

## Colorado

### Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

#### Topics

##### **I. Discrimination**

No new laws or regulations enacted in 2015 or 2016.

##### **II. Pre-Employment Inquiry Guidelines**

No new laws or regulations enacted in 2015 or 2016.

##### **III. Family and Medical Leave**

No new laws or regulations enacted in 2015 or 2016.

##### **IV. Wage and Hour Laws**

###### **A. Colorado Minimum Wage Initiative No. 101**

Colorado voters approved Initiative 101, which amends the Colorado Constitution to increase the minimum wage in yearly steps to \$12 per hour by January 1, 2020. The amendment does not affect the tip credit, which remains at \$3.02.

For non-exempt Colorado workers, the amendment increases the minimum wage in increments as follows:

- \$9.30 per hour on and after January 1, 2017 (\$6.28 per hour plus tips for tipped employees);
- \$10.20 per hour on or after January 1, 2018 (\$7.18 per hour plus tips for tipped employees);
- \$11.10 per hour on or after January 1, 2019 (\$8.08 per hour plus tips for tipped employees);
- \$12.00 per hour on or after January 1, 2020 (\$8.98 per hour plus tips for tipped employees); and
- Continued incremental increases based on the cost of living as measured by the Consumer Price Index used for Colorado.

Colo. Const. Art. XVIII, Section 15 (Effective Date 01/01/2017).

###### **B. CO Final Rule on Minimum Wage Order Number 33**

The Colorado Division of Labor Standards and Statistics announced that it has adopted Minimum Wage Order 33, which will govern minimum wages in 2017. Effective January 1, 2017, the state's minimum wage increased from \$8.31 to \$9.30 per hour. For tipped employees, the minimum cash wage increased from \$5.29 to \$6.28 per hour, whereas the maximum tip credit an employer may apply towards meeting its minimum wage obligation will remain at \$3.02 per hour.

7 CCR 1103-1 (Effective Date 01/01/2017).

**V. Drug Testing**

No new laws or regulations enacted in 2015 or 2016.

**VI. Noncompete and Other Employment Agreements**

No new laws or regulations enacted in 2015 or 2016.

**VII. Workplace Safety**

No new laws or regulations enacted in 2015 or 2016.

**VIII. Workers' Compensation**

Colorado law provides that workers' compensation shall be reduced by 50% where:

- the injury is caused by the willful failure of the employee to use safety devices provided by the employer;
- the injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee.

The amended law requires that an admission of liability reducing the amount of compensation must include a statement by a representative of the employer listing the specific facts on which the reduction is based. In addition, if the insurer or self-insured employer admits liability for the claim, any party may request an expedited hearing on the issue of whether the employer or insurer may reduce compensation. The application for hearing must be filed within 45 days after the date of the admission.

The amendments expressly state that they apply to all workers' compensation claims, regardless of the date the claim was filed.

C.R.S. 84-42-112, C.R.S. 8-43-203, and C.R.S. 8-43-404 (Effective Date 07/01/2016).

**IX. Miscellaneous**

**A. Verifying Legal Employment Status**

Federal law requires employers to collect and maintain I-9 forms to ensure that each employee is legally eligible for employment in the United States. Colorado law had imposed additional employee verification requirements on employers. Specifically, within 20 days of the hire date, an employer had to affirm that it had not altered or falsified the employee's identification documents, and affirm that it had not knowingly hired an unauthorized alien. Employers were also obligated to keep written or electronic copies of the state-required affirmations, and of the documents required by 8 U.S.C. sec 1324a, for the term of each employee's employment.

This amendment eliminates all of the above state-mandated affirmation and retention requirements. According to Colorado legislators, these extra obligations were redundant as they merely reaffirmed that the employer completed the I-9 form. Accordingly, employers need only continue to comply with federal law requirements regarding new hire employment eligibility verification.

C.R.S. 8-2-122 (Effective Date 07/31/2016).

## **B. Pregnancy Accommodations**

Colorado joins a growing list of states that provide specific protections to employees and applicants for health conditions related to pregnancy. The new law requires employers to provide reasonable accommodations to employees and applicants for health conditions related to pregnancy or recovery from childbirth, unless the accommodation would impose an undue hardship on the employer's business.

### **Undue Hardship**

To determine whether the employer will be subject to an undue hardship, the law considers the nature and cost of an accommodation, the employer's financial resources, the employer's personnel and facilities, and the proposed accommodation's effect on the expenses, resources, and operations of the employer. Where an employer has already provided or is required to provide a similar accommodation to other classes of employees, the law creates a rebuttable presumption that the proposed accommodation would not impose an undue hardship.

### **Employer Obligations**

The law imposes several restrictions on employers. Employers are prohibited from:

- taking adverse action against an employee who requests or uses a reasonable accommodation;
- denying an employment opportunity to an employee or applicant based on the need for a reasonable accommodation related to pregnancy or childbirth;
- requiring an applicant or employee to accept a reasonable accommodation that she did not request or one that is unnecessary; or
- requiring an employee to take leave if another reasonable accommodation can be provided.

When an applicant or employee requests an accommodation, the employer must engage in the interactive process to determine an effective accommodation. Employers may require an employee or applicant to provide documentation from a licensed health care provider about the need for the requested accommodation.

The law provides examples of possible reasonable accommodations:

- more frequent or longer break periods and more frequent restroom, food, and water breaks;
- obtaining or modifying equipment or seating;
- lifting limitations;
- temporary transfer to a less strenuous position, if available;
- job restructuring;

- light duty, if available;
- assistance with manual labor; and,
- modified work schedules, with limitations on the obligations an employer must undertake.

The law makes it clear that it neither increases or decreases employees' rights under any other law with respect to paid or unpaid leave.

### **Notice Requirement**

Employers must provide written notice of the right to be free from discriminatory or unfair employment practices to new employees at the beginning of their employment and to existing employees within 120 days after the law takes effect. Employers must also post conspicuous notice in the workplace.

The definition of unfair employment practices includes the discriminatory practices described in the new law.

C.R.S. 24-34-401 (Effective Date 07/01/2016) and C.R.S. 24-34-402.3 (Effective Date 08/10/2016).

### **C. Earphones with Wireless Device Permitted While Driving**

Colorado law prohibits the use of earphones while driving. The new law amends the definition of "earphones" to exclude "speakers or other listening devices that are built into protective headgear or a device or a portion of a device that only covers all or a portion of one ear and that is connected to a wireless, handheld telephone." Thus, the new law permits a driver to use an earphone or earpiece when paired with a cell phone to allow for hands-free operation of the device.

C.R.S. 42-4-1411 (Effective Date 03/26/2015).

### **D. Employee Access to Personnel Files**

Prior to this new law, Colorado employees had no statutory right to access their personnel files. Now, upon request, every employer must allow employees to inspect and copy their own personnel files at the employer's office at least annually, at a time convenient to both the employer and the employee. Terminated employees may inspect their personnel files only once after their employment has been terminated. An employer may require that an employee or former employee inspect his or her personnel file in the presence of an employer representative, and may require that an employee pay the reasonable cost of copying the documents.

The new law defines "personnel file" as the personnel records of the employee, collected and maintained by the employer, that are used or have been used to determine the employee's qualifications for employment, promotion, additional compensation, employment termination or other disciplinary action. A personnel file does not include:

- documents or records that must be placed in a separate file from the regular personnel file under federal or state law or rule;
- documents related to confidential reports from the employee's previous employer;

- documents related to an active investigation, whether criminal, disciplinary, or one conducted by a regulatory agency; or
- information in a document or record that identifies any person who made a confidential accusation against the employee who is making a request for his or her file.

The new law does not apply to financial institutions chartered and supervised under state or federal law, such as banks, trust companies, savings institutions, and credit unions, nor does it apply to employers that are subject to the Colorado Open Records Act or their employees.

The new law creates no private cause of action for violation of the law. Further, the new law does not require an employer to create or maintain personnel files for its employees, nor does it require an employer to retain documents for any specified period of time. However, other statutes may impose records retention obligations with respect to certain types of employee-related documents.

C.R.S. 8-2-129 (Effective Date 01/01/2017).

#### **E. CO Final Rule on Employment Verification**

Effective August 10, 2016, Colorado H.B. 1114 (discussed here) eliminated Colorado's state employment verification requirements on employers. Previously, within 20 days of the hire date, an employer had to affirm that it had not altered or falsified the employee's identification documents, and affirm that it had not knowingly hired an unauthorized alien. Employers were also obligated to keep written or electronic copies of the state-required affirmations as well as the documents required by federal law for the term of each employee's employment. Accordingly, the Division of Labor Standards and Statistics repealed its rules associated with the eliminated requirements in line with H.B. 1114.

7 CCR 1103-3 (Effective Date 01/01/2017).