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Keeping Up With Colorado: Recent Employment Law Developments

The Colorado Department of Labor and Employment ("CDLE") and the Colorado General Assembly have recently updated guidelines or passed new legislation that will affect all Colorado employers. A quick update on these issues is below:

Updated Notice Requirements for Unemployment Insurance Benefits

Colorado requires employers provide written notice of the right to seek unemployment benefits to their employees at the time of an employee's separation from employment. Previously, employers were required to provide terminated employees with the following information:

- A statement advising that unemployment compensation benefits may be available;
- Contact information and other details needed to file an unemployment claim; and
- Contact information to inquire about the status of an unemployment claim.

Effective May 25, 2022, Senate Bill 22-234 amended C.R.S. § 8-74-101 and now requires employers also to provide written notice at the time of termination as follows:

- The employer's name and address;
- The employee's name and address;
- The employee's identification number or the last four digits of the employee's social security number;
- The employee's hire date and last day of work;
- The employee's year-to-date-earning and their wages for the last week worked; and
- The reason for the separation of the employee and the employer.

The Colorado Anti-Discrimination Act

House Bill 22-1367 enacted four major changes to the Colorado Anti-Discrimination Act ("CADA"), which applies to all Colorado employers:

1. The time period for complainants to file an administrative complaint of discrimination with the Colorado Civil Rights Division ("CCRD") was extended from six months to 300 days, which mirrors the deadline for filing federal discrimination claims with the Equal Employment Opportunity Commission.
2. The time period for the CCRD to investigate a claim or retain jurisdiction over discrimination charges has been extended from 270 days to 450 days. This will change the earlier practice of the CCRD requesting the parties to consent to additional time to allow CCRD to investigate the claims.
3. The definition of "employee" in the CADA was expanded to include those engaged in domestic service, including babysitters, housekeepers or caretakers.
4. Remedies under CADA for age claims were expanded so they mirror those under federal law, and successful age discrimination claimants now may recover compensatory and punitive damages, in addition to reinstatement, back pay, front pay, liquidated damages or other equitable relief deemed appropriate.

Commissions and Bonuses

Under the Colorado Wage Act, employers are required to pay employees upon separation of employment for all wages that are deemed "earned, vested, and determinable" at the time of separation. In a recent interpretative bulletin, the CDLE clarified that commissions or bonuses that meet that standard must be paid upon separation if the only reason for denying the bonus is that the employee is not employed upon the date of payment of the commission or bonus. This suggests that employers may no longer use clauses requiring employees to be employed at the time of payment of commissions and bonuses (so-called "present-to-win" clauses) to avoid payment of commissions and bonuses if an employee leaves before the payment is due.

Healthy Families and Workplaces Act Sick and Public Health Emergency Leave

The CDLE recently issued an interpretative bulletin that answered some open questions under the Colorado Healthy Families and Workplaces Act ("HFWA"), which requires payment of sick leave and public health emergency leave.

The HFWA provides that employees "accrue" one hour of paid sick leave for every 30 hours worked up to 48 hours, that employees be allowed to carry over any accrued but unused paid sick leave, and that employees may use no more than 48 hours of HFWA sick leave in any year. The interpretative guidance makes clear that an employer can cap the "accrual" of paid sick leave if an employee already has sick leave carried over into the new year so long as the employee has a total of 48 hours of sick leave available for use in any one year.

In addition, the HFWA requires an employer to supplement an employee's paid sick leave up to 80 hours for full-time employees if a public health emergency is declared. The guidance now clarifies that an employer should determine whether it needs to supplement an employee's accrued sick leave to meet the public health emergency requirements at the time the employee notifies the employer of the need to take public health emergency leave, not on the date when the public health emergency is initially declared.

Mental Health Records

House Bill 22-1354 revised provisions in the Colorado's Workers' Compensation Act (the "Act") relating to the release and disclosure of mental health records of an injured employee making a claim under the Act. The Act now requires mental health providers to provide mental health records to self-insured employers when: (1) necessary for payment, adjustment, or adjudication of claims; or (2) when necessary for an employer to comply with all applicable laws. The records also must be kept separate from the employee's personnel records. In addition, these mental health records may not be disclosed "to any person who is not reasonably necessary for the medical evaluation, adjustment, or adjudication of claims involving physiological or psychiatric issues" unless otherwise directed.

Mental health records under the Act have been defined broadly to include "psychological or psychiatric tests, including neuropsychological testing; other records prepared by or for a mental health provider; independent medical examination records, audio recordings, and reports that address psychological or psychiatric issues; Division [of Workers' Compensation] independent medical evaluation records and reports that address psychological or psychiatric issues; and records relating to the evaluation, diagnosis, or treatment of a substance use or abuse disorder."

Misclassification and Wages

Employers that fail to provide information requested from the CDLE's Division of Labor Standards and Statistics ("DLSS") will no longer face a misdemeanor criminal penalty. If, however, an employer fails to pay the amount owed determined within 60 days of the decision, the employer is liable for:

- The employee's attorneys' fees;
- An additional fine of 50% of the amount owed; and
- A penalty, either 50% of the amount owed or $3,000, whichever is greater.

The DLSS also may enforce collection of these amounts by lien or levy on the employer. Effective at the start of next year, employees or the DLSS may also bring claims "on behalf of a group of similarly situated employees" for non-payment of wages, similar to class action proceedings. Employees also may bring retaliation claims and could potentially recover back pay, front pay, interest on unpaid wages, fines for each day the employee's rights were violated, liquidated damages and injunctive relief.

Colorado also created the Worker and Employee Protection Unit, which will work under the Colorado Attorney General to investigate violations of the Colorado Employment Security Act and potential misclassification of workers as independent contractors.

Whistleblower Protections

Colorado expanded whistleblower protections for employees. First, the legislature enacted the Colorado False Claims Act ("CFCA"), which provides protection for whistleblowers and prohibits retaliation for the individual's participation in:

- "[C]onducting or assisting with an investigation for . . . an action filed or to be filed pursuant to [the CFCA], or conducting or assisting with an investigation when there is a reasonable belief of a potential violation of [the CFCA]";
- "[M]eeting with potential or retained counsel or agents or representatives of the state about the matter that is the subject of an action filed or to be filed pursuant to [the CFCA]";
- "[P]roviding the individual's counsel or agents or representatives of the state with confidential information"; or
- "[F]iling an action pursuant to [the CFCA]."

Second, Senate Bill 22-097 expanded the Public Health Emergency Whistleblower law ("PHEW"), which originally protected employees from retaliation for raising health and safety concerns arising out of the COVID-19 pandemic. The bill removed the requirement that the worker's concerns be related specifically to a public health emergency. Therefore, the PHEW protects any employee who raises reasonable concerns relating to health and safety concerns or any other significant workplace threat to health or safety.

If you have any questions about Colorado's new legislation or guidance, or how they may impact your organization, please contact your Kutak Rock attorney or a member of the firm's National Employment Law Group. You may also visit us at www.KutakRock.com.