

Employment law in Colorado is undergoing a dramatic shift. In early 2021, Colorado employers experienced the imposition of mandatory sick pay and pandemic leave pay under the Healthy Families and Workplace Act. Employers also discovered the various job posting and promotion transparency obligations required by the Equal Pay for Equal Work Act. And Colorado's 73rd General Assembly is considering additional legislation that would make sweeping changes to Colorado's antidiscrimination laws. Senate Bill 21-176 is titled "Protecting Opportunities and Workers' Rights (POWR) Act".

The proposed legislation would revise Colorado's Anti-Discrimination Act (CADA). The proposed changes are numerous but a few of them are worthy of note and attention. Most significant are the following:

#### *Standard for Employer Liability*

- The current standard for establishing employer liability in the employment context is that a "hostile work environment" has to be sufficiently severe or pervasive such that it alters a term or condition of employment. State and federal case law is clear: antidiscrimination statutes are not intended to be civility codes and not every personal slight is intended to create a legal cause of action. But under the POWR Act's proposed changes, the new standard would specifically reject the existing "severe or pervasive" standard and allow for liability to attach if conduct "offends, humiliates, distresses, or intrudes upon the individual or otherwise interferes with and undermines the individual's personal sense of well-being or safety," or "affects the individual's ability to perform the individual's job."

#### *Lower Liability Standard*

- Notably, the new liability standard would be significantly lower than the well-established and recognized criteria. The POWR Act goes on to clarify that the nature of the workplace would essentially not be relevant when determining whether the conduct created a hostile work environment. In other words, the act would treat construction sites the same as office settings and nonprofit organizations. The proposed law specifies that "a single incident of harassing conduct can be sufficient" to establish liability; it does not have to be "severe or pervasive." If a coworker, a contractor, or even a customer makes a single statement or engages in a single act that "undermines" an employee's, independent contractor's, or subcontractor's "personal sense of well-being or safety," that could be sufficient to establish employer liability.

When determining liability, the POWR Act would establish that all potentially discriminatory remarks made in the workplace, regardless of by whom the remark had been made and regardless of whether the remark had been made in the context of an employment decision or even by a decision-maker, would be relevant to determine whether the worker suffered discrimination. In other words, if a first-shift worker heard a third-shift peer make a comment that the first-shift worker believed to be offensive, the first-shift worker could later use that comment to try and establish that he or she had been discriminatorily discharged by a first-shift supervisor who had not made the statement or was even aware the statement had been made. Under the current standards, judges are

likely to hold that the referenced comment was a “stray remark” and not relevant to the determination of whether discrimination had occurred. The proposed standard essentially would eliminate the judge’s ability to determine what is relevant to determining whether discrimination or harassment occurred.

### *Protected Classes*

- The POWR Act would expand antidiscrimination protections “for individuals based on their ‘caregiver status’ or ‘marital status.’” These would be new categories of protected classes similar to sex, race, religion, age, and other more well-known categories of employees.

### *Expanded Coverage*

- The POWR Act would expand antidiscrimination protections to include “independent contractor[s],” “subcontractor[s],” and any other individuals, “including unpaid interns,” “who perform[] services for monetary compensation” or “in exchange” for anything of value.

### *Remedial Action Requirement*

- The POWR Act would add a new form of potential liability for employers. The proposed law would establish that an employer would commit an unfair employment practice if an employer had failed to conduct a “reasonable investigation,” or had “fail[ed] to take prompt, reasonable remedial action.” In other words, even if an employee is not subjected to a discriminatory or hostile work environment but the employer does not conduct an investigation that the worker believes to be “reasonable” or does not take action against the alleged offender that the worker believed to be prompt or reasonable, the worker could initiate a lawsuit and the employer could be potentially liable.

### *Confidentiality, Nondisclosure, or Nondisparagement Provisions*

- The POWR Act would substantially eliminate an employer’s and an employee’s ability to mutually agree to any form of confidentiality, nondisclosure, or nondisparagement provisions. Even if both parties agree in a settlement agreement that confidentiality and nondisparagement are appropriate, the court would be prohibited from requiring the employee to adhere to the agreement’s terms.
- The POWR Act includes what appears to be a facially innocuous provision: “The claim nearly always raises questions of fact.” While this provision may appear to not be impactful, it creates a dramatic procedural change in how employment cases are litigated. Parties to cases routinely file a motion for summary judgment, which, if successful, allows a court to dismiss a case that the judge believes lacks legal merit. Without this mechanism, virtually all employment cases would go to trial, regardless of the merits of the case.

There are a myriad of other proposed changes that would also lessen employers' abilities to defend against frivolous claims of harassment and discrimination. In short, the new system, if the POWR Act is passed in its current form, will allow a worker to file a lawsuit stemming from a single comment or act that purportedly impacts the individual's sense of well-being while simultaneously limiting the parties' abilities to resolve the matter by mutually agreeable terms and essentially mandating a trial be held, regardless of the legal merits of the claim.

Because of the significant changes the POWR Act introduces, employers may want to stay informed and ensure that their legislators understand their position on this important piece of proposed legislation.

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