

Publications

The POWR Act Significantly Changes Colorado Discrimination Law

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In August 2023, Colorado enacted the Protecting Opportunities and Workers' Rights Act (POWR Act). As outlined below, the POWR Act makes major changes to Colorado employment law that apply to all employers. Employers should review their current policies, procedures, and agreements to ensure they comply with the Act. Contact your Vorys lawyer if you have questions about the POWR Act or its impact on your business.

Changes to Harassment and Discrimination Claims

The POWR Act makes two major changes to harassment claims by redefining the standard for harassment claims and by limiting affirmative defenses. The expanded definition of harassment now includes any "unwelcome" conduct and rejects the federal "severe or pervasive" standard for determining whether conduct constitutes legally actionable harassment.

An employer may assert an affirmative defense to supervisory harassment only if it first establishes: (1) it has a policy and practice reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment; (2) it communicates the existence and details of the policy to both its supervisory and nonsupervisory employees; and (3) the employee unreasonably failed to take advantage of the policy. Additionally, employers may no longer to assert that an otherwise qualified employee's disability "has a significant impact on the job" as a reason why the employer cannot provide a reasonable accommodation.

The Act also adds marital status to the list of protected classes under the Colorado civil rights law.

Restrictions on Nondisclosure Agreements

The POWR Act restricts the use of certain nondisclosure agreement provisions entered into or renewed on or after August 7, 2023. A nondisclosure agreement is void if it limits an employee or job applicant from disclosing or discussing any alleged discriminatory or

unfair employment practice. Such agreement is not void only if it meets all the following:

- The agreement is mutual.
- The agreement expressly permits disclosure of underlying facts of alleged discriminatory or unfair employment practices, including the existence and terms of a settlement agreement, to immediate family members, religious advisors, medical or mental health providers, mental or behavioral health therapeutic support groups, legal counsel, financial advisors, or tax preparers; any government agency for any reason without first notifying the employer; in response to legal process without first notifying the employer, and for all other purposes required by law.
- The agreement states the disclosure of underlying facts of any alleged discriminatory or unfair employment practice is not disparagement.
- The agreement, if it includes a nondisparagement provision, states that if the employer disparages the employee or applicant, the employer may not seek to enforce the nondisparagement or nondisclosure provisions of the agreement or seek damages against the employee or other party for violating those provisions.
- Any liquidated damages provision must be reasonable and proportional to the economic loss and not punitive.
- The agreement must have an addendum, signed by both parties, attesting to the compliance of the agreement with the POWR Act.

An individual or the Colorado Civil Rights Commission may bring an action against an employer. An employee or applicant may recover actual damages, a \$5,000 penalty, costs, and attorneys' fees.

New Recordkeeping Requirements

Employers must preserve personnel or employment records for at least five years from the later of the date the employer receives the record or the date of the personnel action (such as a charge or lawsuit) related to the record. Such records include requests for accommodation, employee complaints of discriminatory or unfair employment practices, application forms, and other records related to hiring, promotion, demotion, transfer, termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, and records of training provided to or facilitated to employees.

Employers must also maintain an accurate, designated repository of all written or oral complaints of discriminatory or unfair employment practices, including harassment. For each such complaint, the date of complaint, the identity of the complaining party, the identity of the alleged perpetrator, and the substance of the complaint must be recorded and maintained.