

Colorado Enacts Significant New Employment Laws

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It was a busy legislative session in Colorado this year, with Governor Jared Polis signing more than 470 new bills into law. Included among the new legislation are four laws that will create sweeping changes to the state's employment landscape: the [Protecting Opportunities and Workers' Rights \(POWR\) Act](#), the [Job Application Fairness Act](#) (JAFA), [amendments](#) to the Colorado Healthy Families and Workplace Act, and [amendments](#) to the Colorado Equal Pay for Equal Work Act.

Below, we highlight the new rights and obligations created under each of these laws and identify key steps employers with Colorado workforces should take now to ensure compliance.

Unless otherwise noted, all new laws and amendments discussed below took effect on August 7, 2023. Each of these new laws and amendments applies to private employers with at least one employee in Colorado.

The POWR Act (SB 23-172)

The POWR Act amends several components of the Colorado Anti-Discrimination Act (CADA), including revising the definition of unlawful "harassment," expanding employment discrimination protections to include marital status, and adding new provisions regarding nondisclosure agreements (NDAs) and recordkeeping obligations.

New Standard and Definition of Unlawful "Harassment"

The POWR Act explicitly rejects the federal "severe and pervasive" standard for unlawful harassment and replaces it with a lower standard, which prohibits any "*unwelcome* physical or verbal conduct or any written, pictorial, or visual communication" that is:

- *directed toward* an individual or group of individuals on the basis of a protected class,
- *subjectively offensive* to the individual alleging harassment, and
- *objectively offensive* to a reasonable individual who is a part of the same protected class.

For the conduct or communication to be unlawful, one of three things must be true: (a) submission to the conduct must be a condition of employment, (b) objection or submission to the conduct must be the basis for an employment decision, or (c) the conduct must unreasonably interfere with the individual's work performance, such that it creates a hostile work environment.

Further, the POWR Act provides that the frequency with which harassment has previously occurred and the nature of the work are generally no longer relevant to determine whether unlawful harassment has occurred. "[P]etty slights, minor annoyances, and lack of good manners" may rise to the level of unlawful harassment depending on the totality of the circumstances, which include considering (a) the frequency, duration, location, and nature of the conduct; (b) the power differential between the parties; (c) the use of epithets or slurs; (d) whether the conduct is threatening; and (e) the number of individuals involved.

The POWR Act also specifically encourages (but does not require) employers to adopt equal employment opportunity policies to prevent workplace harassment as well as other discriminatory or unfair employment practices.

Updated Defenses to Harassment and Disability Discrimination Claims

The POWR Act also revises employers' ability to defend themselves against two types of CADA claims. First, for harassment claims based on a supervisor's conduct, an employer may now only assert an affirmative defense if it can show that:

- the employer has established a program that is reasonably designed to prevent harassment (i.e., proof that the employer takes prompt, reasonable action to investigate, address, and remediate (when warranted) complaints of unlawful discrimination, harassment, and other unfair employment practices);
- the employer has communicated the existence of the program to all employees; and
- the complainant has unreasonably failed to take advantage of the program.

Second, for disability discrimination claims, the POWR Act permits an employer to take adverse action or refuse to hire an individual with a disability so long as (a) there is no reasonable accommodation that can be made "that would allow the individual to satisfy the essential elements" of the role, and (b) the disability actually disqualifies the individual from the role. Before the POWR Act, employers also needed to prove that the disability had a "significant impact" on the job.

Inclusion of Marital Status as a Protected Class in the Employment Context

The POWR Act adds marital status as a new protected category under CADA's employment discrimination provisions. (Previously, only CADA's public accommodation provisions prohibited marital status discrimination.)

Strict Requirements for NDAs

Under the POWR Act, all NDAs **entered into or renewed** on or after August 7, 2023, will be void unless they meet the following six requirements:

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- The NDA must be mutually applicable to all parties involved.
 - The NDA explicitly states that it does not prevent the employee or prospective employee from disclosing the underlying facts of any alleged discriminatory or unfair employment practice (including the existence and terms of a settlement agreement):
 - to the individual’s immediate family members, medical or mental health providers, mental or behavioral health therapeutic support group, legal counsel, financial advisors, religious advisors, or tax preparers;
 - to a local, state, or federal government agency for any reason (“without first notifying the employer”);
 - in response to legal process (“without first notifying the employer”); and
 - for all other purposes as required by law.
 - The NDA explicitly states that a lawful disclosure does not constitute disparagement.
 - If the NDA contains a non-disparagement provision and the employer disparages the employee or prospective employee, the NDA prohibits the employer from then seeking damages or enforcing the NDA or non-disparagement provision against any other party to the agreement.
 - Any liquidated damages provision within the NDA must provide for an amount that is reasonable, proportionate, and not punitive.
 - The parties have signed and attached to the NDA an addendum exhibiting compliance with the other five requirements.

The POWR Act defines a “nondisclosure provision” as any provision that “limits the ability of the employee or prospective employee to disclose or discuss, either orally or in writing, any alleged discriminatory or unfair employment practice.”

An employer will need to carefully follow these requirements while crafting NDAs because the POWR Act provides that each instance of a violation may result in the employer being liable for actual damages, attorneys’ fees, and costs, as well as a penalty of \$5,000 per violation and/or punitive damages. However, this penalty may be reduced or declined if the employer can show that it executed the NDA in good faith and did not believe that its actions were in violation of the requirements. Importantly, merely presenting an unlawful NDA to an employee or prospective employee constitutes a violation of CADA under the POWR Act. (An employer need not actually attempt to enforce the unlawful NDA.)

New Employment Recordkeeping Requirements

Finally, the POWR Act also amends CADA to require employers to **preserve records of complaints** related to discriminatory or unfair labor practices and certain related information for at least five years.

Employers must keep personnel and employment records for at least five years after the later of (a) the date the record was created/received or (b) the date of (i) the personnel action to which the record pertains or (ii) the final disposition of a charge of discrimination or related action to which the record pertains, as applicable. “[P]ersonnel or employment records” include records regarding accommodation requests; complaints of discriminatory or unfair employment practices; applications; trainings provided to or facilitated for employees; any other records related to hiring, promotion, demotion, transfer, layoff, termination, rates of pay or other terms of compensation; and selection for training or apprenticeships.

Employers must also maintain an “accurate, designated repository of all written or oral complaints of discriminatory or unfair employment practices,” including the date of the complaint, the alleged perpetrator, the complaining party (unless the complaint was made anonymously), and the actual substance of the complaint.

Job Application Fairness Act (SB 23-158)

Beginning on July 1, 2024, Jafa will prohibit employers from asking age-related questions to an applicant on an initial application, including requesting or requiring that the applicant disclose their age, date of birth, and attendance or graduation dates from school.

However, employers may ask applicants to verify their compliance with age requirements imposed pursuant to a federal law or regulation, a state or local law or regulation based on a bona fide occupational qualification, or a bona fide qualification pertaining to public or occupational safety.

Although Jafa does not establish a private right of action for violations, if the Colorado Department of Labor and Employment (CDLE) determines that an employer has violated the law, the agency will issue an initial order to the employer to comply with Jafa within 15 business days. Subsequent violations will result in a maximum fine of \$1,000 – \$2,500, depending on the number of previous violations. Importantly, each non-compliant “job posting” (i.e., a “job posting” that requires applicants to disclose unlawful age-related information in their application for the position) will be considered a separate violation, but additional liability will *not* be imposed based on the number of responses that the employer receives to the posting. However, Jafa directs the CDLE to promulgate rules on how it will handle complaints, so employers should stay tuned for further guidance.

Amendments to the Colorado Healthy Families and Workplace Act (SB 23-017)

Pursuant to SB 23-107, beginning August 7, 2023, employees eligible for leave under the Colorado Healthy Families and Workplace Act (HFWA) will be permitted to use such leave for two new types of absences:

- to grieve the death of a covered “family member” (as defined in [CRS 8-13.3-402](#)), to attend a funeral/memorial for a covered family member, or to handle legal or financial matters in the wake of a covered family member’s death, and
- to evacuate from their residence or to care for a covered family member whose school or place of care has been closed due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected occurrences or events.

As a reminder, the HFWA already permits employees to use paid sick leave for a variety

of [other](#) health and safety reasons.

Amendments to the Colorado Equal Pay for Equal Work Act (SB 23-105)

As we [previously reported](#), beginning January 1, 2024, Colorado employers will have significant new disclosure and notice requirements under the state's Equal Pay for Equal Work Act (EPEWA), including, but not limited to:

- An obligation to provide notice to employees for each “job opportunity” (rather than a promotional or advancement opportunity);
- In addition to salary and benefit information, an obligation to include in job notifications the date the application window for each job opportunity is anticipated to close;
- New disclosure obligations for positions that follow career progressions; and
- An obligation to make reasonable efforts to disclose information regarding selected candidates to employees with whom the candidate will likely work.

SB 23-105 also extends the statute of limitations for claims under the EPEWA from three years to six years. The CDLE is [expected](#) to issue proposed enforcement rules and further guidance this fall.

What Colorado Employers Should Do Now

Each of these new laws will likely affect a variety of policies and practices for Colorado employers. To ensure that they are ready to comply with the new legal landscape, employers with a Colorado workforce should do the following:

- Review and revise discrimination, harassment, and other equal employment opportunity [policies](#) to comply with the new legislation, including ensuring that if legal standards are part of the policy, the POWR Act's “unwelcome” standard for harassment is properly included, and identifying marital status as a protected characteristic if all protected characteristics are listed in the policy.
- Update and provide [training](#) to all employees regarding discrimination, harassment, and other equal employment opportunity policies, including complaint reporting mechanisms.
- Conduct an [audit](#) of discrimination and harassment complaint procedures, including how such complaints are investigated and remediated. Ensure that human resources professionals, supervisors, and investigators understand their role in the investigation process.
- Review and revise NDAs to ensure that any such agreements entered into or renewed after August 7, 2023, are mutually applicable to the employer and employee, and otherwise comply with the new requirements under the POWR Act.
- Review and update record retention policies and procedures to comply with the POWR Act and train human resources professionals and other relevant stakeholders on their new obligations thereunder.

- Ensure that initial application materials do not ask or require an applicant to disclose age-related information, including, in particular, requesting the years of the applicant's graduation from school.
- Review and revise sick leave policies to permit employees to use such leave for covered bereavement activities and unexpected occurrences.
- Update job posting and notice procedures to ensure compliance with the amendments to the Equal Pay for Equal Work Act's disclosure obligations as of January 1, 2024.

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