

Why Does Managing Employees Keep Getting Harder?



*Learning More About Current and Post Pandemic Labor
and Employment Challenges*

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Discrimination

Discrimination

What is Employment Discrimination?

Treating someone differently with respect to a personnel action based on a *protected category*.



Protected Categories

- Race
- Color
- Religion
- National Origin
- Gender/Sex
- Pregnancy
- Age
- Disability
- Citizenship Status
- Genetic Information
- Service Member Status
- FMLA leave
- Union supporter
- Whistleblower
- *CO: sexual orientation, transgender status, marital status, family status*

EEOC Statistics – FY 2021

- Retaliation: 37,632 (55.8 percent of all charges filed)
- Disability: 24,324 (36.1 percent)
- Race: 22,064 (32.7 percent)
- Sex: 21,398 (31.7 percent)
- Age: 14,183 (21.0 percent)
- National Origin: 6,377 (9.5 percent)
- Color: 3,562 (5.3 percent)
- Religion: 2,404 (3.6 percent)
- Equal Pay Act: 980 (1.5 percent)
- Genetic Information: 440 (0.7 percent)

Government's Focus

- Retaliation claims - increased each year since 2007
- Sexual orientation, gender identity, transgender status as a protected category
- Accommodations for - employees with pregnancy-related disabilities, religious beliefs, disabilities
- Harassment
- COVID-related cases – race, age, disability, pregnancy

Colorado's Expanded Protections

- Effective August 10, 2022
- Employee has 300 days to file discrimination charge (instead of 180 days)
- Age discrimination claimants can seek punitive damages – in addition to compensatory damages, attorneys' fees and costs

Accommodations – the ADA

Employers must “**reasonably accommodate**” employees with a disability, unless it would amount to an undue hardship

- Transfer to an available vacant position
- Adjustment of work hours
- Additional work breaks
- Leave of absence for treatment or for adjustment of medication

Reasonable accommodations **do not** include:

- Restructuring job to eliminate essential functions
- Permitting erratic attendance
- Providing *indefinite* leaves of absence



Medical Information

- Must be kept strictly confidential – “need to know” basis only
- This includes reasons for leave of absence, workers’ compensation injury details, illness or injury
- Also includes COVID information
 - Vaccine status
 - Infection status – unless employee gives permission

Gender Identity Discrimination



- EEOC takes the position that discrimination against a transgender individual is discrimination because of sex
- CO protects transgender status
- Can be a challenge – even for open-minded people
- Major issues - appearance policies, use of facilities, spa guests

Transgender Issues

According to Williams Institute (UCLA School of Law)

- 1.4 million Americans identify as transgender
- 1- Hawaii, 2 -California, 3 -New Mexico and 4 – Georgia
- Lowest – North Dakota, Wyoming, Iowa

Harassment

EEOC – “A Common Set of Priorities”

Preventing Systemic Harassment

- A “jaw-dropping” moment – 30 years of corporate training has had little effect on preventing workplace harassment
- Of 90,000 charges against employers – 1/3 related to harassment
- EEOC says 90% of harassment victims never file a legal complaint

Harassment in Hospitality

- According to a Huffington Post survey:
 - Of 2,235 female employees – 1 in 3 had experienced sexual harassment at work
 - 16% of women who said they had not been harassed said they had experienced sexually explicit behavior or remarks
 - 42% of women in the food service and hospitality industry reported sexual harassment
 - Highest of any field
 - Why?

ZERO TOLERANCE POLICY

Your policy should prohibit **all** harassment based on any protected classification in the workplace is prohibited, ***regardless*** of whether it reaches the “legal standard” of unlawful harassment.

What does “Zero Tolerance” mean?

What About . . . ?

Off Site Conduct/Communication with Sexual Content

- *Do you have a duty to respond?*
- *Investigate?*
- *How do you respond to the behavior?*

Harassment by Non-Employees/Third Parties

- *This includes: guests, visitors, vendors, independent contractors and other business associates*
- *How do you protect your employees?*

Your Company's Policy Should . . .

- Prohibit all forms of discrimination
- Prohibit all forms of harassment
- Prohibit retaliation
- Directly address third-party harassment – guests, visitors, contractors
- Require managers and supervisors to enforce it
- Develop and maintain a meaningful reporting procedure

End to Sexual Harassment Arbitration

- New Law Ending Mandatory Arbitration of Sexual Harassment Cases:
 - President Biden signed into law the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.”
 - Prohibits employers from including mandatory arbitration clauses in employee handbooks, offer letters, and contracts that would apply to claims of sexual harassment or assault.
 - Applicable to disputes that arise after March 3, 2022.
 - Employees may voluntarily agree to arbitrate.

Contractors and Staffing Agencies

Independent Contractors

- Individual contractors may be considered employees
 - IRS, DOL, EEOC, OSHA – all have different standards
 - A true independent contractor works for themselves and other companies

Staffing Agencies

- Be cautious and protect yourself
- Many of your executives are signing contracts that do not protect your property
- Need to cover:
 - Wage and hour compliance
 - Immigration compliance
 - Indemnification
 - Cooperation for harassment claims and accommodation requests
 - Ability to inspect records

Workplace Safety

What we know. . .

- OSHA has been in the spotlight
- National Emphasis Program to devote more resources to Covid and other infectious diseases
- Administration has signaled a new day has dawned for workplace safety

What we anticipate. . .

- Congress has approved increased budget
 - More enforcement inspectors
 - Broader scope of inspections
- Increased penalties
 - Max for Serious & Other-Than-Serious ↑ from \$14,502 to \$70k per violation
 - Willful, repeated, and failure to abate, max fine ↑ to \$700k, minimum ↑ to \$50k
- More willful citations and criminal referrals
- Focus on whistleblower protection

What we can do . . .

- Continue to train on safety and awareness
 - If you see something, say something
- Take action to correct risks before and after incidents
 - Largest penalties are for willful, repeated, or unabated violations
- Learn from others
 - Monitor trends in OSHA inspections

The background features a series of vibrant, multi-colored light trails in shades of red, orange, yellow, green, cyan, and blue. These trails originate from a central point on the left and fan out towards the right, creating a sense of motion and energy against a dark background.

Social and Political Discourse

What We Know . . .

- Political discourse is polarizing
- Companies being pressured to get into (or stay out of) political issue
- Media & social media quick to react

Recent Legislative Examples:

- Stop WOKE Act to limit CRT in schools and workplaces
- Florida Parental Rights in Education (aka “Don’t Say Gay”) Act
- Abortion Laws
- Transgender Athlete Laws

What We **Anticipate** . . .

- Laws will be challenged; outcomes uncertain
- Some states are considering legislation about social and political discourse in the workplace
- Expect to see additional attention from both lawmakers and union organizers
- Employees will have strong beliefs about new laws; will discuss them at work; some of these conversations will go poorly
- Employees and others may expect or demand the company take a stand; politicians may retaliate; social media

What We **Can Do** . . .

- Continue to closely monitor pending legislation for necessary changes to company policy
- Review social media policy with eye toward balance of individual expression and preservation of company image
- Prepare HR and leaders to address employees' potentially inappropriate speech and conduct
- Do not tolerate violent, disruptive employee conduct

Colorado's Lawful Off-Duty Statute

- Prohibits employers from taking adverse employment action against a job applicant or employee as a result of (1) any lawful activity (2) off the premises of the employer (3) during nonworking hours.
- Case law has expanded protection to include:
 - off-duty marijuana use
 - politically motivated speech and activities
 - where a *de minimis* part of the disputed activity takes place *on* the employer's premises during traditional working hours.

Employees can collect wages and benefits, costs and attorneys' fees

Exceptions

- Employers may discipline/ terminate employees for off-duty activities that are reasonably and rationally related to their employment - *activities that are “inherently connected” to the individual’s employment and emanate from the employee’s job duties and the company’s business interests.*
- Employers may discipline/terminate employees when the decision is necessary to avoid a conflict of interest, or the appearance of a conflict of interest, with any responsibilities of the employer.

Colorado Updates

Healthy Families and Workplaces Act

Effective January 1, 2021

- Extends COVID-19-related sick leave protections.
- Creates a traditional paid sick leave requirement beginning January 1, 2021.

Paid Sick Leave “PSL”

- Effective 1/1/22 for all employers regardless of size
- Covers full and part-time employees
- PSL accrued at one hour for every 30 hours worked, maximum of 48 hours
- Accrual starts when employment begins
- May use PSL as it is accrued
- May carry forward up to 48 hours
- BUT not paid out at termination
- More generous PTO already provided? Can cover state-required PSL.

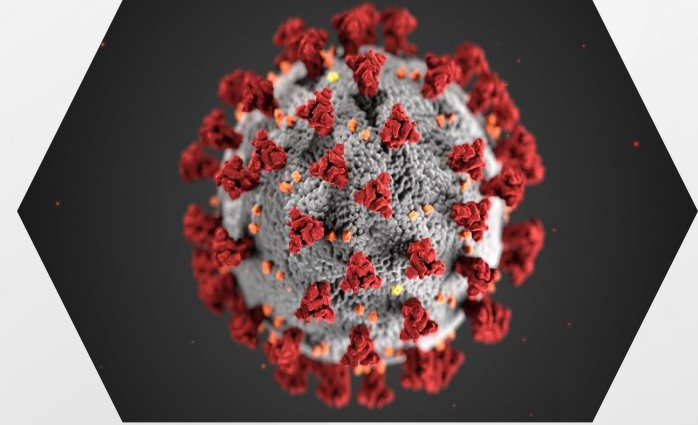
Public Health Emergency Leave

Any employee who works for any employer is eligible

- No minimum days/hours of employment
- Applicable if federal, state or local emergency is called
- One-time obligation

If the employee is sick, employee is entitled to:

- Full-time Employees – 80 *supplemental* hours of paid sick leave
- Part-time Employees – The greater of either (1) the amount of time the employee is scheduled to work in a fourteen-day period or (2) the amount of time the employee actually works on average in a fourteen-day period.



CO Family and Medical Leave

- Proposition 118 passed in November 2020
- 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 would be allowed for pregnancy or childbirth complications
- First premiums would be paid beginning January 1, 2023; benefits begin January 1, 2024
- Non-retaliation provisions

CO Criminal Background Laws

Background Check Law:

- Prohibits employers from stating in an advertisement or application that a person with a criminal history may not apply for the job.
- Employer may not inquire into or require disclosure of an applicant's criminal history on an initial application form.
- Inquiries may be made later in the hiring process, and still obtain an applicant's criminal background report.

Clean Slate Law:

- Records will be automatically sealed after a set amount of time, so long as the person has not committed any new offenses.
- Civil infractions would be eligible for sealing after 4 years have passed since the final disposition; petty offense or misdemeanor records after 7 years; and felonies after 10 years have passed since the final disposition or release from jail, whichever comes later.
- Violent crimes, such as murder, assault, sexual assault and robbery, will not be eligible for sealing.

Criminal History Inquiries

Exceptions

- › When a law prohibits a person with a particular criminal history from being employed in a job (such as: day care)
- › When the employer designates a position for participation in a program to encourage employment of people with criminal histories
- › When the employer is required by law to conduct a criminal history check
- › **Penalties**
- › No private cause of action
- › 1st violation: warning and order to comply
- › 2nd violation: penalty of up to \$1,000
- › 3rd violation: penalty of up to \$2,500

“Use-It-Or-Lose-It” Vacation

- Colorado Supreme Court ruled – vacation pay is earned and may not be forfeited upon termination.
Nieto v. Clark’s Market, June 14, 2021
- Adjust your policies NOW.

Equal Pay for Equal Work Act

Effective January 1, 2021

Prohibits discriminating between employees

- on the basis of sex or
- on the basis of sex **plus** another protected status

by paying one employee a wage rate less than the rate paid to an employee of a different sex for substantially similar work



Equal Pay for Equal Work Act

Exceptions:

- Seniority system
- Merit system
- System that measures earnings by:
 - ❖ Quantity or quality of production
 - ❖ Geographic location where the work is performed
 - ❖ Education, training or experience
 - ❖ Required business travel

Equal Pay for Equal Work Act

Employers may not:

- Ask applicant for prior wage history
- Rely on wage history
- Discriminate or retaliate against an individual who fails to disclose wage history
- Prohibit employees from or retaliate against employees for discussing their wage rates



Equal Pay for Equal Work Act

Requirements:

- Job postings
 - Must include salary ranges & benefits
- Internal promotion opportunities
 - Posted for all employees
- Recordkeeping



Equal Pay for Equal Work Act

Employees may go **directly to court** within two years.
Meaning, no need to go to the CCRD or EEOC first.

Penalties for violations:

- Back pay for up to three years
- Liquidated damages in an equal amount
- Job posting violations: \$500 to \$10,000 per violation
- Attorneys' fees and costs

Looking Ahead . . .

Secure Savings Program

- Effective Date: TBD 2023

Paid Family and Medical Leave Insurance Program

- Effective Date: January 1, 2024





Questions?

Thank You!



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