



HR-Alert: Colorado Expands Anti-Discrimination Laws

Effective August 7, 2023, the [Protecting Opportunities and Workers' Rights \(POWR\) Act](#) expanded the Colorado Anti-Discrimination Act (CADA) by broadening the definition of harassment and establishing a lower burden of proof. The new law limits an employer's ability to assert an affirmative defense to harassment claims in instances where an employee accuses a supervisor. In addition, it includes marital status as a protected category, clarifies nondiscriminatory employment practices related to employees with disabilities, outlines the necessary requirements for an enforceable nondisclosure agreement relating to discriminatory employment practices, and adds certain recordkeeping requirements for employers.

Harassment Claims Will Have a Lower Burden of Proof

The POWR Act adds "unwelcome" conduct to the definition of harassment and removes the provision that harassment has to be "severe or pervasive" as a standard of proof. Conduct that 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" will be considered harassment under Colorado law. The new law also provides an affirmative defense to employers when an employee proves that a supervisor engaged in unlawful harassment. To assert the defense, an employer must:

- Have in place an established program to prevent and deter harassment
- Demonstrate they promptly proceeded to investigate, address, or remediate the discriminatory conduct
- Demonstrate they communicated the details of the program to all employees and the employee in question unreasonably failed to take advantage of the program

Marital Status as a Protected Category

The POWR Act adds marital status to the classifications protected by law and clarifies that it is an unfair and discriminatory practice to discharge an employee or to refuse to hire or promote a person solely on the basis that the person is married to or plans to marry another employee. It does not, however, change Colorado law with respect to decisions to discharge an employee, or refuse to hire a person where the spouse would have certain authority over the other spouse, such as supervisory, auditing, or dismissal authority, or if one spouse has access to the employer's confidential information.

Nondiscriminatory Practices Relating to Disability

Rather than considering whether a disability would have a significant impact on a job as previously noted under the CADA, the POWR Act specifies that discharge, demotion, or refusal to hire or promote a person with a disability will not be an unfair or discriminatory employment practice if there is no reasonable

accommodation that can be made that would allow the individual to satisfy the “essential functions of the job.” In addition, the disability must actually disqualify the individual from the job.

Stringent Nondisclosure Agreement Requirements

The POWR Act voids nondisclosure agreements entered into after its effective date that “limit the ability of the employee or prospective employee to disclose... any alleged discriminatory or unfair employment practice” unless the provision meets specific conditions.

Recordkeeping Requirements

Under the POWR Act, employers are required to maintain “any personnel or employment record” the employer made or received for at least five years and with regard to complaints of discriminatory or unfair employment practices, to maintain those records in a designated storage area.

Employer Next Steps

- Review current policies, procedures, and employment agreements to ensure compliance with the updated regulations
- Seek to invest, if you have not already, in a comprehensive harassment prevention training program geared towards educating employees about their rights and responsibilities

If you have any questions regarding this HR-Alert, please [email us](#).