

ASAP Webinar

# LEGAL & LEGISLATIVE UPDATE FOR EMPLOYERS

*Presented by*

**Michael Santo**

*Employment Law  
Attorney*

July 27, 2023

THE LAW FIRM OF  
**BECHTEL  
& SANTO**

**ASAP**

# *ASAP*



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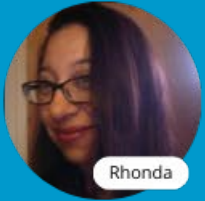
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Crystal



Angie



Rhonda



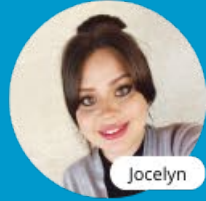
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Ryan



Candace



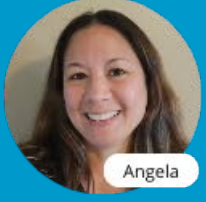
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Wyatt



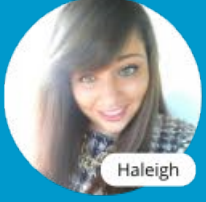
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Angela



Cheryl



Haleigh



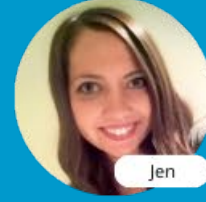
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Mary



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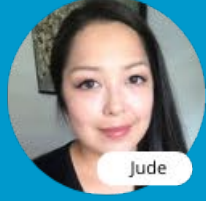
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Tracey



Natalie



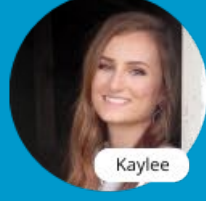
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Sami



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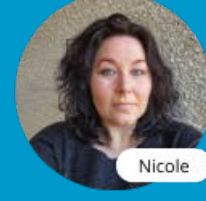
Kaylee



Rachel



Rebecca



Nicole



Tyler



## **Michael Santo, Presenter**

Employment Law Attorney

Bechtel & Santo

Employment law attorney Michael Santo is cofounder and partner at Bechtel & Santo in Grand Junction, Colorado. Since 1994, Michael has focused his practice on defending companies in employment litigation, including discrimination lawsuits; wrongful discharge; and wage and hour matters. Counseling companies on day-to-day employment issues is also an important part of Michael's practice. This includes advising employers on hiring, discipline, and termination decisions; on leave and disability issues; and on preparing and revising employee handbooks. By helping employers develop sound personnel policies, Michael assists many Colorado companies, large and small, in minimizing the risk of employment-related litigation.

# What We'll Cover

Employment law attorney Michael Santo will cover new and pending legislation that impacts HR and employee policies for all Colorado employers, regardless of size and industry.

- Anti-discrimination and harassment (POWR)
- Employee recordkeeping
- Job postings (Equal Pay Act)
- Paid sick leave (HFWA)
- Mandatory break periods
- Labor law posters
- Q&A

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# Legal and Legislative Update

## July 2023

Presented by

**Michael C. Santo**  
Bechtel & Santo

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# 2023 STATE LEGISLATION UPDATE



**PROTECTING OPPORTUNITIES AND  
WORKERS' RIGHTS (POWR ACT)  
(SB23-172)**

Concerning protections for Colorado  
workers against discriminatory  
employment practices

**Effective August 7, 2023**



# UPDATES TO EMPLOYMENT DISCRIMINATION LAWS (POWR ACT)

## History:

- The Colorado Anti-Discrimination Act (CADA) of 1957 identified that it is an unfair employment practice for an employer “to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry.”
- In 1964, the United States Congress passed the Title VII of the Civil Rights Act of 1964, which had the same protections as CADA and identified “sex” as a protected classification.
- Both laws focus on “discrimination,” but **now cover “harassment” and “retaliation”** as well.

# POWR ACT

## ***Current\** law required proof for unlawful harassment:**

First, unlawful harassing conduct must be unwelcome and based on the victim's protected status.

Second, the conduct must be:

- subjectively abusive to the person affected; and
- objectively ***severe and pervasive*** enough to create a work environment that a ***reasonable*** person would find hostile or abusive.

*\*Effective through August 6, 2023*

# POWR ACT

## **Goals of POWR as identified in the law:**

- Extinguishment of the severe and pervasive standard
- Encourage organizations to adopt EEO policies to “prevent and disincentivize” unlawful harassment and discrimination
- Encourage the free reporting, discussion, and exposure of discriminatory practices in order to better protect employees
- Discourage attempt to interfere with employees’ ability to communicate about and report alleged discriminatory or unfair employment practices

# POWR ACT

## **POWR adds “marital status” to the list of protected classes:**

“Marital status” means a relationship or a spousal status of an individual, including but not limited to being single, cohabitating, engaged, widowed, married, in a civil union, or legally separated, or a relationship or a spousal status of an individual who has had or is in the process of having a marriage or civil union dissolved or declared invalid.”

## **Updated list of protected classifications under Colorado law:**

disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, age, national origin, ancestry, or marital status.

# POWR ACT

## Exceptions to Marital Status Protections

Notably, POWR did not alter CADA provision that identifies it is not an unfair or discriminatory employment practice to discharge an employee or refuse to hire an applicant where:

- “(A) One spouse directly or indirectly would exercise supervisory, appointment, or dismissal authority or disciplinary action over the other spouse;
- (B) One spouse would audit, verify, receive, or be entrusted with moneys received or handled by the other spouse; or
- (C) One spouse has access to the employer’s confidential information, including payroll and personnel records.”

# POWR ACT

## **POWR eliminates the “significant impact” requirement for disability discrimination claims.**

- Previously, CADA provided that it was not a discriminatory practice for an employer to take an adverse employment action “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.*” (Emphasis added.)
- The loosened standard now provides only that it is not a discriminatory practice for an employer to take an adverse employment action “if there is no reasonable accommodation that the employer can make with regard to the disability that would allow the individual to satisfy the essential functions of the job and the disability actually disqualifies the individual from the job.”

# POWR ACT

## **POWR also amends the definition for “harass.”**

“Harass” means to engage in, or the act of engaging in, any unwelcome physical or verbal conduct or any written, pictorial, or visual communication directed at an individual or group of individuals because of that individual’s or groups membership in, or perceived membership in, a protected class, which conduct is

- Subjectively offensive to the individual alleging harassment; and
- Is objectively offensive to a reasonable individual who is a member of the same protected class.

# POWR ACT

**The conduct need not be severe or pervasive to constitute a discriminatory or unfair employment practices and is a violation if:**

- Submission to the conduct or communication is explicitly or implicitly made a term/condition of the individual's employment; or
- Submission to, objection to, or rejection of the conduct or communication is used as a basis for employment decisions affecting the individual; or
- 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.



# POWR ACT

The ***severe or pervasive standard*** for Title VII hostile work environment claims accounts for the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.

- “Offensive:” Unpleasant or disgusting, as to the senses; causing anger or annoyance; insulting.

# POWR ACT

POWR also identifies that “petty slights, minor annoyances, and lack of good manners do not constitute harassment unless” those actions meet the severe and pervasive standard when taken individually or in combination and under the totality of the circumstances.

- What’s the line between a “petty slight” and a comment that unreasonably interferes with an employee’s work performance or creates an offensive work environment?

# POWR ACT

Factor not considered: “the nature of the work or the frequency with which harassment in the workplace occurred in the past is not relevant.”

Factors to consider in making this determination include, but will not be limited to:

- Frequency of the conduct or communication recognizing that a single incident may rise to the level of harassment;
- The number of individuals engaged in the conduct;
- The type or nature of the conduct or communication;
- The duration of the conduct or communication;

*(continued on next slide)*

# POWR ACT

Factors to consider in making this determination include, but will not be limited to *(continued from previous slide)*:

- The location where the conduct or communication occurred;
- Whether the conduct or communication is threatening;
- Any use of epithets, slurs, or other conduct or communication that is humiliating or degrading; and
- Whether the conduct or communication reflects stereotypes about an individual or group of individuals in a protected class.

# POWR HYPOTHETICAL

## **Ruffin v. Lockheed Martin Corp. (2016):**

Employer exposed his chest to an employee and at one point told her she looked “like a piece of candy.”

[Casetext Summary](#)

# POWR HYPOTHETICAL

## **Lampkins v. Mitra QSR KNE, LLC. (2019):**

While pumping breast milk employee had another employee peer into the office window and make squeezing gestures, had another employee enter the office to use the computer, and told her she should pump at home. Employee had the material she used to cover the window removed, and a separate employee falsely told the plaintiff that a customer saw her breast.

[Casetext Opinion](#)

# POWR HYPOTHETICAL

## **Khalaf v. Ford Motor Co. (2020):**

Plaintiff was told by his supervisor to “be a big girl and come up with the savings.” He was told to “deal with it” after complaining of other employees being hostile towards him. He was told to “fetch coffee” for other employees, and claimed his national origin was the reason he was told to do so. An employee left a comment in the drop box that criticized the plaintiff’s ability to write and understand English.

[Casetext Summary](#)

# POWR HYPOTHETICAL

## **Williams v. FedEx Corporate Services (2017):**

Employee was given a heavier workload then began to ask for help, but supervisors ignored his requests and called him names like “Mr. Secondary” and accused him of whining and “being a baby.” One supervisor threatened to prevent him from being promoted if he continued whining. The employee was also disciplined after returning from medical leave, for failing to enter his sales calls in the proper platform.

[Casetext Opinion](#)



# FARAGHER-ELLERTH CURRENT STANDARD

**What is the employer's current standard for proof if the employee proves the employee's prima facie claim?**

- Employer took reasonable steps to prevent and promptly correct sexual harassment in the workplace, and
- The aggrieved employee unreasonably failed to take advantage of the employer's preventive or corrective measures.

# POWR ACT

When an employee proves that a supervisor unlawfully harassed the employee, the employer may only assert an affirmative defense to the claim if the employer establishes that it has an established program that is reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment.

## **Factors in establishing this burden:**

- The employer must take prompt, reasonable action to investigate or address alleged discriminatory or unfair employment practices;  
*(continued on next slide)*

# POWR Act

Factors in establishing this burden *(continued from previous slide)*:

- The employer takes prompt, remedial actions, when warranted, in response to complaints of discriminatory or unfair employment practices;
- The employer has communicated the existence of details of this program to supervisory and nonsupervisory employees; and
- The employee has unreasonably failed to take advantage of the employer's program.

# POWR ACT

## **POWR impacts employer recordkeeping responsibilities:**

An employer shall preserve any personnel or employment record the employer made, received, or kept at least five (5) years after the later of:

- The date the employer made or received the record.
- The date of the personnel action about which the records pertains or of the final disposition of a charge of discrimination or related action.

# POWR ACT

The term “personnel or employment record” includes the following:

- requests for accommodation;
- written and oral employee complaints of discrimination, harassment, or unfair employment practices;
- submitted job applications;
- “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.”

# POWR ACT

An employer shall maintain an accurate, designated **repository of all written or oral complaints of discriminatory or unfair** employment practices that includes:

- The date of the complaint
- The identity of the complaining party, if the complaint was not made anonymously,
- The identity of the alleged perpetrator, and
- The substance of the complaint.

These are not public records and are considered “personnel records” (i.e., not open to public inspection).

# POWR ACT STEPS MOVING FORWARD

## **Employee Handbook updates to consider:**

- Focus on “protected classification” by defining each (not just sex)
  - Hair, race or color, religion or creed, national origin or ancestry
  - Sex or gender, gender identity or gender expression
  - Marital status
  - Age
  - Pregnancy
  - Physical or mental disability
  - Military status
  - Genetic information
  - Religion

# POWR ACT STEPS MOVING FORWARD

## **Employee Handbook updates to consider:**

- Provide employees definition/examples of harassment?
- Provide employees definition/examples of unprofessional conduct?
- Provide employees definition/examples of inappropriate?
- Provide the POWR Factors to be considered?
- Identify that employees will be protected from retaliation?



# POWR ACT STEPS MOVING FORWARD

## **Accommodation Policy**

- Disability: Reasonable/unreasonable accommodation, undue hardship
- Pregnancy (including Colorado law; PUMP; Pregnant Workers Fairness Act)
- Religion: New standard – whether granting an accommodation would substantially increase costs in relation to the conduct of the organization’s particular business. The Supreme Court also noted that the impact on co-workers was irrelevant and that employers must do more than conclude that forcing other employees to work overtime would constitute an undue hardship.”

# POWR ACT STEPS MOVING FORWARD

**Establish a complaint procedure** that is reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment.

- The employer must take prompt, reasonable action to investigate or address alleged discriminatory or unfair employment practices;
- The employer takes prompt, remedial actions, when warranted, in response to complaints of discriminatory or unfair employment practices;
- The employer has communicated the existence of details of this program to supervisory and nonsupervisory employees; and
- The employee has unreasonably failed to take advantage of the employer's program.

# POWR ACT STEPS MOVING FORWARD

Who will the Employee Handbook identify will take in the complaints that needs to be stored in the repository?

- Human Resources?
- Supervisors?
- Others?

# POWR ACT STEPS MOVING FORWARD

Who will be able to input the complaints to the database?

- Human Resources?
- Managers/Supervisors?
- Others?

# POWR ACT STEPS MOVING FORWARD

Who will be able to review the information?

- Human Resources?
- Supervisors/Managers?
- Executives?

# POWR ACT STEPS MOVING FORWARD

What information is required to be in the database?

- The date of the complaint.
- The identity of the complaining party, if the complaint was not made anonymously.
- The identity of the alleged perpetrator, and
- The substance of the complaint.

Will the employer convey (e.g., in an Employee Handbook) what it plans to do with the information it receives?

# POWR ACT STEPS MOVING FORWARD

What else helps establish that the complaint procedure is reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment?

- Investigation efforts:
  - Who did the person hearing the complaint speak to after receiving the complaint?
  - When did those discussions occur?
  - What was said?
  - What other steps did the person take?
- What prompt remedial action was taken?

# POWR ACT -- STEPS MOVING FORWARD

How could these records be used in the future?

- Plaintiff's attorneys contact those who made complaints (particularly those who are no longer with the organization) to determine if those individuals believed that the complaint procedure reasonably prevented harassment, deterred future harassment, and protected employees from harassment.



# POWR ACT -- STEPS MOVING FORWARD

## **Establish protected activity in a retaliation claim:**

- Employee engaged in protected opposition to discrimination;
- Employee suffered an adverse employment action; and
- There is a causal connection between the protected activity and the adverse employment action.

# POWR ACT

Severance Agreements that limit the ability of the employee to disclose or discuss any alleged discriminatory or unfair employment practice are void *unless*:

- The nondisclosure applies equally to all parties.
  - The provision ***expressly states*** that it does not restrain the individual from disclosing the underlying facts of any alleged discriminatory or unfair employment practices:
    - Including disclosing the existence of a settlement agreement to the employee's immediate family, religious advisor, medical or mental health provider, legal counsel, financial advisor, or tax preparer.
- (continued on next slide)*

# POWR ACT

The provision ***expressly states*** that it does not restrain the individual from disclosing the underlying facts of any alleged discriminatory or unfair employment practices (*continued from previous slide*):

- To any local, state, or federal agency for any reason without first notifying the employer.
- In response to a legal process, such as a subpoena to testify at a deposition or in a court, without first notifying the employer and when required by law.

# POWR ACT

Severance Agreements that limit the ability of the employee to disclose or discuss any alleged discriminatory or unfair employment practice are void unless (*continued from previous slides*):

- The nondisclosure provision ***expressly states*** that disclosure of underlying facts of any alleged discriminatory or unfair employment practice does not constitute disparagement;
- The agreement identifies that if the employer disparages the employee, the employer may not seek to enforce the nondisparagement provision of the agreement against the employee.

# POWR ACT

To be enforced, a liquidated damage provisions in a Severance Agreement must:

- Be reasonable and proportional in light of the anticipated actual economic loss that a breach of the agreement would cause;
  - Vary based on the nature and the severity of the breach; and
  - Not be punitive.
  - Include an addendum, signed by all parties, that attests to compliance with these factors.
- Damages for violation of these requirements: Actual damages, plus \$5,000 per violation.
  - POWR is effective August 7, 2023

# POWR ACT

Any employee who is presented with an agreement that includes a nondisclosure provision that violates POWR may immediately bring an action to recover penalties.

- In such an action, the employee can recover:
  - Actual damages
  - Reasonable costs
  - Attorney fees

If the individual proves the organization provided others such an agreement, it will be evidence of punitive damages.

# EMPLOYEE HANDBOOKS

## What's the purpose of an Employee Handbook?

- To protect the employer.
- To satisfy legal requirements.
- To clarify benefits that are/aren't provided to employees.
- To prevent unintentional discrimination
- To give employees notice of work rules.

## Who is the primary audience for Employee Handbooks?

- Human Resources
- Employees
- Supervisors/Managers
- Company
- Colorado Civil Rights/Equal Employment Opportunity Commission
- Judges / Juries

# **JOB APPLICATION FAIRNESS ACT (SB23-058)**

Concerning protections for Colorado  
workers against discriminatory  
employment practices

**Effective July 1, 2024**



# JOB APPLICATION FAIRNESS ACT

- Starting July 1, 2024, the Bill prohibits employers from inquiring about a prospective employee's age, date of birth, and dates of attendance at or date of graduation from an educational institution on an employment application.
- An employer may request/require an individual to provide additional application materials, including copies of certifications, transcripts, and other materials, at the time of an initial employment application, if the employer notifies the individual that the individual may redact information that identifies their age, date of birth, or dates of attendance at or graduation from an educational institution.

# JOB APPLICATION FAIRNESS ACT

An employer may request an individual to verify compliance with “age requirements” imposed pursuant to or required by:

- A bona fide occupational qualification pertaining to public or occupational safety;
- A federal law or regulation; or
- A state or local law or regulation based on a bona fide occupational qualification.

But even those requirements may not require the individual to disclose age, date of birth, or dates of graduation from an educational institution on an initial application.

# JOB APPLICATION FAIRNESS ACT

The Bill does not create a private cause of action.

- Instead, a person claiming a violation of this requirement must file a complaint with the Department of Labor and Employment (CDLE) and, upon the determination that there is a violation, may be subject to the following penalties:
  - First Violation: a warning and an order requiring compliance within 15 days
  - Second Violation: a warning and an order requiring compliance within 15 days and a civil penalty not to exceed \$1,000
  - Subsequent Violations: a warning and an order requiring compliance within 15 days and a civil penalty not to exceed \$2,000

# JOB APPLICATION FAIRNESS ACT

## **Practical Tips/Next Steps:**

- Determine if your organization needs applicants to provide additional application materials, including copies of certifications, transcripts, and other materials, at the time of an initial employment application. If so, you must revise the application to notify the applicant that they may redact information that identifies their age, date of birth, or dates of attendance at or graduation from an educational institution when the applicant submits that information.
- Revise your application so that it does not require age information, dates of attendance, and graduation dates.
- Training for supervisors should not be necessary because after receiving the application, the organization can request that information as required; though one shouldn't ever request an applicant's age.

**HEALTHY FAMILIES AND  
WORKPLACES ACT (HFWA)  
(SB23-017)**

Concerning additional uses for  
Colorado paid sick leave

**Effective August 7, 2023**

# HFWA UPDATES

**This law expands HFWA to require employers to permit employees to use paid leave for the following reasons:**

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

# HFWA UPDATES

- “Family member” means:
  - (a) an employee’s immediate family members (e.g., a person related by blood, marriage, or civil union);
  - (b) a child to whom the employee stands in loco parentis or a person who stood in loco parentis to the employee; and
  - (c) a person for whom the employee is responsible for providing or arranging health- or safety-related care.

# HFWA UPDATES

## Steps to take:

- HFWA requires every employer to (1) supply each employee with a written notice regarding the availability of HFWA leave for the reasons identified in the law, which includes a notice that employers can't retaliate against an employee for requesting leave and that employees may file a complaint or civil action, and (2) display the CDLE poster.
- Revise your organization's HFWA/PTO policy to include the new reasons for leave and the "retaliation protections."



# **EQUAL PAY ACT (SB23-105)**

Concerning modifications to measures to ensure equal pay for equal work in Colorado.

**Effective January 1, 2024**

**(The “Isabelle” law)**



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Jared S. Polis

GOVERNOR OF THE STATE OF COLORADO

EBILL 23-105

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# EQUAL PAY ACT *MODIFICATIONS*

The Act covers all “employers,” public or private, that employ at least one person in Colorado, and all employees of those employers.

The following are not covered:

- Employers with no employees in Colorado.
- A party just sharing or re-posting another employer’s job
- An employer whose job is re-posted by a third party on its own: An employer is not liable if it has a compliant posting, but then a third party, on its own initiative, re-posts that employer’s job without the required information (i.e., without being hired or instructed by the employer to do so).

# EQUAL PAY ACT *MODIFICATIONS*

The employer must “in good faith” disclose the following in the notification of each “job opportunity” prior to “the date on which the employer makes a selection decision”:

- The hourly or salary compensation or the range of hourly or salary compensation;
- A general description of the benefits and other compensation applicable to the job opportunity or promotional opportunity; and
- The date the application window is anticipated to close.

# EQUAL PAY ACT *MODIFICATIONS*

A “job opportunity” (formerly referred to as “opportunities for promotion”) means “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.”

The term “job opportunity” does not include “career development” or “career progression:”

- “Career development” means a change to an employee’s terms or compensation, benefits, full-time or part-time status, duties, or access to further advance in order to update the employee’s job title or compensate the employee reflect work perform or contributions already made by the employee.”

# EQUAL PAY ACT *MODIFICATIONS*

- “Career progression” means a regular or automatic movement from one position to another based on time in a specific role or other objective metrics.
  - For career-progression positions: An employer “shall disclose and make available to all eligible employees the requirements for career progression, in addition to each positions, terms of compensation, benefits, full-time or part-time status, duties, and access to further advancement.”
  - The term “all eligible employees” is not defined in the Act. The Act defines “employee” to be “a person employed by the employer.”

# EQUAL PAY ACT

## *CURRENT* CDLE REGULATIONS

### Employers must include in each job posting:

- **Rate of compensation** (or a range thereof), including salary and hourly, piece, or day rate compensation;
- General description of any **bonuses, commissions, or other compensation**; and
- General description of all **benefits** the employer is offering for the position.
  - Benefits that must be generally described include health care, retirement benefits, paid days off, and any tax-reportable benefits, but not minor “perks” like use of an on-site gym or employee discounts.

# EQUAL PAY ACT

## *CURRENT* CDLE REGULATIONS

- At a minimum, employers must describe the nature of these benefits and what they provide, not specific details or dollar values — such as listing that the job comes with “health insurance,” without needing to detail premium costs or coverage specifics.
- Employers cannot use an open-ended phrase such as “etc.,” or “and more,” rather than provide the required “general description of all of the benefits.”
- CDLE Example: “\$50,000, health insurance, 401K” is compliant; “\$50,000 with competitive benefits” is not.



# EQUAL PAY ACT

## *CURRENT* CDLE REGULATIONS

- **Acceptable range:** An employer may ultimately pay more or less than a posted range, as long as the range, at the time of posting, was what the employer genuinely believed it would be willing to pay for the job.
  - A range's bottom and top cannot include open-ended phrases like "\$30,000 and up" (with no top of the range), or "up to \$60,000" (with no bottom)."
- **Electronic postings may link to compensation and benefit information**

*\*Prior to January 1, 2024*

# EQUAL PAY ACT *MODIFICATIONS*

**Exceptions for out-of-state employers:** If an employer is only physically located out of Colorado, and has fewer than 15 employees working in Colorado, all of whom work only remotely, then through July 1, 2029, the employer is only required to provide notice of remote job opportunities.

# EQUAL PAY ACT *MODIFICATIONS*

After selection, all employers must make reasonable efforts to announce, post, or otherwise **make known the following information within 30 days after a candidate is selected** and begins performing work in the position to, at minimum, the employees the employer intends the selected candidate to regularly work with:

- The name of the selected candidate;
- The selected candidate's former job title if presently employed;
- The selected candidate's new job title; and
- Information on how current employees may demonstrate interest in similar job opportunities, including identifying individuals or departments to whom the employee can express interest in similar positions.

# EQUAL PAY ACT

## *CURRENT* CDLE REGULATIONS

### **Hiring can occur without a job posting:**

- *Out-of-state jobs are excluded.* Employers need not disclose compensation for jobs to be performed entirely outside Colorado (including non-Colorado jobs that may include modest travel to Colorado), even if the job posting is published in Colorado (or is an online posting that reaches Colorado). Remote work performable in Colorado or elsewhere for a covered employer must comply with the Act and Rules.
- A remote job posting, even if it states that the employer will not accept Colorado applicants, remains covered by the Act and Rules.
- The Act expressly covers all jobs, so a Colorado-covered employer's posting of work performable anywhere is not within the narrow-implied exception for out-of-state worksites to which Colorado law is arguably inapplicable.

# EQUAL PAY ACT

## *CURRENT* CDLE REGULATIONS

### **Exceptions and limitations to employer duties to notify employees of promotional opportunities:**

- Temporary, acting, or interim positions lasting up to six months; before hiring someone to hold the position for more than six months, the employer must give other employees notice of the promotional opportunity in time to apply.
- Automatic consideration for promotion after a trial period of one year or less, and the commitment to consider the employee for promotion is memorialized from the start in a writing (e.g., offer letter, contract, or employer handbook) and based solely on the employee's own performance and/or the employer's needs.
- Promotions to replace current employees unaware of their separation.

# EQUAL PAY ACT

## CURRENT REQUIREMENTS WHEN A PROMOTIONAL OPPORTUNITY EXISTS

### **Triggers posting:**

- Changing their authority, duties, or opportunities
- Changing both their title and their pay

### **Does not trigger posting:**

- Changing their title alone, without changing their pay, in material ways, with or without a title or pay change or their authority, duties, or opportunities
- Changing their pay alone, without changing their title, or their authority, duties, or opportunities

# EQUAL PAY ACT MODIFICATIONS

## **Practical Tip/Next Steps**

- Update policies and practices regarding pre-decision and post-decision notice requirements.
- Develop a statement regarding how current employees may demonstrate interest in similar job opportunities, including identifying individuals or departments to whom the employee can express interest in similar positions.
- Determine if EPA requirements are going to be identified in your Employee Handbook.

# EQUAL PAY ACT MODIFICATIONS

## **Practical Tip/Next Steps** *(continued)*

- **Perform a wage analysis by December 31, 2023:**
  - Liquidated damages: “In determining whether the employer’s violation was in good faith, the fact finder may consider evidence that within two years prior to the date of the commencement of the civil action, the employer completed a thorough and comprehensive pay audit of its workforce, with the specific goal of identifying and remedying unlawful pay disparities.”
  - Such audit should consider: (1) seniority; (2) merit; (3) quantity or quality of production; (4) geographic distinctions; (5) education, training, or experience if they are related to the work; and (6) travel, if travel is a regular and necessary condition of the work performed.





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