

# Colorado Employers—Get Ready for a Wave of New Laws

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The Colorado General Assembly was busy drafting and passing numerous employment laws during its 2022 legislative session, creating a wave of change for employers in the Centennial State.

## Colorado Expands Termination Notice Requirements for Employers

Under [Senate Bill \(SB\) 22-234](#), which Governor Jared Polis signed into law on May 25, 2022, “at the time of an employee’s separation from [employment],” an employer in Colorado must provide additional written notice to the employee containing specific information related to the availability of unemployment compensation benefits. Previously, Colorado law required employers to provide a separation notice containing the following information:

- A statement that unemployment compensation benefits are available to unemployed workers who meet the eligibility requirements under Colorado law
- Contact information to file an unemployment claim
- Information the worker will need to file a claim
- Contact information to inquire about the status of an unemployment compensation claim after it is filed

Under the new law, in addition to the information above, employers are now required to provide the following:

- The employer’s name and address
- The employee’s name and address
- The employee’s identification number or the last four digits of the employee’s Social Security number
- The employee’s start date and last day of work
- The employee’s year-to-date earnings and wages for the last week worked
- The reason for the separation of the employee from the employer

This notice may be provided electronically or as a hard copy. The Colorado Department of Labor and Employment (CDLE) is expected to release an official template notice sometime in the near future.

Effective August 9, 2022, [House Bill \(HB\) 22-1367](#) brings four significant changes to the Colorado Anti-Discrimination Act (CADA).

First, HB 22-1367 expands the statute of limitations for filing a charge of discrimination under CADA from six months to 300 days. This is the same amount of time that is permitted under federal antidiscrimination laws.

Second, HB 22-1367 expands the Colorado Civil Rights Commission's jurisdiction over a charge of discrimination from 270 days to 450 days after the initial filing of the charge, thereby granting the commission additional time to investigate a complaint and issue a finding.

Third, HB 22-1367 expands the definition of "employee" to include a person engaged in domestic service. Accordingly, individuals employed in private homes, such as babysitters, housekeepers, or caretakers, will be protected by CADA and may bring a discrimination claim under CADA against their domestic employers.

Finally, HB 22-1367 greatly expands the remedies available for age discrimination claims. Just like claims based on other protected characteristics, claims under CADA for age discrimination will now provide for the recovery of compensatory and punitive damages. This last item is significant because a plaintiff who sues under both the federal Age Discrimination in Employment Act (ADEA) and CADA will be entitled to liquidated damages under the ADEA's provisions and compensatory and punitive damages under CADA.

#### **Mental Health Records Disclosure**

[House Bill 22-1354](#) clarifies provisions in Colorado's Workers' Compensation Act relating to the release and disclosure of the mental health records of an injured employee making a claim under the act. The act applies to all claims filed on or after the law's effective date of June 9, 2022.

HB 22-1354 defines "mental health records" broadly to include "psychological or psychiatric tests, including neuropsychological testing; other records prepared by or for a mental health provider; independent medical examination records, audio recordings, and reports that address psychological or psychiatric issues; Division [of Workers' Compensation] independent medical evaluation records and reports that address psychological or psychiatric issues; and records relating to the evaluation, diagnosis, or treatment of a substance use or abuse disorder."

Of note, HB 22-1354 requires mental health providers to provide a self-insured employer with mental health records where necessary for payment, adjustment, and adjudication of claims involving psychological or psychiatric issues or where necessary for an employer to comply with applicable state or federal laws, rules, or regulations. Upon receipt of records, a self-insured employer must keep a workers' compensation claimant's mental health records separate from personnel files. HB 22-1354 also establishes that any employer that has retained mental health records under the statute may not disclose the records "to any person who is not reasonably necessary for the medical evaluation, adjustment, or adjudication of claims involving psychological or psychiatric issues," unless otherwise directed by order of the director of the Division of Workers' Compensation or an administrative law judge. This limits the disclosure of information to a claimant's supervisor or manager only to such "information from the claimant's mental health records concerning any work restrictions placed on the claimant" and excludes "the claimant's actual mental health records."

As for an insurer, HB 22-1354 permits the release of information from a claimant's mental health records to the claimant's employer concerning work restrictions and information necessary for the adjustment or adjudication of a claim, but it prohibits the disclosure of the claimant's actual mental health records to third parties that do not need the information.

Mental health records may be disclosed only for specifically approved purposes.

### **Wage Theft and Misclassification**

On June 3, 2022, Governor Polis signed into law [Senate Bill 22-161](#) to address issues of wage theft, employee misclassification, and enforcement procedures and remedies for violations of laws pertaining to wage payment and employee classification. SB 22-161 took effect on August 9, 2022.

A main theme of the new law concerns various penalties for wage theft and noncompliance with investigations by the state. Specifically, SB 22-161 eliminates misdemeanor criminal liability for failure to furnish information requested by the CDLE's Division of Labor Standards and Statistics (DLSS) and instead implements a penalty of no less than \$50 per day. Beginning January 1, 2023, an employer that does not pay all earned wages within fourteen days after a "written demand is sent to the employer or [an] administrative claim or civil action is sent to or served on the employer," is liable for the unpaid wages plus an automatic penalty of "the greater of two times the amount of the unpaid wages or compensation or one thousand dollars [\$1,000]." If an employee can show that the employer's failure to pay was willful, the penalty increases to "the greater of three times the amount of the unpaid wages or compensation or three thousand dollars [\$3,000]." An employer's failure to pay is per se willful if the employee can show that the employer has failed to pay wages of a similar type within the five years immediately preceding the claim.

If an employer fails to pay an employee the amount determined to be owed by the DLSS or a hearing officer within sixty days of the determination or decision, the employer will be liable for:

- the employee's attorneys' fees incurred in pursuing civil action to enforce the determination;
- an additional fine equal to 50 percent of the amount determined to be owed; and
- a penalty equal to the greater of 50 percent of the amount determined to be owed or \$3,000.

The new enforcement provisions do not end there. In order to collect past-due wages, fines, and penalty obligations ordered as part of a proceeding, the DLSS may place a lien or levy on the employer or any other person that has possession, custody, or control of the employer's assets. These liens are superior to any other liens filed later on the same assets.

Senate Bill 22-161 also creates additional avenues for suit. Effective January 1, 2023, an employee or the DLSS may bring class action-type claims "on behalf of a group of similarly situated employees." Additionally, SB 22-161 creates a private right of action for retaliation claims brought under the statute. An employee who is retaliated against for filing a complaint or instituting a proceeding under any wage and hour rule or who testifies or provides evidence in a proceeding related to any wage and hour rule may file a civil action against the employer. The employee may recover legal and equitable relief, including:

- “back pay”;
- “reinstatement of employment, or if reinstatement is not feasible, front pay”;
- “the payment of wages unlawfully withheld”;
- “interest on unpaid wages at a rate of [12] percent per annum from the date the wages were first due”;
- “the payment of a penalty of [\$50] per day for each employee whose rights ... were violated and for each day that the violation occurred or continued”;
- “liquidated damages in an amount equal to the greater of two times the amount of the unpaid wages or [\$2,000]”; and
- “injunctive relief.”

Another significant addition is the creation of the Worker and Employee Protection Unit. This new unit will operate under the purview of the Colorado attorney general, and it has the power to issue civil investigative demands and subpoenas, administer oaths, take sworn statements, and serve/execute search warrants for investigations in any county in Colorado. The unit may investigate alleged violations of the Colorado Employment Security Act and bring actions pursuant to the statute against employers for misclassification of employees as independent contractors. The unit may also enforce wage determinations that the DLSS refers to the unit, that the DLSS declines or fails to enforce, or that the DLSS has not yet investigated.

#### **Whistleblower Protections Under the Colorado False Claims Act**

On June 7, 2022, Governor Polis signed into law [HB 22-1119](#), the Colorado False Claims Act (CFCA). Similar in some ways to its federal counterpart, the CFCA expands protections in Colorado for individuals reporting false claims.

Directly relevant to employers, the CFCA implements protections for whistleblowers and prohibits retaliatory action against an individual because of the individual's efforts in:

- “conducting or assisting with an investigation for ... an action filed or to be filed pursuant to [the CFCA], or conducting or assisting with an investigation when there is a reasonable belief of a potential violation of [the CFCA]”;
- “meeting with potential or retained counsel or agents or representatives of the state about the matter that is the subject of an action filed or to be filed pursuant to [the CFCA]”;
- “providing the individual's counsel or agents or representatives of the state with confidential information”; or
- “filing an action pursuant to [the CFCA].”

An employee who is “discharged, demoted, suspended, threatened, harassed, ... retaliated against or discriminated against in the terms and conditions of ... employment, contract, business, or profession” or retaliated against in any other manner, is entitled to all relief necessary to make the employee whole. This includes, but is not limited to, reinstatement, twice the amount of back pay, interest on back pay, compensation for special damages, and attorneys' fees, costs, and other damages. Further, an employee may recover up to three times the actual attorneys' fees and costs when an employer brings an action against the individual in retaliation for:

- “acts later determined to be lawful acts”;
- “disclosure of confidential information to counsel or an agent or representative of the state pursuant to [the CFCA];
- “violating an employment contract, confidentiality agreement, nondisclosure agreement, or other agreement”; or
- “committing any other tort or breach of duty and the court hearing the action determines by a preponderance of the evidence that the ... employer ... brought the lawsuit against the individual for the purpose of retaliating against the individual.”

### **Health and Safety Whistleblower Protections**

On July 11, 2020, in the early stages of the COVID-19 pandemic, Governor Polis approved the [Public Health Emergency Whistleblower \(PHEW\) law](#). As evidenced by its name, the law prohibits retaliation against employees and certain independent contractors for raising health and safety concerns related to a public health emergency. Notably, effective May 31, 2022, [Senate Bill 22-097](#) expands the protections of PHEW by removing the requirement that the health and safety concerns be related to a public health emergency. This means that any worker who, in good faith, raises “any reasonable concern about workplace violations of government health or safety rules, or about an otherwise significant workplace threat to health or safety” is protected under PHEW. Protected conduct includes concerns raised with “the principal, the principal’s agent, other workers, a government agency, or the public if the principal controls the workplace conditions giving rise to the threat or violation.” Further, PHEW now also protects workers who oppose any practice they reasonably believe is unlawful under PHEW or who participate in any manner in an investigation, proceeding, or hearing as to any matter they believe to be unlawful under PHEW.

This also means that under PHEW a principal may not require or attempt to require a worker to sign an agreement that limits or prevents the worker from disclosing information about workplace health and safety practices or hazards. Any such agreement is void and unenforceable as contrary to the public policy of the state.

A person seeking relief for a violation of PHEW may do so through three different channels. A person may file a complaint with the DLSS, institute an action in district court, or bring a whistleblower action on behalf of the state in district court. The person must exhaust his or her administrative remedies by filing a complaint with the DLSS before filing a lawsuit. An action must be brought within two years after suffering an adverse employment action based on having raised a health or safety concern.

If the DLSS determines a violation has occurred, it is authorized to award reasonable attorneys’ fees, reinstatement, back pay, and front pay based on the nature of the violation. The DLSS may impose additional penalties of not less than \$100 for each day a principal fails to comply with an order of the DLSS.

If the matter proceeds to court, a court may award the following remedies: (1) reinstatement with or without back pay; (2) the greater of \$10,000 or “any lost pay resulting from the violation, including back pay for a reinstated or rehired worker and front pay for a worker who is not reinstated or rehired”; (3) “any other equitable relief the court deems appropriate”; and (4) reasonable attorneys’ fees to the prevailing plaintiff. The court may order punitive damages if it finds the principal’s conduct was “intentional” and the plaintiff demonstrates by “clear and convincing evidence” that the principal “engaged in a discriminatory, adverse, or retaliatory employment practice

with malice or reckless indifference to the rights of the plaintiff." The court may also order compensatory damages for "intentional" conduct. When determining an appropriate damages award, PHEW requires courts to "consider the size and assets" of the principal and the "egregiousness" of a "discriminatory, adverse, or retaliatory employment practice."

Principals must provide notice to workers of their rights under PHEW by posting the [Colorado Workplace Public Health Rights Poster: Paid Leave, Whistleblowing, & Protective Equipment](#) in a conspicuous location at the work site.