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Update on the State of Employment Law in Colorado

PSB LAW

Fall 2023 from PSB Law!

Each August, newly passed statutory law takes effect in Colorado. Here, we will summarize major law changes affecting employees and employers effective in 2023. At PSB Law, we support employees and employers in resolving workplace disputes and employee benefits issues. In addition, we have significant experience in creating business documentation for small business, in non-compete law, and provide assistance to employees seeking to claim disability benefits under ERISA and PERA.

A. Colorado Gives “POWR” to Employees

On June 6, 2023, Governor Polis signed into law, effective as of August 7, 2023, specifics include:

1. POWR Makes It Easier to Establish Harassment Claims

Prior to POWR, to prove a claim of harassment under either the federal or state anti-discrimination law, a plaintiff had to establish that harassment was “severe or pervasive.” Harassment that was not proven to be “severe or pervasive,” was effectively legal, and tolerated, in the workplace.



Now, an employee does not have to prove that the harassment is severe or pervasive. Instead, harassment is evaluated considering the following factors:

1. Was submission to the conduct or communication is explicitly or implicitly made a term or condition of the individual’s employment?
2. Was submission to, objection to, or rejection of the conduct or communication is used as a basis for employment decisions affecting the individual; or
3. Whether 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.

“Petty slights, minor annoyances, and lack of good manners” do not constitute harassment unless such actions, when taken individually or in combination under a “totality of the circumstances,” meet one of the above categories. The “totality of the circumstances” includes: the frequency, duration, type or nature and location of the offending conduct or communication; the number of individuals involved; whether the conduct or communication was threatening; whether it involved humiliating or degrading epithets or slurs or reflected stereotypes; and lastly, whether a power differential exists between the parties.



2. Greater Vulnerability for Employers Where Supervisor is the Harasser

The POWR Act limits the ability of employers to defend against supervisor harassment unless the employer can show that it has an established anti-discrimination program and given notice of the program to its employees. The program must include procedures for “prompt, reasonable action” for investigating and addressing complaints of discriminatory or unfair employment practices both “when warranted” and “in response to complaints.” If those two elements are present, the employer must also prove that the employee unreasonably failed to take advantage of the program.



3. Greater Expectation for Accommodation of Disability

Under the POWR Act, employers will no longer be able to assert that an otherwise qualified employee’s disability has a “significant impact on the job” as a reason why the employer cannot provide accommodation. Accommodation can be denied only when no reasonable accommodation is available that would allow the employee to satisfy the essential functions of the job and the disability actually disqualifies the individual from the job.

4. Restrictions on the Use of Nondisclosure Agreements

The POWR Act the use of nondisclosure provisions in agreements entered with existing and prospective employees designed to restrict an employee’s disclosure of alleged discriminatory or unfair employment practices. Such agreements are void unless the language of the provision expressly states that the provision:

- applies equally to both parties;
- does not restrain the individual from talking to certain advisors;
- disclosure of the underlying facts under certain circumstances does not constitute “disparagement” of the employer.
- the employer may not enforce a provision if it is disclosing or disparaging.
- Provides for liquidated damages only for anticipated actual damages and is not punitive in nature.
- Is attested to by both parties in a separate addendum as complying with the POWR Act.

Penalties of \$5,000 per violation can be assessed and the possibility of punitive damages where it is determined other similar individuals have been presented with agreements in violation of the Act.

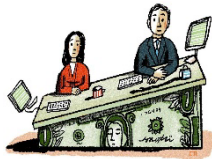
5. Recordkeeping Requirements



The POWR Act requires employers to maintain in a “designated repository” for “any personnel or employment record” received or created which relates to a complaint filed, whether in writing or orally, alleging a discriminatory, harassing, or unfair employment practice. **This novel provision will require all employers to implement new procedures for retaining complaint-related records.** These records must be retained for five years and include: (1) the date of the complaint; (2) the identity of the complaining party, if known; (3) the identity of the alleged perpetrator; and (4) the substance of the complaint. Job applications, requests for accommodation and records relating to hiring, promotion, transfer, termination, and training, among other things, must be retained.

B. Other Colorado Employment Law Changes in 2023.

1. **Protections for Public Workers Act, C.R.S. § 29-33-101 et. seq.**, this new Colorado law creates protections, including against retaliation, for employees of municipalities, school districts, small counties and special districts, among others, for engaging in speech related to workplace issues and employee rights, off-duty political participation, and union activity. Similar legal protections were implemented for employees of larger counties, in C.R.S. § 8-3.3-101 et seq,
2. **SB23-053, Restrictions On Non-Disclosure Agreements.** This new Colorado law protects government employees from being forced to sign employment contracts prohibiting their disclosure of circumstances around their employment. There are exceptions. Retaliation protections are available under this statute.
3. **Healthy Families and Workplaces Act (HWFA)** was amended to expand paid leave for health and safety-related reasons and for bereavement and natural disaster needs. The public health emergency leave benefit for COVID-19 is no longer available.
4. **Job Application Fairness Act, C.R.S. § 8-2-131.** This act restricts employers from making age related inquiries of applicants, including prohibiting asking about dates of birth, school attendance or graduation. There are exceptions if being a certain age is a legal requirement for the position.



5. **Ensure Equal Pay For Equal Work, SB 23-105,** amends Colorado's Equal Pay for Equal Work Act to include more expansive definitions of what is covered, so that promotions and vacated positions are now job opportunities covered by the law. This law was amended to ensure that remote workers in Colorado, are covered.

C. Patricia Bellac Named Super Lawyer for Eighth Year

Our managing attorney, Patricia Bellac, has been recognized as a Super Lawyer for 2023, for the eighth time, in recognition for her outstanding service in the areas of Employment and Business Law. In addition to this latest recognition, of which only the top 5% of attorneys in Colorado achieve. *Congratulations, Patricia!!*

D. US Supreme Court: Oil Rig Worker Making Over \$200K Entitled to Overtime Pay



In a recent decision, the United States Supreme Court held, in a 6-3 decision, that a highly compensated employee, earning over \$200K a year and classified by his employer as a “bona fide executive,” is entitled to overtime pay. The court concluded that because the worker was paid a daily rate, and not a salary, he did not qualify for exemption from overtime under the Fair Labor Standards Act (FLSA). *Helix Energy Solutions Group, Inc. v. Hewitt*, No. 21-984 (February 22, 2023).

Hewitt worked for Helix Energy Solutions Group on an offshore oil rig, typically working 84 hours a week. Helix paid Hewitt on a daily-rate basis, with no overtime compensation. Hewitt's paycheck, issued every two weeks, amounted to his daily rate times the number of days he worked in the pay period. His typical weekly wage was approximately \$963/week, well over the qualifying amount of \$455/week for a “highly compensated employee” as that term is used in the FLSA regulations. However, because he was only paid for hours he actually worked and not paid if he did not work, the court concluded he could not meet the “salary basis” test for exemption from overtime pay. The court concluded the term “salary” requires “the stability and security of a regular weekly, monthly, or annual pay structure.” To qualify for exemption from the overtime requirements of the FLSA, a highly compensated employee must not only meet the “salary level” threshold but also be paid a “true salary” meaning being paid compensation that is predetermined, fixed and does not vary with the amount of time actually worked.

E. Wage and Hour, Overtime Exemption Changes

In 2023, the Colorado minimum wage is \$13.65 per hour, or \$10.63 for tipped employees. The Salary Basis for overtime exemption is \$50,000 per year. For purposes of enforcing a non-compete agreement, an employee must earn \$112,500 or at least \$67,500 to be bound by a non-solicitation.

We are here to assist you with all your employment, business and employee benefits law needs. All of our best, The PSB Law Team



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