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The POWR Act: An Employment Law Update

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› *This article is intended as general guidance and not as legal advice.*

As of this writing, the Colorado legislature is poised to pass the Protecting Opportunities and Workers' Rights (POWR) Act, which the Governor is expected to sign, and will become effective on or around August 6, 2023.

The POWR Act makes several significant changes to Colorado employment law. For example, the POWR Act:

- Removes, from the longstanding definition of harassment both in Colorado and under federal standards, the requirement that the alleged conduct results in a hostile work environment.
- Further specifies that the alleged conduct in a harassment claim does not need to be severe or pervasive to be discriminatory, which eliminates another longstanding element of harassment.
- Specifies the requirements for an employer to affirmatively defend against an employee's claim of harassment by a supervisor.
- Specifies the requirements that must be satisfied for an agreement between an employer and an employee to be confidential.
- Changes the disability accommodation analysis by eliminating an employer's ability to assert only "significant impact" as the basis for denying a request for accommodation made by an individual otherwise qualified for the job.

ABOUT THE AUTHOR

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Under existing Colorado and federal standards, for harassment to be actionable against an employer, the alleged behavior must be severe or pervasive. Simple teasing, offhand comments, or isolated incidents that are not extremely serious do not violate existing standards. Severe or pervasive means such as changing the conditions of employment and creating an abusive (hostile) environment, judged by both an objective standard (in other words, any reasonable person would find the conduct abusive); and a subjective standard (in other words, the employee in question found the conduct abusive).

The POWR Act specifically provides that, to be actionable against an employer, the alleged conduct does not need to be severe or pervasive. In turn, a hostile work environment is not required. Rather, the alleged conduct may be actionable if the result is unreasonable interference with an individual's work performance, or the creation of an intimidating, or offensive working environment. The POWR Act further provides that petty slights, minor annoyances, and lack of good manners are not actionable unless, under the totality of the circumstances, the result is intimidating or offensive. In other words, a minor annoyance or lack of good manners may be actionable.

Indeed, the POWR Act provides that a single incident may rise to the level of harassment. Further, conduct that may have been welcome at one time may later become unwelcome. The result places greater weight on the subjective standard at the expense of the objective standard, which has been an important safeguard against an individual's unreasonable reaction or sudden change of mind about the nature of particular conduct.

The POWR Act fundamentally changes the analysis associated with determining if harassment is actionable against an employer. Because a single incident or offhand comment may be actionable, employers may be compelled to terminate an employee that, under current standards, would be admonished and given the opportunity to improve before conduct became pervasive and a work environment hostile.

The POWR Act provides the employer must demonstrate implementation of a harassment prevention, deterrence, and employee protection program. A satisfactory program requires the employer to demonstrate that the employer takes prompt, reasonable action to investigate or address alleged harassment, and takes prompt, reasonable remedial action in response to a complaint. Employers must communicate the existence and details of the above program to employees and, in defense of a complaint, demonstrate the employee has unreasonably failed to take advantage of the employer's program by making a complaint the employer could act upon.

At this point, what any of the above paragraph means, in practical application, is anyone's guess. We will begin to get clarity as the courts interpret the new law. Employers will definitely, at least, want to have regular harassment and discrimination training, with proof of participation by each employee. Employers will, at least, want to fully investigate any complaint, no matter how minor, documenting the investigation results and any associated remedial action.

It is not unusual, in the event of a harassment claim that is actionable against an employer, for the employer (or the employer's insurance carrier) to settle the claim in the form of a confidential settlement and non-disparagement agreement. Increasingly, confidential settlement agreements are falling out of favor because they are viewed as making it possible for employers to keep both current and prospective employees in the dark about serial or severe violations of employee protective laws and regulations.

The POWR Act establishes a complex set of requirements that must be met for a settlement agreement to be confidential and in order for non-disparagement language to be enforceable. Employers will need to stop using existing forms of settlement agreements and work with counsel, on a case-by-case basis, to determine if an agreement may be confidential at all, and, if it may, what process must be followed, and language used, to make such confidentiality valid.

Beyond provisions addressing harassment, the POWR Act includes provisions related to the accommodation of disabilities in the workplace.

Currently, if an individual has a disability and asks their employer to make an accommodation that will enable that individual to perform the essential functions of the job, under existing Americans with Disabilities Act (ADA) and Colorado Anti-Discrimination Act (CADA) analysis, the employer may deny the request if there is not a reasonable accommodation that the employer can make. An accommodation is generally considered unreasonable if it results in a significant financial, operational, or similar impact on the business.

The POWR Act establishes a new element in addition to the significant impact analysis, requiring the disability also actually disqualify the individual from the job. Stated differently, if an individual is qualified to perform the essential functions of a job, then the employer must make virtually any accommodation necessary for the individual to perform those essential functions, regardless, for example, of the cost or disruption to the business.

As with most legislation, Colorado's POWR Act contains some nuance and it is new, which means much will be learned over the coming months as the law is tested and regulations refined. In the interim, take the steps necessary to avoid tripping over the basic stuff. Implement a consistent and robust anti-discrimination program, update employee policies as needed and train supervisors. If a complaint is raised, investigate, document, and, if warranted, remediate. Stop using that form of settlement agreement that you got from somewhere years ago.

Carefully consider requests for accommodation. If an employee or prospective employee is qualified, consider the full range of accommodations with the goal of making it possible for the individual to perform the essential functions of the job.

Finally, if you have questions or concerns, seek the advice of good counsel. ■