the Colorado Anti-Discrimination Act (CADA) and establishing a new unlawful workplace harassment definition;
- Limiting the enforceability of confidential non-disclosure agreements executed in response to complaints of "unfair" or "discriminatory" employment practices;
- Broadening "marital status"-related protections under CADA;
- More precisely aligning disability discrimination standards with the federal American with Disabilities Act (ADA); and
- Imposing new, heightened recordkeeping requirements for employers.

These changes apply to employment practices occurring on or after the effective date of the POWR Act, Aug. 7, 2023. Almost all Colorado employers of all sizes are covered by CADA and the POWR Act's amendments.

Modified Standard for Workplace Harassment; Affirmative Defense

The "severe or pervasive" standard to determine if workplace harassment has occurred under Colorado law has been a longstanding legal doctrine applied by federal and state courts. However, after a four-year effort to pass the POWR Act, the Colorado legislature rejected the "severe or pervasive" standard as not taking into account "the realities of the workplace or the harm that workplace harassment causes." Indeed, the POWR Act explicitly provides that "the nature of the work or the frequency with which harassment in the workplace occurred in the past is not relevant to whether the conduct or communication is a discriminatory or unfair employment practice." Instead, and going forward starting Aug. 7, the POWR Act defines "harass" or "harassment" to mean the following behaviors or conduct:

1. Engaging in any unwelcome physical or verbal conduct or any written, pictorial, or visual communication;

2. Directed at an individual or group of individuals;

3. Because of that individual or group's membership in, or perceived membership in, a protected class;

4. Which conduct or communication is subjectively offensive to the individual alleging harassment; and

5. Which conduct or communication is objectively offensive to a reasonable individual who is a member of the same protected class.

By the statutory language, this conduct and behavior need not rise to the level of "severe and pervasive." Rather, such conduct will be considered a violation of the law if: (a) submission to the conduct or communication is explicitly or implicitly made a term or condition of the individual's employment; (b) submission to, objection to, or rejection of the conduct or communication is used as a basis for employment decisions affecting the individual; or (c) the conduct or communication has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment.

Although "petty slights, minor annoyances, and lack of good manners" do not automatically constitute harassment, if they may meet the POWR Act's new definition of harassment, such an isolated incident may form the basis of a legal claim. It must otherwise meet the above standards of unlawful harassment "under the totality of the circumstances," taking into account factors such as:

1. The frequency of the conduct or communication, recognizing that a single incident may rise to the level of harassment;

2. The number of individuals engaged in the conduct or communication;

3. The type or nature of the conduct or communication, recognizing that conduct or communication that, at one time, was or is welcome between two or more individuals may become unwelcome to one or more individuals;

4. The location where the conduct or communication occurred;

5. Whether the conduct or communication is threatening;

6. Whether a power differential exists between the individual alleged to have engaged in harassment and the individual alleging harassment;

7. Any use of epithets, slurs, or other conduct or communication that is humiliating or degrading; and

8. Whether the conduct or communication reflects stereotypes about an individual or group of individuals in a protected class.

These amendments will operate to capture more conduct and communication as unlawful harassment than under the current Colorado legal framework.

Importantly, the POWR Act also provides an affirmative defense to employers defending harassment claims against a supervisor that tracks the judicially created *Faragher-Ellerth* defense available under federal anti-discrimination law. If the employer can demonstrate the following, the affirmative defense may be available:

1. The employer has established a program that is reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment. Programs will satisfy this requirement if the employer can demonstrate that:

    a. The employer takes prompt, reasonable action to investigate or address alleged discriminatory or unfair employment practices; and

    b. The employer takes prompt, reasonable remedial actions, when warranted, in response to complaints of discriminatory or unfair employment practices.

2. The employer communicated the existence and details of such program to all employees; and

3. The employee unreasonably failed to take advantage of such program.

Accordingly, Colorado employers should evaluate their policies and practices for receiving, investigating, and resolving internal complaints in light of this available defense vis-à-vis the broadened definition of unlawful workplace harassment.

The elements of unlawful harassment under Title VII of the federal Civil Rights Act are not changed by this Colorado law, meaning different standards will be applicable to claims brought under both federal and state law for workplace harassment. The full extent of those differences will be developed over the next several years as Colorado courts hear and decide claims for alleged workplace harassment occurring on or after Aug. 7, 2023, the POWR Act's effective date.

Limitations on Non-Disclosure Agreements

The POWR Act's legislative declaration provides that "attempts to interfere with employees' ability to communicate about and report alleged discriminatory or unfair employment practices are contrary to the public policy of the state." To that end, the POWR Act imposes strict requirements for nondisclosure

provisions between employers and current or prospective employees that limit the employee's ability to disclose or discuss, orally or in writing, any alleged "discriminatory" or "unfair employment" practice. Specifically, such an agreement is void unless all the following requirements are met:

1. The nondisclosure provision applies equally to all parties to the agreement (mutuality);

2. The nondisclosure provision expressly states that it does not restrain the employee or prospective employee from disclosing the underlying facts of any alleged discriminatory or unfair employment practice (including the existence and terms of a settlement) to certain enumerated individuals (e.g., spouse, attorney, etc.) and agencies or as otherwise required by law;

3. The nondisclosure provision expressly states that disclosure of the underlying facts of any alleged discriminatory or unfair employment practice consistent with (2) above does not constitute disparagement;

4. If a non-disparagement provision is included in the agreement, it must contain a condition that if the employer disparages the employee or prospective employee to a third party, the employer may not seek to enforce the non-disparagement or nondisclosure provisions of the agreement or seek related damages (though the remainder of the agreement remains enforceable);

5. Any liquidated damages provision in the agreement must meet certain enumerated criteria; and

6. The agreement contains an addendum signed by all parties to the agreement attesting to compliance with these requirements.

These express requirements apply to agreements entered into or renewed after Aug. 7, 2023. Further, the POWR Act imposes sanctions against employers that present employees or prospective employees with agreements that violate the above conditions, including immediate liability for actual damages, attorney's fees, and costs plus a penalty of $5,000 per violation. Additionally, the amendments provide that evidence that an employer previously entered a nondisclosure agreement involving the conduct of the same individual or individuals alleged to have engaged in the misconduct may be presented and will be considered evidence to support an award of punitive damages in a lawsuit covered by the POWR Act. Because most form separation agreements include nondisclosure provisions that do not contain the terms required by the POWR Act, Colorado employers should update their forms and practices in light of these changes.

Because CADA's anti-retaliation provisions, as amended by the POWR Act, may arguably be interpreted to apply to Colorado's wage laws, employers should be mindful to carefully draft nondisclosure provisions attendant to any separation agreements resolving employee claims.

Disability Standard Altered

Additionally, the POWR Act aligns CADA's disability discrimination standards with the federal ADA standard. The amendments removed the requirement that a disability must have "a significant impact on the job" in order for an employer to refuse to hire, fire, promote, or demote an individual with a disability. Instead, an employer need not accommodate an individual with a disability if there is "no reasonable accommodation that would allow the individual to satisfy the essential functions of the job," mirroring the federal standard.

Broadened Marital Status-Related Protections

Along with disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, age, national origin, and ancestry, and other subsets, by the POWR Act amendments, CADA now protects an individual against discrimination or unfair employment practices based upon "marital status." This expands upon CADA's already-protected marital-related status. CADA has and continues to protect employees of employers with more than 25 employees from adverse employment action solely because they plan to marry another employee of the employer.

New Recordkeeping Requirements

Currently, CADA does not impose specific recordkeeping requirements on employers related to personnel files. Following the effective date of the POWR Act, however, Colorado employers must preserve certain specific types of personnel records for at least five years after the later of (1) the date the employer made or received the record; or (2) the date the personnel action to which the record pertains or the final disposition of a charge of discrimination or related action, as applicable. The types of records that must be preserved for this timeframe include requests for accommodation; complaints of discriminatory or unfair labor practices (written or oral); application forms; documents related to hiring, promotion, demotion, transfer, layoff, termination, rates of pay and other compensation, and selection for training or parentship; and records of training provided to or facilitated for employees.

Further, Colorado employers are affirmatively required to maintain "an accurate, designated repository of all written or oral complaints of discriminatory or unfair employment practices," including (1) the date of the complaint; (2) the identity of the complaining party; (3) if the complaint was made anonymously; (4) the identity of the alleged perpetrator; and (5) the substance of the complaint.

Although many employers maintain these records in the usual course of business, it is appropriate to revisit HR retention, documentation, and filing policies and practices in light of the statutory amendments.

Conclusion

The POWR Act's CADA amendments alter the legal implications of employee relations matters that Colorado employers face daily, presenting the opportunity for employers to review and refresh policies and practices. It is unclear whether state agencies will engage in rulemaking and/or promulgate sub-regulatory guidance, as has been the case with some other recent employment laws. But in the meantime, no later than Aug. 7, 2023, all Colorado employers should evaluate and scrutinize their practices and procedures to mitigate risk of employee claims or void employment agreements.

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