Holland & Hart

Mark Wiletsky

Partner
303.473.2864
Boulder
mbwiletsky@hollandhart.com

Shifting Landscape: New Laws Significantly Impact Colorado Employers

Insight — June 7, 2023

During this legislative session, Colorado enacted more protections for employees in the workplace, including redefining what constitutes unlawful harassment, restricting confidentiality agreements, expanding the ability to use paid sick leave, and addressing job posting requirements.

Polis signed into law the Protecting Opportunities and Workers' Rights (POWR) Act (SB23-172), Additional Uses of Paid Sick Leave (SB23-017), and the Ensure Equal Pay for Equal Work Act (SB23-105). POWR and Additional Uses of Paid Sick Leave go into effect August 7, 2023 and Ensure Equal Pay for Equal Work Act goes into effect January 1, 2024. These laws, and POWR in particular, make considerable changes to the obligations and requirements of employers in Colorado. Now is a good time to revisit any form agreements used with current or prospective employees (*e.g.*, settlement agreements, employment agreements, etc.) and employee handbooks, update anti-harassment and complaint procedures and plan for anti-harassment training, and assess your internal job posting process.

POWR ACT

POWR substantially expands Colorado's anti-harassment law and imposes restrictions on confidentiality agreements. Here's a summary of the key changes:

- **Nondisclosure/Confidentiality Provisions.** Agreements, including separation and settlement agreements, that limit current or prospective employees from discussing discriminatory or unfair employment practices are void unless:
    1. the provision applies equally to the employer;
    2. the provision expressly states that it does not restrain the employee from disclosing the underlying facts of any alleged discriminatory or unfair employment practice (including disclosure to immediate family members, health providers, or religious advisors, among others) and that such disclosure does not constitute disparagement;
    3. if the agreement includes a non-disparagement provision, the agreement states that an employer cannot enforce a non-disparagement or nondisclosure provision (or seek damages under the same) if the employer disparages an employee or prospective

employee;

4. if the agreement includes a liquidated damages provision, such liquidated damages meet requirements listed in the statute: the damages must be reasonable and proportionate in light of the anticipated economic loss, not punitive, and varied based on the nature or severity of the breach; and
5. the agreement includes an addendum attesting to compliance with the law signed by all parties.
6. While the law does not expressly apply to former employees, it is nevertheless worth consulting with counsel before preparing nondisclosure provisions, even if the agreement is entered into with a former employee.

Moreover, the law (once effective) may allow confidential settlement agreements entered into after August 7, 2023 to be used as evidence against employers in civil actions to support punitive damages if one or more agreements that included a nondisclosure provision involved conduct of the same individual(s) who are alleged in the action to have engaged in the discriminatory or unfair employment practice.

- **Workplace Harassment.** Federal law has long required employees to establish that harassment based on race, sex, or other protected characteristics was either severe or pervasive. In other words, an offhand comment or comments that are offensive may not be enough to establish a hostile work environment. The POWR Act eliminates that requirement. If the conduct or communication has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment, then an employee no longer needs to show that the conduct or communication was severe or pervasive; in other words, one comment or a single, non-severe incident may give rise to a claim. POWR further clarifies that the nature of the work or the frequency with which harassment in the workplace occurred in the past is no longer relevant. Petty slights, minor annoyances, and lack of good manners can meet the new standard for unlawful harassment depending on the totality of circumstances, with various factors listed in the statute. Finally, the law codifies a common affirmative defense against claims of harassment by supervisors only if certain conditions are met. Among other requirements, an employer must show that it had a program in place to prevent, deter, and protect from harassment; the program was communicated to employees; and the employee(s) claiming harassment unreasonably failed to take advantage of the program.
- **Recordkeeping.** Personnel and employment records (requests for accommodation, employee complaints, applications for employment, etc.) must be retained for five years after the record is received, created, or the date of personnel action about which the record pertains or of the final disposition of a charge of discrimination or related action. Moreover, employers must

maintain a designated repository of all written or oral complaints of discriminatory or unfair employment practices that includes: (1) the date of the complaint, (2) the identity of the complaining party, (3) if the complaint was not made anonymously, (4) the identity of the alleged perpetrator, and (5) the substance of the complaint.

PAID SICK LEAVE

The new law expands the reasons for which employees may use paid sick leave under the Colorado Healthy Families and Workplaces Act (HFWA) to include leave for an employee to:

- grieve, attend funeral services or a memorial, or deal with financial and legal matters that arise after the death of a family member; and
- care for a family member whose school or place of care has been closed—or to evacuate a place of residence—due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected occurrence or event that results in closure or the need to evacuate.

JOB POSTING REQUIREMENTS

Under this amendment to the Equal Pay for Equal Work Act, internal posting requirements apply to any "job opportunity" (with certain exceptions) rather than "promotional opportunities" and must include compensation, benefits, and when the application window is anticipated to close. Below is a list of key changes:

- **Announcing Job Opportunities.** Employers must make reasonable efforts to announce or post "job opportunities" to all employees on the same calendar day and prior to the date on which the employer makes a decision. This does not apply to employers with no physical presence in Colorado and fewer than 15 employees working in Colorado, all of whom work only remotely; for those employers, through July 1, 2029, they are only required to provide notice of remote job opportunities. We will have to wait for additional rule-making or interpretive guidance to understand what is expected of such employers after July 1, 2029.

  While "job opportunities" is seemingly broader than "promotional opportunities," employers will be relieved to know that the definition of a "job opportunity" appears to exclude "in-line" promotions. As a reminder, the current rules and interpretive guidance generally require employers to post notices even for so-called in-line promotions, when an employee moves (for example) from a level one to a level two in the same position. That created a great deal of difficulty for dealing with otherwise routine movement by employees. Now, "job opportunity" is defined as "a current or anticipated vacancy for which the employer is considering a candidate or candidates or interviewing a candidate or candidates or that the employer externally posts." And "vacancy" means an "open position, whether as a result of a newly created position or a vacated position." Moreover, the new law specifically excludes "career progression" (i.e., in-line promotions) and "career

development." While these terms are all defined, they are also subject to multiple interpretations, so it will be important to review any guidance or rules issued by the Colorado Division of Labor and Employment.

However, for positions with "career progression," employers will be required to disclose and make available to all eligible employees the requirements for career progression, in addition to each position's terms of compensation, benefits, full-time or part-time status, duties, and access to further advancement. The law does not provide any detail or guidance on how or when or in what form such information must be disclosed.

- **Announcing New Hires.** Employers must make reasonable efforts to announce or post, within 30 days after a candidate begins work, the following information to employees with whom the candidate will work regularly: (a) name of the candidate, (b) the candidate's former job title (if an internal hire), (c) the new job title, and (d) information on how employees may demonstrate interest in similar job opportunities in the future, including identifying individuals or departments to whom the employees can express interest in similar job opportunities.

TAKEAWAYS AND NEXT STEPS

- Revisit your anti-harassment policies and complaint procedures with counsel to ensure that, if sued by an employee for workplace harassment, you will be entitled to the statutory affirmative defense noted above. It may also be a good time to conduct anti-harassment training to mitigate the risk of such a claim. We also recommend revisiting your training program to emphasize that even a single offensive comment or incident could result in a lawsuit.
- Review your settlement and other employment agreements with counsel and revise as necessary to avoid potential penalties ($5,000 per violation) and other damages available under POWR with respect to nondisclosure and confidentiality provisions. Colorado is following the lead of other states with similar provisions, so if your organization has employees in multiple jurisdictions, be sure to check the laws in those jurisdictions as well.
- Revise your employee handbooks and policies concerning paid sick leave to include the additional qualifying uses, or otherwise note that the company will provide leave for all situations prescribed by HFWA. Employers should post in the workplace, and provide to remote employees, a copy of the Colorado Workplace Public Health Rights Poster that is available here (along with other required posters). We anticipate the Department of Labor and Employment will update this poster this year.
- Reassess your internal job posting procedures, identify jobs with "career progression" that may require standing disclosures, and consider a process for announcing new hires to the team with whom they will likely work regularly.

Subscribe to get our Insights delivered to your inbox.