

THE EMPLOYER'S ADVISORY

A PERIODICAL HIGHLIGHTING
CURRENT EMPLOYMENT-LAW ISSUES

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2023 Legislative Wrap Up **The Governor (and “Isabelle”) sign** **a slew of** **Employment Bills**

The 2023 Legislative Session wrapped up a few weeks ago and the Legislature sent almost 20 employment bills to the Governor for signature. In the end, the Governor signed all but one employment bill, which he vetoed. Perhaps tired by those efforts, the Governor had “Isabelle” co-sign one of the bills – SB23-105. Now, The Employer’s Advisory is not exactly sure who “Isabelle” is, why the Governor thought it necessary to have her co-sign just SB23-105, or why what looks like a child’s “signature” is on the official version of SB23-105. But in short, that’s that. If you’re interested in looking, the final version of the bill with the child-like signature is available on the Colorado General Assembly website.

The following summarizes those employment/HR bills that will soon become effective.

POWR ACT (SB23-172). The Colorado bill regarding human resources issues that gained the most attention this year was POWR, which stands for Protecting Opportunities and Workers’ Rights Act Concerning Protections for Colorado Workers Against Discriminatory Employment Practices. This bill, which has now been signed by the Governor, implements the following changes to Colorado’s anti-discrimination law:

- **Harassment Standard.** Current Colorado law (i.e., Colorado Antidiscrimination Act (“CADA”)) requires an individual to prove, in part, that the conduct at issue was subjectively abusive to the person affected and objectively severe and pervasive enough to create a work environment that a reasonable person would find hostile or abusive. POWR removes the “severe and pervasive” standard and removes the “reasonable person” standard. So, now, to establish a claim for harassment, the individual must establish that the conduct or communication “is subjectively offensive to a reasonable individual who is a member of the same protected class.” In fact, POWR specifically identified that the “conduct need not be severe or pervasive to constitute a discriminatory or an unfair employment practice.” So, while it will certainly be some time before POWR cases make their way into court, many observers believe this new standard will be viewed as a much lower threshold than the severe/pervasive standard, which will likely cause many more employment claims to find their way in front of a jury.

- **Marital Status.** CADA protects individuals based on an individual’s “protected classification.” For example, it protects against conduct or communication that discriminates against an individual’s age, sex, national origin, etc. POWR added marital status as a protected classification.

- **Nondisclosure/Confidentiality Provisions.** POWR requires specific language in severance/settlement agreements regarding permissible

disclosure(s) of the alleged discriminatory or unfair employment practices. For example, the agreement's nondisclosure provisions must apply equally to the employer and the employee, and the agreement must not prevent the employee from disclosing the underlying facts to family, health providers, religious advisors, etc. Such an agreement must also contain a provision where each party attests that the requirements of POWR were followed in the agreement.

- Employment Records. Under POWR, organizations must now keep all employment records for at least five (5) years.

- Repository of Information. POWR will require Colorado employers to maintain an accurate, designated repository of all written or oral complaints of discriminatory or unfair employment practices. The repository must include the date of the complaint, the identity of the complaining party (unless made anonymously), the identity of the alleged perpetrator, and the substance of the complaint.

- Investigations. POWR requires that Colorado employers develop, if the employer has not already, an investigation procedure where the employee can submit complaints and where the employer will undertake prompt, remedial actions, when warranted, in response to complaints. Employers must communicate the existence and details of this program to all its employees.

Concerning Prohibition Against an Employer Taking Adverse Action Against an Employee who Accepts a Gratuity (HB23-1146). This bill would have prohibited organizations from taking an adverse action against an employee who accepts a cash gratuity offered by a patron. The Governor, though, vetoed this bill.

Concerning the Addition of Qualifying Uses of Sick Leave (SB23-017). SB017 expands the Colorado Healthy Families and Workplaces Act to require employers to provide time off for:

1. Care for a family member whose school or place of care has been closed due to

inclement weather, loss of power, or other unexpected occurrence or event that results in the closure of the family member's school or place of care; and

2. Grieve, attend funeral services or a memorial, or deal with financial and legal matters that arise after the death of a family member.

Job Application Fairness Act (SB 23-058). Starting July 1, 2024, the bill 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 employment application. An employer may request/require an individual to provide additional application materials, including copies of certifications, transcripts, and other materials, at the time of an initial employment application, if the employer notifies the individual that the individual may redact information that identifies their age, date of birth, or dates of attendance at or graduation from an educational institution. The now-signed bill does provide that an employer may request an individual to verify compliance with age requirements imposed pursuant to or required by: (1) 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. When it becomes effective, this bill will not create a private right of action. Instead, an individual claiming a violation must file a complaint with the Colorado Department of Labor and Employment to determine if penalties will be assessed.

Employer Assistance for Home Purchase Tax Credit (HB23-1189). This bill creates a state income tax credit for employers who make a monetary contribution to an employee for use by the employee in purchasing a primary residence. The amount of the credit allowed is 5% of an employer's contribution to an employee, but the credit is capped at \$5,000 per employee per year and an employer cannot receive a credit of more than \$500,000 for all contributions made in a year to employees. The employee must use the money contributed for eligible

expenses, which include a down payment and closing costs, including fees for appraisals, mortgage origination, and inspections. An employee may authorize the employee's employer to withhold a specified amount of the employee's earnings as an employee contribution into the savings account established by the employer that holds the employer's contribution.

Support In-demand Career Workforce (HB23-1246) and Universal High School Scholarship Program (SB23-205). These two bills will, in total, put more than \$60 million in aid toward students seeking in-demand degrees.

Equal Pay Act Modifications (SB 23-105). This bill amends the Equal Pay Act and its requirements regarding posting of positions. For example, SB105 now requires employers to post all "job opportunities." Previously, the Equal Pay Act only required the posting of "promotional opportunities." Further, SB105 identified that this posting must include the hourly or salary compensation or the range of such compensation, a general description of benefits, and the date the application window closes. Additionally, SB105 requires that employers post the name of the candidate who the employer selected to fill a job opportunity, the selected candidate's new job title, and information on how employees may demonstrate interest in similar job opportunities in the future, including identifying individuals or departments where employees can express interest in similar job opportunities.

Practical Tip. So, what steps should Colorado employers undertake with these new Acts:

1. Review your anti-harassment policies and procedures with your legal counsel to ensure compliance with POWR. Further, it is essential that all Colorado employers train employees in these policies and procedures and that organizations develop an internal system for tracking all complaints of discriminatory or unfair employment practices.

2. Review your settlement/severance agreement with your legal representative to ensure compliance with POWR. POWR includes the potential for an automatic fine of \$5,000 for noncompliance.

3. Review and revise your Sick Leave policy to ensure that it identifies the new reasons for paid leave under HFWA.

4. Review and, if necessary, revise your application process and develop a posting system to identify new hires.

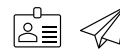
UPCOMING SEMINAR

On July 19, 2023, The Employer's Advisory will present an efficient 90-minute presentation on these new bills and what steps employers should undertake. The presentation will be held by the Western Colorado Human Resources Association and co-sponsored by Mesa County Chambers of Commerce. Please check the WCHRA website for more information regarding this presentation. Hope to see you there!!!

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