2024 COLORADO
Employment Law Update

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Agenda for Today

- POWR Act and its changes
- Equal Pay and its changes
- HFWA and its changes
- Job application changes
- FAMLI
- Wage Theft Bill
- Questions at the end

Protecting Opportunities and Workers' Rights (POWR) Act

- Disability discrimination
- Harassment definition
- Non-disparagement/ confidentiality agreements
- Record keeping requirements

Expanded Protected Categories

- disability,
- race,
- creed,
- color,
- sex,
- sexual orientation,
- gender identity,
- gender expression,
- **marital status**,
- religion,
- age,
- national origin, or
- ancestry

Carve Out For Small Employers

- The Act makes it a “discriminatory or unfair employment practice” to discharge, refuse to hire, or promote a person solely on the basis that such employee or person is married to or plans to marry another employee
- But, that subsection of the law does not apply to employers with 25 or fewer employees.

POWR - Disability

- Brings disability discrimination more in line with the ADA
  - New text: “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 would allow the individual to satisfy the essential functions of the job”
  - Previous text: “. . . if there is no reasonable accommodation . . . and the disability has a significant impact on the job”

POWR – Harassment

- Deletes the old definition from C.R.S. § 24-34-402(1)(a)(II):
  - "harass" means to create a hostile work environment based upon an individual's [protected class]
  - "harassment is not an illegal act unless a complaint is filed with the appropriate authority at the complainant's workplace and the authority fails to initiate a reasonable investigation . . . and take prompt remedial action. . ."

POWR – Harassment Continued…

- Replaces it with a new definition at C.R.S. § 24-34-402(1.3)
  - "Harass" or "harassment" means 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 a group of individuals *because of that individual's or group's membership in*, **or perceived membership in**, *a protected class* . . . which conduct or communication is *subjectively offensive to the individual alleging harassment* and is **objectively offensive to a reasonable person 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. . ."

POWR – Harassment Continued…

- "The conduct or communication . . . is a violation of subsection (1)(a) of this section 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."

POWR – Harassment Continued…

- “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 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 standards set forth in (1.3)(a)”

POWR – Harassment Continued…

- Factors to consider for “totality of the circumstances”
  - Frequency of the conduct,
  - Type or nature of the conduct,
  - Duration,
  - Location,
  - Whether conduct is threatening,
  - Existing power differential,
  - Use of epithets, slurs, or conduct that is humiliating or degrading,
  - Conduct reflects stereotypes about an individual or group of individuals

Affirmative Defenses

May assert affirmative defense to claim that supervisor engaged in unlawful harassment only if:

1. Existence of program "reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment"
    a. Employer takes prompt, reasonable action to investigate discriminatory or unfair employment practices
    b. Employer takes prompt, reasonable remedial actions in response to complaints, when warranted
2. Employer has communicated existence and details of this program
3. Employee unreasonably failed to take advantage of this program

POWR- Changes to Severance Agreements and Non-disclosure Agreements

- C.R.S. § 24-34-407 makes a provision in an agreement entered into between an employer and employee "that limits the ability of the employee or prospective employee to disclose or discuss, either orally or in writing, any alleged discriminatory or unfair employment practice" is void UNLESS:
  1. It is mutual
  2. Enumerated exceptions for disclosure of "the underlying facts of any alleged discriminatory or unfair labor employment practice"
  3. Disclosure of the underlying facts subject to any enumerated exception does not constitute a disparagement
  4. If there is a non-disparagement and the employer disparages the employee, then the employer may not seek to enforce the non-disparagement or NDA provisions or seek damages against the employee for violating those provisions
  5. Reasonable liquidated damages provision
  6. Addendum signed by both employer and employee attesting to compliance with the POWR Act

Recordkeeping Requirements

- Must have a “designated repository” to store all written or oral complaints of discrimination or unfair employment practices.
- For each such complaint, must include
  - Date of complaint
  - Identity of complaining party (if complaint was not made anonymously)
  - Identity of alleged perpetrator
  - Substance of complaint
- Must maintain for five years

Other Recordkeeping Obligations

- For five years, must also maintain “personnel or employment records”:
  - Requests for accommodation
  - Employee complaints of discriminatory or unfair employment practices
  - Application forms submitted by applicants for employment
  - Other records related to hiring, promotion, demotion, 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

Equal Pay Act

- Allows a plaintiff to obtain relief for backpay going back 6 years rather than 3, C.R.S. § 8-5-103(3)

- Amendments to Part 2 re job posting transparency effective January 1, 2024

- Replaces the phrase "opportunities for promotion" with "job opportunity"
  - "'Job opportunity' **does not** include career development or career progression," C.R.S. § 8-5-101(5.5)(b)

Equal Pay Act

- In each **job opportunity**, employers must now disclose the date by which the employer anticipates the application window closing (in addition to the compensation range and general description of benefits)
- Within 30 days of selecting a candidate to fill a job opportunity, the employer must "make reasonable efforts" to announce the name of the candidate, the person's job title, and "information on how employees may demonstrate interest in similar job opportunities in the future,"

Equal Pay Act

- Employers must disseminate requirements for career progression to all eligible employees and each position's terms of compensation, benefits, full- or part-time status, duties, and access to further advancement,

  - "career progression" : a regular or automatic movement from one position to another based on time in a specific role or other objective metrics
  - "career development" : a change to an employee's terms of compensation, benefits, full-time or part-time status, duties, or access to further advancement in order to update the employee's job title or compensate the employee to reflect work performed or contributions already made by the employee

HFWA – Sick Leave (Prior Qualifying Reasons)

1. A mental or physical illness, injury, or health condition that prevents work;
2. obtaining preventive medical care (including a vaccination), or a medical diagnosis, care, or treatment, of any mental or physical illness, injury, or health condition;
3. obtaining medical attention, mental health care or other counseling, legal or other victim services, or relocation required as a result of being a victim of domestic abuse, sexual assault, or criminal harassment;
4. care for a family member who has a mental or physical illness, injury, or health condition, or who needs the sort of care listed in categories 1-3; or
5. closure by a public official of the employee's place of business or the employee's child's school or place of care due to a public health emergency (as defined by the law), requiring the employee to care for the child.

HFWA – Sick Leave (New Qualifying Reasons)

1. To grieve, attend funeral services or a memorial, or deal with financial and legal matters that arise after the death of a family member;
2. to care for a family member whose school or place of care has been closed due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected events; or
3. to evacuate the employee's place of residence due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected events.

Job Application Fairness Act

- Effective July 1, 2024
- An employer CANNOT request or require an individual to include their age, DOB, or dates of attendance at or graduation from an educational institution on an “initial employment application”
- An employer MAY
  - Request copies of transcripts, but the employer must notify the individual that they can redact information that identifies their age, DOB, and dates of attendance or graduation
  - Request that an individual **verify compliance** with age requirements where age is a requirement of the position
  - Enforcement by the CDLE only by penalties; there is no private right of action

FAMLI Act - Purpose

- Covers all employers regardless of size
- Operates like unemployment comp via state insurance program or approved private plans
- Quite a bit of overlap with FMLA
- 12 weeks of paid family and medical leave funded through a payroll tax paid by employers and employees - 50/50 split.
  - Additional four weeks of leave for pregnancy or childbirth complications.
- Premiums started January 1, 2023; benefits started January 1, 2024.

FAMLI Act - Eligibility

- Covered individual:
  - Employee who earns $2,500 during base period
  - Or who elects coverage because self-employed or local government worker
- Covered leaves:
  - Birth, adoption, or placement within first year
  - Family member with serious health condition (SHC)
    - Domestic partners
    - “significant personal bond” like a family relationship
  - One’s own SHC
  - Qualifying exigency (military) leave
  - Safe leave (domestic violence, stalking, sexual assault/abuse victims)

FAMLI Act - Duration

- 12 weeks for any purpose, or purposes in the aggregate
  - Based on a rolling annual year
  - Concurrent with FMLA
- Along with additional 4 weeks if pregnancy/childbirth complications
- Can be intermittent (1 hour or shorter if employer uses shorter increments to measure leave)
- Employee must make reasonable effort to schedule so as not to unduly disrupt operations
- 30 days' advance notice if foreseeable; otherwise, as soon as practicable

FAMLI Act – Leave/Employment Protections

- Right to take leave and non-retaliation
- Job restoration for those employed 180 days or more
  - Same or substantially equivalent position
- Employer must maintain health-care benefits on same terms
- Employer cannot count FAMLI leave as unexcused, or use it as the basis for discipline or discharge
- Enforced through civil action, with same remedies as FMLA
- 2-year SOL (unless willful, which is 3-year SOL)

FAMLI Act - Coordination of Benefits

- Worker's and Unemployment Comp benefits do not overlap with FAMLI – you get one or the other
- Recent rulemaking in this area – FAMLI and employer-provided PTO or paid leave
  - Employees don't get both for the same hours absent, however . . .
- Employees aren't required to use or exhaust any accrued vacation/sick leave, or other PTO prior to or while receiving FAMLI benefits
  - So they can stack benefits

FAMLI Act - Coordination of Benefits

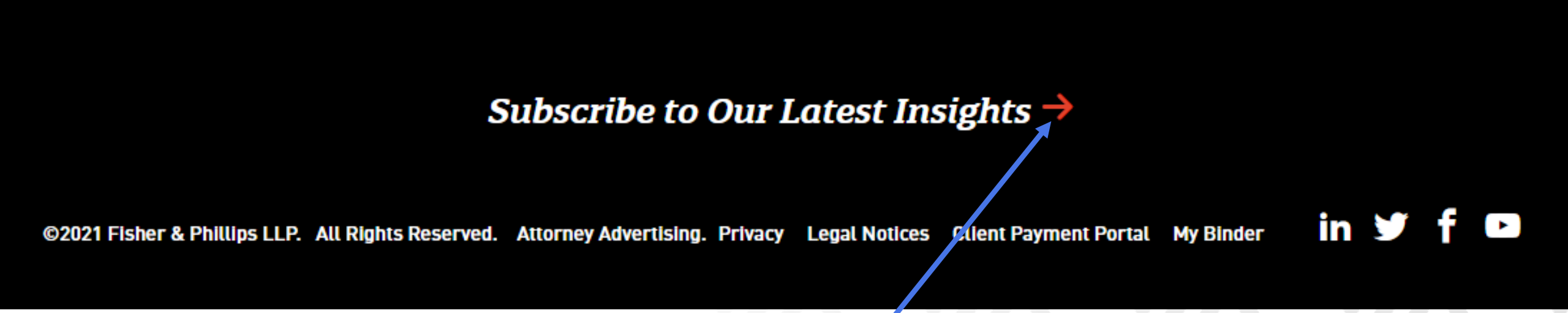
- Employee and employer may mutually agree that the employee may use any accrued vacation/sick leave, or other PTO while receiving FAMLI benefits
  - Up to the employee's average weekly wage
  - Employer can recoup overpayments through pay deductions
  - But Employer may have to replenish the employee's bank of accrued employer-provided paid leave/PTO/sick leave equal to the amount recouped as an overpayment
- Employers will have to carefully track requirements under FAMLI leave and HFWA paid sick

Wage Theft – What Almost Was for Construction

The Proposed Bill:

- Made the prime contractor on any project pay for the valid wage claims of any Specialty Contractor on a project **at any tier**
- Could have caused the prime contractor to ask for payment & performance bonds from all contractors on a project (raising project costs for owners and hurting small contractors who can't obtain a bond)
- Would likely cause the prime contractor to develop a certified payroll on steroids (all persons on job documented by name and hours and verified paid to get invoice into pay app)

Vetoed by Governor



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QUESTIONS?

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