

# HB 23-172: Navigating the ▶ Colorado POWR Act

Protecting Opportunities and Workers' Rights Act

# Legislative Declarations CRS.24-34- 400.2

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All Coloradans should have an equal opportunity to succeed in the workplace and to be free from discrimination and harassment based on their protected status.

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When Employees have a safe workplace that is free from discrimination and harassment, those employees are more productive and are more inclined to remain in their jobs, and their employers' benefit from increased employee productivity and retention;

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While many employers have made great strides in improving workplace environments by making them free from discrimination and harassment since CRS 24-34-400 was first enacted in 1951, many employees in this state still experience D&H in the workplace, resulting in mental, physical and economic harm

# Legislative Declarations CRS 24-34- 400.2 - continued



It is critical that employers engage in preventative and corrective actions to eliminate D&H and ensure a safe workplace environment for all their employees



The act establishes fines for noncompliance and empowers the state and local authorities to enforce the provisions of the act.



Courts should apply the law consistently to all workplaces.

## 24-34-400.2

# It is Public Policy of the State to encourage:



Employers to adopt equal employment opportunity policies to prevent and disincentivize illegal harassment and discrimination.



The free reporting, discussion and exposure of discriminatory or unfair employment practices in order to better protect employees and discourage discriminatory or unfair employment practices.



Any 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.

# POWR Act Rejects “Severe or Pervasive”

- ▶ The general assembly finds that the “*Severe or Pervasive*” standard of proof created by the courts to determine if harassment at work is a discriminatory or unfair employment practice does *not* take into account the realities of the workplace or the harm that workplace harassment causes.
- ▶ The state rejects the “severe or pervasive” standard in favor of a standard that “prohibits unwelcome harassment”.



- ▶ It is a discriminatory or an unfair employment practice:
  - ▶ For an employer to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation, term, conditions, or privileges of employment against any individual otherwise qualified because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, **MARITAL STATUS**, religion, age or ancestry.
  - ▶ Maintains it is **NOT** an unlawful employment practice to refuse to hire, to discharge, to promote or demote, a persons with disabilities if there is no **reasonable accommodation specific to the disability** that the employer can make that would allow the individual who is otherwise qualified to satisfy the **essential functions of the job**.

24-34-402 Discriminatory or unfair employment practices - affirmative defense.

- ▶ CRS 24-34-402 previously provided that it was not a discriminatory practice for an employer to take an adverse employment action “if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the individual from the job, and **the disability has a significant impact on the job.**”
- ▶ Under the POWR Act, the requirement that the disability had “a significant impact on the job” has been deleted.

## Changes to Disability Discrimination Claims



# 24-34-402

## Definition of Harassment

- ▶ To Harass, or Harassment, is to engage in, or the act of engaging in, 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.
- ▶ Of which conduct or communication 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. The conduct or communication **need not be *severe or pervasive*** to constitute a discriminatory or unfair employment practice.



# It is Harassment and a Violation of CRS 24-34-402 IF:



Submission to the conduct or communication is explicitly or implicitly made a term or condition of the individual's employment.



Submission to, objection to, or rejection of the conduct or communication is used as a basis for employment decisions affecting the individual.



The conduct or communication has the purpose of *unreasonably interfering* with the individual's work performance or creating and intimidating, hostile, or offensive working environment.

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- ▶ The nature of the work or the frequency with which harassment in the workplace occurred in the **past is not relevant** to whether the conduct or communication is a discriminatory or unfair practice
- ▶ Petty slights, minor annoyances and lack of good manners do not constitute harassment **unless** when taken *individually or in combination and under the totality* of the circumstances, meet the standards set forth.



What is an  
employer to do??

Established  
Program &  
CRS 24-34-408

- ▶ When an Employee proves that a supervisor unlawfully harassed that employee, the employer may assert an affirmative defense to the harassment claim only if the employer establishes that:
  - ▶ The Employer has *established a program* that is reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment.
  - ▶ The Employer has communicated the existence and details of the *established program* to both its supervisory and nonsupervisory employees.
  - ▶ The Employee has unreasonably failed to take advantage of the employer's *established program*.

# CRS 24-34-402

## 1.5 (a)

### Employers Establishment of Affirmative Defense

*Established Program* - An Employer's Harassment Prevention program satisfies the requirements if the employer can demonstrate:



- ▶ The employer takes prompt, reasonable action to investigate or address alleged discriminatory or unfair employment practices.
- ▶ The employer takes prompt, reasonable remedial actions, when warranted, in response to complaints of discriminatory or unfair employment practices.

# CRS 24-34-408 - Employer record keeping - repository of discrimination complaints



**An Employer shall preserve any personnel or employment record the employer made, received, or kept for at least five years after the later of:**

Date employer made record or date of the personnel action about which the record pertains or of the final disposition of a charge of discrimination or related action, as applicable.



**An Employer shall maintain an accurate, designated repository of all written or oral complaints of discriminatory or unfair employment practices**

Include the date of the complaint

Identity of the complaining party (if complaint was not made anonymously)

Identity of alleged perpetrator

Substance of the complaint

# Personnel or Employment Record Includes:



Requests for Accommodation



Employee Complaints of discriminatory or unfair employment practices whether written or oral



Application forms submitted by applicants for employment



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



Records of training provided to or facilitated for employees

# CRS 24-34-407 Nondisclosure agreements - requirements for enforcement - penalties for noncompliance.

- ▶ A provision in an agreement entered into or renewed between an employer and an employee or prospective employee that limits the ability of either party to disclose or discuss any alleged discriminatory or unfair employment practice is void unless it complies with a list of stringent requirements, which are detailed in the statute.
  - ▶ The list of provision goes on and on...
- ▶ Severe consequences for a non-compliant NDA.
- ▶ CTSI GUIDANCE - Do not enter or attempt to enter into any nondisclosure agreements without guidance from your attorney or an employment lawyer.





# CTSI Recommendations - Key Takeaways

- ▶ Update / create your Counties Anti-Harassment policies and *Established Program* that includes the reporting, investigation, and documentation requirements under this Act.
- ▶ Train all Supervisors and nonsupervisory staff on the updated Definitions of Harassment, Counties Policies and the Counties *Established Program* designed to ensure a harassment free workplace.
- ▶ I recommend highlighting “history does not matter” and “applies to all workplaces equally”.
- ▶ Review your Job descriptions and update to reflect “Essential Functions of the Job” including physical and mental requirements.

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