

CHAPTER 389

GOVERNMENT - STATE

SENATE BILL 23-172

BY SENATOR(S) Winter F. and Gonzales, Buckner, Cutter, Danielson, Hinrichsen, Jaquez Lewis, Marchman, Moreno, Sullivan, Bridges, Coleman, Exum, Fields, Hansen, Kolker, Mullica, Priola, Roberts, Rodriguez;
also REPRESENTATIVE(S) Weissman and Bacon, deGruy Kennedy, Dickson, Epps, Froelich, Garcia, Jodeh, Kipp, Lindsay, Mabrey, Michaelson Jenet, Titone, Vigil, Willford, Woodrow, Boesenecker, Brown, Duran, English, Gonzales-Gutierrez, Hamrick, Herod, Joseph, Lieder, Lindstedt, Martinez, Ortiz, Parenti, Ricks, Sharbini, Sirota, Story, Velasco, Young, McCluskie.

AN ACT

CONCERNING PROTECTIONS FOR COLORADO WORKERS AGAINST DISCRIMINATORY EMPLOYMENT PRACTICES, AND, IN CONNECTION THEREWITH, MAKING AN APPROPRIATION.

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

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

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

24-34-306. Charge - complaint - hearing - procedure - exhaustion of administrative remedies. (1) (a) (I) Any person claiming to be aggrieved by a discriminatory or AN unfair practice as defined by parts 4 to 7 of this ~~article~~ ARTICLE 34 may, by ~~himself or herself~~ ONESELF or through ~~his or her attorney-at-law~~ THE PERSON'S ATTORNEY, make, sign, and file with the division a verified written charge stating the name and address of the respondent alleged to have committed the discriminatory or unfair practice, setting forth the particulars of the alleged discriminatory or unfair practice, and containing any other information required by the division.

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

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

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

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

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

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

(c) WHILE MANY EMPLOYERS HAVE MADE GREAT STRIDES IN IMPROVING WORKPLACE ENVIRONMENTS BY MAKING THEM FREE FROM DISCRIMINATION AND HARASSMENT SINCE THIS PART 4 WAS FIRST ENACTED IN 1951, MANY EMPLOYEES IN THIS STATE STILL EXPERIENCE DISCRIMINATION AND HARASSMENT IN THE WORKPLACE, RESULTING IN MENTAL, PHYSICAL, AND ECONOMIC HARM;

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

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

(2) ADDITIONALLY, THE GENERAL ASSEMBLY:

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

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

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

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

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

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

(b) ATTEMPTS TO INTERFERE WITH EMPLOYEES' ABILITY TO COMMUNICATE ABOUT AND REPORT ALLEGED DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES ARE CONTRARY TO THE PUBLIC POLICY OF THE STATE.

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

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

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

(II) With regard to a disability, it is not a discriminatory or an unfair employment practice for an employer to ~~act as provided in this subsection (1)(a)~~ REFUSE TO HIRE, TO DISCHARGE, OR TO PROMOTE OR DEMOTE AN INDIVIDUAL WITH A DISABILITY if there is no reasonable accommodation that the employer can make with regard to the disability THAT WOULD ALLOW THE INDIVIDUAL TO SATISFY THE ESSENTIAL FUNCTIONS OF THE JOB AND the disability actually disqualifies the individual from the job. ~~and the disability has a significant impact on the job. For purposes of this subsection (1)(a), "harass" means to create a hostile work environment based upon an individual's race, national origin, sex, sexual orientation, gender identity, gender expression, disability, age, or religion. Notwithstanding the provisions of this subsection (1)(a), 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 of a complaint and take prompt remedial action if appropriate.~~

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

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

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

(II) With regard to a disability, it is not a discriminatory or an unfair employment practice for an employment agency to refuse to list and properly classify for employment or to refuse to refer an individual for employment in a known available job for which the individual is otherwise qualified if there is no reasonable accommodation that the employer can make with regard to the disability THAT WOULD ALLOW THE INDIVIDUAL TO SATISFY THE ESSENTIAL FUNCTIONS OF THE JOB AND the disability actually disqualifies the applicant from the job. ~~and the disability has a significant impact on the job;~~

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

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

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

(I) (A) To deny to or withhold from any qualified individual because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, MARITAL STATUS, religion, age, national origin, or ancestry the right to be admitted to or participate in an apprenticeship training program, an on-the-job training program, or any other occupational instruction, training, or retraining program. ~~but~~

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

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

(III) To print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for such programs, or to make any inquiry in connection with such programs that expresses, directly or indirectly, any limitation, specification, or discrimination as to disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, MARITAL STATUS, religion, age, national origin, or ancestry or any intent to make any such

limitation, specification, or discrimination, unless based on a bona fide occupational qualification;

(h) (I) For any employer to discharge an employee or to 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 of the employer; but this ~~subparagraph (I) shall~~ SUBSECTION (1)(h)(I) DOES not apply to employers with twenty-five or fewer employees.

(II) It ~~shall~~ IS not be unfair or discriminatory for an employer to discharge an employee or to refuse to hire OR PROMOTE a person for the reasons stated in ~~subparagraph (I) of this paragraph (h)~~ SUBSECTION (1)(h)(I) OF THIS SECTION under circumstances where:

(1.3) (a) AS USED IN SUBSECTIONS (1)(a) AND (1.5) OF THIS SECTION AND IN THIS SUBSECTION (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 GROUP OF INDIVIDUALS BECAUSE OF THAT INDIVIDUAL'S OR GROUP'S MEMBERSHIP IN, OR PERCEIVED MEMBERSHIP IN, A PROTECTED CLASS, AS DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION, WHICH CONDUCT OR COMMUNICATION IS SUBJECTIVELY OFFENSIVE TO THE INDIVIDUAL ALLEGING HARASSMENT AND IS OBJECTIVELY OFFENSIVE TO A REASONABLE INDIVIDUAL 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 UNDER SUBSECTION (1)(a) OF THIS SECTION AND 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.

(b) 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 AN UNFAIR EMPLOYMENT PRACTICE UNDER SUBSECTION (1)(a) OF THIS SECTION.

(c) (I) NOTWITHSTANDING SUBSECTION (1)(a) OF THIS SECTION, 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 SUBSECTION (1.3)(a) OF THIS SECTION.

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

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

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

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

(D) THE DURATION OF THE CONDUCT OR COMMUNICATION;

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

(F) WHETHER THE CONDUCT OR COMMUNICATION IS THREATENING;

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

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

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

(1.5) (a) WHEN AN EMPLOYEE PROVES THAT A SUPERVISOR UNLAWFULLY HARASSED THAT EMPLOYEE, AS DESCRIBED IN SUBSECTION (1.3)(a)(III) OF THIS SECTION, THE EMPLOYER MAY ASSERT AN AFFIRMATIVE DEFENSE TO THE HARASSMENT CLAIM ONLY IF THE EMPLOYER ESTABLISHES THAT:

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

(A) THE EMPLOYER TAKES PROMPT, REASONABLE ACTION TO INVESTIGATE OR ADDRESS ALLEGED DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES, AS DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION; AND

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

(II) THE EMPLOYER HAS COMMUNICATED THE EXISTENCE AND DETAILS OF THE PROGRAM SPECIFIED IN SUBSECTION (1.5)(a)(I) OF THIS SECTION TO BOTH ITS SUPERVISORY AND NONSUPERVISORY EMPLOYEES; AND

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

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

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

24-34-407. Nondisclosure agreements - requirements for enforcement - penalties for noncompliance. (1) A PROVISION IN AN AGREEMENT ENTERED INTO OR RENEWED ON OR AFTER THE EFFECTIVE DATE OF THIS SECTION BETWEEN AN EMPLOYER AND AN EMPLOYEE OR A PROSPECTIVE 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, WHICH PROVISION IS REFERRED TO IN THIS SECTION AS A "NONDISCLOSURE PROVISION", IS VOID UNLESS:

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

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

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

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

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

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

(c) THE NONDISCLOSURE PROVISION EXPRESSLY STATES THAT DISCLOSURE OF THE

UNDERLYING FACTS OF ANY ALLEGED DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE WITHIN THE PARAMETERS SPECIFIED IN SUBSECTION (1)(b) OF THIS SECTION DOES NOT CONSTITUTE DISPARAGEMENT;

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

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

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

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

(III) NOT PUNITIVE; AND

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

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

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

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

(4) IN ANY ACTION BROUGHT UNDER THIS SECTION, IF THE EMPLOYER SHOWS THAT THE ACT OR OMISSION GIVING RISE TO THE ACTION WAS COMMITTED IN GOOD FAITH AND THAT THE EMPLOYER HAS REASONABLE GROUNDS FOR BELIEVING THAT THE

EMPLOYER'S ACT OR OMISSION DID NOT VIOLATE THIS SECTION, THE COURT MAY, IN ITS DISCRETION, DECLINE TO AWARD A PENALTY OR REDUCE THE AMOUNT OF THE PENALTY SPECIFIED IN SUBSECTION (2)(a) OF THIS SECTION.

24-34-408. Employer record keeping - repository of discrimination complaints - definition. (1) AN EMPLOYER SHALL PRESERVE ANY PERSONNEL OR EMPLOYMENT RECORD THE EMPLOYER MADE, RECEIVED, OR KEPT FOR AT LEAST FIVE YEARS AFTER THE LATER OF:

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

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

(2)(a) AN EMPLOYER SHALL MAINTAIN AN ACCURATE, DESIGNATED REPOSITORY OF ALL WRITTEN OR ORAL COMPLAINTS OF DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES, AS DESCRIBED IN SECTION 24-34-402 (1)(a), THAT INCLUDES THE DATE OF THE COMPLAINT, THE IDENTITY OF THE COMPLAINING PARTY, IF THE COMPLAINT WAS NOT MADE ANONYMOUSLY, THE IDENTITY OF THE ALLEGED PERPETRATOR, AND THE SUBSTANCE OF THE COMPLAINT.

(b) RECORDS OF COMPLAINTS IN AN EMPLOYER'S DESIGNATED REPOSITORY MAINTAINED IN ACCORDANCE WITH THIS SUBSECTION (2) ARE NOT PUBLIC RECORDS, AS DEFINED IN SECTION 24-72-202 (6), AND, FOR PURPOSES OF AN EMPLOYER THAT IS SUBJECT TO PART 2 OF ARTICLE 72 OF THIS TITLE 24, RECORDS IN A DESIGNATED REPOSITORY ARE CONSIDERED PERSONNEL RECORDS, AS DEFINED IN SECTION 24-72-202 (4.5), AND ARE NOT OPEN TO PUBLIC INSPECTION PURSUANT TO SECTION 24-72-204 (3)(a)(II)(A). ADDITIONALLY, IN ACCORDANCE WITH SECTION 24-72-204 (3)(a)(X), ANY RECORD OF A SEXUAL HARASSMENT COMPLAINT OR INVESTIGATION IS NOT OPEN TO PUBLIC INSPECTION EXCEPT AS SPECIFIED IN SAID SECTION 24-72-204 (3)(a)(X).

(3) AS USED IN THIS SECTION, "PERSONNEL OR EMPLOYMENT RECORD" INCLUDES REQUESTS FOR ACCOMMODATION; EMPLOYEE COMPLAINTS OF DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES, WHETHER WRITTEN OR ORAL; 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; AND RECORDS OF TRAINING PROVIDED TO OR FACILITATED FOR EMPLOYEES.

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

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

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

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

(2) For the 2023-24 state fiscal year, \$23,469 is appropriated to the department of education. This appropriation is from the general fund. To implement this act, the department may use this appropriation as follows:

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

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

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

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

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

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

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

(4) For the 2023-24 state fiscal year, \$23,363 is appropriated to the department of health care policy and financing for use by the executive director's office. This appropriation is from the general fund. To implement this act, the office may use this appropriation as follows:

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

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

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

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

(a) \$104,483 for use by administration and finance for personal services, which

amount is based on an assumption that the division will require an additional 2.2 FTE;

- (b) \$17,619 for use by administration and finance for operating expenses; and
- (c) \$6,979 for the purchase of legal services.

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

- (a) \$138,752 for general courts administration, which amount is based on an assumption that the department will require an additional 2.5 FTE; and
- (b) \$8,142 for the purchase of legal services.

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

- (a) \$37,994 for personal services, which amount is based on an assumption that the office will require an additional 0.8 FTE;
- (b) \$6,407 for operating expenses; and
- (c) \$2,432 for the purchase of legal services.

(8) For the 2023-24 state fiscal year, \$17,708 is appropriated to the department of law for use by the administration division. This appropriation is from the general fund. To implement this act, the division may use this appropriation as follows:

- (a) \$16,651 for personal services, which amount is based on an assumption that the department will require an additional 0.3 FTE; and
- (b) \$1,057 for the purchase of legal services.

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

- (a) \$61,740 for personal services, which amount is based on an assumption that the office will require an additional 1.3 FTE;
- (b) \$10,412 for operating expenses; and
- (c) \$4,124 for the purchase of legal services.

(10) For the 2023-24 state fiscal year, \$89,090 is appropriated to the department

of personnel. This appropriation is from the general fund. To implement this act, the department may use this appropriation as follows:

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

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

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

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

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

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

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

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

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

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

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

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

(13) For the 2023-24 state fiscal year, \$266,298 is appropriated to the department of regulatory agencies. This appropriation is from the general fund. To implement this act, the department may use this appropriation as follows:

(a) \$205,631 for use by the civil rights division for personal services, which amount is based on an assumption that the division will require an additional 2.3 FTE;

(b) \$27,888 for use by the civil rights division for operating expenses; and

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

(14) For the 2023-24 state fiscal year, \$14,248 is appropriated to the department of regulatory agencies for use by the executive director's office and administrative services. This appropriation is from reappropriated funds received from the department of regulatory agencies under subsection (13)(a) and of this section. To implement this act, the office may use the appropriation for personal services, which amount is based on an assumption that the office will require an additional 0.3 FTE.

(15) For the 2023-24 state fiscal year, \$2,403 is appropriated to the department of regulatory agencies for use by the executive director's office and administrative services. This appropriation is from reappropriated funds received from the department of regulatory agencies under subsection (13)(b) of this section. To implement this act, the office may use the appropriation for operating expenses.

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

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

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

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

(17) For the 2023-24 state fiscal year, \$88,008 is appropriated to the department of transportation. This appropriation is from the state highway fund created in section 43-1-219, C.R.S., and is based on an assumption that the department will require an additional 1.5 FTE. To implement this act, the department may use this appropriation for administration.

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

SECTION 7. Act subject to petition - effective date - applicability. (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly; except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item,

section, or part will not take effect unless approved by the people at the general election to be held in November 2024 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

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

Approved: June 6, 2023