

**First Regular Session
Seventy-fourth General Assembly
STATE OF COLORADO**

PREAMENDED

*This Unofficial Version Includes Committee
Amendments Not Yet Adopted on Second Reading*

LLS NO. 23-0705.01 Christy Chase x2008

SENATE BILL 23-172

SENATE SPONSORSHIP

Winter F. and Gonzales, Buckner, Cutter, Danielson, Hinrichsen, Jaquez Lewis, Marchman, Moreno, Sullivan

HOUSE SPONSORSHIP

Weissman and Bacon, deGruy Kennedy, Dickson, Epps, Froelich, Garcia, Jodeh, Kipp, Lindsay, Mabrey, Michaelson Jenet, Titone, Vigil, Willford, Woodrow

Senate Committees

Judiciary
Appropriations

House Committees

A BILL FOR AN ACT

101 **CONCERNING PROTECTIONS FOR COLORADO WORKERS AGAINST**
102 **DISCRIMINATORY EMPLOYMENT PRACITCES, AND, IN**
103 **CONNECTION THEREWITH, MAKING AN APPROPRIATION.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov>.)

For purposes of addressing discriminatory or unfair employment practices pursuant to Colorado's anti-discrimination laws, the bill enacts the "Protecting Opportunities and Workers' Rights (POWR) Act", which:

- Directs the Colorado civil rights division (division) to include "harassment" as a basis or description of

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters or bold & italic numbers indicate new material to be added to existing law.
Dashes through the words or numbers indicate deletions from existing law.

- discrimination on any charge form or charge intake mechanism;
- Adds a new definition of "harass" or "harassment" and repeals the current definition of "harass" that requires creation of a hostile work environment;
 - Adds protections from discriminatory or unfair employment practices for individuals based on their "marital status";
 - Specifies that in harassment claims, the alleged conduct need not be severe or pervasive to constitute a discriminatory or unfair employment practice;
 - For purposes of the exception to otherwise discriminatory practices for an employer that is unable to accommodate an individual with a disability who is otherwise qualified for the job, eliminates the ability for the employer to assert that the individual's disability has a significant impact on the job as a rationale for the employment practice;
 - Specifies that it is a discriminatory or an unfair employment practice for an employer to fail to initiate an investigation of a complaint or to fail to take prompt, reasonable, and remedial action;
 - Specifies the requirements for an employer to assert an affirmative defense to an employee's proven claim of unlawful harassment by a supervisor; and
 - Specifies the requirements that must be satisfied for a nondisclosure provision in an agreement between an employer and an employee or a prospective employee to be enforceable.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1. Short title.** The short title of this act is the
 3 "Protecting Opportunities and Workers' Rights (POWR) Act".

4 **SECTION 2.** In Colorado Revised Statutes, 24-34-306, **amend**
 5 (1)(a) as follows:

6 **24-34-306. Charge - complaint - hearing - procedure -**
 7 **exhaustion of administrative remedies.** (1) (a) (I) Any person claiming
 8 to be aggrieved by a discriminatory or AN unfair practice as defined by
 9 parts 4 to 7 of this ~~article~~ ARTICLE 34 may, by ~~himself or herself~~ ONESELF

1 or through ~~his or her attorney-at-law~~ THE PERSON'S ATTORNEY, make,
2 sign, and file with the division a verified written charge stating the name
3 and address of the respondent alleged to have committed the
4 discriminatory or unfair practice, setting forth the particulars of the
5 alleged discriminatory or unfair practice, and containing any other
6 information required by the division.

7 (II) THE DIVISION SHALL INCLUDE ON ANY CHARGE FORM OR
8 CHARGE INTAKE MECHANISM AN OPTION TO SELECT "HARASSMENT" AS A
9 BASIS OR DESCRIPTION OF THE TYPE OF DISCRIMINATORY OR UNFAIR
10 EMPLOYMENT PRACTICE THAT IS THE SUBJECT OF THE CHARGE.

11 **SECTION 3.** In Colorado Revised Statutes, **add** 24-34-400.2 as
12 follows:

13 **24-34-400.2. Legislative declaration.** (1) THE GENERAL
14 ASSEMBLY FINDS THAT:

15 (a) ALL COLORADANS SHOULD HAVE AN EQUAL OPPORTUNITY TO
16 SUCCEED IN THE WORKPLACE AND ARE ENTITLED TO A WORKPLACE THAT
17 IS SAFE AND FREE FROM DISCRIMINATION AND HARASSMENT BASED ON
18 THEIR PROTECTED STATUS;

19 (b) WHEN EMPLOYEES HAVE A SAFE WORKPLACE THAT IS FREE
20 FROM DISCRIMINATION AND HARASSMENT, THOSE EMPLOYEES ARE MORE
21 PRODUCTIVE AND ARE MORE INCLINED TO REMAIN IN THEIR JOBS, AND
22 THEIR EMPLOYERS BENEFIT FROM INCREASED EMPLOYEE PRODUCTIVITY
23 AND RETENTION;

24 (c) WHILE MANY EMPLOYERS HAVE MADE GREAT STRIDES IN
25 IMPROVING WORKPLACE ENVIRONMENTS BY MAKING THEM FREE FROM
26 DISCRIMINATION AND HARASSMENT SINCE THIS PART 4 WAS FIRST
27 ENACTED IN 1951, MANY EMPLOYEES IN THIS STATE STILL EXPERIENCE

1 DISCRIMINATION AND HARASSMENT IN THE WORKPLACE, RESULTING IN
2 MENTAL, PHYSICAL, AND ECONOMIC HARM;

3 (d) IT IS CRITICAL THAT EMPLOYERS ENGAGE IN PREVENTIVE AND
4 CORRECTIVE ACTIONS TO ELIMINATE WORKPLACE DISCRIMINATION AND
5 HARASSMENT AND ENSURE A SAFE WORKPLACE ENVIRONMENT FOR ALL
6 THEIR EMPLOYEES; AND

7 (e) COURTS SHOULD APPLY THE LAW CONSISTENTLY TO ALL
8 WORKPLACES.

9 (2) ADDITIONALLY, THE GENERAL ASSEMBLY:

10 (a) FINDS THAT THE "SEVERE OR PERVASIVE" STANDARD CREATED
11 BY COURTS TO DETERMINE IF HARASSMENT AT WORK IS A DISCRIMINATORY
12 OR AN UNFAIR EMPLOYMENT PRACTICE DOES NOT TAKE INTO ACCOUNT
13 THE REALITIES OF THE WORKPLACE OR THE HARM THAT WORKPLACE
14 HARASSMENT CAUSES; AND

15 (b) REJECTS THE "SEVERE OR PERVASIVE" STANDARD FOR PROOF
16 OF WORKPLACE HARASSMENT IN FAVOR OF A STANDARD THAT PROHIBITS
17 UNWELCOME HARASSMENT.

18 (3) THE GENERAL ASSEMBLY FURTHER FINDS AND DECLARES THAT:

19 (a) IT IS THE PUBLIC POLICY OF THE STATE TO ENCOURAGE:

20 (I) EMPLOYERS TO ADOPT EQUAL EMPLOYMENT OPPORTUNITY
21 POLICIES TO PREVENT AND DISINCENTIVIZE ILLEGAL HARASSMENT AND
22 DISCRIMINATION; AND

23 (II) THE FREE REPORTING, DISCUSSION, AND EXPOSURE OF
24 DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES IN ORDER TO
25 BETTER PROTECT EMPLOYEES AND DISCOURAGE DISCRIMINATORY OR
26 UNFAIR EMPLOYMENT PRACTICES; AND

27 (b) ATTEMPTS TO INTERFERE WITH EMPLOYEES' ABILITY TO

1 COMMUNICATE ABOUT AND REPORT ALLEGED DISCRIMINATORY OR UNFAIR
2 EMPLOYMENT PRACTICES ARE CONTRARY TO THE PUBLIC POLICY OF THE
3 STATE.

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5 **SECTION 4.** In Colorado Revised Statutes, 24-34-402, **amend**
6 (1) introductory portion, (1)(a), (1)(b), (1)(c), (1)(d), and (1)(f); and **add**
7 (1.3) and (1.5) as follows:

8 **24-34-402. Discriminatory or unfair employment practices -**
9 **affirmative defense.** (1) It is a discriminatory or AN unfair employment
10 practice:

11 (a) (I) For an employer to refuse to hire, to discharge, to promote
12 or demote, to harass during the course of employment, or to discriminate
13 in matters of compensation, terms, conditions, or privileges of
14 employment against any individual otherwise qualified because of
15 disability, race, creed, color, sex, sexual orientation, gender identity,
16 gender expression, MARITAL STATUS, religion, age, national origin, or
17 ancestry. ~~but,~~

18 (II) With regard to a disability, it is not a discriminatory or an
19 unfair employment practice for an employer to act as provided in this
20 subsection (1)(a) REFUSE TO HIRE, TO DISCHARGE, OR TO PROMOTE OR
21 DEMOTE AN INDIVIDUAL WITH A DISABILITY if there is no reasonable
22 accommodation that the employer can make with regard to the disability
23 THAT WOULD ALLOW THE INDIVIDUAL TO SATISFY THE ESSENTIAL
24 FUNCTIONS OF THE JOB AND the disability actually disqualifies the
25 individual from the job. ~~and the disability has a significant impact on the~~
26 ~~job. For purposes of this subsection (1)(a), "harass" means to create a~~
27 ~~hostile work environment based upon an individual's race, national origin,~~

1 sex, sexual orientation, gender identity, gender expression, disability, age,
2 or religion. Notwithstanding the provisions of this subsection (1)(a),
3 harassment is not an illegal act unless a complaint is filed with the
4 appropriate authority at the complainant's workplace and the authority
5 fails to initiate a reasonable investigation of a complaint and take prompt
6 remedial action if appropriate.

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8 (b) (I) For an employment agency to:

9 (A) Refuse to list and properly classify for employment or REFUSE
10 to refer an individual for employment in a known available job for which
11 the individual is otherwise qualified because of disability, race, creed,
12 color, sex, sexual orientation, gender identity, gender expression,
13 MARITAL STATUS, religion, age, national origin, or ancestry; or for an
14 employment agency to

15 (B) Comply with a request from an employer for referral of
16 applicants for employment if the request indicates either directly or
17 indirectly that the employer discriminates in employment on account of
18 disability, race, creed, color, sex, sexual orientation, gender identity,
19 gender expression, MARITAL STATUS, religion, age, national origin, or
20 ancestry. but,

21 (II) With regard to a disability, it is not a discriminatory or an
22 unfair employment practice for an employment agency to refuse to list
23 and properly classify for employment or to refuse to refer an individual
24 for employment in a known available job for which the individual is
25 otherwise qualified if there is no reasonable accommodation that the
26 employer can make with regard to the disability THAT WOULD ALLOW THE
27 INDIVIDUAL TO SATISFY THE ESSENTIAL FUNCTIONS OF THE JOB AND the

1 disability actually disqualifies the applicant from the job. ~~and the~~
2 ~~disability has a significant impact on the job;~~

3 (c) For a labor organization to exclude any individual otherwise
4 qualified from full membership rights in the labor organization, to expel
5 an individual from membership in the labor organization, or to otherwise
6 discriminate against any of its members in the full enjoyment of work
7 opportunity because of disability, race, creed, color, sex, sexual
8 orientation, gender identity, gender expression, MARITAL STATUS,
9 religion, age, national origin, or ancestry;

10 (d) For any employer, employment agency, or labor organization
11 to print or circulate or cause to be printed or circulated any statement,
12 advertisement, or publication, or to use any form of application for
13 employment or membership, or to make any inquiry in connection with
14 prospective employment or membership that expresses, either directly or
15 indirectly, any limitation, specification, or discrimination as to disability,
16 race, creed, color, sex, sexual orientation, gender identity, gender
17 expression, MARITAL STATUS, religion, age, national origin, or ancestry or
18 intent to make any such limitation, specification, or discrimination, unless
19 based ~~upon~~ ON a bona fide occupational qualification or required by and
20 given to an agency of government for security reasons;

21 (f) For any employer, labor organization, joint apprenticeship
22 committee, SPONSOR OF AN APPRENTICESHIP PROGRAM REGISTERED
23 PURSUANT TO ARTICLE 15.7 OF TITLE 8, or vocational school providing,
24 coordinating, or controlling apprenticeship programs or providing,
25 coordinating, or controlling on-the-job training programs or other
26 instruction, training, or retraining programs:

27 (I) (A) To deny to or withhold from any qualified individual

1 because of disability, race, creed, color, sex, sexual orientation, gender
2 identity, gender expression, MARITAL STATUS, religion, age, national
3 origin, or ancestry the right to be admitted to or participate in an
4 apprenticeship training program, an on-the-job training program, or any
5 other occupational instruction, training, or retraining program. ~~but,~~

6 (B) With regard to a disability, it is not a discriminatory or an
7 unfair employment practice to deny or withhold the right to be admitted
8 to or participate in any such program if there is no reasonable
9 accommodation that can be made with regard to the disability THAT
10 WOULD ALLOW THE INDIVIDUAL TO SATISFY THE ESSENTIAL FUNCTIONS OF
11 THE PROGRAM AND the disability actually disqualifies the individual from
12 the program. ~~and the disability has a significant impact on participation~~
13 ~~in the program;~~

14 (II) To discriminate against any qualified individual in pursuit of
15 such programs or to discriminate against ~~such an~~ THE individual in the
16 terms, conditions, or privileges of such programs because of disability,
17 race, creed, color, sex, sexual orientation, gender identity, gender
18 expression, MARITAL STATUS, religion, age, national origin, or ancestry;
19 OR

20 (III) To print or circulate or cause to be printed or circulated any
21 statement, advertisement, or publication, or to use any form of application
22 for such programs, or to make any inquiry in connection with such
23 programs that expresses, directly or indirectly, any limitation,
24 specification, or discrimination as to disability, race, creed, color, sex,
25 sexual orientation, gender identity, gender expression, MARITAL STATUS,
26 religion, age, national origin, or ancestry or any intent to make any such
27 limitation, specification, or discrimination, unless based on a bona fide

1 occupational qualification;

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3 (1.3) (a) AS USED IN SUBSECTIONS (1)(a) AND (1.5) OF THIS
4 SECTION AND IN THIS SUBSECTION (1.3), "HARASS" OR "HARASSMENT"
5 MEANS TO ENGAGE IN, OR THE ACT OF ENGAGING IN, ANY UNWELCOME
6 PHYSICAL OR VERBAL CONDUCT OR ANY WRITTEN, PICTORIAL, OR VISUAL
7 COMMUNICATION DIRECTED AT AN INDIVIDUAL OR GROUP OF INDIVIDUALS
8 BECAUSE OF THAT INDIVIDUAL'S OR GROUP'S MEMBERSHIP IN, OR
9 PERCEIVED MEMBERSHIP IN, A PROTECTED CLASS, AS DESCRIBED IN
10 SUBSECTION (1)(a) OF THIS SECTION, WHICH CONDUCT OR
11 COMMUNICATION IS SUBJECTIVELY OFFENSIVE TO THE INDIVIDUAL
12 ALLEGING HARASSMENT AND IS OBJECTIVELY OFFENSIVE TO A
13 REASONABLE INDIVIDUAL WHO IS A MEMBER OF THE SAME PROTECTED
14 CLASS. THE CONDUCT OR COMMUNICATION NEED NOT BE SEVERE OR
15 PERVASIVE TO CONSTITUTE A DISCRIMINATORY OR AN UNFAIR
16 EMPLOYMENT PRACTICE UNDER SUBSECTION (1)(a) OF THIS SECTION AND
17 IS A VIOLATION OF SUBSECTION (1)(a) OF THIS SECTION IF:

18 (I) SUBMISSION TO THE CONDUCT OR COMMUNICATION IS
19 EXPLICITLY OR IMPLICITLY MADE A TERM OR CONDITION OF THE
20 INDIVIDUAL'S EMPLOYMENT;

21 (II) SUBMISSION TO, OBJECTION TO, OR REJECTION OF THE
22 CONDUCT OR COMMUNICATION IS USED AS A BASIS FOR EMPLOYMENT
23 DECISIONS AFFECTING THE INDIVIDUAL; OR

24 (III) THE CONDUCT OR COMMUNICATION HAS THE PURPOSE OR
25 EFFECT OF UNREASONABLY INTERFERING WITH THE INDIVIDUAL'S WORK
26 PERFORMANCE OR CREATING AN INTIMIDATING, HOSTILE, OR OFFENSIVE
27 WORKING ENVIRONMENT.

1 (b) THE NATURE OF THE WORK OR THE FREQUENCY WITH WHICH
2 HARASSMENT IN THE WORKPLACE OCCURRED IN THE PAST IS NOT
3 RELEVANT TO WHETHER THE CONDUCT OR COMMUNICATION IS A
4 DISCRIMINATORY OR AN UNFAIR EMPLOYMENT PRACTICE UNDER
5 SUBSECTION (1)(a) OF THIS SECTION.

6 (c) (I) NOTWITHSTANDING SUBSECTION (1)(a) OF THIS SECTION,
7 PETTY SLIGHTS, MINOR ANNOYANCES, AND LACK OF GOOD MANNERS DO
8 NOT CONSTITUTE HARASSMENT UNLESS THE SLIGHTS, ANNOYANCES, OR
9 LACK OF MANNERS, WHEN TAKEN INDIVIDUALLY OR IN COMBINATION AND
10 UNDER THE TOTALITY OF THE CIRCUMSTANCES, MEET THE STANDARDS SET
11 FORTH IN SUBSECTION (1.3)(a) OF THIS SECTION.

12 (II) FACTORS TO CONSIDER UNDER THE TOTALITY OF THE
13 CIRCUMSTANCES INCLUDE:

14 (A) THE FREQUENCY OF THE CONDUCT OR COMMUNICATION,
15 RECOGNIZING THAT A SINGLE INCIDENT MAY RISE TO THE LEVEL OF
16 HARASSMENT;

17 (B) THE NUMBER OF INDIVIDUALS ENGAGED IN THE CONDUCT OR
18 COMMUNICATION;

19 (C) THE TYPE OR NATURE OF THE CONDUCT OR COMMUNICATION,
20 RECOGNIZING THAT CONDUCT OR COMMUNICATION THAT, AT ONE TIME,
21 WAS OR IS WELCOME BETWEEN TWO OR MORE INDIVIDUALS MAY BECOME
22 UNWELCOME TO ONE OR MORE OF THOSE INDIVIDUALS;

23 (D) THE DURATION OF THE CONDUCT OR COMMUNICATION;

24 (E) THE LOCATION WHERE THE CONDUCT OR COMMUNICATION
25 OCCURRED;

26 (F) WHETHER THE CONDUCT OR COMMUNICATION IS
27 THREATENING;

1 (G) WHETHER ANY POWER DIFFERENTIAL EXISTS BETWEEN THE
2 INDIVIDUAL ALLEGED TO HAVE ENGAGED IN HARASSMENT AND THE
3 INDIVIDUAL ALLEGING THE HARASSMENT;

4 (H) ANY USE OF EPITHETS, SLURS, OR OTHER CONDUCT OR
5 COMMUNICATION THAT IS HUMILIATING OR DEGRADING; AND

6 (I) WHETHER THE CONDUCT OR COMMUNICATION REFLECTS
7 STEREOTYPES ABOUT AN INDIVIDUAL OR GROUP OF INDIVIDUALS IN A
8 PROTECTED CLASS.

9 (1.5) (a) WHEN AN EMPLOYEE PROVES THAT A SUPERVISOR
10 UNLAWFULLY HARASSED THAT EMPLOYEE, THE EMPLOYER MAY ASSERT AN
11 AFFIRMATIVE DEFENSE TO THE HARASSMENT CLAIM ONLY IF THE
12 EMPLOYER ESTABLISHES THAT:

13 (I) THE EMPLOYER HAS ESTABLISHED A PROGRAM THAT IS
14 REASONABLY DESIGNED TO PREVENT HARASSMENT, DETER FUTURE
15 HARASSERS, AND PROTECT EMPLOYEES FROM HARASSMENT. AN
16 EMPLOYER'S PROGRAM SATISFIES THIS SUBSECTION (1.5)(a)(I) IF THE
17 EMPLOYER CAN DEMONSTRATE THAT:

18 (A) THE EMPLOYER CONDUCTS PROMPT, REASONABLE
19 INVESTIGATIONS OF ALLEGED DISCRIMINATORY OR UNFAIR EMPLOYMENT
20 PRACTICES, AS DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION; AND

21 (B) THE EMPLOYER TAKES PROMPT, REASONABLE REMEDIAL
22 ACTIONS, WHEN WARRANTED, IN RESPONSE TO COMPLAINTS OF
23 DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES, AS DESCRIBED IN
24 SUBSECTION (1)(a) OF THIS SECTION.

25
26 (II) THE EMPLOYER HAS COMMUNICATED THE EXISTENCE AND
27 DETAILS OF THE PROGRAM SPECIFIED IN SUBSECTION (1.5)(a)(I) OF THIS

1 SECTION TO BOTH ITS SUPERVISORY AND NONSUPERVISORY EMPLOYEES;

2 (III) THE EMPLOYER MAINTAINS AN ACCURATE, DESIGNATED
3 REPOSITORY OF ALL WRITTEN OR ORAL COMPLAINTS OF DISCRIMINATORY
4 OR UNFAIR EMPLOYMENT PRACTICES, AS DESCRIBED IN SUBSECTION (1)(a)
5 OF THIS SECTION, THAT INCLUDES THE DATE OF THE COMPLAINT, THE
6 IDENTITY OF THE COMPLAINING PARTY, THE IDENTITY OF THE ALLEGED
7 PERPETRATOR, AND THE SUBSTANCE OF THE COMPLAINT; AND

8 (IV) THE EMPLOYEE HAS UNREASONABLY FAILED TO TAKE
9 ADVANTAGE OF THE EMPLOYER'S PROGRAM SPECIFIED IN SUBSECTION
10 (1.5)(a)(I) OF THIS SECTION.

11 (b) NOTHING IN THIS SUBSECTION (1.5) SUPERSEDES OR
12 ELIMINATES ANY OTHER ANALYSES, EVALUATIONS, OR STANDARDS OF
13 LIABILITY FOR HARASSMENT ESTABLISHED IN THIS SECTION AND THROUGH
14 JUDICIAL INTERPRETATION OF TITLE VII OF THE FEDERAL "CIVIL RIGHTS
15 ACT OF 1964", AS AMENDED, 42 U.S.C. SEC. 2000e ET SEQ.; THE FEDERAL
16 "AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967", AS AMENDED, 29
17 U.S.C. SEC. 621 ET SEQ.; TITLES I AND V OF THE FEDERAL "AMERICANS
18 WITH DISABILITIES ACT OF 1990", AS AMENDED, 42 U.S.C. SEC. 12111 ET
19 SEQ.; AND THE FEDERAL "CIVIL RIGHTS ACT OF 1991", AS AMENDED, 42
20 U.S.C. SEC. 1981a.

21 **SECTION 5.** In Colorado Revised Statutes, **add 24-34-407 and**
22 **24-34-408** as follows:

23 **24-34-407. Nondisclosure agreements - requirements for**
24 **enforcement - penalties for noncompliance.** (1) A PROVISION IN AN
25 AGREEMENT ENTERED INTO OR RENEWED ON OR AFTER THE EFFECTIVE
26 DATE OF THIS SECTION BETWEEN AN EMPLOYER AND AN EMPLOYEE OR A
27 PROSPECTIVE EMPLOYEE THAT LIMITS THE ABILITY OF THE EMPLOYEE OR

1 PROSPECTIVE EMPLOYEE TO DISCLOSE OR DISCUSS, EITHER ORALLY OR IN
2 WRITING, ANY ALLEGED DISCRIMINATORY OR UNFAIR EMPLOYMENT
3 PRACTICE, WHICH PROVISION IS REFERRED TO IN THIS SECTION AS A
4 "NONDISCLOSURE PROVISION", IS VOID UNLESS:

5 (a) THE NONDISCLOSURE PROVISION APPLIES EQUALLY TO ALL
6 PARTIES TO THE AGREEMENT;

7 (b) THE NONDISCLOSURE PROVISION EXPRESSLY STATES THAT IT
8 DOES NOT RESTRAIN THE EMPLOYEE OR PROSPECTIVE EMPLOYEE FROM
9 DISCLOSING THE UNDERLYING FACTS OF ANY ALLEGED DISCRIMINATORY
10 OR UNFAIR EMPLOYMENT PRACTICE:

11 (I) INCLUDING DISCLOSING THE EXISTENCE AND TERMS OF A
12 SETTLEMENT AGREEMENT, TO THE EMPLOYEE'S OR PROSPECTIVE
13 EMPLOYEE'S IMMEDIATE FAMILY MEMBERS, RELIGIOUS ADVISOR, MEDICAL
14 OR MENTAL HEALTH PROVIDER, MENTAL OR BEHAVIORAL HEALTH
15 THERAPEUTIC SUPPORT GROUP, LEGAL COUNSEL, FINANCIAL ADVISOR, OR
16 TAX PREPARER;

17 (II) TO ANY LOCAL, STATE, OR FEDERAL GOVERNMENT AGENCY
18 FOR ANY REASON, INCLUDING DISCLOSING THE EXISTENCE AND TERMS OF
19 A SETTLEMENT AGREEMENT, WITHOUT FIRST NOTIFYING THE EMPLOYER;

20 (III) IN RESPONSE TO LEGAL PROCESS, SUCH AS A SUBPOENA TO
21 TESTIFY AT A DEPOSITION OR IN A COURT, INCLUDING DISCLOSING THE
22 EXISTENCE AND TERMS OF A SETTLEMENT AGREEMENT, WITHOUT FIRST
23 NOTIFYING THE EMPLOYER; AND

24 (IV) FOR ALL OTHER PURPOSES AS REQUIRED BY LAW;

25 (c) THE NONDISCLOSURE PROVISION EXPRESSLY STATES THAT
26 DISCLOSURE OF THE UNDERLYING FACTS OF ANY ALLEGED
27 DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE WITHIN THE

1 PARAMETERS SPECIFIED IN SUBSECTION (1)(b) OF THIS SECTION DOES NOT
2 CONSTITUTE DISPARAGEMENT;

3 (d) THE AGREEMENT INCLUDES A CONDITION THAT IF A
4 NONDISPARAGEMENT PROVISION IS INCLUDED IN THE AGREEMENT AND THE
5 EMPLOYER DISPARAGES THE EMPLOYEE OR PROSPECTIVE EMPLOYEE TO A
6 THIRD PARTY, THE EMPLOYER MAY NOT SEEK TO ENFORCE THE
7 NONDISPARAGEMENT OR NONDISCLOSURE PROVISIONS OF THE AGREEMENT
8 OR SEEK DAMAGES AGAINST THE EMPLOYEE OR ANY OTHER PARTY TO THE
9 AGREEMENT FOR VIOLATING THOSE PROVISIONS, BUT ALL OTHER
10 REMAINING TERMS OF THE AGREEMENT REMAIN ENFORCEABLE;

11 (e) ANY LIQUIDATED DAMAGES PROVISION IN THE AGREEMENT
12 DOES NOT CONSTITUTE A PENALTY OR PUNISHMENT, AND, TO BE
13 ENFORCED, A LIQUIDATED DAMAGES PROVISION MUST PROVIDE FOR AN
14 AMOUNT OF LIQUIDATED DAMAGES THAT IS:

15 (I) REASONABLE AND PROPORTIONATE IN LIGHT OF THE
16 ANTICIPATED ACTUAL ECONOMIC LOSS THAT A BREACH OF THE
17 AGREEMENT WOULD CAUSE;

18 (II) VARIED BASED ON THE NATURE OR SEVERITY OF THE BREACH;
19 AND

20 (III) NOT PUNITIVE; AND

21 (f) AN ADDENDUM, SIGNED BY ALL PARTIES TO THE AGREEMENT
22 AND ATTESTING TO COMPLIANCE WITH THIS SUBSECTION (1), IS ATTACHED
23 TO THE AGREEMENT.

24 (2) (a) EACH INSTANCE WHEN AN EMPLOYER INCLUDES IN AN
25 AGREEMENT A NONDISCLOSURE PROVISION THAT VIOLATES SUBSECTION
26 (1) OF THIS SECTION CONSTITUTES A VIOLATION OF THIS SECTION. AN
27 EMPLOYER IS LIABLE FOR ACTUAL DAMAGES AND A PENALTY OF FIVE

1 THOUSAND DOLLARS PER VIOLATION.

2 (b) THE COMMISSION AND ANY EMPLOYEE OR PROSPECTIVE
3 EMPLOYEE WHO IS PRESENTED WITH AN AGREEMENT THAT INCLUDES A
4 NONDISCLOSURE PROVISION THAT VIOLATES SUBSECTION (1) OF THIS
5 SECTION MAY IMMEDIATELY BRING AN ACTION FOR INJUNCTIVE RELIEF
6 AND TO RECOVER PENALTIES. IN ADDITION TO PENALTIES, AN EMPLOYEE
7 OR A PROSPECTIVE EMPLOYEE MAY RECOVER ACTUAL DAMAGES,
8 REASONABLE COSTS, AND ATTORNEY FEES IN ANY PRIVATE ACTION
9 BROUGHT PURSUANT TO THIS SECTION.

10 (3) IN ANY CIVIL ACTION INVOLVING A CLAIM OF A
11 DISCRIMINATORY OR AN UNFAIR EMPLOYMENT PRACTICE, A PLAINTIFF MAY
12 PRESENT EVIDENCE THAT THE EMPLOYER AGAINST WHOM THE ACTION WAS
13 FILED ENTERED INTO ONE OR MORE AGREEMENTS THAT INCLUDED A
14 NONDISCLOSURE PROVISION INVOLVING THE CONDUCT OF THE SAME
15 INDIVIDUAL OR INDIVIDUALS WHO ARE ALLEGED IN THE ACTION TO HAVE
16 ENGAGED IN THE DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE. IF
17 SUCH EVIDENCE IS PRESENTED, THE EVIDENCE SHALL BE CONSIDERED
18 EVIDENCE IN SUPPORT OF AN AWARD OF PUNITIVE DAMAGES.

19 (4) IN ANY ACTION BROUGHT UNDER THIS SECTION, IF THE
20 EMPLOYER SHOWS THAT THE ACT OR OMISSION GIVING RISE TO THE ACTION
21 WAS COMMITTED IN GOOD FAITH AND THAT THE EMPLOYER HAS
22 REASONABLE GROUNDS FOR BELIEVING THAT THE EMPLOYER'S ACT OR
23 OMISSION DID NOT VIOLATE THIS SECTION, THE COURT MAY, IN ITS
24 DISCRETION, DECLINE TO AWARD A PENALTY OR REDUCE THE AMOUNT OF
25 THE PENALTY SPECIFIED IN SUBSECTION (2)(a) OF THIS SECTION.

26 24-34-408. Employer record keeping - definition. (1) AN
27 EMPLOYER SHALL PRESERVE ANY PERSONNEL OR EMPLOYMENT RECORD

1 THE EMPLOYER MADE, RECEIVED, OR KEPT FOR AT LEAST FIVE YEARS
2 AFTER THE LATER OF:

3 (a) THE DATE THE EMPLOYER MADE OR RECEIVED THE RECORD; OR

4 (b) THE DATE OF THE PERSONNEL ACTION ABOUT WHICH THE
5 RECORD PERTAINS OR OF THE FINAL DISPOSITION OF A CHARGE OF
6 DISCRIMINATION OR RELATED ACTION, AS APPLICABLE.

7 (2) AS USED IN THIS SECTION, "PERSONNEL OR EMPLOYMENT
8 RECORD" INCLUDES REQUESTS FOR ACCOMMODATION; EMPLOYEE
9 COMPLAINTS OF DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES;
10 APPLICATION FORMS SUBMITTED BY APPLICANTS FOR EMPLOYMENT;
11 OTHER RECORDS RELATED TO HIRING, PROMOTION, DEMOTION, TRANSFER,
12 LAYOFF, TERMINATION, RATES OF PAY OR OTHER TERMS OF
13 COMPENSATION, AND SELECTION FOR TRAINING OR APPRENTICESHIP; AND
14 RECORDS OF TRAINING PROVIDED TO OR FACILITATED FOR EMPLOYEES.

15 **SECTION 6. Appropriation.** (1) For the 2023-24 state fiscal
16 year, \$152,866 is appropriated to the department of corrections. This
17 appropriation is from the general fund. To implement this act, the
18 department may use this appropriation as follows:

19 (a) \$123,478 for use by support services for personal services
20 related to the personnel subprogram, which amount is based on an
21 assumption that the subprogram will require an additional 2.6 FTE;

22 (b) \$20,823 for use by support services for operating expenses
23 related to the personnel subprogram; and

24 (c) \$8,565 for use by management for the purchase of legal
25 services.

26 (2) For the 2023-24 state fiscal year, \$23,469 is appropriated to
27 the department of education. This appropriation is from the general fund.

1 To implement this act, the department may use this appropriation as
2 follows:

3 (a) \$22,200 for use by management and administration for general
4 department and program administration, which amount is based on an
5 assumption that the division will require an additional 0.4 FTE; and

6 (b) \$1,269 for use by management and administration for the
7 purchase of legal services.

8 (3) For the 2023-24 state fiscal year, \$35,415 is appropriated to
9 the office of the governor. This appropriation is from the general fund. To
10 implement this act, the office may use this appropriation as follows:

11 (a) \$6,660 for use by the office of the governor for administration
12 of governor's office and residence, which amount is based on an
13 assumption that the office will require an additional 0.1 FTE;

14 (b) \$423 for the purchase of legal services;

15 (c) \$26,640 for use by the office of information and technology
16 for central administration, which amount is based on an assumption that
17 the office will require an additional 0.5 FTE; and

18 (d) \$1,692 for use by the office of information and technology for
19 the purchase of legal services.

20 (4) For the 2023-24 state fiscal year, \$23,363 is appropriated to
21 the department of health care policy and financing for use by the
22 executive director's office. This appropriation is from the general fund.

23 To implement this act, the office may use this appropriation as follows:

24 (a) \$18,997 for personal services, which amount is based on an
25 assumption that the office will require an additional 0.4 FTE;

26 (b) \$3,203 for operating expenses; and

27 (c) \$1,163 for the purchase of legal services.

1 (5) For the 2023-24 state fiscal year, \$129,081 is appropriated to
2 the department of human services. This appropriation is from the general
3 fund. To implement this act, the department may use this appropriation
4 as follows:

5 (a) \$104,483 for use by administration and finance for personal
6 services, which amount is based on an assumption that the division will
7 require an additional 2.2 FTE;

8 (b) \$17,619 for use by administration and finance for operating
9 expenses; and

10 (c) \$6,979 for the purchase of legal services.

11 (6) For the 2023-24 state fiscal year, \$146,894 is appropriated to
12 the judicial department for courts administration. This appropriation is
13 from the general fund. To implement this act, the department may use this
14 appropriation as follows:

15 (a) \$138,752 for general courts administration, which amount is
16 based on an assumption that the department will require an additional 2.5
17 FTE; and

18 (b) \$8,142 for the purchase of legal services.

19 (7) For the 2023-24 state fiscal year, \$46,833 is appropriated to
20 the department of labor and employment for use by the executive
21 director's office. This appropriation is from the general fund. To
22 implement this act, the office may use this appropriation as follows:

23 (a) \$37,994 for personal services, which amount is based on an
24 assumption that the office will require an additional 0.8 FTE;

25 (b) \$6,407 for operating expenses; and

26 (c) \$2,432 for the purchase of legal services.

27 (8) For the 2023-24 state fiscal year, \$17,708 is appropriated to

1 the department of law for use by the administration division. This
2 appropriation is from the general fund. To implement this act, the division
3 may use this appropriation as follows:

4 (a) \$16,651 for personal services, which amount is based on an
5 assumption that the department will require an additional 0.3 FTE; and

6 (b) \$1,057 for the purchase of legal services.

7 (9) For the 2023-24 state fiscal year, \$76,276 is appropriated to
8 the department of natural resources for use by the executive director's
9 office. This appropriation is from the general fund. To implement this act,
10 the office may use this appropriation as follows:

11 (a) \$61,740 for personal services, which amount is based on an
12 assumption that the office will require an additional 1.3 FTE;

13 (b) \$10,412 for operating expenses; and

14 (c) \$4,124 for the purchase of legal services.

15 (10) For the 2023-24 state fiscal year, \$89,090 is appropriated to
16 the department of personnel. This appropriation is from the general fund.
17 To implement this act, the department may use this appropriation as
18 follows:

19 (a) \$57,725 for use by the division of human resources for
20 personal services related to risk management services, which amount is
21 based on an assumption that the division will require an additional 0.8
22 FTE;

23 (b) \$6,350 for use by the division of human resources for
24 operating expenses related to risk management services;

25 (c) \$23,210 for use by the state personnel board for personal
26 services, which amount is based on an assumption that the board will
27 require an additional 0.2 FTE; and

1 (d) \$1,805 for use by the state personnel board for operating
2 expenses.

3 (11) For the 2023-24 state fiscal year, \$52,912 is appropriated to
4 the department of public health and environment for use by
5 administration and support. This appropriation is from the general fund.
6 To implement this act, the department may use this appropriation as
7 follows:

8 (a) \$42,743 for personal services, which amount is based on an
9 assumption that the office will require an additional 0.9 FTE;

10 (b) \$7,208 for operating expenses; and

11 (c) \$2,961 for the purchase of legal services.

12 (12) For the 2023-24 state fiscal year, \$52,912 is appropriated to
13 the department of public safety for use by the executive director's office.
14 This appropriation is from the general fund. To implement this act, the
15 office may use this appropriation as follows:

16 (a) \$42,743 for personal services, which amount is based on an
17 assumption that the office will require an additional 0.9 FTE;

18 (b) \$7,208 for operating expenses; and

19 (c) \$2,961 for the purchase of legal services.

20 (13) For the 2023-24 state fiscal year, \$266,298 General Fund is
21 appropriated to the department of regulatory agencies for use by the
22 executive director's office and administrative services. To implement this
23 act, the department may use this appropriation as follows:

24 (a) \$205,631 for personal services , which amount is based on an
25 assumption that the office will require an additional 2.6 FTE;

26 (b) \$27,888 for operating expenses; and

27 (c) \$32,779 for the purchase of legal services.

1 (14) For the 2023-24 state fiscal year, \$47,045 is appropriated to
2 the department of revenue for use by the executive director's office. This
3 appropriation is from the general fund. To implement this act, the office
4 may use this appropriation as follows:

5 (a) \$37,994 for personal services related to administration and
6 support, which amount is based on an assumption that the division will
7 require an additional 0.8 FTE;

8 (b) \$6,407 for operating expenses related to administration and
9 support; and

10 (c) \$2,644 for the purchase of legal services.

11 (15) For the 2023-24 state fiscal year, \$88,008 is appropriated to
12 the department of transportation. This appropriation is from the general
13 fund and is based on an assumption that the department will require an
14 additional 1.5 FTE. To implement this act, the department may use this
15 appropriation for administration.

16 (16) For the 2023-24 state fiscal year, \$81,949 is appropriated to
17 the department of law. This appropriation is from reappropriated funds
18 received from the departments of corrections, education, office of the
19 governor, health care policy and financing, human services, judicial, labor
20 and employment, law, natural resources, public health and environment,
21 public safety, regulatory agencies, revenue, and transportation under
22 subsections (1)(c), (2)(b), (3)(b), (3)(d), (4)(c), (5)(c), (6)(b), (7)(c),
23 (8)(b), (9)(c), (11)(c), (12)(c), (13)(c), (14)(c), and (15) of this section and
24 is based on the assumption that the department will require an additional
25 0.5 FTE. To implement this act, the department of law may use this
26 appropriation to provide legal services for the departments of corrections,
27 education, office of the governor, health care policy and financing, human

1 services, judicial, labor and employment, law, natural resources, public
2 health and environment, public safety, regulatory agencies, revenue, and
3 transportation.

4 **SECTION 7. Act subject to petition - effective date -**
5 **applicability.** (1) This act takes effect at 12:01 a.m. on the day following
6 the expiration of the ninety-day period after final adjournment of the
7 general assembly; except that, if a referendum petition is filed pursuant
8 to section 1 (3) of article V of the state constitution against this act or an
9 item, section, or part of this act within such period, then the act, item,
10 section, or part will not take effect unless approved by the people at the
11 general election to be held in November 2024 and, in such case, will take
12 effect on the date of the official declaration of the vote thereon by the
13 governor.

14 (2) This act applies to employment practices occurring on or after
15 the applicable effective date of this act.