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## An Annual Update on Employment Law in the State of Colorado



## Happy 2021 from PSB Law

Although 2020 was marked by disease and political discord, 2021 represents a new opportunity for growth, healing, and recovery. Last year presented unique challenges in the field of employment law due to COVID and economic shutdowns. Our year was largely devoted to asserting and defending rights of both employees and employers in the context of the challenges all faced due to the coronavirus pandemic. In addition, we advise clients in various business matters, including on topics concerning immigration, incorporation, employment agreements, contracts, and compensation. In this iteration of our newsletter, we summarize some of the most consequential legal changes that occurred in the past year and some that will be significant in 2021.

We look forward to serving the needs of our clients in this year and in all future years. - PSB



## COVID Whistleblower Protection 3 Key Provisions

On June 11, 2020, Governor Polis signed HB 20-1415, which prohibits most employers and entities that rely on independent contractors for a specified percentage of their workforce, from discriminating, retaliating, or taking adverse action against any workers who either:

1. Raise a concern about workplace health and safety practices or hazards related to a public health emergency to the employer, other workers, a government agency, or the public, if the workplace health and safety practices fail to meet guidelines established by a federal, state, or local public health agency with jurisdiction over the workplace;
2. Voluntarily wear their own personal protective equipment at the workplace, if that equipment provides a higher level of protection than the equipment provided by the employer, is recommended by an appropriate governmental authority, and the equipment does not interfere with performance of the work for the employer, or
3. Oppose any practice that the worker reasonably believes is a violation of this law, file a charge or testify, or assist others or participate in an investigation, administrative proceeding or hearing, regarding matters covered by this law. worker reasonably believes violates the law, among other activities.

The bill provides procedures for workers affected by retaliatory actions to seek relief by, among other methods, bringing suit against the employer or through a whistleblowing action.

Remedies for violation of this law are broad and include an award of reasonable attorney's fees, and possible reinstatement, back pay, compensatory damages and punitive damages. This law took effect on July 14, 2020 and applies to actions taken on or after that date. For concerns about conduct that occurred before July 14, 2020, common law remedies may be available. Employers must post a notice about this law in a conspicuous place.

For more info, check our blog at [psblawfirm.com/blog](https://psblawfirm.com/blog).

[www.psblawfirm.com](https://www.psblawfirm.com)

Stay on top of the law

# Updates on Independent Contractor Law

Recent and upcoming changes, from California's implementation of the ABC test to new Department of Labor rules, may affect you

## California

In *People v. Uber Technologies, Inc.*, a California appeals court affirmed a trial court ruling that specifically ordered Uber and Lyft to treat their drivers as employees instead of independent contractors. There, the court strictly applied the ABC test. That test, which determines if a worker is properly classified as an independent contractor, puts the onus on the hiring entity to prove that a worker 1) is free from the control and direction of the hiring entity, 2) conducts work outside of the usual course of the hiring entity's business, and 3) operates

established trade, business, or occupation. Colorado currently follows a similar test but omits the requirement that the independent contractor conduct work outside the usual course of the hiring entity's business. In other words, an independent contractor in Colorado is permitted to perform work in the same line of business as the hiring entity.

## Proposed DOL Rule

A new federal rule is programmed to go into effect on this subject beginning in March 2021. In this proposed rule—which may be canceled at the direction of the incoming Biden administration—the biggest factors in examining whether an individual is an independent contractor are two considerations: 1) the nature and degree of control over the work and 2) the



worker's opportunity for profit or loss based on initiative and/or investment. Importantly under the second consideration, contracts should explicitly disclaim any prohibition on the independent contractor performing work for entities other than the hiring entity. While other factors may be relevant and considered, these two factors are given the most weight under the rule. If a worker is determined to be largely free from the control of the hiring entity and can make profits or sustain losses upon his or her own initiative without restriction from the hiring entity, that worker is more than likely to be deemed an independent contractor in fact.



## COVID Changes >>>

# Colorado Paid Sick Leave

The Coronavirus pandemic has driven numerous changes to employee rights and employer responsibilities. Are you affected? Under Colorado's Healthy Families and Workplaces Act, you probably are.

The Healthy Families and Workplaces Act requires that, beginning January 1, 2021, employers in Colorado who have sixteen or more employees provide all employees paid sick leave. This new act directs employers to track work time, even for salaried and otherwise FLSA-exempt employees, to ascertain how much paid sick leave must be granted.

Employees, under the Act, earn one hour of paid sick leave for every thirty hours worked. So, in a typical forty-hour workweek, an employee would accrue 1.33 hours of paid sick leave, for example. An employee may use up to forty-eight hours of paid sick leave in a year, but an employer is not required to allow employees to use more than that.

Employees can carry forward unused paid sick leave into future years. An employer is not required to compensate an employee upon termination, resignation, retirement, or other



separation for accrued yet unused paid sick leave, except in limited circumstances. There are certain parameters that apply to the valid use of such leave, which employers are generally required to allow. However, employers may discipline employees who use paid sick leave for unauthorized purposes. Employers are limited in what kinds of information they may request to verify the purposes of an employee's absence.

Because other complex rules apply to paid sick leave, employers should seek legal counsel to ensure proper compliance. Employees, likewise, should seek legal advice if paid sick leave is unlawfully denied to them.

## Wage and Hour Updates

Colorado and Denver Update Rates for 2021

Colorado Overtime and Minimum Pay Standards Order #37, effective January 1, 2021, sets the new minimum wage standards to \$12.32 per hour, or \$9.30 for tipped employees. The Federal minimum salary required for overtime exemption remained at \$35,568 per year for the executive, administrative and professional exemptions and \$684 per week for employees in computer-related occupations. Likewise, Colorado's minimum salary exemption rate stayed at \$40,500.

Within the city of Denver, the minimum wage raised to \$14.77 as of January 1, 2021, and is set for a mid-year increase on July 1, 2021, to \$15. By 2022, the minimum wage will increase to \$15.87. Although Denver is currently the only city in Colorado to set its own minimum wage, other cities may be planning to do so in the near future.

# Equal Pay for Equal Work Act

*Procedures for improving equitability in hiring and promotions go into effect beginning 2021. Are you prepared?*



Starting in 2021, employers of all sizes in Colorado must now comply with Part 2 of the Equal Pay for Equal Work Act. That is, the Act now requires employer to make “reasonable efforts to announce, post, or otherwise make known all opportunities for promotion to all current employees on the same calendar day and prior to making a promotion decision.”

Furthermore, employers must disclose in postings for job openings the hourly or salary compensation associated for that position, or an appropriate range, along with a description of the benefits and other compensation afforded for that position.

These transparency efforts come with consequences for any employer who fails to comply. Under the Act, each employer violation can result in a fine between \$500 and \$10,000. Failure to maintain records of wages or job descriptions for employees for up to two years after the end of employment for an affected employee gives cause to Colorado courts to find favorably for employees who bring claims under the Act.

Employers should take care to comply with these new provisions or risk exposure to substantial fines in instances of promotion discrimination, wage or job opening disputes.



## Supreme Court In Review

*The Court decided two notable cases in 2020 that have had a big impact on employer and employee rights.*

### *Bostock v. Clay County*

In June 2020, the Supreme Court decided a landmark case for LGBTQ rights in the workplace. In *Bostock v. Clayton County*, the Court held that an employer violates Title VII if it terminates or otherwise discriminates against an individual for being homosexual or being a transgender person. The Court decreed in that case that it is unlawful to discriminate against an individual “because of” the individual's sex, which includes consideration of the person's sexual orientation and gender identity. Going forward, employers are not permitted to discriminate against people who identify as homosexual or transgender in the workplace nor can they exclude such individuals from hiring consideration.

### *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*

The Court held that employers with deeply held religious beliefs may refrain from paying into healthcare plans that provide contraceptive coverage or may otherwise seek to exempt such coverage from employer health plans in contravention of requirements under the Affordable Care Act. Now, on religious exemption grounds, employers are no longer required to provide such services so long as they can prove a sincerely held religious belief against providing contraception.

## Closing comments...

*We hope this year brings you continued success, opportunities for growth, unbounded happiness, and peace. We are here to support your needs now, and into the future. Wishing you all the best for 2021.*

*Sincerely,  
PSB Law Firm*

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