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Contents

Holland & Hart LLP is a full-service Am Law 200 firm that was founded in 1947 and has offices in Alaska, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Wyoming, and Washington, DC. It delivers integrated legal solutions to regional, national, and international clients of all sizes in a diverse range of industries. The sophisticated labor and employment team provides pragmatic solutions that manage liability risks and protect employers' interests, reputation, and business objectives. The firm provides practical, efficient, strategic representation for all types of labor and employment matters, including traditional labor, workplace safety, and immigration issues.

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1. Current Socio-Economic, Political and Legal Climate; Context Matters

1.1 "Gig" Economy and Other Technological Advances

Colorado Senate Bill 18-171 – which was introduced in the 2018 Legislation session, passed in the Senate, but stalled in the House of Representatives and did not pass – established a test for determining whether a marketplace contractor within the "gig" economy is considered an "employee" under the Workers' Compensation Act of Colorado and whether services provided by a marketplace contractor are considered "employment" under the Colorado Employment Security Act.

According to the latest estimates, gig workers comprise only a small portion of the US workforce at this time, but those numbers are expected to continue to rise. As a result of the gig companies' practices, they have come under fire for employee misclassification.

Independent contractor status does not provide traditional employment rights and protections conferred to "employees." If classified as employees, workers are entitled to benefits (eg, unemployment insurance, minimum wage protection and overtime pay, paid leave if applicable, and tax relief). If classified as independent contractors, these benefits are not available to gig economy workers.

Two recent decisions by the Trump administration have reversed the trend of the previous administration to classify workers as employees. The Trump administration's Department of Labor published a response to the question of worker classification of web-platform company workers. The Department of Labor noted that the company's workers should not be classified as employees.

1.2 "Me Too" and Other Movements

Recently, the "Me Too" movement has hit close to home for the Colorado legislature. An interim committee was created by the legislature after more than a dozen people made credible sexual harassment allegations against four sitting lawmakers. In the 2018 session, former Democratic Rep. Steve Lebsock was expelled from office.

Employers may want to consider the following in the wake of the "Me Too" movement and other similar issues.

- Non-disclosure provision – under an NDA, one or both parties agree that they will not disclose certain types of information (eg, restricting the parties from discussing settlement negotiations, the settlement amount, or the underlying claims). This has been controversial, as it has been seen as a tactic to "silence" victims of sexual harassment; however, it is a good way to protect the confidentiality of settlements.
- Non-disparagement provision – a narrower non-disparagement provision in an agreement can restrict parties only from engaging in defamation, libel, or slander. A broader provision can restrict a party from making statements that would injure the other party's reputation, which could restrict a party from making even truthful statements.

Under the Colorado Anti-discrimination Act, "harass" means to create a hostile work environment based on a protected class, including sex, sexual orientation, or transgender status. Harassment is not an illegal act unless a complaint is filed with the appropriate authority, and subsequently this authority fails to initiate a reasonable investigation of the complaint and take prompt remedial action if appropriate (C.R.S. §24-34-402).

A survey of sexual harassment awards and settlements in cases involving the Equal Employment Opportunity Commission (EEOC) in the 10th Circuit Court of Appeals (which covers Colorado) confirms these suits and settlements can be costly to employers. Settlement terms can often include numerous nonfinancial requirements; eg, providing harassment training to supervisors and employees, updating policies and practices, a written apology to the victimized employee, posting additional notices in the workplace about employees' right to be free from harassment, and continued EEOC monitoring of the company's practices.

In addition, the recent tax reform bill takes away the tax deduction that used to be allowed for any settlement or payment related to sexual harassment or abuse if subject to a non-disclosure agreement.

1.3 Decline in Union Membership

Union membership in the private sector has been on the decline in the USA for decades. In the private sector, the percentage of unionized workers in the USA has fallen to 6.4% as of 2018. In Colorado, however, union membership saw a slight increase to 12% in 2018, up from 11% in 2017. This may be due to an increase in union membership among teachers, nurses, counsellors, and other similar professionals in the education industry, particularly in the Denver metro area.

Unlike approximately half of the USA, Colorado does not have "right to work" laws in place, which provide that no person within that particular state can be compelled, as a condition of employment, to join or not join or pay dues to a labor union. However, Colorado's Labor Peace Act represents a hybrid right-to-work system in that it does prohibit union/employer collective bargaining agreements calling for "closed shops," in which only union members may be hired by the employer. Further, and similar to other right-to-work states, employees are generally not required to join a union or pay dues upon being hired and they can still enjoy the same pay/benefits as union member employees, but the employees who decline to join the union are not entitled to union protections (such as representation in employment disputes).

Under the Act, however, employees may override the Act's limited right-to-work provisions by becoming an "all-union shop." Specifically, if 75% of the employees at issue vote in favor of having an all-union shop in an election overseen by Colorado's Department of Labor, then the shop becomes a typical "union shop" in which a new employee must join the union and pay dues within a specified period of time. Likewise, the Department of Labor oversees petitions and elections to revoke or remove a shop's "all-union shop" status based on a lack of employee support for it.

1.4 National Labor Relations Board

Under the Trump administration, and as of 2017, the National Labor Relations Board, as reconstituted with a Republican majority, has made (and continues to make) sweeping changes to prior Board precedent from the Obama administration that have tilted the scales dramatically in favor of employers. As just one example, the Board has reversed its prior precedent holding that employer policies, handbooks, and the like can violate the National Labor Relations Act if they could be "reasonably construed" by an employee as prohibiting or limiting the employee's exercise of protected rights under the Act. Now, the Board balances two factors when evaluating employer handbooks and policies: (i) the

nature and extent of the policy's impact on protected rights and activities, and (ii) the employer's legitimate justifications for the policy. The Board also now considers certain policies that were previously deemed illegal to be presumptively lawful, including rules and policies mandating workplace civility.

Another telling example is the reconstituted Board's rejection of Obama-era precedent that facilitated union organization and recognition of smaller, "micro" bargaining units. Previously, if a union petitioned for a representation election among a small group of employees, and the employer contended that the proposed unit wrongfully excluded other employees that should have been included in the bargaining unit, the employer would bear the burden of showing that the small group of employees shared an "overwhelming" community of interest with the excluded employees in order to expand the bargaining unit to those employees. Now, the Board has reverted back to the traditional community of interest standard, which only requires the Board to determine whether the group of employees a union seeks to represent is "appropriate" for collective bargaining.

These are just two examples of the Board's recent holdings that have expanded employer rights under the Act (or at least returned such rights to the pre-Obama Board status quo). Other major anticipated changes include the Board's likely limitation or outright reversal of its prior Purple Communications decision (prohibiting employers from curtailing employee use of employer email systems for legal, non-business reasons), and its exercise of its rulemaking authority to redefine and limit "joint employer" liability under the Act.

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

Colorado employers must take care to understand and properly treat various kinds of relationships in the employment context. Some areas where Colorado employers should give careful attention are (i) in clearly understanding the nature of the employment relationship and how it can change, (ii) in the proper classification of workers, (iii) in the consideration of the pros and cons of the professional employer organization (PEO) relationship, and (iv) in labor relations, each of which is discussed below.

In Colorado, an employment relationship is presumed to be at will. The at-will relationship can be changed by contract. An express contract for employment may be made and amended either orally or in writing, and can also be implied in fact (ie, created by conduct, including through employment handbooks or other documents showing company policies and practices).

For example, there are many Colorado laws (including statutory law, common law, and jury instructions) governing when an employee must be treated as an employee versus an independent contractor, which are applicable in different circumstances. These include the Colorado Employee Misclassification Act, the Colorado Wage Claim Act, the Colorado Employment Security Act, and the Colorado Worker's Compensation Act. In general, a common denominator in these various tests for distinguishing a contractor from an employee is the degree of control exercised over the worker. However, given the various tests applicable in different circumstances, Colorado employers must carefully classify workers to ensure proper classification, as failure to do so can result in substantial financial liabilities. The Colorado Employee Misclassification Act, for example, provides for penalties of up to USD5,000 per misclassified employee for the first misclassification with willful disregard, and up to USD25,000 per misclassification for subsequent willful misclassifications, along with other penalties.

Another area where Colorado employers need to be clear on legal rights and obligations in the employment relationship is in the decision whether to enter into a PEO relationship. A PEO partners with a company as a "co-employer." A PEO and an employer share employment-related responsibilities pursuant to an agreement allocating each entity's responsibilities, subject to Colorado state law requirements governing the PEO relationship. While the roles and responsibilities of the co-employers can vary, typically the PEO manages employer-related administrative functions, including payroll, HR functions, and benefits. The employer typically manages the day-to-day direction and control of the employees, including hiring, reassigning, and discharging. There are various pros and cons to the PEO relationship, as well as varying rights and obligations under the law and under contractual agreements with PEOs that Colorado employers should carefully consider in determining whether and, if so, how to enter into an employment relationship.

2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity

Colorado Revised Statute Title 8 contains the laws governing employer-employee relationships in Colorado, including wages, workers' compensation and employment security (unemployment compensation). Colorado's Administrative Regulations (CCR) include rules governing employment-related matters. Specifically, 7 CCR 1101 to 1103 includes regulations concerning wages, employment security (unemployment compensation), employment verification, restrictions on the use of credit reporting, social media, and worker's compensation. Depending on the specific provision, these laws generally cover employees.

Colorado has a misclassification statute for independent contractor status under the Employment Security Act, which provides for statutory penalties.

An individual who is and whose work is free from control and direction, under the contract for the performance and who is customarily engaged in an independent trade, occupation, profession, or business related to the performed service, is not an "employee" under Colorado law.

Colorado courts consider multiple factors when determining whether an individual is an independent contractor or an employee. A written contract between the parties may create a rebuttable presumption of an independent contractor relationship as opposed to an employee/employer relationship. For workers' compensation purposes, the signatures must be notarized.

Every contract under Colorado law contains an implied covenant of good faith and fair dealing; however, in the employment context, the Colorado Court of Appeals refuses to extend this to at-will employment contracts.

2.3 Immigration and Related Foreign Workers

For US or international companies seeking to employ foreign workers, their corporate structure may impact the immigration options (ie, visas) available for those non-U.S. citizen workers. All non-US citizens performing work in the USA that directly or indirectly benefits a US company must hold a work visa (ie, H-1B specialty occupation visa, L-1 intercompany visa). Foreign workers entering under an ESTA or B-1 business visitor visa are not permitted to perform productive labor in the USA, except in limited circumstances such as repairing manufactured goods sold by a foreign entity. Any employer seeking to sponsor a foreign worker to work in the USA must have a US federal employer ID number.

When employers are considering relocating international workers, the following factors should be considered as part of the corporate structure: (i) the nationality of the entity; (ii) the percentage of shared ownership between any foreign-owned entity and the US entity; and (iii) if a foreign entity has made any significant investments in the USA, such as opening a new office. Each of the factors above will shape the immigration options available to employees.

When foreign entities have made a significant investment of more than USD300,000 in the USA by opening a new subsidiary office or creating a new manufacturing factory, they may be permitted to sponsor "essential" workers of the same nationality to enter the USA under an E-2 visa. Whether an employee is considered essential is based upon the uniqueness of the skillsets, the availability of US workers, the salary of the prospective employee, and the educational degree of the worker. E-2 visas are unique in that the applications may be filed directly with the US Embassy abroad, which can accelerate the process.

US companies with foreign parent or subsidiary entities are permitted to transfer foreign workers who have been employed for at least a year abroad into the USA under an L-1 intercompany transfer visa if the workers are either: (i) executives or managers who have at least two direct reports with bachelor's degrees, or (ii) specialized knowledge workers who hold unique knowledge within the industry or company. L-1 workers are permitted to come and go without any constraints on how much time they spend in the USA as long as they are employed by a US employer. Currently, due to the political headwinds, L-1 visas are experiencing significant scrutiny at the USCIS, with denial rates of 40% and higher.

Foreign entities that are seeking to employ citizens of Canada, Mexico, Australia, Singapore, and Chile have unique immigration options such as the TN, E-3, and H1B1 visas that bypass conventional quotas. Each of these visas comes with its own specific constraints, such as the duration, the eligible occupations, and whether immigrant dependants are permitted to work. As multinational employers are considering their talent pool and the accessibility to move their talent around the world, companies should be aware of each country's unique immigration laws, particularly in light of recent contractions and constraints in immigration options.

2.4 Collective Bargaining Relationship or Union Organizational Campaign

Under the National Labor Relations Board's successorship doctrine, a business that acquires a unionized business is generally not bound to the collective bargaining agreement between the union and the predecessor business, but it may nonetheless have the duty to recognize and bargain with the union if there is a substantial continuity of business operations and a continuity in the workforce between the predecessor and the successor entity.

The Board will find a continuity of business operations if the new employer conducts essentially the same business as the former employer. Likewise, if the majority of employees hired are former employees of the predecessor employer, the Board will find a continuity in the workforce for purposes of successorship. Although a successor employer is bound to recognize and bargain with the incumbent union in such situations, the successor employer is still able to set the initial terms and conditions of employment without first bargaining with the union. However, if the successor employer hires all of the predecessor employees, then it is considered a "perfectly clear successor" and must bargain with the union before implementing any new terms and conditions of employment. Under the National Labor Relations Act, it is illegal for the new employer to discriminatorily refuse to hire some of the predecessor's employees based on their

union membership in order to avoid the continuity in the workforce element of the successorship doctrine.

Although successor employers are not bound by the terms of the collective bargaining agreement between its predecessor and the union, if the new employer is found to be an "alter-ego" of the predecessor, then the new employer is not only obligated to bargain with the union but is also bound by the terms and conditions of the prior collective bargaining agreement. The Board will find alter-ego status when the two enterprises have substantially identical management, business purpose, operations, equipment, customers, and supervision, as well as ownership.

Thus, for any entity acquiring another entity with a unionized workforce, the continuity of the employee workforce is the key consideration in determining whether the acquiring entity is a "successor" and required to bargain with the incumbent union. Whether a new employer may be considered an alter-ego for purposes of the Board's requirement to both recognize the incumbent union and be bound by the existing collective bargaining agreement depends on whether the old and new employers are essentially identical.

3. Interviewing Process

3.1 Legal and Practical Constraints

The Colorado Anti-Discrimination Act (CADA) prohibits all public and private employers from discriminating in their hiring practices based on disability, race, creed, color, sex (including sexual harassment), pregnancy, marital status, sexual orientation (including transgender status), religion, age (40 or older), national origin, or ancestry. Specifically, the Act prohibits employers from asking about any of these characteristics, unless based on a bona fide occupational qualification (BFOQ). Public employers are also prohibited from inquiring about political affiliation, veteran's status, or organizational membership. The Act also prohibits those employers with 25-plus employees from refusing to hire a person who is married to, or plans to marry, an employee of the employer, with exceptions.

- Social media – employers may not request the applicant to provide a username, password, or other information necessary to access a personal account or service. This does not include access to nonpersonal accounts or services that provide access to the employer's internal computer or information systems.
- Criminal history – private employers are prohibited from asking job applicants about certain arrest and conviction records.
- Credit checks – the Colorado Employment Opportunity Act prohibits the use of consumer credit information for employment purposes if unrelated to the job.
- Disability inquiries – Colorado state's Civil Rights Commission prohibits employers from asking about the existence, nature, or severity of an applicant's disability, at least until after the employer has extended an employment offer.
- The "Equal Pay for Equal Work Act" – this new law establishes a salary history ban on Colorado employers. Employers cannot ask about an applicant's salary history or rely on a prior wage rate when determining a wage rate for a position. This new law comes into effect in January 2021.
- Ban the box – the Colorado Chance to Compete Act (also known as "ban the box") prohibits employers from advertising or stating on an application that an individual with a criminal history may not apply for a position, and from inquiring into an applicant's criminal history on an initial application form. The law applies to an employer with 11 or more employees.

4. Terms of the Relationship

4.1 Restrictive Covenants

Colorado law voids all restrictive covenants in the employment context (and has been applied in related contexts, such as franchisor/franchisees and independent contractors) unless: (i) they involve the sale of a business, (ii) they protect trade secrets, (iii) they provide for the recovery of an employee's training costs if the employee works for the employer for less than two years, or (iv) they restrain management or executive employees or members of the professional staff. The restrictions still must be reasonably limited in temporal and geographic scope, and not be overly restrictive.

Colorado courts view customer and employee non-solicitation agreements as a form of a covenant not to compete, which is generally void unless a statutory exception applies.

Colorado courts have held that the "trade secret" exception to Colorado's overall prohibition against restrictive employment covenants may apply if the customer non-solicit is also reasonably limited in temporal and geographical scope.

As to scope, Colorado courts have held that a one-year non-solicit that did not contain any geographic limitation could be enforced, but the court revised the covenant to restrict its reach to a reasonable geographic area.

Where an employee non-solicitation provision is limited to prohibiting only initiating contacts or direct, "active" solicitation of the employer's employees, it is enforceable, despite the invalidity of an accompanying non-competition provision. Courts will also enforce broader employee non-solicitation agreements that fall within applicable statutory exemptions.

If an employer fires an employee in bad faith or without cause shortly after the employee signs a restrictive covenant, the consideration for the restrictive covenant fails and the covenant is unenforceable for lack of consideration.

Colorado courts will enforce choice of law clauses in restrictive covenants, unless a party can prove: (i) application of the chosen state law would be antagonistic to a fundamental policy of Colorado, and (ii) Colorado has a materially greater interest than the chosen state in deciding the enforceability of the restrictive covenants.

Colorado courts have discretion to reform unreasonable geographical restrictions in restrictive covenants. However, where a non-competition agreement lacks both duration and geographic scope, a Colorado court is unlikely to rewrite it to make it enforceable.

Colorado bars any covenant not to compete that limits a physician's right to practice medicine, except that all other provisions of the agreement are enforceable, including provisions requiring the payment of damages reasonably related to the termination of the agreement. Provisions of a covenant not to compete that require the payment of damages upon termination may include damages related to competition. After termination of an agreement, a physician may disclose his or her continuing practice of medicine and new contact information to a patient with a rare disorder to whom the physician was providing consultation or treatment prior to termination. Neither the physician nor the physician's employer is liable for damages from the disclosure or from the physician's continued treatment of the patient after termination.

4.2 Privacy Issues

Privacy laws from state-to-state differ greatly when it comes to privacy considerations in the employer-employee relationship. In Colorado, there are several key privacy issues employers must consider, including issues concerning drug screening, employee monitoring, off-duty conduct, social media accounts, and credit checks. Each of these issues is discussed below.

As to drug screening, Colorado does not have a general law governing drug and alcohol testing of employees of private employers. As a matter of state law, however, Colorado has legalized marijuana, both for medical and recreational use. The law is not yet settled as to what marijuana legalization means for employers conducting drug testing, although employers are free to discipline or discharge employees who test positive for marijuana use – notwithstanding the decriminalization of marijuana under Colorado (but not federal) law. Note that there may be local drug and alcohol testing requirements; for example, the City of Boulder has drug and alcohol testing requirements which govern the circumstances in which an employer may request a drug/alcohol test from an employee.

Regarding employee surveillance, Colorado law requires the consent of at least one party to a conversation in order for telephone or wire communications to be recorded. As a best practice, Colorado employers should have written policies prohibiting any expectation of privacy on the part of any employee, whether in items or materials brought on the employers' premises or related to the employer's information systems and devices.

As to off-duty conduct, with limited exceptions, the Colorado Anti-Discrimination Act prohibits employers from terminating employees for engaging in lawful activity off premises during non-work hours. As noted, however, the Colorado Supreme Court has ruled that a termination for use of medical marijuana outside the workplace after the employee tested positive during a random drug test did not violate this statute.

As to social media, subject to certain exceptions, Colorado law generally prohibits employers from (i) suggesting, requesting, or requiring that an employee or applicant disclose any user name, password, or any other information that provides access to the individual's personal accounts or personal electronic communications devices; (ii) compelling an employee or applicant to add anyone as a "friend" or to their list of contacts; (iii) requiring, requesting, suggesting, or causing an employee or applicant to change their privacy settings associated with a social networking account; or (iv) discharging, disciplining, or discriminating against any employee or applicant for refusing or failing to disclose such information.

4.3 Discrimination, Harassment and Retaliation Issues

The Colorado Anti-Discrimination Act provides protection against harassment, discrimination and retaliation based on disability, race, creed, color, sex (including sexual harassment), pregnancy, marital status, sexual orientation (including transgender status), religion, age (40 or older), national origin, or ancestry.

Employers can establish safeguards against harassment and discrimination through multiple avenues; eg, establishing and maintaining anti-harassment, anti-discrimination, and anti-retaliation policies; handbooks and procedures that all employees are required to read and sign; periodic trainings; posting notices in the workplace about employees' right to be free from harassment; and continued monitoring of the company's practices.

In the released statistics for fiscal year 2018, the Equal Employment Opportunity Commission reported a 13.6% increase in sexual harassment charges over the previous

year and a 50% increase in lawsuits that include allegations of sexual harassment. Furthermore, the EEOC noted that its sexual harassment webpage has seen double the number of visits since the #MeToo movement gained momentum. Employees are becoming more willing to come forward with harassment complaints, and employers are encouraged to revisit and update their approach to handling and eliminating sexual harassment in the workplace. This includes encouraging bystander intervention and reporting.

Employers may want to consider setting up an 800 number or using a hotline service that allows employees to anonymously report potential harassment or workplace misconduct 24/7. The hotline need not be staffed as long as it permits employees to leave a message.

4.4 Workplace Safety

Colorado is not a "state-plan" state, meaning it does not have a federally approved occupational safety and health program. As such, the Federal Occupational Safety and Health Act (OSHA) governs workplace safety and health in the private sector.

Colorado insurance laws set certain requirements for employee wellness and prevention programs. Wellness and prevention programs are designed to promote health or prevent disease. Health insurance and health benefits providers may offer incentives or rewards to encourage individuals to participate in such programs. Wellness incentives may be based on participation in the programs or on completion and satisfaction of certain goals or outcomes, subject to Health Information and Privacy (HIPAA) laws.

Smoking in the Workplace

The Colorado Clean Indoor Air Act prohibits smoking, including the use of electronic smoking devices, in any indoor area, including any place of employment. Smoking is also prohibited in hotel/motel rooms and assisted living facilities. The limited exceptions where smoking is allowed include a business's outdoor areas, private homes and vehicles, and establishments intended to allow smoking, such as cigar bars. Smoking is prohibited within 25 feet of any business's entryway (ie, outside the front or main doorway and a 25-foot radius outside the doorway). Employers exempt from the law must provide a smoke-free work area for each employee requesting such.

Good Samaritan Law

Under Colorado's Good Samaritan law, a person who sees an emergency situation and proceeds to give emergency care, in good faith and without compensation, will not be liable for injury resulting from that care, so long as the bystander does not provide grossly negligent care or engage in willful and wanton behaviour that results in damages.

Automated External Defibrillators (AEDs)

With the exceptions of schools, Colorado does not have a specific law requiring public places to have AEDs; however, there is a law that addresses any entity that chooses to place one within its confines. If an employer has an AED on the premises, it must ensure that expected users receive appropriate training. It also must report the existence of the AED on the premises, the type of AED, and its location to the applicable emergency communications or vehicle dispatch center, along with other specified requirements under Colorado law.

At-Work Fatality

Employers are required under Colorado law to immediately report workplace fatalities to the Colorado Division of Workers' Compensation as well as their insurers. Employers, or their insurers, have 20 days to notify the Division whether they admit or contest liability for the fatality. Failure to file such notification within 20 days may result in monetary liability.

Workplace Violence

Employers may seek protective orders under Colorado law and courts are authorized to issue protective orders in the name of the business for the protection of the employees. Certain employers in Colorado are required to provide any employee seeking to protect himself or herself from domestic abuse or violence, stalking or sexual assault up to three days' leave per twelve-month period. Covered employers cannot terminate, retaliate against or otherwise discriminate against employees who exercise this right.

Guns and Weapons in the Workplace

Colorado law prohibits an individual from carrying concealed weapons outside a person's own home, car, business or property unless the person has a concealed carry permit. However, the concealed carry permit law explicitly does not "limit, restrict, or prohibit in any manner the existing rights of a private property owner, private tenant, private employer, or private business entity." Employers may, thus, limit or prohibit bringing guns and weapons into the workplace.

4.5 Compensation and Benefits

Mini-COBRA Notice

All Colorado employers who provide insured health plan benefits must, in addition to federally required notice, provide written notice to eligible terminated employees and dependants of their right to elect continued health insurance coverage. The notice must be signed by the employee or postmarked within ten days of termination and mailed to the employee's last-known address.

The federal Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) requires the group health plan administrator of an employer with 20 or more employee equivalents to provide a COBRA election notice to a quali-

fied beneficiary within 14 days after becoming aware of the employment and benefits termination. If the employer is not the administrator of the health plans, it must notify the administrator within 30 days of the termination.

Colorado Employment Security Act
The Colorado Employment Security Act (CESA) governs unemployment insurance compensation. The unemployment insurance program provides temporary and partial wage replacement to unemployed workers whose unemployment is resulting through no fault of their own. Certain entities are not employers under CESA, including certain nonprofits, hospitals, higher education institutions, agricultural employers and domestic services employers.

The CESA enumerates factors to help in the determination of whether a worker is considered an employee or an independent contractor to be eligible for unemployment insurance. Variations and exceptions to eligibility exist, including education institutions, athletes, unlawful residents and seasonal workers.

The Employee Retirement Income Security Act (ERISA) does not provide a statutory limitations period for civil actions except for breaches of fiduciary duty. Thus, the most analogous state statute of limitations for Colorado applies for ERISA suits. In Colorado, that limitation period is one year.

5. Termination of the Relationship

5.1 Addressing Issues of Possible Termination of the Relationship

Colorado is an at-will employment state; however, Colorado recognizes exceptions to the doctrine, including violation of public policy, wrongful constructive discharge, fraudulent inducement, and breach of implied contract.

For an employee to establish a prima facie case for wrongful discharge under the public policy exception, an employee must establish four elements: (i) the employer directed the employee to perform an illegal act as part of the employee's work-related duties; (ii) the action directed by the employer would violate a statute or clearly expressed public policy; (iii) the employee was terminated as a result of refusing to perform the illegal act; and (iv) the employer was aware or should have been aware that the employee's refusal was based upon the employee's reasonable belief that the act was illegal. Additionally, in Coors Brewing Co. v Floyd, 978 P.2d 663, 667-668 (Colo. 1999), the Supreme Court of Colorado reiterated that this exception protects an employee from having to choose between committing a crime and losing his or her job. It does not protect those who perform the illegal act required by his or her employer and is then fired to cover up the employer's complicity in a crime, nor an individual who participates in the crime but does not blow the whistle on the employer. Further, if a wrongful discharge claim is premised on public policy that is embodied in a particular statute (such as a federal anti-discrimination statute), and the statute itself provides its own remedial scheme for violations, then employees cannot maintain a claim for wrongful discharge under the public policy exception based on violations of the statute.

An employee may establish wrongful constructive discharge if the employee can present sufficient evidence that the resignation from employment was due to the employer's deliberate actions that made the working conditions so intolerable that any reasonable person in the employee's position would have no choice but to resign.

An employer's right to terminate an at-will employee without cause will not protect the employer from liability if the employer fraudulently induced the employee to accept employment.

Implied Contract Formation
Pre-hire representations
In Dorman v Petrol Aspen, Inc., 914 P.3d 909 (Colo. 1996), the Supreme Court of Colorado held that an implied employment contract could exist based on the circumstances and the provisions in the offer letter where such provisions indicated that the parties anticipated long-term employment.

Post-hire representations
Colorado recognizes that implied employment contracts may arise based on employee handbooks or personnel manuals. For example, an employee may be able to enforce the termination procedures in a personnel manual under traditional contract principles or under a theory of promissory estoppel, if applicable under the circumstances.

Disclaimers
A clear and conspicuous at-will disclaimer in policies or employee handbooks can help an employer avoid an implied contract claim. However, a court may find an employer manifested the intent to be bound by the terms of the handbook or manual if it contains mandatory termination procedures or requires just cause for termination, notwithstanding the presence of an at-will disclaimer.

Mass layoff and plant closing notification laws
Colorado does not have a law regarding mass layoff and plant closing notifications, but employers are still subject to the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. § 2101 et seq.

6. Employment Disputes: Claims; Dispute Resolution Forums; Relief

6.1 Contractual Claims

In Colorado, an employment relationship is presumed to be at-will (ie, the employer or the employee can terminate the relationship for any reason, at any time, with or without cause or notice).

The at-will relationship can be changed by contract. An express contract for employment may be made and amended either orally or in writing, and can also be implied in fact (ie, created by conduct, including through employment handbooks or other documents showing company policies and practices).

There are also a number of unlawful reasons for terminating the employment relationship under Colorado law. In addition to the statutory prohibition on discrimination or retaliation due to protected bases (as set forth in Colorado's Anti-Discrimination Act), Colorado also recognizes public policy exceptions to the at-will rule, including for refusing to engage in illegal activity, whistle-blowing, etc.

6.2 Discrimination, Harassment and Retaliation Claims

Employers must comply with Colorado's discrimination, harassment, and/or retaliation laws, including the Colorado Anti-Discrimination Act and the Colorado Wage Equality Regardless of Sex Act.

CADA protects employees from discrimination and harassment based on a protected class and prohibits retaliation. It also contains provisions prohibiting employers from taking action based on lawful activities outside work. The protected classes under Colorado law are disability, race, creed, color, sex (including sexual harassment), pregnancy, marital status, sexual orientation (including transgender status), religion, age (40 or older), national origin, or ancestry.

The Colorado Wage Equality Regardless of Sex Act protects employees from gender discrimination in payment and compensation. Effective January 1, 2021, the Equal Pay for Equal Work Act will amend the Colorado Wage Equality Regardless of Sex Act with new prohibitions and obligations. Wage differentials between employees of different sexes who perform substantially similar work are allowed where the employer can demonstrate that the difference in wages is based upon one or more factors, including a seniority system, a merit system, a system that measures earnings by quantity or quality of production, the geographic location where the work is performed, education, training, or experience to the extent that they are reasonably related to the work in question, or travel, if the travel is a regular and necessary condition of the work performed.

A person may be liable under CADA if he or she aided, abetted, compelled, incited, or coerced another person into a violation of CADA; obstructed or prevented a person from complying with the provisions of CADA; attempted, directly or indirectly, to commit a violation of CADA; or discriminated against a person for opposing a discriminatory employment practice, filing a charge, or participating in a hearing or an investigation under CADA. CADA includes under the definition of "person" individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, receivers, and the state and its political subdivisions and agencies.

Colorado law prohibits an employer from terminating an employee because the employee engaged in a lawful activity off the employer's premises during nonworking hours unless (i) it is a bona fide occupational requirement, (ii) it is reasonably and rationally related to the employment activities and responsibilities of a particular employee, or (iii) it is necessary to avoid a conflict of interest or the appearance of a conflict with any responsibilities to the employer.

Additionally, Colorado law recognizes disparate treatment, disparate impact, and/or harassment claims included under CADA. Harassment is not unlawful unless a complaint is filed with the appropriate authority at the employee's workplace and such authority has failed to initiate a reasonable investigation and take prompt remedial action. The regulations to CADA make sexual orientation harassment an unlawful practice under the Act. Under CADA, "sexual harassment" includes unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature. Both hostile work environment and quid pro quo harassment are recognized under CADA.

Courts analyse CADA harassment claims under the same standards applied to claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

Vicarious Liability for Harassment

An employer is vicariously liable under CADA if the employer knows or should have known of the discrimination or harassment. An employer is strictly liable if the harassment is committed by a person with actual or apparent supervisory authority, and the employee is not required to complain to the employer.

Disability-Related Protections

Colorado provides disability-related protections pursuant to CADA. "Disability" under CADA means a physical or mental impairment that substantially limits one or more of an individual's major life activities; having a record of such impairment; or being regarded as having such an impairment. Under CADA, an impairment "substantially limits" one or more of an individual's major life activities if the individual is unable to perform, or is significantly restrict-

ed in performing, a major life activity that most people in the general population can perform. Claims under CADA are analyzed under the same principles as those under the Americans With Disabilities Act. Short-term or temporary conditions are not considered to substantially limit a major life activity for purposes of CADA liability.

Duty to Reasonably Accommodate Disabilities
CADA imposes an obligation on a covered employer to provide a reasonable accommodation to a qualified individual unless the employer can demonstrate the accommodation would impose an undue hardship.

Pregnancy Discrimination and Disabilities
CADA protects against unlawful discrimination based on an employee's pregnancy, potential to become pregnant, or pregnancy-related conditions, including miscarriage, abortion, childbirth, and recovery from childbirth. In August 2016, Colorado expanded its pregnancy protections by enacting the Colorado Pregnant Workers Fairness Act (CPWFA). Employers are now required to provide a reasonable, requested accommodation for health conditions related to pregnancy or the physical recovery from childbirth, unless the accommodation would impose an undue hardship.

6.3 Wage and Hour Claims

Most of Colorado's wage and hour laws are contained in Title 8, Article 4 of the Colorado Revised Statutes and in the Colorado Code of Regulations. Wage protections include minimum wage, overtime, and pay equality requirements. Each area will be discussed in turn.

Minimum Wage
Under the Colorado Constitution, the state minimum wage is adjusted annually due to inflation. As of 2017, the general statewide minimum wage was increased to USD11.10 per hour and is due to increase to USD12.00 per hour in 2020. The minimum wage will be annually adjusted according to the Consumer Price Index for Colorado. Colorado also allows a tip credit, permitting employers to pay a reduced minimum wage where the cash wage plus tips is at least the minimum wage rate.

Overtime
Colorado also has a Minimum Wage Order applicable to various industries and categories of employees. Where applicable, the Minimum Wage Order requires employers to pay overtime to non-exempt employees at the rate of 1.5 times the regular hourly rate for hours in excess of 40 hours per workweek, on a daily basis for hours worked over 12 hours per day, or for 12 consecutive hours, whichever results in the greatest wage payment to the employee.

Wage and Hour Enforcement
The Colorado Department of Labor and Employment ("Department") has power to enforce the Minimum Wage Order and to investigate matters pertaining to wage payment. Employees have the right to file complaints with the Department. An employee may also file a civil action to recover unpaid wages, costs, and attorney's fees. The minimum wage statute also provides for criminal penalties; employers failing to pay minimum wage are guilty of a misdemeanor, punishable by a fine of USD100-USD500 and/or imprisonment up to a year.

Pay Equality
Finally, Colorado employers should also note that Colorado state law prohibits employers from discriminating on the basis of sex in the payment of wages. Colorado state law also prohibits discrimination in the payment of wages (and other terms and conditions of employment) due to other protected bases.

6.4 Whistle-blower/Retaliation Claims

Colorado recognizes retaliation and/or whistle-blowing claims under CADA.

An employer is prohibited from retaliating against a person who has (i) opposed a discriminatory practice under CADA; (ii) filed a charge under CADA; or (iii) testified, assisted, or participated in an investigation, proceeding, or hearing under CADA. Courts analyze retaliation claims under CADA in the same manner as claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

6.5 Dispute Resolution Forums

Depending on the claim, Colorado state law claims may be heard in different fora, including administrative agencies (including the Colorado Civil Rights Division) for regulatory claims, state or federal district courts for common law and statutory claims, and alternative dispute methods, including mediation or arbitration, where agreed upon by the parties.

Arbitration can be either mandatory or voluntary. Mandatory arbitration can be required by statute or by an applicable contract's language. Under Rule 25 (R-25) of the American Arbitration Association's (AAA's) Commercial Arbitration Rules and Mediation Procedures, "the arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary." As such, they may not be fully confidential. The Federal Arbitration Act of 1925 (FAA) does not impose confidentiality requirements on the parties. Similarly, in Colorado, the Colorado Uniform Arbitration Act (CUAA) does not provide for the confidentiality of arbitration proceedings. Colorado courts also tend to uphold the admissibility of evidence from an arbitration in a subsequent proceeding. As such, if the parties wish to maintain the confidentiality of arbitration proceedings, they should include this requirement in the arbitration clause. Under Colorado law, grounds

for vacating an arbitral award or modifying an arbitral award in Colorado are limited to certain situations. Otherwise, a tribunal's judgment is final and binding on the parties.

Mediation

The Uniform Mediation Act (UMA), a model law promulgated by the National Conference of Commissioners on Uniform State Laws, is meant to protect the confidentiality of mediation proceedings and provides that, if mediation communications are confidential and privileged, they will not be subject to discovery or admission into evidence in a formal proceeding. Colorado has not adopted the UMA, but it did enact the Colorado Dispute Resolution Act, which also protects the confidentiality of mediation proceedings. Any party or the mediator must not voluntarily or be compelled to disclose any information concerning mediation communications or communications provided in confidence to the mediator, with limited exceptions.

6.6 Class or Collective Actions

Disputes over unpaid wages are one of the most common subjects of class and/or collective actions in the employment law context. Claims for unpaid wages under the federal Fair Labor Standards Act (FLSA) may proceed as a "collective action," in which a group of "similarly situated" employees may collectively assert claims for unpaid wages. If the collective action is conditionally certified by the court, then prospective collective action members must "opt in" to the action in order to become bound by the judgment in the lawsuit. Typically, at the end of discovery, the court will conduct another review of the propriety of the collective action to determine whether the collective action members are sufficiently "similarly situated" in order to proceed with their claims collectively.

In order to sue as a group for unpaid wages under Colorado's Wage Act, aggrieved employees must satisfy the more exacting class action standards under Rule 23 of either the federal or Colorado rules of civil procedure by showing that (i) the proposed class is so numerous that joinder of all members is impracticable, (ii) there are questions of law and fact common to the class, (iii) the claims or defences of the representative party are typical of the claims or defences of the class, and (iv) the representative parties will fairly and adequately protect the interests of the class. If the court certifies the class action, then all class members are parties to the class unless they affirmatively "opt out" of the lawsuit.

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Regardless of whether the action is a collective action under the FLSA or a class action under Colorado law, the employer's damages exposure is significant. Under the FLSA, employers may be subject to liquidated damages in the form of both the actual amount of unpaid wages plus additional damages in the amount of the unpaid wages, essentially resulting in double damages. Colorado law likewise provides for statutory penalties for unpaid wages. However, under recent United States Supreme Court precedent, employers may now legally enter into arbitration agreements with employees as a condition of employment in which the employees expressly waive the right to pursue class or collective actions, thereby requiring employees to submit claims for unpaid wages to individualized arbitration. This represents a significant victory for employers looking to mitigate or minimize their risk to being exposed to costly and protracted class/collective actions in the future.

6.7 Possible Relief

Employees may bring a wide range of various claims for relief under Colorado law, including claims under Colorado common law, statutory claims, and regulatory relief. Examples of common law claims include claims for breach of contract, breach of privacy, and retaliatory discharge; these types of claims can allow recovery for compensatory and punitive damages. Examples of statutory and regulatory claims include claims for payment under the state's wage and hour and discrimination statutes. In addition to compensatory and punitive damages, statutory and regulatory claims may also allow for other additional remedies, including recovery of front pay, back pay, liquidated damages, and/or attorney's fees and costs. For more details about the relief available for any particular claim, employers should consult the specific Colorado laws relating to that claim.

Depending on the claim, Colorado state law claims may be heard in different fora, including administrative agencies (including the Colorado Civil Rights Division) for regulatory claims, state or federal district courts for common law and statutory claims, and alternative dispute methods, including mediation or arbitration, where agreed upon by the parties.

7. Extraterritorial Application of Law

There is no information relevant to this section.