Changes Coming To Colorado Discrimination Claims

Insights
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On January 1, 2015, changes to Colorado's employment anti-discrimination statute will go into effect, drastically impacting employers facing employment discrimination claims. The changes will significantly expand the remedies available under the statute, and will make it easier and more attractive for employees to file discrimination lawsuits in state court rather than alleging violations of federal law.

Colorado Discrimination Overview

The Colorado Anti-Discrimination Act (CADA) makes it unlawful for an employer to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry. The CADA prohibits discrimination and retaliation in employment on the same grounds as federal anti-discrimination laws.

But Colorado law goes beyond current federal protections by prohibiting employment discrimination on the basis of sexual orientation, including transgender status, for all employers, not just those that are federal contractors. Additionally, unlike federal law, the CADA applies to all Colorado employers, regardless of size.

Under the current version of the law and for discrimination claims arising before January 1, 2015, the CADA allows prevailing employees to recover only back pay and equitable relief such as reinstatement. The parties are not entitled to a jury trial and no attorneys' fees are awarded.

These limited CADA remedies have resulted in most employees pursuing discrimination claims in federal court, alleging violations of federal antidiscrimination laws in order to seek the additional remedies available under federal law. This was fine by employers who generally prefer litigating in the more business-friendly federal court. After January 1, that is all about to change.

Significant Changes Coming

In May of 2013, the Colorado legislature passed the Job Protection and Civil Rights Enforcement Act, which amended the CADA as applied to discriminatory conduct that occurs on or after January 1, 2015. The most important change is that the amended statute now allows prevailing employees to recover compensatory and punitive damages in discrimination lawsuits brought under state law,

remedies which were previously unavailable.
In addition to back pay and reinstatement, aggrieved employees now may seek to recover front pay, compensatory damages for emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses, as well as punitive damages. The total amount of compensatory and punitive damages will be capped at the same amounts as under federal law based on the number of employees, with additional caps for small employers not subject to the federal antidiscrimination laws, namely $10,000 for employers with one to five employees and $25,000 for employers with six to fourteen employees.

Additional changes will significantly impact Colorado employers facing discrimination claims. The CADA amendments allow the court to award attorneys' fees and costs to prevailing employees. Fees and costs may also be awarded to prevailing employers, but only in cases that are found to be frivolous, groundless, or vexatious. Either party also may demand a jury trial.

Additionally, the CADA amendments did away with the age cap of 70 for age discrimination claims, allowing age discrimination lawsuits by individuals over the age of 40, with no maximum age cap, consistent with the federal age discrimination law.

Practical Implications Of The CADA Changes
The practical effects of these amendments are game changers. First, employees alleging intentional discrimination or retaliation who file their lawsuits in state court, alleging only violations of state law, will now be able to recover the same types of damages, including attorneys' fees, as employees filing suit in federal court under federal law. In state law cases, employers will not be able to remove the lawsuits to federal court, which typically is the favored venue for employers, unless diversity jurisdiction exists, such as when the parties are citizens of different states. In other words, employers more often will find themselves in a plaintiff-friendly state court, from which they are unable to remove the case.

Litigating discrimination cases in state rather than federal courts is significant for Colorado companies in many ways. First, state courts have heavier dockets and fewer resources than their federal counterparts, meaning the judges will be pulled in many directions without magistrate judges available to handle discovery issues and other procedural matters.

Second, there is far less case law interpreting the CADA than exists for federal discrimination laws. Judges will be forced to decide issues that have not previously arisen under state law, with federal precedent merely persuasive rather than binding.

Third, employees residing in remote areas of Colorado will be able to litigate their lawsuit in the state court located in their local community, rather than having to litigate in the single federal court in Colorado located in Denver. In addition, if a jury trial is requested, the jury pool will be drawn from those local counties. In short, employers may find themselves in uncharted and unfamiliar territory.

Another major impact of the CADA amendments is that employees alleging discrimination on the basis of their sexual orientation, which is not a protected category under federal law (except for

basis of their sexual orientation, which is not a protected category under federal law (except for certain federal contractors), will now be able to recover compensatory and punitive damages under the CADA, remedies which were previously unavailable. LGBT employees who experienced discrimination or retaliation had little incentive to file a CADA claim when potential damages were limited to back pay and reinstatement. Such claims may be more likely now that front pay, emotional distress damages, and punitive damages could result in a significant monetary award.

Finally, small employers with fewer than 15 employees will likely find themselves defending more employment discrimination and retaliation claims as they can now be held liable for the same types of damages allowed in Title VII, ADA and other federal discrimination cases. In addition, the prospect of facing increased damages, including a potential award of attorneys' fees and costs, will change the risk level for small employers who often have fewer resources in reserve to survive such lawsuits.

What You Should Do Now
Consider taking the following actions in preparation for the January 1 changes to the CADA:

- have an attorney review your personnel policies to make sure they are up to date, and compliant with state and federal law;
- ensure that your managers and supervisors are adequately trained in all areas of employment discrimination, specifically including how to handle employee complaints;
- review your procedures for investigating reports of harassment, discrimination and retaliation;
- implement and enforce a strong anti-retaliation policy; and
- make sure that you have effective personnel practices in place, and that all managers are properly documenting disciplinary issues.

For more information, contact any attorney in the Denver office of Fisher Phillips at 303.218.3650.

This Legal Alert provides an overview of a specific state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.