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‘POWR’ Play: Colorado Law Tips the Scale in Favor of Employees Regarding Employment Claims, Nondisclosure Agreements

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David L. Zwisler

Denver

Author

Marielle A. Moore

Denver

Author

Rebecca M. Lindell

Denver
Salt Lake City

Author

On June 7, 2023, Governor Jared Polis signed Senate Bill (SB) 23-172 into law, radically transforming Colorado’s employment discrimination legal landscape by expanding the Colorado Anti-Discrimination Act (CADA). SB 23-172, the **Protecting Opportunities and Workers’ Rights (POWR) Act**, establishes that “[i]t is the public policy of the state to encourage … [e]mployers to adopt equal employment opportunity policies” prohibiting and addressing harassment and discrimination, as well as to encourage free reporting and communication around discriminatory and unfair employment practices in the workplace.

Quick Hits

The POWR Act adds “unwelcome” conduct to the definition of “harassment” and rejects the judicially created “severe or pervasive” standard of proof.

Nondisclosure agreements are void under the POWR Act unless they meet several conditions.

The POWR Act will not take effect until at least ninety days after the General Assembly adjourns.

To that end, the POWR Act broadens the type of conduct that constitutes harassment and restricts employers’ use of affirmative defenses. The legislation repeals the current legal definition of “harass” (“to create a hostile work environment based upon an individual’s race, national origin, sex, sexual orientation, gender identity, gender expression, disability, age, or religion”) for a broader definition with a much lower threshold of proof. These changes will make it easier for employees to plead and prove harassment claims. In contrast, employers will be required to meet a higher evidentiary standard for affirmative defenses.

The POWR Act also adds protections against discrimination based on “marital status” and mandatory criteria for enforceability of nondisclosure agreements and it places an additional recordkeeping obligation on employers. The act appropriates approximately $1.2 million from the general fund for state fiscal year 2023-24 to implement the changes.

The POWR Act is subject to petition. An individual has ninety days after the General Assembly adjourns to submit a petition to the Colorado Secretary of State’s Office to refer all or a portion of the act to the ballot for voter approval. The act will therefore not take effect until at least ninety days after the General Assembly adjourns.

An Expanding Definition of Harassment

The POWR Act expands the definition of "harassment" to include any "unwelcome" conduct and explicitly rejects the judicially created "severe or pervasive" standard of proof. Specifically, the new definition encompasses any "unwelcome physical or verbal conduct or any written, pictorial, or visual communication directed at an individual or group of individuals because of that individual's or group's membership in, or perceived membership in, a protected class" that "is subjectively offensive to the individual alleging harassment" and "objectively offensive to a reasonable individual who is a member of the same protected class." The new definition does not include "petty slights, minor annoyances, and lack of good manners," *unless* they meet the new definition of harassment "when taken individually or in combination and under the totality of the circumstances." The act specifies that "the totality of the circumstances" includes the frequency, duration, and location of the conduct or communication; the number of individuals involved; and "the type or nature of the conduct or communication," and whether it is threatening, involves epithets or slurs, or reflects stereotypes. Conduct or communication constitutes actionable harassment if:

> "[s]ubmission to the conduct or communication is explicitly or implicitly made a term or condition of the individual's employment";
>
> "[s]ubmission to, objection to, or rejection of the conduct or communication is used as a basis for employment decisions affecting the individual"; or
>
> "[t]he 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."

While the POWR Act prohibits consideration of the nature of the work or the frequency with which harassment occurred in the past in determining whether certain conduct rises to the level of actionable harassment, the frequency of the conduct, the number of number of individuals engaged in the conduct, the threatening nature of the conduct, the power differential between the parties involved, and the use of epithets or slurs, or conduct reflecting stereotypes, may all be considered.

Limitation on Affirmative Defenses

If an employee can prove harassment by a supervisor, the POWR Act prevents an employer from asserting an affirmative defense unless the employer can establish that it has "a program that is reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment." To fulfill this requirement, the employer must demonstrate the following:

> that it "takes prompt, reasonable action to investigate or address alleged discriminatory or unfair employment practices" and "when warranted, in response to complaints";
>
> that it "has communicated the existence and details of the program ... to both its supervisory and nonsupervisory employees"; and
>
> that "[t]he employee has unreasonably failed to take advantage of the employer's program."

In addition, 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 an accommodation.

Limitations on Nondisclosure Agreements

The POWR Act adds a completely new section to CADA that places limitations on agreements between employers and employees or prospective employees that contain nondisclosure or confidentiality provisions. Specifically, any agreement that limits an individual's ability to disclose an alleged discriminatory or unfair employment practice is considered void unless it:

- applies equally to both the employer and employee or prospective employee;
- states that it does not prohibit the individual "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, religious advisor, medical or mental health provider, mental or behavioral health therapeutic support group, legal counsel, financial advisor, or tax preparer";
- states that it does not prohibit the individual from disclosing the underlying facts of any alleged discriminatory or unfair employment practice to any government agency, including the existence and terms of a settlement agreement, or in response to a subpoena "without first notifying the employer";
- "expressly states that disclosure of the underlying facts of any alleged discriminatory or unfair employment practice ... does not constitute disparagement" of the employer or others involved;
- states that "the employer may not seek to enforce the nondisparagement or nondisclosure provisions of the agreement or seek damages" if the employer has disparaged the individual in violation of the nondispragement provision;
- includes no liquidated damages provision that penalizes or punishes the employee for breach, which means that a liquidated damages provision must be "[r]easonable and proportionate in light of the anticipated actual economic loss" for a breach and is varied to account for the "nature or severity" of the anticipated breach; and
- contains an addendum, signed by all parties, attesting to the agreement's compliance with the act.

The Colorado Civil Rights Commission or an individual may bring an action against an employer that presents an employee with an agreement that does not comport with the requirements of the POWR Act. An employee or prospective employee may recover actual damages, costs, and attorneys' fees. In addition, any employer found to have violated this provision is liable for actual damages and a penalty of $5,000 per violation, which may be reduced upon a showing of good faith by the employer. In contrast, evidence of multiple agreements violating the nondisclosure provisions may be used as evidence to support an award of punitive damages.

Recordkeeping Requirements

The POWR Act places an affirmative obligation on employers to preserve personnel and employment records for a period of five years from the later of the date the employer created or received the employment record, the date the personnel action giving rise to the personnel record occurred, or the final disposition of a charge of discrimination or related action. The term "personnel or employment record" includes the following:

- requests for accommodation;

written and oral employee complaints of discrimination, harassment, or unfair employment practices;

submitted job applications;

"records related to hiring, promotion, demotion, transfer, layoff, termination, rates of pay or other terms of compensation, and selection for training or apprenticeship"; and

"records of training provided to or facilitated for employees."

In addition, a covered employer must maintain a "designated repository" of all written and oral complaints of discrimination, harassment, or unfair employment practices, including "the date of the complaint, the identity of the complaining party, if the complaint was not made anonymously, the identity of the alleged perpetrator, and the substance of the complaint."

Ogletree Deakins' **Denver office** will continue to monitor developments with respect to the POWR Act and will provide updates on the **Colorado** and **Unfair Competition and Trade Secrets** blogs as additional information becomes available.

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