

# THE EMPLOYER'S ADVISORY

A PERIODICAL HIGHLIGHTING  
CURRENT EMPLOYMENT-LAW ISSUES

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## WHAT GOES AROUND, COMES AROUND

Harken back to all those years ago in 2021. Okay, that was actually only two years ago, but doesn't it seem like a long time ago? Anyway, at that time, the Colorado legislature was starting its first full session after the COVID-induced abbreviated session of 2020. During that 2021 session, the Colorado legislature proposed a bill known as POWR, which was an acronym for a bill entitled, "Concerning Protections for Colorado Workers Against Discriminatory Employment Practices."

The POWR 2021 bill sought to substantially modify Colorado's civil rights statute regarding claims for discrimination and harassment based on an individual's protected classification (e.g., disability, gender identity, national origin, race, religion, sex, sexual orientation, gender identity, etc.). While POWR passed through the Colorado Senate, it did not make it out of the House of Representatives. And while a similar bill named POWR was proposed in 2022, that POWR bill had a much narrower scope of changes. For example, POWR 2022, which passed, expanded the definition of "employee" to include individuals in domestic service. It also extended the time limit to file a charge of discrimination from 180 days to 300 days after the alleged discrimination, which is consistent with the federal employment discrimination statutes. Finally, it also expanded the remedies for age discrimination claims to make them more consistent with other forms of discrimination.

So, you may think, "uh, why are we talking about a bill that didn't pass two years ago?" Well, in short, POWR is back. And while it looks a lot like POWR 2021 in its effort to amend Colorado's civil rights law, POWR brings its own punch. Here's a summary of POWR 2023:

*POWR 2023 adds a new definition of "harass" or "harassment" and repeals the current definition of "harass" that requires creation of a hostile work environment.* In short, POWR 2022 would amend the burden of proof in a discrimination/harassment claim from the federally-created "severe or pervasive conduct" standard to a standard based on whether a reasonable person in the same protected class as the plaintiff would find the conduct complained to be "offensive." That would mean, for example, that juries in a gender discrimination claim would need to consider whether a reasonable person of the same gender as the plaintiff would also find the conduct "offensive."

In making this "offensive" decision, the bill emphasizes that while the "totality of the circumstances" approach should be undertaken, a single act may suffice for a determination that the conduct is "offensive." Additionally, while Colorado courts traditionally considered the type of work environment as relevant, POWR 2023 would remove such a defense.

*POWR 2023 Specifies that it is a discriminatory or an unfair employment practice for an*

*employer to fail to initiate an investigation of a complaint or to fail to take prompt, reasonable, and remedial action.* In essence, if POWR 2023 passes, it could be considered a discriminatory employment practice for an employer to fail to conduct an investigation of a harassment complaint. While, in most cases, employers should investigate complaints of harassment and risk adverse decisions in litigation by failing to do so, the decision whether to conduct an investigation would be taken out of an organization's discretion because an investigation on a harassment complaint from an employee would be required by law.

*POWR 2023 specifies the requirements for an employer to assert an affirmative defense to an employee's proven claim of unlawful harassment by a supervisor.* Initially, an affirmative defense is a defense in which the defendant introduces evidence that, if found to be credible, will negate liability, even if it is proven that the defendant committed the alleged acts. In short, affirmative defenses are critical for organizations at trial.

But POWR 2023 would take away an organization's ability to assert affirmative defenses unless the employer could prove four things: (1) the employer designed a program to prevent harassment and deter future harassers from engaging in such activities; (2) the employer communicated that program to all employees; (3) no employee has submitted a charge of retaliation for a complaint of unlawful harassment with the Colorado Civil Rights Division or the Equal Employment Opportunity Commission within the last six (6) years; and (4) the employee unreasonably failed to take advantage of that program to address the issues.

*POWR 2023 specifies the requirements that must be satisfied for a nondisclosure provision in an agreement between an employer and an employee or a prospective employee to be enforceable.* If POWR 2023 passes, Colorado organizations will be required to permit the employee to have limited discussions with others about the basis for the settlement agreement and POWR 2023 would limit having a

liquidated damage provision for such disclosure in a settlement agreement.

*POWR 2023 requires the Colorado Civil Rights Division to provide copies of past Charges of Discrimination against the organization to the current Charging Party, with the names of redacted.* In essence, individuals filing a charge of discrimination would be entitled to see the claims previously filed against its organization.

*POWR 2023 requires training, training, and more training.* If POWR passes, employers with 20 or more employees will be required to provide annual training regarding harassment, discrimination prevention, bystander intervention, and civility in the workplace, to all employees and within 180 days after hire to new employees.

In sum, POWR 2023 packs a big wallop of a punch. The bill was just proposed a couple of weeks ago in the Colorado Senate, where it currently sits. So, there's still some road ahead for a bill that many will be closely monitoring for the rest of the session.

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