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COLORADO EMPLOYERS FACE POWR-FUL CHANGES TO EMPLOYMENT LAW

August 3, 2023

SUMMARY

On August 7, 2023, Colorado's Protecting Opportunities and Workers' Rights (POWR) Act takes effect, significantly shifting the power balance toward employees. Among other things, the Act:

- lowers the threshold for workplace harassment claims;
- limits an employer's affirmative defense to claims of harassment by supervisors;
- restricts the use of nondisclosure provisions in employment-related agreements; and
- establishes new record-keeping requirements.

BROADENS THE DEFINITION OF HARASSMENT

The Act redefines harassment as:

- unwelcome conduct or communication;
- directed at an individual because of their membership, or perceived membership, in a protected class; and
- the conduct or communication is subjectively offensive and is objectively offensive to a reasonable individual in the same protected class.

Most notably, the Act eliminates the long-standing requirement that the conduct be severe or pervasive. The Act further dictates that neither the nature of the work nor the frequency of past harassment is relevant to whether conduct creates an offensive working environment. Even a single, non-severe incident can now constitute unlawful harassment under "the totality of the circumstances." Factors to consider include the frequency, duration and location of the conduct; the number of individuals involved; the nature of the conduct; whether a "power differential" exists

between the individuals involved; and whether the conduct is threatening, involves epithets or slurs or reflects stereotypes.

In short, it will now be much easier for employees to establish viable harassment claims.

NARROWS THE AFFIRMATIVE DEFENSE TO CLAIMS OF HARASSMENT BY A SUPERVISOR

The POWR Act also narrows the existing affirmative defense to claims of harassment by a supervisor. Now an employer will be required to prove all of the following:

- The employer has established a program that is reasonably designed to prevent, deter, and protect employees from harassment. A program satisfies this requirement if the employer can show that it takes prompt, reasonable actions to investigate, address, and remediate complaints of discrimination or unfair employment practices; and
- The employer has communicated the existence and details of the program to all employees; and
- The employee has unreasonably failed to take advantage of the employer's program.

Employers should develop and publicize a program to deter harassment and ensure that they have a system in place to investigate harassment complaints to preserve their ability to assert an affirmative defense.

LIMITS THE USE OF NONDISCLOSURE PROVISIONS

The POWR Act voids nondisclosure provisions in any agreement that limit an employee or prospective employee's ability to "disclose or discuss, either orally or in writing, any alleged discriminatory or unfair employment practice," unless the nondisclosure provision:

- Applies equally to all parties;
- 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 agreement, to the individual's immediate family, religious advisor, medical or mental health provider, mental or behavioral health therapeutic support group, legal counsel, financial advisor, or tax preparer;
- 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 to any government agency, including the existence and terms of a settlement agreement, or in response to a subpoena, without first notifying the employer;

- Expressly states that disclosure of the underlying facts of any alleged discriminatory or unfair employment practice does not constitute disparagement;
- Expressly states that the employer may not enforce the nondisparagement or nondisclosure provisions or seek damages if the employer disparages the employee or prospective employee to a third party in violation of the agreement's nondisparagement provision;
- Does not include a liquidated damages provision that constitutes a penalty or punishment; and
- Contains an addendum, signed by all parties, attesting to the agreement's compliance with the Act.

These requirements apply to all provisions entered into or renewed on or after August 7, 2023.

The Colorado Civil Rights Division or an individual may bring legal action against an employer who presents an employee with an agreement that violates these requirements. The employer will be liable for actual damages, costs, attorney fees, and a $5,000 penalty per violation.

Additionally, evidence of agreements violating the nondisclosure requirements may be used as evidence to support an award of punitive damages in a claim for discriminatory or unfair employment practices. Employers should review their agreements to ensure they comply with the Act.

ESTABLISHES NEW RECORD-KEEPING REQUIREMENTS

The Act requires employers to maintain personnel and employment records for at least five years. Employers must also maintain an accurate and "designated repository" of all complaints of discrimination, harassment, or unfair employment practices. The repository must include the date of the complaint, the identity of the complaining individual, the identity of the alleged perpetrator, and the substance of the complaint. This requirement applies to written and oral complaints.

MEET THE TEAM

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