The 10 Things Colorado Employers Should Do After Lawmakers Pass Batch of New Workplace Laws

Insights
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The Colorado legislature has been busy this season passing new employment laws, adding to your compliance obligations in a big way. We reviewed the key workplace laws that Colorado Governor Jared Polis signed into effect and have developed a comprehensive overview of the most important aspects you'll need to know about. Here are the 10 things you should do to stay up to speed with all of the new laws coming into effect.

New Grab-Bag Statute Creates Several New Employer Obligations

As we predicted soon before the 2023 legislative session began, Colorado lawmakers revived and passed the controversial Protecting Opportunities and Workers' Rights (POWR) Act, a statute that assembles various workplace measures into one game-changing law. Governor Polis signed it into effect earlier this month and is set to take effect on August 7.

Adds Marital Status as a Protected Class

One of the changes the POWR Act makes is adding marital status as a protected class in Colorado. This means that employers cannot take any adverse employment actions against employees based on their marital status once the law takes effect.

1. You should amend your handbook policies, managerial training materials, and other communications related to your commitment to non-discriminatory practices to conform with this new law. And of course, you should ensure that you don't make employment decisions based on marital status.

Makes it More Difficult to Use Nondisclosure Agreements

Another significant change brought about by the POWR Act is a restriction on the use of nondisclosure agreements (NDAs) at work. Specifically, NDAs are void if they limit the ability of an employee or prospective employee to discuss alleged discriminatory or unfair employment practices. The only way they can pass muster is if they meet many enumerated conditions, including an addendum signed by all parties stating that they have complied with the new law.

What's more, the POWR Act makes employers liable for actual damages and a penalty of $5,000 whenever they violate any of the new NDA requirements – this on top of potential exposure for costs and attorneys' fees.

2. Employers must be especially careful when using nondisclosure agreements in the future. Work with your counsel to determine whether any existing template agreements you have in place including non-disclosure provisions are in compliance and adjust them as necessary.

New Recordkeeping Requirements on Employers

The POWR Act requires employers to maintain personnel or employment records for at least five years after either:

- the record was made or received; or
- the date of the personnel action that resulted in the record or the final disposition of a charge of discrimination or related action.

Critically, the new law defines "personnel or employment record" to include the following: requests for accommodation; employee complaints of discriminatory or unfair employment practices, whether written or oral; application forms submitted by applicants for employment; other records related to hiring, promotion, demotion, transfer, layoff, termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; and records of training provided to or facilitated for employees.

3. Work with your HR Department and supervisory staff to ensure they are aware of the new recordkeeping obligations. Change any record retention policies to ensure they comply with new standards. And if you have a policy of retaining documents past their retention date for administrative ease, read this Insight on the seven reasons you need a robust record retention policy.

Lowered Burden of Proof for Workplace Harassment Claims

The POWR Act also jettisons longstanding standards for workplace harassment claims and replaces them with standards that we suspect will be easier for plaintiffs to prove. Where before aggrieved parties had to demonstrate that harassment was "severe or pervasive" to succeed on their claims, they now must merely prove that they were subjected to conduct or communication that was:

- subjectively offensive to them; and
- objectively offensive to a "reasonable individual who is a member of the same protected class."

Moreover, while the POWR Act states that "petty slights, minor annoyances, and lack of good manners do not constitute harassment," it goes on to clarify that slights, annoyances, and bad

manners *can* constitute harassment under a nine-factor "totality of the circumstances" test.

Still, the POWR Act makes clear that, to be actionable, the conduct or communication at issue must fall into one of three categories:

- submission to the conduct or communication must have been made a term or condition of the individual's employment;
- submission to, objection to, or rejection of the conduct or communication must have been used as a basis for an employment decision affecting the individual;
- the conduct or communication must have had either the purpose or effect of interfering with the individual's work performance or of creating an intimidating, hostile, or offensive working environment.

Additionally, the POWR Act specifies that employers may avail themselves of an affirmative defense to supervisor harassment, but only if the employer demonstrates that it has "established a program that is reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment."

4. Work with your legal counsel to determine how these changed standards might impact future employment litigation and whether it will impact your risk analysis when assessing potential or threatened claims.

Changed Standards for Disability Discrimination

The POWR Act further amends the Colorado Antidiscrimination Act to expand opportunities for disabled employees. Previously it was not a discriminatory or unfair employment practice for an employer to take an adverse employment action against a disabled employee "if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the individual from the job, and the disability has a significant impact on the job."

The new law removes the last clause and adds that the defense only applies if the employer at issue cannot make reasonable accommodations "that would allow the individual to satisfy the essential functions of the job."

5. Reassess your reasonable accommodation procedures, including your interactive process guidelines, given this new standard and the possible changes in might bring when assessing specific situations.

New Equal Pay Obligations

Governor Polis recently approved an amendment to the state's relatively new equal pay law which goes into effect January 1, 2024. While the Ensure Equal Pay for Equal Work Act Amendment clarified when employers must announce promotions with compensation and benefits information, it also places additional burdens on employers.

For each job opportunity – which 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 – employers must announce:

- the range of the hourly and salary compensation;
- a general description of the benefits and other compensation available; and
- the date the application window is expected to close.

6. You may want to work with your legal counsel to determine whether it would make sense for your organization to engage in a legally privileged self-audit of your compensation practices to ensure you are compliant with all pay equity standards.

A few definitions are helpful to better understand this new obligation:

- A "vacancy" is "an open position, whether as a result of a newly created position or a vacated position."
- Job opportunities do not include "career development" or "career progression."
- "Career development" is defined as a "change to an employee's terms of compensation, benefits, full-time or part-time status, duties, or access to further advancement in order to update the employee's job title or compensate the employee to reflect work performed or contributions already made by the employee."
- A "career progression" means "a regular or automatic movement from one position to another based on time in a specific role or other objective metrics."

Within 30 days after a candidate selected to fill a job opportunity begins working in the position, an employer must make reasonable efforts to announce to the employees with whom the employer intends the individual to work regularly:

- the name of the candidate selected for the job;
- the former job title if the candidate selected was already employed by the employer;
- the new job title; and
- information on how other employees may demonstrate an interest in similar positions.

Further, for each career progression, employers must disclose the requirements for career progression, and the position's compensation, benefits, full-time or part-time status, duties, and

access to further advancement.

7. Work with your legal and HR teams to review all of your internal hiring procedures so that you can incorporate these new announcement obligations and disclosures into your standard practices.

A few notes related to the newly passed Amendment:

- The Amendment clarified that employers are not required to include information that would violate an individual's right to privacy under applicable law when announcing a job opportunity.
- Through July 1, 2029, employers based outside of Colorado that have fewer than 15 remote workers in Colorado need only provide notice of remote job opportunities.
- The Amendment increased the backpay period for claims under the Act from three years to six years.
- The Amendment also notified employers that additional rules will be promulgated to enforce the Act no later than July 1, 2024. We'll continue to monitor new developments and provide updates when the regulations are released, so make sure you are signed up for the Fisher Phillips Insight service to ensure you receive the latest information directly to your inbox.

Expanded Reasons for Colorado Employees' Paid Sick Leave

Colorado's paid sick leave requirements will change beginning August 7. Governor Polis signed Senate Bill 23-017 into effect on June 2, expanding the reasons for paid sick leave for employees under Colorado's Healthy Families & Workplaces Act (HFWA). The law requires all employers to provide paid sick leave to Colorado employees, accrued at one hour of paid sick leave for every 30 hours worked, up to a maximum of 48 hours.

Current Reasons Employees Can Use Paid Sick Leave

Permitted uses for paid sick leave continue to include the following:

- The employee has a mental or physical illness, injury, or health condition; needs a medical diagnosis, care, or treatment related to such illness, injury, or condition; or needs to obtain preventive medical care;
- The employee needs to care for a family member who has a mental or physical illness, injury, or health condition; needs a medical diagnosis, care, or treatment related to such illness, injury, or condition; or needs to obtain preventive medical care;
- The employee or family member has been the victim of domestic abuse, sexual assault, or harassment and needs to be absent from work for purposes related to such crime; or
- A public official has ordered the closure of the school or place of care of the employee's child or

of the employee's place of business due to a public health emergency, necessitating the employee's absence from work.

New Reasons for Paid Sick Leave Use

Colorado employees will now be entitled to use paid sick leave for the following additional reasons:

- To grieve, attend funeral services or a memorial, or deal with financial and legal matters arising after the death of a family member.
- To care for a family member whose school/daycare is closed due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected event.
- To evacuate their residence due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected event.

8. Update your policies and postings by August 7 to inform employees of their sick leave entitlements under HFWA. You should also continue tracking accrual and use of sick leave for all employees and requesting documentation of the reason for paid leave when applicable.

A Note About Public Health Emergency Paid Sick Leave for COVID-19

Note that Public Health Emergency (PHE) Leave expired June 8, 2023, four weeks after the Public Health Emergency officially ended on May 11. This means that PHE leave is no longer available to employees, even if they are testing for or diagnosed with COVID-19. Going forward, Colorado employees are only entitled to paid sick leave for a permitted reason stated above.

Increased Age Discrimination Responsibilities

On June 5, Governor Polis signed the Job Application and Fairness Act into law. Set to take effect on July 1, 2024, the new law prohibits discrimination against individuals 40 years and older. It also adds requirements to the Federal Age Discrimination in Employment Act of 1967 (ADEA).

Under the Act, employers are prohibited from inquiring about or requiring an applicant to disclose the applicant's age, date of birth, or dates of attendance or graduation from school on an initial employment application. There are only three exceptions where inquiring about the age of an applicant is allowed:

1. When required by a bona fide occupational qualification pertaining to public or occupational safety;
2. When in compliance with requirements imposed by federal laws and regulations; and
3. When required by state or local laws and regulations that are also based on a bona fide occupational qualification.

The Act does not authorize private civil suits against employers by applicants. Rather, individuals may file a complaint to the Colorado Department of Labor and Employment. The first violation of the act earns a warning from the Department and 15 days to comply with the act. A second violation of the Act renders another 15-day order and a civil penalty of below $1,000. A third violation leads to a penalty below $2,500. Importantly, every job posting violating the Act counts as a single separate violation.

9. To avoid penalties, you should remove questions on applications and applicant platforms that inquire about an applicant's age. You can require applicants to provide copies of certifications or transcripts in the initial employment application. However, if you do so, you must inform applicants that they can redact information identifying their age. You should also instruct interviewers and all hiring personnel on how best to avoid age-related questions.

Conclusion

We will continue to monitor workplace law developments as they apply to Colorado employers and provide updates when appropriate.

10. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information for Colorado employers directly to your inbox.

If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Denver office.

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