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Employees Have the POWR (Act): Colorado Enacts New Protections for Employees

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In June 2023, Colorado Gov. Jared Polis signed into law the Protecting Opportunities and Workers' Rights (POWR) Act, which, among other things, substantially limits the use of nondisclosure agreements, lowers the burden of proof for workplace harassment claims and imposes new record-keeping requirements on employers with employees working in Colorado. We outline the key provisions of the act – which took effect on August 7, 2023 – below.

Limitations on nondisclosure agreements

The POWR Act declares that it is the state's public policy to encourage "free reporting, discussion, and exposure of discriminatory or unfair employment practices" to better protect employees. Therefore, the POWR Act makes clear that "attempts to interfere with employees' ability to communicate about and report alleged discriminatory or unfair employment practices are contrary to the public policy of the state."

In alignment with these objectives, the POWR Act substantially limits an employer's ability to use nondisclosure agreements entered into or renewed on or after August 7, 2023. Under the act, such provisions that limit an employee's or prospective employee's ability to "disclose or discuss" any alleged discriminatory or unfair employment practices are now void, unless the agreement satisfies **all** of the following requirements:

- The provision applies equally to the employer and employee.
- The provision expressly states that it does not restrain the employee or prospective employee from disclosing the underlying facts of any alleged discriminatory or unfair practices to certain individuals – including immediate family members, local, state, or federal government agencies, or in response to a legal process (e.g., a subpoena).
- The provision expressly states that disclosure of the underlying facts of any allegation does not constitute disparagement.
- The agreement includes a condition that if a nondisparagement provision is included and the employer disparages the employee or prospective employee, the employer cannot seek to enforce the provision or seek damages against the employee.
- Any liquidated damages provision in the agreement does not constitute a penalty or punishment – and to be enforceable, it must include an amount that is reasonable and proportionate and not punitive.
- The agreement must attach an addendum signed by all parties to the agreement, attesting to compliance with the above requirements.

Notably, any violation of the above requirements carries significant costs and penalties, including liability for actual damages and a penalty of $5,000 per violation. Further, any employee or prospective employee who is presented with an agreement that fails to comply with the new requirements may immediately bring an action and may recover penalties, actual damages, reasonable costs, attorneys' fees and punitive damages.

Lowered standard for workplace harassment

Like some other states, such as New York, the POWR Act also rejects the "severe or pervasive" standard for proof of workplace harassment claims in favor of a lower standard that makes harassment claims easier to prove. Under this standard, unwelcome 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" is harassment under Colorado law.

While the conduct or communication need not be severe or pervasive to be unlawful, it must still meet one of the following additional requirements to constitute illegal harassment:

- Submission to the conduct or communication is explicitly or implicitly made a term or condition of the individual's employment.
- Subjection to or objection to the conduct or communication is used as a basis for the employment decision affecting the employee.
- 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.

Notably, however, even a single incident may rise to the level of harassment, and the act points out that conduct that was previously welcome may become unwelcome between two individuals.

Limitations on affirmative defenses to harassment claims

The POWR Act also limits an employer's ability to assert affirmative defenses to claims of harassment by supervisors. To assert such a defense, employers must now establish that they had a program in place designed to prevent harassment and deter future harassers that was communicated to employees, and that the employee bringing such a claim unreasonably failed to take advantage of the program. As part of this program, employers must take prompt and reasonable action to investigate or address the alleged harassment or unfair employment practice and take remedial actions when warranted.

New record-keeping requirements

The POWR Act also requires employers to preserve personnel or employment records for at least five years. Personnel or employment records broadly include:

- Requests for accommodation.
- Employee complaints.
- Application forms submitted by applicants for employment.
- "Other records related to hiring, promotion, demotion, transfer, layoff, termination, rates of pay or other terms of compensation, selection for training or apprenticeship, and records of training."

In addition, employers also must keep a "designated repository" of all written and oral complaints of discrimination or unfair employment practices, which must include the date of the complaint, identity of the parties and substance of the complaint.

Marital status as a protected class and modified disability discrimination framework

Finally, the POWR Act also adds marital status as a protected category under the state's anti-discrimination law and modifies the framework for disability discrimination. With respect to disability claims, Colorado law now provides that it is not a discriminatory or unfair employment practice to take adverse action against an individual with a disability 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." Previously, the law also required that the disability has a "significant impact on the job." By removing this requirement, the state's standard now mirrors the federal Americans with Disabilities Act standard.

Next steps

Colorado employers should take the following steps in light of the POWR Act's significant new obligations:

- Review and revise any nondisclosure agreements, including any separation or settlement agreements with such provisions, for compliance with the law.

- Review and revise applicable policies to comply with the new standards outlined in the act.
- Train relevant human resources (HR) staff and management on any updated policies and standards established by the act.
- Review and revise applicable document retention policies with respect to personnel files and other employment records and work with HR to ensure compliance with the new record-keeping requirements.
- Reevaluate reasonable accommodation processes in light of the new disability discrimination framework, if applicable.

If you have questions about the new law, please contact a member of Cooley's employment group.

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