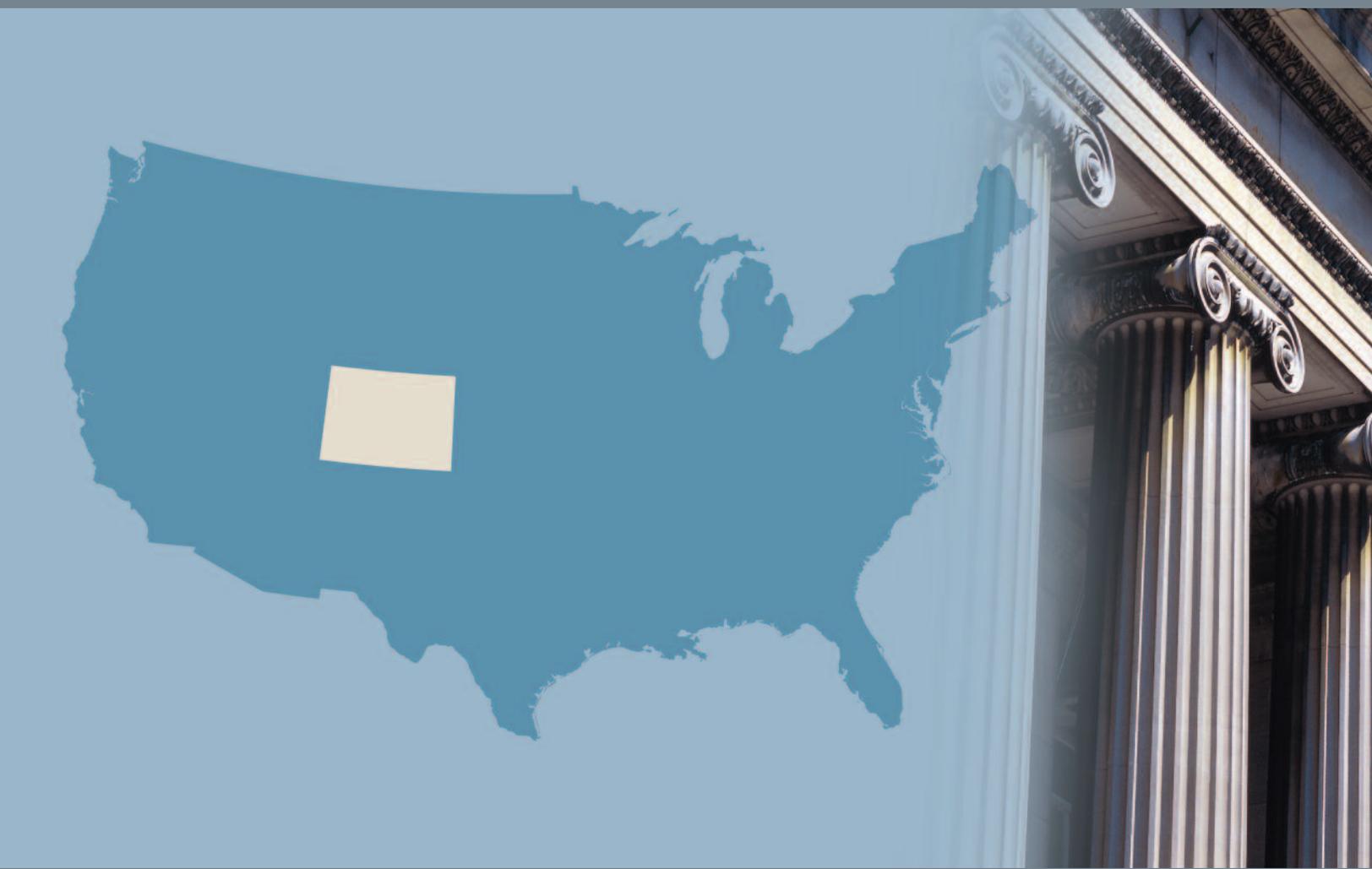


Labor and Employment Laws in the State of Colorado



**ON THE FRONT LINES
OF WORKPLACE LAWSM**

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This booklet is intended to provide an overview of the most important parts of Colorado state employment laws. It is not intended to be legal advice for any specific situation or set of facts. Whenever you are dealing with any employment related situation it is always a good idea to seek the advice of competent legal counsel.

I. INTRODUCTION

This booklet was written to identify major employment laws of the State of Colorado applicable to private employers. It is not intended to provide complete coverage of the state statutes referenced or a comprehensive review of legal issues. Other potential sources of legal authority such as court decisions, federal law, and local ordinances also may need to be considered, depending upon the situation. As a general rule, when an employer is subject to both federal and Colorado law, the law which imposes the higher standard on employers or greatest protection for employees will apply.

The Colorado Department of Labor and Employment's (CDLE) Division of Labor administers and enforces many of the laws cited below. The Colorado Civil Rights Division, part of the Department of Regulatory Agencies, administers and enforces many of Colorado's anti-discrimination laws.

II. HIRING AND AUTHORIZATION TO WORK

A. State Directory Of New Hires

To facilitate child-support enforcement, every employer must submit to the state directory of new hires a copy of the W-4 form or an equivalent form for each new employee hired to work in Colorado. The document must be submitted within 20 days of hire, or by the time of the first regularly scheduled payroll following hire, whichever is later. Colo. Rev. Stat. §26-13-125(3).

B. Employment Verification Law

All Colorado employers must be able to demonstrate to the state, upon request, that they are in compliance with federal requirements for verifying employees' eligibility to work. Colo. Rev. Stat. §8-2-122. In order to do so, within 20 days of hiring a new employee, an employer must complete an affirmation form created by the CDLE that the employer:

- has examined the legal work status of such newly hired employee;
- has retained file copies of the documents required by federal law (Form I-9 identity and employment authorization documents);
- has not altered or falsified the employee's identification documents; and
- has not knowingly hired an unauthorized alien.

The completed form and copies of the employee's documents must be kept for the duration of the employee's employment.

If the employer fails to submit the documents upon request or submits false or fraudulent documents, the employer may face a fine of up to \$5,000 for the first offense and up to \$25,000 for each subsequent offense.

C. Verification Requirements Under State And Local Contracts

Colorado's Public Contracts for Services and Illegal Aliens Law, Colo. Rev. Stat. §§8-17.5-101 to -102, prohibits a state agency or political subdivision from entering into, or renewing, any public contract for services with a person who knowingly employs "illegal aliens," or knowingly subcontracts with such a business. Before entering a contract, the contractor must certify it is in compliance with the law and that it participates in the federal "Basic Pilot Program" for verifying employment eligibility (also known as E-Verify) or the CDLE's "Department Program." The Department Program is based on the Colorado Employment Verification law and requires contractors to complete and retain mandated forms and to consent to audits by the department.

A state or local government contractor who learns that one of its subcontractors on the contract knowingly employs or contracts with an illegal alien must notify the subcontractor and the agency and terminate the subcontractor if, within three days, the subcontractor does not stop employing or contracting with the illegal alien.

The law authorizes the CDLE to receive and investigate complaints and to conduct random compliance audits. Penalties for violating this statute include termination of the government contract and payment for damages caused by the termination. The state may also blacklist for two years a contractor whose contract is terminated for this reason.

The City and County of Denver requires its construction and supply contractors to vouch for their existing employees' immigration status in order to bid on a contract and to use E-Verify to check the work status of new hires as a condition of holding a contract. Denver Mun. Code §20-90.

D. Keep Jobs In Colorado Act of 2013

A Colorado law dating back to the 1930s required contractors to use Colorado residents to perform at least 80% of the labor on any public works contract that was financed by state, county, school district or municipal moneys, but the law was rarely enforced. In 2013, the Colorado legislature repealed the law's criminal penalties and added provisions directing the CDLE to enforce the law by investigating complaints, imposing fines for violations and, in cases of multiple violations, initiating debarment proceedings. Colo. Rev. Stat. §§8-17-101 to -107.

The law defines "residents" as persons with a valid Colorado driver's license, a valid Colorado state-issued photo identification, or documentation that they have resided in Colorado for the last 30 days. It applies to new public works contracts for which the invitation for bids or the request for proposals is issued on or after January 1, 2014, which may be reasonably expected to exceed \$500,000 in the aggregate for any fiscal year. The law does not apply to any public works project that receives federal money. It cannot be enforced through a private right of action.

III. DISCRIMINATION

Colorado has a variety of laws that protect applicants and employees who belong to certain classes, from the traditional protected classifications based on race, sex, religion, etc., to classes of

employees an employer might not expect (e.g., parents who attend conferences at their child's school).

A. Colorado Anti-Discrimination Act

1. Generally

Under Colorado law, it is unlawful for an employer of two or more employees to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation, terms, conditions, or privileges of employment because of an individual's disability, race, creed, color, sex, sexual orientation, religion, age (over 40), national origin, ancestry, or marriage to a coworker, against anyone otherwise qualified. Colo. Rev. Stat. §24-34-402(1)(a). "Sexual orientation" is defined as "a person's orientation toward heterosexuality, homosexuality, bisexuality or transgender status or an employer's perception thereof." Colo. Rev. Stat. § 24-34-401(7.5).

Unlawful discrimination includes harassment of employees based on disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry. Colo. Rev. Stat. §24-34-402(1)(a). Regardless of the protected classification on which harassment is based, the statute specifies that harassment is not an illegal act unless a complaint is filed with the appropriate authority at the workplace, and the authority fails to initiate a reasonable investigation and take prompt, appropriate remedial action.

Regulations address harassment based on sexual orientation and specifically prohibit, among other things, intentionally causing distress to an individual by disclosing to others the individual's sexual orientation or deliberately misusing an individual's preferred name, form of address, or gender-related pronoun. 7 Colo. Code Reg. 708, Rule 81.8(A). Employers may not set standards that require an individual to dress or groom in a manner inconsistent with the individual's gender identity. Employees must be allowed to use gender-segregated facilities (e.g., restrooms, locker rooms) consistent with their gender identity.

The Colorado Anti-discrimination Act prohibits employers from attempting to discriminate, aiding or inciting a discriminatory practice, or preventing a person from complying with the law. Retaliation against any person who has opposed a discriminatory practice, filed a charge or participated in an investigation is prohibited.

2. Disability Discrimination And Medical Marijuana

Although Colorado amended its constitution to authorize the medical use of marijuana, the amendment expressly states that employers are not required to accommodate the medical use of marijuana in any workplace. Colo. Const. art. XVIII §14.

3. Marriage To A Coworker

Employers of more than 25 employees may not refuse to hire applicants or discharge employees because the person is married to or plans to marry another employee of that employer. Colo. Rev. Stat. §24-34-402(1)(h). Exceptions may be made where one spouse directly or indirectly would have supervisory, appointment, dismissal, or disciplinary authority over the other. Exceptions may also be made where one spouse would audit, verify, receive, or be entrusted with

moneys received or handled by the other, or one spouse has access to the employer's confidential information including payroll and personnel records.

4. Wage Disclosure

It is unlawful for an employer to discriminate or retaliate against any employee because the employee inquired about, disclosed, compared, or discussed the employee's wages. Employers may not require employees to agree that they will not disclose their wages and may not require an employee to sign a waiver or other document that purports to deny them the right to disclose their wage information. Colo. Rev. Stat. §24-34-402(1)(i).

5. Enforcement And Remedies

The Anti-discrimination Act does not provide the exclusive remedy for discriminatory conduct in the workplace. *Brooke v. Restaurant Servs., Inc.*, 906 P.2d 66, 68 (Colo. 1995). Individuals must, however, exhaust their administrative remedies under the Act before filing a civil action in a state district court. Colo. Rev. Stat. §24-34-306(14). The Act requires individuals to file charges of discrimination with the Colorado Civil Rights Division within six months of the occurrence of the alleged discriminatory act in order to preserve their rights under the Act.

Remedies that may be awarded against employers in employment discrimination cases brought under state law include back pay, reinstatement or front pay, and injunctive relief. Additionally, compensatory damages, punitive damages and attorneys' fees are available to a prevailing plaintiff where intentional discrimination is proven.

Caps based on the size of the employer's workforce will limit the total amount of compensatory and punitive damages that may be awarded on a claim as follows:

1 to 4 employees	up to \$10,000
5 to 14 employees	up to \$25,000
15 to 100 employees	up to \$50,000
101 to 200 employees	up to \$100,000
201 to 500 employees	up to \$200,000
over 500 employees	up to \$300,000

Any party may demand trial by jury when an employee seeks compensatory or punitive damages.

B. Lawful Off-Duty, Off-Premises Activities

The Colorado Anti-discrimination Act prohibits employers of any size from terminating employees for engaging in any lawful activity off the premises of the employer during nonworking hours. Colo. Rev. Stat. §24-34-402.5. Exceptions apply when the activity the employer limits "relates to a bona fide occupational requirement or is reasonably and rationally related to a group of employees or is necessary to avoid a conflict of interest with any responsibilities to the employer."

This law was originally created to address employee use of tobacco products away from work, but it has been applied broadly. In a lawsuit, a court may award attorneys' fees to prevailing employees if the employer had 15 or more employees in 20 or more weeks in the preceding calendar year.

C. Victim Protection Leave

Employers must permit employees who are victims of the crimes of domestic abuse, stalking, or sexual assault to take up to three days leave, paid or unpaid, to seek protective orders, obtain medical care, secure their home, seek legal assistance, or attend or prepare for court proceedings arising from the crime. Colo. Rev. Stat. §24-34-402.7. Employees must first exhaust their vacation, personal and sick leave unless the employer waives that requirement.

You must keep information related to the leave confidential, and employees who take such leave have no greater rights to continued employment and benefits than if the employee was not entitled to such leave. An employee's sole remedy for a violation of this section of the Act is to file a civil suit to recover wages and benefits that would have been due the employee up to and including the date of judgment and to recover equitable relief.

D. Same-Sex Marriage And Civil Unions

In 2013, the Colorado legislature passed the Colorado Civil Union Act (CCUA), Colo. Rev. Stat. §14-15-101 to -119, declaring that the public policy of the state, as set forth in section 31 of article II of the state constitution, recognizes only the union of one man and one woman as a marriage, while permitting unrelated, unmarried adults to enter into a civil union. The following year, the Tenth Circuit Court of Appeals, which covers Colorado, concluded that a state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union. The U.S. Supreme Court declined to hear an appeal of that decision. As a result, parties to a same-sex marriage or civil union in Colorado may be protected in the employment setting under both the Civil Unions Act and the Anti-Discrimination Act.

As noted above, the Anti-Discrimination Act prohibits discrimination based on sexual orientation and provides limited protection to individuals based on their marital status.

The CCUA extends to the parties in civil unions certain rights, protections and responsibilities that are available to spouses, including:

- protection against discrimination based upon spousal status;
- workers' compensation benefits (the survivor benefits and wage payments available to a spouse);
- unemployment benefits (the right to be treated as a family member or as a spouse);
- family leave benefits;
- life insurance policies, including the ability to cover a party to a civil union as a dependent; and

- insurance provided by a health coverage plan (the same coverage that is provided for an employee's spouse and the ability to cover a party to a civil union as a dependent).

Colorado has a version of COBRA that requires employers with group sickness and accident insurance policies insuring at least 10 employees to provide healthcare continuation coverage options to employees. Colo. Rev. Stat. §10-16-108. It now defines "dependent" to include a partner in a civil union.

Family leave policies voluntarily adopted by employers must apply to partners in civil unions as they apply to spouses.

E. Family Care Act

Colorado's Family Care Act, Colo. Rev. Stat. §§8-13.3-201 to -205, requires employers to provide to employees the same level of FMLA leave to care for an employee's partner in a civil union that is available to care for an employee's spouse. For purposes of this state law, "employer" and "serious health condition" are defined in the same way those terms are defined in the FMLA. Employers must provide leave to care for a domestic partner if the domestic partnership is registered with the employee's municipality or the state, or if the employer recognizes the individual as the employee's domestic partner.

Leave under the Colorado Family Care Act runs concurrently with leave under the FMLA and does not increase the total amount of leave an employee is entitled to under FMLA, the Colorado Act, or both. You may grant employees more leave than the statute requires. An employee who is denied such leave may recover damages or equitable relief as specified in the FMLA.

F. Leave For Illness, Bereavement, Pregnancy And Adoption

Colorado law does not require employers to provide sick pay, sick leave, bereavement pay or bereavement leave. Nor has the state enacted a medical or pregnancy leave law that applies to private-sector employees for their own medical condition or pregnancy. However, an employer that permits paternity or maternity time off for biological parents shall, upon request, make such time off available to adoptive parents and shall provide benefits and job guarantees on the same basis as they are provided for biological parents. Colo. Rev. Stat. §19-5-211.

G. Military Leave

Employees who are members of the Colorado National Guard or the reserve forces of the United States are entitled to an unpaid leave of absence of up to 15 days in a calendar year to receive military training. Employees are entitled to be restored to their same or similar positions with the same status, pay, and seniority upon completion of such leave. Colo. Rev. Stat. §28-3-609.

H. Voting Leave

On election day, employees are allowed to be absent from work for up to two hours to vote during the time the polls are open. Colo. Rev. Stat. §1-7-102. Hourly-paid employees shall be paid

for the time they are gone, and no deduction may be made from the pay of employees paid on another basis. Employers need not grant this leave to employees who are not scheduled to be on the job for three or more hours during the time the polls are open.

I. Absences For Jury Service And Participation In Legal System

State law requires employers to pay their regularly employed workers \$50 per day for the first three days of trial or grand jury service unless the employer and employee agree to a higher amount. Colo. Rev. Stat. §13-71-126. If payment is not made within 30 days after the employee tenders the juror service certificate, the employee may bring suit to recover the wages plus treble damages and attorneys' fees. Colo. Rev. Stat. §13-71-133. The law also prohibits employers from harassing, threatening, or coercing an employee, or from depriving any employee of employment or the incidents of employment because of juror service. Employers may not make demands of employees that would conflict with juror service. Colo. Rev. Stat. §13-71-134.

Employees are not entitled to employment compensation when they participate in other, unrelated areas of the legal system such as serving as a witness in a case, responding to a subpoena, or acting as a plaintiff or defendant in the courts.

J. Blacklisting

It is unlawful for any employer to maintain a blacklist, or to notify any other employer that it has blacklisted a current or former employee, for the purpose of preventing the employee from receiving employment. Colo. Rev. Stat. §§8-2-111, -114. Limited exceptions exist for certain types of financial institutions and related entities, health care employers, and employers who provide information about caregivers for persons with developmental disabilities.

K. Credit Information (Employment Opportunity Act)

An employer may not use consumer credit information about an applicant or employee, or require an applicant or employee to consent to its use of such information, unless: 1) the employer is a bank or financial institution; 2) the employer is required by law to use it; or 3) the information is substantially related to the job, the purpose of the request for the information is substantially related to the job and the purpose is disclosed to the individual. Colo. Rev. Stat. §8-2-126.

“Consumer credit information” includes any communication of information bearing on a consumer’s creditworthiness, credit standing, credit capacity, or credit history. Consumer credit information is more likely to substantially relate to job positions that set the direction for the company, handle financial information or work on contracts with federal intelligence, security, defense or space agencies.

Before using consumer credit information to deny hiring or promotion, decrease compensation, demote, or terminate an individual, an employer must provide notice to the individual. Notice must be provided to applicants in the same medium in which the application was made. Notice to employees must be in writing. The CDLE may investigate complaints and award civil penalties.

The Colorado Employment Opportunity Act applies in addition to the federal Fair Credit and Reporting Act, 15 U.S.C. §§1681 – 1681x, which requires employers to provide certain notices and obtain consent from applicants and employees before using an outside firm that provides information about an employee or potential employee’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living. The Colorado Act took effect July 1, 2013 and applies to employers of four or more workers except state or local law enforcement.

L. Employer Access To Employees’ Social Media Accounts

Under Colorado’s User Name Password Privacy Protection Act, Colo. Rev. Stat. §8-2-127, employers may not require applicants or employees to disclose their user names, passwords, or other means for accessing their personal accounts or services through a personal electronic communications device. Also, employers may not compel applicants or employees to add anyone to their list of contacts or change their privacy settings associated with a social-networking account. Employers who refuse to hire, discipline, discharge, or threaten to take such actions against an individual who refuses to disclose such information or provide access, violate the law. The CDLE may investigate complaints and impose civil penalties.

The Act does not prohibit an employer from:

- requiring employees to disclose any user name, password, or other means for accessing non-personal accounts or services that provide access to the employer’s internal computer or information systems;
- investigating, based on receipt of information about an employee’s use of a personal website or account for business purposes, to ensure compliance with securities or financial laws;
- investigating, based on receipt of information about the unauthorized downloading of the employer’s proprietary information or financial data to a personal website or account;
- accessing information about applicants and employees that is publicly available online; or
- enforcing existing personnel policies that do not conflict with the law.

This law took effect on May 11, 2013 and applies to all employers of employees in Colorado except corrections departments and state and local law enforcement agencies.

M. Personnel Files, Employee Information And References

Unlike some other states, Colorado does not have a law decreeing that private employees have a right to access their personnel files. Public employee access is addressed by statute. Colo. Rev. Stat. §§24-72-202, -203; §24-71-303.

Colorado law provides immunity from civil liability for employers who disclose information about a current or former employee’s job history or job performance to a prospective

employer at the prospective employer's or the employee's request, unless the employee can show the information provided was false and the employer knew or should have known it was false. Colo. Rev. Stat. § 8-2-114. The statute defines "performance" as:

- the suitability of the employee for reemployment;
- the employee's work-related skills, abilities and habits as they may relate to suitability for future employment; or
- the reason for the employee's separation.

The immunity applies only if employees authorized to give information are the ones who actually supply the information. Employers who provide written information to prospective employers must send a copy to the employee upon request.

N. Smoking In The Workplace

Under the Colorado Clean Indoor Air Act, Colo. Rev. Stat. §25-14-201 to -209, smoking is prohibited in any indoor area including any place of employment that is not exempted. The law provides that every employee has a right to work in an area free of environmental tobacco smoke, so if an employer owns a facility that is exempted from the smoking prohibition, the employer must provide a smoke-free work area for each employee who requests it. "Environmental tobacco smoke" is defined as "the complex mixture formed from the escaping smoke of a burning tobacco product, also known as 'sidestream smoke,' and smoke exhaled by the smoker."

O. Workplace Accommodations For Nursing Mothers Act

Colorado's Workplace Accommodations for Nursing Mothers Act, Colo. Rev. Stat. §8-13.5-101 to -104, requires all Colorado employers to provide unpaid breaks to nursing mothers or allow them to use their paid breaks to express breast milk each day for their nursing children. Employers must provide a private place near the work area, and a toilet stall is not an acceptable place. The law applies to nursing mothers for up to two years following the birth of their child.

P. Parental Involvement In K-12 Education Act

You must permit your employees to take unpaid time off to attend certain academic activities for or with the employee's child or any child for whom the employee has primary legal responsibility. Colo. Rev. Stat. §8-13.3-101 to -104. Full-time employees' leave may not exceed six hours in any one-month period or 18 hours in any academic year. Part-time employees are entitled to time off in proportion to their work hours. In the alternative, employers and employees can agree the employee will use paid leave to attend the activity and work the amount of hours of paid leave taken within the same work week.

Employees must attempt to schedule these activities outside of regular work hours and, except in an emergency, must notify their employers of the need for leave at least one week in advance. Employers may require that the leave be taken in increments of three hours or less and may require verification of the activity from the school. Generally, this Act applies to employers who employed 50 or more employees in each of 20 weeks in the preceding calendar year.

Q. Political Activity

It is unlawful for an employer to prevent employees from participating in political activities or from becoming candidates for political office. Colo. Rev. Stat. §8-2-108.

IV. WAGE AND HOUR LAWS

A. Minimum Wage Order

Under the authority of the Colorado Minimum Wages of Workers Act, the Director of the Colorado Division of Labor determines minimum wages in accordance with the Colorado Constitution's requirement that minimum wage rates be adjusted annually for inflation and be paid to employees who receive the state or the federal minimum wage. Colo. Const. art. XVIII, § 15, Colo. Rev. Stat. §§8-6-101 to -119. Accordingly, the Director issues a wage order each year reflecting the adjustment.

Colorado Wage Order Number 31 set the minimum wage rate at \$8.23 effective January 1, 2015. See www.colorado.gov/cdle/labor. It applies to employers and employees in the 1) retail and service; 2) food and beverage; 3) health and medical; and 4) commercial support service industries within the boundaries of the state. Exemptions apply for administrative, executive/supervisor, professional and outside sales employees and for some additional specific jobs. Employers may credit against an employee's minimum wage the reasonable cost of meals provided to the employee and the cost of lodging up to \$25.00 per week.

To claim a tip credit, you must pay tipped employees a cash wage of at least \$5.21 per hour. If the employee's tips plus the cash wage do not equal at least the minimum wage, the employer must make up the difference in cash wages.

The wage order also regulates overtime, meal and rest periods, tips and gratuities, uniforms, and recordkeeping. It does not apply to employees of state, local or federal governments or political subdivisions.

B. Overtime And Hours Of Work

Employers in the industries covered by Wage Order 31 must pay covered employees one-and-one-half times their regular rate for all hours worked in excess of:

- 40 hours in a week;
- 12 hours in a work day;
- 12 consecutive hours; or
- whichever of these calculations results in the greatest amount of wages.

Certain types of employees are exempt from the overtime, but not the other, provisions of the wage order.

The wage order considers all time an employee is suffered or permitted to work to be compensable working time, whether or not it is required by the employer and whether or not it is recorded. It provides rules for time spent traveling and sleeping time during tours of duty of 24 hours or longer. Employers must provide meal periods of at least 30 minutes in every scheduled work shift of more than five consecutive hours and a compensated, 10-minute rest period in the middle of each four-hour work period. If an uninterrupted meal is impractical, the employee must be allowed to consume an on-duty meal while performing duties and must be fully compensated for that time. Employers need not compensate employees for meal time that is uninterrupted and duty-free.

C. Wage Payment

The Colorado Wage Payment Act, Colo. Rev. Stat. §§8-4-101 to -123, prescribes the timing and method of paying wages, including payment of wages upon separation from employment, permissible deductions, direct deposit, and electronic payroll cards. It applies to every person employing any person in Colorado except counties, cities, municipal corporations, school districts, and irrigation companies or districts organized under Colorado law.

The Wage Payment Act applies to all amounts for labor or service performed by an employee, but no amount constitutes wages until earned, vested and determinable. It does not apply to severance payments. When an employee quits or resigns, wages are due at the next regular pay day. When employment ends at the employer's volition, wages are due and payable immediately.

If an employer provides paid vacation for employees, the employer shall pay, upon separation from employment, all vacation pay earned and determinable in accordance with the terms of any agreement between the employer and the employee. The Act prohibits employers from intimidating, threatening, restraining, coercing, blacklisting, discharging, or discriminating against employees who file complaints or participate in proceedings under the state's wage-payment laws.

D. Deductions, Uniforms And Garnishments

The only deductions permitted under the Wage Payment Act and the Minimum Wage Order are: 1) deductions mandated or allowed by law (e.g., taxes, garnishments); 2) contributions attributable to automatic enrollment in an employee retirement plan; 3) deductions for loans, advances, goods or services, equipment or property provided by an employer to an employee pursuant to a written agreement; 4) deductions to recover the replacement cost of a shortage due to theft by an employee if a report has been filed with the proper law enforcement authority and 5) other deductions authorized by an employee if the authorization is revocable (e.g., insurance, savings plans, charities). Colo. Rev. Stat. §8-4-105.

If an employee is entrusted with collecting, handling or paying money or property during his employment and fails to pay or return it on termination, the employer has 10 calendar days to audit or adjust its accounts before it must pay the employee his final pay.

Under Wage Order 31, employers that require employees to wear special apparel or a particular uniform must pay the cost of purchases, maintenance, and cleaning. If the uniform is washable and does not require special care such as ironing or dry cleaning, the employer need not

maintain it or pay for cleaning. You may require a deposit of up to one half of the actual cost as security for the return of each uniform furnished upon issuance of a receipt to the employee for the deposit. Deductions may not reduce an employee's pay below the minimum wage. You may not deduct for ordinary wear and tear.

Garnishment allows for the withholding of an employee's earnings for payment of a judgment regarding a consumer credit transaction or because of an income assignment for child support or insurance premiums. It is illegal to refuse to hire, discipline, or discharge an employee because of a garnishment arising out of such a debt. Colo. Rev. Stat. §5-5-107 (consumer credit transactions), Colo. Rev. Stat. §14-14-111.5 (16.7) (child support). Colorado law allows an employer to deduct a processing fee of up to \$5.00 per month from the remainder of the employee's earnings after child support has been withheld.

E. Wage Claim Resolution

Current and former employees may pursue wage claims through the state department of labor or through the courts. If an individual files a claim of \$7,500 or less with the division for wages, the division will adjudicate the claim and issue citations and notices of assessments for amounts determined to be due. A person dissatisfied with a decision may appeal the decision to any district court of competent jurisdiction. A prevailing employee is presumptively entitled to attorneys' fees.

F. Colorado Youth Employment Opportunity Act

The Colorado Youth Employment Opportunity Act, Colo. Rev. Stat. §§8-12-101 to -117, sets minimum age and maximum hours of work requirements for persons under the age of 18 (except persons who have received a high school diploma or a passing score on the General Education Development examination) who are employed in any occupation for money or other compensation regardless of to whom it is paid. When both the Fair Labor Standards Act and the Colorado Youth Employment Act apply, the more stringent standard must be observed. With limited exceptions, no one under the age of nine may be employed and youths under age 18 may be employed only in certain occupations at certain ages. The Act sets maximum hours for school days, during and after school hours, and for work weeks.

You can require a minor, who is an employee or applicant to provide an age certificate, which the minor can request from the school superintendent where the minor resides, or from an independent or parochial school that the minor attends. Employers must keep age certificates for the duration of the minor's employment, returning them to the minor, if requested, upon termination of the employment. Similarly, the employer may require, and must retain, proof of a high school diploma, passing score on the General Education Development examination or completion of a vocational education program.

V. DRUGS AND ALCOHOL; MEDICAL EXAMINATIONS

A. Drug And Alcohol Policies And Testing

Colorado statutes do not address drug or alcohol testing in employment except to prohibit employers from requiring applicants or employees to pay for testing required as a condition of

employment. The Colorado Court of Appeals has held that an employee terminated for refusing to be tested does not have a public policy wrongful discharge claim. *Slaughter v. John Elway Dodge Southwest/AutoNation*, 107 P.3d 1165, 1170 (Colo. App. 2005).

B. Recreational And Medical Marijuana Laws

Section 14 of Article XVIII of the Colorado Constitution creates limited exceptions to Colorado's criminal laws for patients, primary caregivers, and physicians for the medical use of marijuana through physician recommendation to alleviate debilitating medical conditions.

Section 16 of Article XVIII provides that, within certain limits, the personal use and possession of marijuana are not unlawful acts. This section expressly states that it does not require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace, nor does it affect your ability to have policies restricting the use of marijuana by your employees. Further, the Colorado Constitution does not prohibit a person or entity who occupies, owns, or controls a property from prohibiting or regulating the possession, consumption, use, display, transfer, distribution, sale, transportation, or growing of marijuana on or in that property.

Under federal law, marijuana use and possession continue to be criminal acts and marijuana remains a controlled substance which, under federal law, cannot be lawfully prescribed.

As of the date of publication of this booklet, a case was pending before the Colorado Supreme Court on the question of whether an employee's medical use of marijuana was lawful activity under the state's lawful activities statute (see Section III.B. above) and whether the employee was protected from discharge for testing positive as a result of off-duty use. *Coats v. Dish Network, L.L.C.*, 012714 COSC, 13SC394.

C. Costs Of Medical Examinations

It is unlawful to require any employee or applicant to pay for the cost of a medical examination (including a drug test) or medical records (including background checks or fingerprinting) required as a condition of employment. Colo. Rev. Stat. §8-2-118.

VI. TRADE SECRETS AND COMPETITION

A. Uniform Trade Secrets Act

Colorado has adopted the Uniform Trade Secrets Act (UTSA) prohibiting the improper acquisition, disclosure, or use of a trade secret. Colo. Rev. Stat. §§7-74-101 to -110. A business may pursue a trade secret misappropriation action independent of any noncompete agreement. Even without a written nondisclosure agreement, a duty to not disclose trade secret information may be implied.

The UTSA defines "trade secret" as all or part of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses or telephone numbers, or other information relating to any business or profession which is secret and of value. The courts have applied the following factors to determine

the existence of a trade secret: 1) the extent to which the information is known outside the business; 2) the extent to which it is known inside the business; 3) precautions taken by the employer to protect its secrecy; 4) the savings and value to the employer of having the information as against its competitors; 5) the time and money expended to develop it; and, 6) the time and expense others would spend to acquire it. See *Porter Indus., Inc. v. Higgins*, 680 P.2d 1339, 1341 (Colo. App. 1984).

B. Theft Of Trade Secrets

Theft of “anything of value of another” is a class 1 misdemeanor; a second or subsequent offense within five years of a prior conviction is a class 5 felony. Colo. Rev. Stat. §18-4-408. No reported Colorado cases have determined the statute’s application to theft of a trade secret.

C. Agreements Not To Compete

Under Colorado law, covenants not to compete are void. Colo. Rev. Stat. §8-2-113(2). This rule does not apply to:

- contracts for the purchase and sale of a business or the assets of a business;
- contracts for the protection of trade secrets;
- contractual provisions for the recovery of expenses of educating and training an employee who has served the employer for less than two years; and
- executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.

Although covenants not to compete are disfavored, covenants to protect the purchaser in the sale of a business may be more liberally construed. Protecting the goodwill of the business and preventing solicitation of customers are considered reasonable purposes to support a covenant not to compete.

What constitutes a trade secret under Colorado law is discussed above. An agreement not to solicit customers has been enforced where the court found it was primarily for the protection of trade secrets rather than to prohibit competition. *Saturn Systems, Inc. v. Militare*, 252 P.3d 516 (Colo. App. 2011).

Whether an employee is “executive and management personnel” or “professional staff” is determined on a case-by-case basis. Courts have considered factors such as: whether the employee worked without supervision or was in charge of an area of the business, the employee’s ability to influence the company’s potential success, and the employee’s access to confidential information. *DISH Network Corp. v. Altomari*, 224 P.3d 362, 368 (Colo. App. 2009). Professional staff to executive and management personnel may include legal, engineering, scientific and medical personnel or junior professional assistants.”

In addition to fitting within one of these statutory exceptions, to be valid, a covenant not to compete must be reasonable in geographic and temporal scope and not impose an undue hardship on the employee. It may be no broader than necessary to afford the required protection. If a

covenant is too broad, the courts may, but are not required to, “blue pencil” or modify the covenant’s scope and application to make it reasonable. *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 762 P.2d 763, 766 (Colo. App. 1988).

In lieu of a geographic restriction, the courts may accept a customer or client restriction, such as a prohibition against contacting customers or prospective customers the employee had contacted in the last year of employment. *Mgmt. Recruiters*, 762 P.2d at 766. Continued at-will employment, without additional pay or benefits, is adequate consideration for an agreement not to compete, even if the agreement was signed after employment began. *Lucht’s Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058 (Colo. 2011).

VII. LABOR RELATIONS LAWS

Colorado is a modified right-to-work state. Under the Colorado Labor Peace Act, Colo. Rev. Stat. §§8-3-101 to -123, a union may become the exclusive representative of all employees in a unit if the majority of employees votes for the union in a secret-ballot representation election.

Under limited circumstances, an employer and union may enter an “all-union” agreement requiring all members of the bargaining unit to provide monetary support of the union that represents the bargaining unit, or be terminated from employment. An all-union agreement may be entered only if it is approved by a majority of all the employees eligible to vote, or at least three-fourths of those who actually vote, whichever is greater. Where an all-union agreement is approved in this manner, employees covered by the agreement must pay union fees, but are not required to be members of the union, in order to work for the employer.

The Labor Peace Act applies to employers of eight or more employees and some public employers.

VIII. CONCLUSION

This booklet is designed to help employers identify Colorado laws related to the development and application of employment policies and procedures and questions that inevitably arise concerning the employment relationship. Our hope is that by providing this summary we will give employers a useful reference to help them quickly answer some of the common, everyday employment questions about Colorado law. Employers with questions or employment problems related to any of the material covered in this booklet can contact the Denver office of Fisher Phillips: 303.218.3650. Visit our website at fisherphillips.com.