LEGAL UPDATES PUBLISHED: JUNE 7, 2023

Colorado's New Employment Laws: What to Know (2023)

Service

Labor & Employment

Professionals

BARBARA A. GRANDJEAN
DENVER:
303.892.4458
BARBARA.GRANDJEAN@
HUSCHBLACKWELL.COM

ASHLEY W. JORDAAN
DENVER:
303.749.7297
ASHLEY.JORDAAN@
HUSCHBLACKWELL.COM

OWEN DAVIS
DENVER:
303.749.7268
OWEN.DAVIS@
HUSCHBLACKWELL.COM

SHAWNA RUETZ
DENVER:
303.749.7245
SHAWNA.RUETZ@
HUSCHBLACKWELL.COM

KEITH K. YBANEZ
DENVER:
303.749.7293
KEITH.YBANEZ@

The 2023 Colorado legislative session closed on May 8, 2023, and in what is now an annual tradition, the General Assembly devoted considerable time during its 120-day session to debating employment-related bills, some quite ambitious in scope. The most sweeping proposed legislation failed—the so-called "fair workweek" scheduling restrictions—but the General Assembly did pass two significant laws about equal pay job postings and modification of the standard of proof for workplace harassment and records retention. It also passed two less significant laws that will impact your daily HR practices concerning paid sick leave and the disclosure of age-related information on job applications.

Governor Polis has either signed these bills into law or is expected to this week.

CO Equal Pay (SB 23-105): Job Postings Round II

One of the most significant employment laws passed in Colorado in the last few years was the Equal Pay for Equal Work Act, which had two mandates. First, it established Colorado as the nation's leader in enforcing equal pay requirements. Second, and controversially, it also mandated the disclosure of salary ranges and employee benefits in job postings, including for positions that may have only the possibility of a Colorado employee filling the position. Perhaps because of the national media attention that the second mandate generated, the General Assembly revisited the equal pay law and passed Senate Bill 23-105, the Ensure Equal Pay for Equal Work Act (EEPEWA), which amends and expands the equal pay job posting requirements effective January 1, 2024.

The law first *narrows* when employers must internally post job opportunities for employees. Addressing a frequent topic of frustration for HR departments,

in-line career progression or "career developments" will be excluded from the scope of promotional opportunities that require internal posting of salary ranges and benefits. The EEPEWA also adds a carveout until July 1, 2029 for employers with no physical presence in Colorado and less than 15 remote employees working in Colorado, requiring only that employers in those circumstances provide notice of remote job opportunities. Consistent with the initial intent of the rule, the notice must still include the hourly or salary compensation range for the job opportunity, a general description of the applicable benefits and other compensation, and the date the application window is anticipated to close.

The law also *expands* notice requirements. EEPEWA adds new post-hire notice obligations requiring employers to disclose: (1) the name of the candidate selected for a job opportunity; (2) the selected candidate's former job title if that individual was an internal hire; (3) the selected candidate's new job title; and (4) information on how employees may demonstrate interest in applying to similar jobs in the future. Notice need not be given if it will violate a candidate's privacy rights or health and safety. The notices must be sent to, at a minimum, the employees with whom the selected candidate will work with regularly. Employers are given discretion on how to post for the notice so long as the requisite information is made known. Employers must also provide all eligible employees with notice of the requirements for in-line career progression, the terms of compensation, benefits, duties, and access to further advancement opportunities.

One problem with the original equal pay law was that the Colorado Department of Labor and Employment (CDLE) lacked the resources to effectively enforce its broad mandate state-wide. The CDLE now has additional resources and an affirmative obligation to investigate complaints regarding wage discrimination or impermissible inquiries into a prospective employee's wage history and order compliance. Beginning July 1, 2024, the Division of Labor Standards and Statistics (DLSS) also must create a mediation process for alleged violations of sex-based wage discrimination claims. Finally, Senate Bill 23-105 doubles, to a maximum of six years, the period of back pay that a claimant can recover for a sex discrimination wage disparity claim if violations continue for that length of time.

Paid Sick Leave (SB 23-017): More Reasons to Take HFWA Leave

Senate Bill 23-017 amends Colorado's Healthy Families and Workplaces Act (HFWA) to provide employees with additional reasons to use paid sick leave. In addition to the reasons already in effect since HFWA first passed three years ago, such as for the employee's illness, a family illness, or a public health emergency, employers must also now allow employees to use accrued paid sick leave to: (1) grieve, attend funerals or memorial services, or deal with financial and legal matters related to the death of a family member; (2) care for a family member whose school or place of care has been closed because of inclement weather, loss of power, heating, or water, or another unexpected occurrence or

event; or (3) evacuate their residence because of inclement weather, loss of power, heating, or water, or another unexpected occurrence or event. The law takes effect in August of this year.

Discrimination Law (SB 23-172): Toughening the Sexual Harassment Standard and More

Senate Bill 23-172, also known as the Protecting Opportunities and Workers' Rights (POWR) Act, makes major changes to the law of employment discrimination and harassment. The changes in the POWR Act include:

Workplace Harassment

Elimination of the "severe or pervasive" standard of proof for harassment applied in federal and state courts for years. Workplace harassment in Colorado is now defined as "to engage in, or the act of engaging in, any unwelcome physical or verbal conduct or any written, pictorial, or visual communication directed at an individual or group of individuals because of that individual's or group's membership in, or perceived membership in, a protected class…, which conduct or communication *is subjectively offensive to the individual alleging harassment and is objectively offensive to a reasonable individual who is a member of the same protected class*. The conduct or communication need not be severe or pervasive to constitute a discriminatory or an unfair employment practice."

An affirmative defense is only available to employers for a supervisor who unlawfully harassed an employee if the employer: (1) has a program reasonably designed to prevent harassment that requires the employer to take prompt and reasonable action to investigate and take remedial actions when warranted; (2) the employer has communicated the details of the program to all employees; and (3) the employee has unreasonably failed to take advantage of the employer's program.

The Colorado Civil Rights Division must add harassment as a basis for discrimination or an unfair employment practice to its charge forms.

Marital status is added as a protected class to the Colorado Anti-Discrimination Act (CADA).

While these changes seem significant, in practice, they are not likely to impact an employer's day-to-day enforcement of its anti-discrimination and anti-harassment policies. Employers rarely, if ever, excuse credible allegations of illegal harassment by minimizing the misconduct under a "severe or pervasive" standard. As before, when employers learn of harassment in the workplace, they must take

steps to remedy the misconduct, usually following an investigation. An employer that relied too heavily on a lower standard would risk losing its defenses and subject itself to exemplary or punitive damages. And it is a rare employer that was willing to claim that it could discriminate on the basis of marital status. Instead, the changes in this law are primarily aimed at standards applied in litigation and limiting the employer's defenses once an employee files a claim.

Nondisclosure Provisions in Employment Agreements

Addition of requirements for a nondisclosure provision that limits the employee's ability to disclose or discuss alleged discriminatory or unfair employment practices.

Consistent with a nationwide trend, Colorado has added its own restrictions to nondisclosure provisions of employment agreements. This significant addition impacts the ability for an employer and employee to include a nondisclosure provision in any type of agreement, including settlement and separation agreements where they had been standard until a few years ago and the rise of the "Me Too" movement. A nondisclosure provision in Colorado is void unless: (1) it applies equally to all parties to the agreement; (2) it expressly states that it does not restrain an employee from disclosing the underlying facts of any alleged discriminatory practice, including the existence and terms of a settlement agreement to specified individuals; (3) it expressly states that disclosure of the underlying facts does not constitute disparagement; and (4) the agreement includes a condition that if a nondisparagement provision is included and the employer disparages the employee, the employer may not seek to enforce the nondisparagement or nondisclosure provisions of the agreement.

When considering whether to enter into a separation or severance agreement that limits an employee's ability to disclose information related to alleged discriminatory or unfair employment practices, employers will now need to evaluate what can actually be protected from disclosure. Additionally, any violation of the nondisclosure provision requirement by the employer will result in damages of $5,000 per violation.

Repository of Complaints

Addition of requirement that employers maintain employment related to complaints of discrimination or other unfair employment practices for at least five years, and maintain those records in a designated repository.

The requirement that an employer keep a repository of discrimination or harassment complaints is broad and incorporates all written and oral complaints of discriminatory or unfair employment practices. The record must include the date of the complaint, the identity of the complaining party (if not an anonymous complaint), the identity of the alleged perpetrator, and the substance of the complaint. Such records are considered personnel records and are not open to public inspection.

Employers unaware of the new rule, particularly small employers, may be surprised by the requirement when defending a charge of discrimination. The POWR Act does not identify the enforcement mechanism for the new repository requirement. The Rules and Regulations of the Colorado Civil Rights Commission (the Rules) provide that an employer that refuses to provide information requested as part of a charge of discrimination is subject to a rebuttable presumption that the information is harmful to the employer's position. Likely this rebuttable presumption will also apply to an employer's failure to maintain and produce a complaint repository.

The more significant impact of the "repository" is its likely impact in litigation. Plaintiffs' attorneys will no doubt seek disclosure of the repository in an attempt to support their clients' claims and to bolster the request for exemplary or punitive damages. We suspect that many discovery fights in litigation will center on the repository in the future.

The "Don't Ask Applicants' Age" Bill (SB 23-058): No, Really, Don't Do It

Employers who followed competent legal advice and adopted standard HR practices have long known the risk of asking applicants' ages on an application. The practice invited age-based discrimination claims and provided little value in the hiring process. Sometimes, seemingly benign questions also appeared on applications, such as graduation dates, that correlate to age. Senate Bill 23-058, also known as the Job Application Fairness Act, now makes it even clearer that employers cannot ask for age or age-related information. Starting July 1, 2024, the Job Application Fairness Act prohibits employers from inquiring about a prospective employee's age, date of birth, and dates of attendance at, or date of graduation from, an educational institution on an initial employment application. An employer may request an applicant to provide application materials such as transcripts and certifications if the employer notifies the applicant that they may redact information that identifies their age, date of birth, or dates of attendance at or graduation from an educational institution. An employer may request an applicant to verify compliance with age requirements if: (1) there is a bona fide occupational qualification pertaining to public or occupational safety; (2) a federal law or regulation; or (3) a state or local law or regulation based on a bona fide occupational qualification.

Contact Us

If you have any questions about this new legislation or other employment law issues, contact Barb Grandjean, Ashley Jordaan, Chris Ottele, Owen Davis, Shawna Ruetz, Keith Ybanez, or your local Husch Blackwell attorney.