

The Only Constant is Change: Colorado Employment Law Updates



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- Labor & Employment

For Colorado employers of all sizes, the last five years have proven the truth of the adage that “the only constant is change.” Starting in 2019 with the signing of a ground-breaking pay transparency law, the Equal Pay for Equal Work Act, continuing in 2022 with the strengthening of Colorado’s already robust law against non-competes, continuing in 2023 with the 2023 Protecting Opportunities and Workers Rights (POWR) Act, which redefines workplace harassment law and restricts workplace confidentiality agreements, and culminating in 2024 with paid family medical leave (FAMLI leave), three trends are clear:

1. Changes in Colorado employment laws have been rapid and dramatic.
2. Colorado is regulating the employer-employee relationship more than ever before.
3. The Colorado legislature’s employment law activism affects employers of all sizes, but the compliance burdens are hardest on small businesses.

Whether employers are celebrating or commiserating about the new laws, it is undeniable that knowing more about recent changes and understanding the quirks, traps, and pitfalls – is well worth the effort.

With that preface, let’s look at what’s new and what has changed in Colorado employment laws. To help you gauge how problematic or burdensome each new or changed law is, I have color-coded them red (toughest on employers), yellow (probably a hassle, but manageable), or green (relatively painless to adapt to).

WAGES AND WORK HOURS

Colorado Wage Act: (Red)

The Wage Act has long required prompt payment of wages to departing employees, which is not only the law but the right thing to do. However, starting in 2023, the legislature has sharpened the teeth on the Wage Act. If the employer terminates an employee, the employer must pay all wages and other compensation that is “earned, vested, and determinable,” immediately. This includes many types of bonuses and commissions, and not just salary. Penalties of up to 300% of the wages owed (plus the actual wages owed) can apply if an employer does not timely pay wages to a departing employee.

How to ensure compliance? Anytime an employee is terminated involuntarily, the employer should pay final wages on the day of termination. If the employee voluntarily resigns, the employer can pay final wages on the next regular payroll date.

- As noted above, wages include all amounts for work performed, plus “earned, vested, and determinable” bonuses and commissions” and earned unused vacation pay. If an employer has a PTO policy, then depending on how the policy is structured, earned and unused PTO might count as wages, too.

Meal and Rest Break Periods (Yellow):

Colorado has long required meal periods (when the work shift exceeds five hours) and rest periods (10 minutes’ paid rest for every four hours worked), but the consequences for not providing paid rest periods have become more severe. Under Colorado law, a missed rest break is treated as 10 minutes of uncompensated time for the employee who missed the break. The liability adds up quickly – consider this hypothetical: a business with 100 employees missing two rest breaks a day

for six months and with an average wage of \$20 per hour could face more than \$80,000 in liability for unpaid wages, not counting penalties the state might assess.

Minimum Wage (Green):

Colorado's state minimum wage, now indexed to changes in the cost of living, reflects the inflationary economy we are currently living in. For 2024, the state minimum wage is \$14.42 per hour (\$10.63 for tipped employees), with some localities having even higher minimums, such as Denver (\$18.29 per hour). Due to the labor shortage in our state, wages for entry-level jobs are often above minimum wage. Still, businesses, especially small businesses, should be aware of the minimum wage and the fact that it will increase annually.

LEAVES

Colorado Family & Medical Leave Insurance (FAMLI) (Yellow):

FAMLI is state-paid family leave, in which the state (not the employer) pays the employee's wages during leave. FAMLI is funded by payroll taxes paid by both employees and employers.

Colorado Healthy Families and Workplaces Act (HFWA) Paid Sick Leave Law (Red):

Colorado employers must provide sick leave to all employees. Employers must provide at least 1 hour of accrued, paid leave per 30 hours worked, up to 48 hours a year. Accrued paid sick leave may be used for a wide range of health and safety needs, including:

- Inability to work due to illness, injury, or health condition;
- Obtaining medical care;
- Needs due to being the victim of domestic abuse, assault, or criminal harassment;
- Caring for a family member who has any of the needs listed above;
- Bereavement or financial/legal needs after the death of a family member;
- Inability to work due to inclement weather, power/heat/water loss, or other unexcepted event that required the employee to (a) evacuate their residence or (b) care for a family member whose school or place of care was closed.

PAY TRANSPARENCY

Equal Pay for Equal Work (EPEW) Act: Pay Transparency and Job Postings (Red):

This pay transparency law requires employers to disclose pay and benefits in all job postings and notices (both internal and public) and disclose all available job/promotion opportunities to all employees simultaneously. The employer must disclose who was hired or promoted once an individual is selected for an available job or promotion. The employer must disclose how to advance through career progressions available to eligible employees. The employer must preserve all records of wage rates and job descriptions.

To comply, make sure all job postings include:

- The rate of pay or range of pay;
- The general description of benefits; and
- How and when to apply.

Another Soon-to-Come EPEW Requirement (July 1, 2024):

Avoid questions that might reveal an applicant's age: during the application and interview process, do not ask applicants any questions that could reveal their age. For example, do not ask applicants to disclose their date of birth, dates of attendance/graduation at a school, or other similar inquiries that would disclose age. The employer may still request additional application materials, such as school transcripts, but is required to notify applicants that they may redact age-related information prior to submission.

WORKPLACE HARASSMENT/CIVIL RIGHTS

Colorado Protecting Opportunities and Workers Rights (POWR) Act (Red):

POWR expands the definition of workplace harassment to include many kinds of workplace behavior that does not rise to the level of “severe or pervasive” harassment, as required under the law previously.

1. Specifically, the POWR Act redefines harassment as follows:

“Harass” or “harassment” means to engage 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 ... [if the] 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 an unfair employment practice ... and is a violation ... if:

- I. Submission to the conduct or communication is explicitly or implicitly made a term or condition of the individual’s employment;
- II. Submission to, objection to, or rejection of the conduct or communication is used as a basis for employment decisions affecting the individual; or
- III. The 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.

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 an unfair employment practice.

Petty slights, minor annoyances, and lack of good manners do not constitute harassment unless the slights, annoyances, or lack of manners, when taken individually or in combination and under the totality of the circumstances, meet the [definition of “harassment” above].”

NOTE: This means that, in Colorado, when evaluating a complaint of “hostile work environment” harassment, the questions to ask are now:

- I. Was the conduct unwelcome?
- II. Was the conduct directed at the complainant because of their protected class (or perceived protected class)?
- III. Was the conduct subjectively offensive to the complainant?
- IV. Would the conduct be objectively offensive to a reasonable person in the same protected class as the complainant?
 - i. Unanswered question: how is the HR professional investigating a complaint to assess how a reasonable person like the complainant would feel?
- V. Did the conduct have the purpose or effect of unreasonably interfering with the complainant’s work performance or creating an intimidating, hostile, or offensive working environment?

If the answer to each of the questions above is “yes,” then there has been unlawful workplace harassment.

- ### 2. In addition, the POWR Act changes how employers must assess requests for disability accommodations (note the struck-out text below). Seemingly, this change would prevent an employer from declining to hire an applicant whose disability would have a significant impact on the job unless (a) there is no reasonable accommodation; and (b) the disability “actually disqualifies” the applicant:

“With regard to a disability, it is not a discriminatory or an unfair employment practice

for an employer to refuse to hire, to discharge, or to promote or demote an individual with a disability if there is no reasonable accommodation that the employer can make with regard to the disability that would allow the individual to satisfy the essential functions of the job and the disability actually disqualifies the individual from the job, and the disability has a significant impact on the job."

3. **The POWR Act also severely restricts employers' use of non-disclosure or non-disparagement provisions in employment contracts or separation/settlement agreements.**

NON-COMPETITION AGREEMENTS

Colorado's Law Banning Most Non-Compete Agreements (C.R.S. 8-2-113) (Red):

Most non-competition agreements are now banned in Colorado. In the past, there were a number of exceptions. However, the legislature eliminated most of those exceptions in 2022, leaving a narrow exception for agreements to protect the use of trade secrets in competition applicable to highly compensated workers (annual salary of at least \$123,750 for 2024). Non-solicitation agreements banning the use of trade secrets to solicit a business's customers are allowed, but only with workers who earn at least 60% of the highly compensated threshold (\$74,250).

Additionally, a trade secret/non-competition/non-solicitation agreement is unenforceable unless the worker receives prescribed notice 14 days before the agreement takes effect. The notice must be in a document separate from other employment /contractor agreements and must:

- Be written in clear language
- Be signed by the worker
- State that the worker is signing a non-competition agreement that could restrict employment prospects in the future
- Direct the workers to the specific sections of the agreement that contain the non-compete restrictions

COLORADO'S REQUIRED WORKPLACE POSTERS

Required Posters (Green):

In addition to the federally required posters, Colorado requires certain posters. Posters are typically updated annually, so check at the end of each year for the updated poster. Colorado employers must post the following posters:

- 2024 Colorado Overtime & Minimum Pay Standards (COMPS) Order #39 Poster
 - Colorado Workplace Public Health Rights Poster
 - Colorado Anti-Discrimination Notices (includes Notice of Pregnancy Accommodations)
 - Colorado Employment Security Act
 - Notice to Employer of Injury
 - Notice of Paydays
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