

## Overview of Hiring and Employment Practices

May 24, 2022

[Updates from SB22-097 and HB22-1367 in redlines](#)

The Colorado Special Districts Property and Liability Pool (the “Pool”) prepared this overview of the general processes for hiring and employment in order to provide information to its Member Districts; this information is not substitute for legal advice. The Pool encourages Districts to work with their human resource colleagues or legal counsel on questions or advice on hiring and employment issues. Further, Pool Members can use the following services at no cost: conferring with a dedicated legal expert through the Pool’s HR Helpline, or utilizing the ten (10) hours of consultation with CPS-HR.

This document overviews recent Colorado legislation that your District will need to implement – as well as provides a high-level summary of other laws that impact hiring and employment.

This document also provides check-lists to help guide your District in its review and update of hiring and employment policies and practices. Taking the time for an annual review is a best practice that can help any entity maintain critical perspective on its policies – and can help keep such policies and their implementation uniform, updated for changes in the law, and reflective of changes in work culture or technology. Further, a proactive review can help a District both to maintain the proper documentation and to demonstrate its legal compliance in order to avoid problems.

### **I. Recent Colorado State Legislative Changes to Employment Practices and Benefits**

This section overviews some, but not all, Colorado state laws enacted during recent legislative sessions of the Colorado General Assembly that impact the hiring and employment practices of Districts.

#### **A. Colorado Equal Pay Act – Took Effect 1/1/2021**

SB 19-085 was introduced to help address the gender-based pay disparities in Colorado. The bill, which took effect on January 1, 2021, includes requirements that apply to all Colorado employers.

Provisions of the Colorado Equal Pay Act are similar some to other, existing laws (for example, which prohibit differential compensation based on sex or that protect employees that discuss or disclose their compensation). However, as described below, Colorado employers have specific requirements under this new law, and failure to follow the law can lead to a suit in state courts.

#### **1. Summary of the Colorado Equal Pay Act,<sup>1</sup> employers may not:**

- Discriminate between employees on the basis of sex, or in combination with another protected status, by paying an employee of one sex less than an employee of a different sex for substantially similar work;
- Ask for prospective employee’s wage history and retaliating against a prospective employee who refuses to provide wage history;

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<sup>1</sup> See also Interpretive Notice & Formal Opinion (“INFO”) #9: Equal Pay for Equal Work Act, Part 2: Transparency in Pay and Opportunities for Promotion and Advancement, available at <https://cdle.colorado.gov/infos>.

- Retaliate against employees who ask about their wages or seek to compare their wages to those of other employees; or
- Prohibit employees from discussing or disclosing their wages.

## 2. Enforcement of Rights under the Colorado Equal Pay Act

Employees who believe they are being paid less due to their gender can file a civil lawsuit within two (2) years of the alleged violation, and can seek up to three (3) years back pay. Regardless, there is no requirement to engage in or exhaust an administrative process before an employee may commence a civil action against an employer. Further, for up to one (1) year after an alleged violation, an employee can file a written complaint with the Division of Labor Standards & Statistics (Division) when an employer fails to meet the “Transparency in Pay and Opportunities for Promotion and Advancement” requirements; the Director of the Colorado Department of Labor and Employment (Department) may order fines for each violation (no less than \$500, no more than \$10,000 per violation). An employer’s failure to maintain documentation for two (2) years after the end of employment creates a rebuttable presumption in favor of an employee’s claim (and instruction to a jury that failure to keep records can be considered evidence that the violation was not made in good faith).

The Division adopted the final Equal Pay Transparency Rules, effective January 1, 2021, which provides additional information and guidance to employers.<sup>2</sup>

## 3. Employer’s Good Faith

The Colorado Equal Pay Act provides a good faith exception when there is an apparent or alleged disparity in pay. An employer’s good faith can be demonstrated when non-discriminatory factors (like geographic location, seniority, merit, regular travel, education, and experience) are considered in compensation. An employer can further show and document its good faith when setting employee compensation by completing regular pay audits to address any disparities in pay that cannot be reasonably based on these factors.<sup>3</sup> A court cannot award back pay (as liquidated damages) if an employer has reasonable grounds to believe its hiring and employment practices comply with the Colorado Equal Pay Act.

## 4. What does my District need to do to comply with the provisions of the Colorado Equal Pay Act?<sup>4</sup>

- Continue an active review your District’s hiring and employment practices;
- Announce employment advancement opportunities to all employees on the same calendar day (and prior to making a promotion decision) and retain documentation with details of the announcement;

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<sup>2</sup> Equal Pay Transparency Rules, 7 CCR 1103-13, available at <https://cdle.colorado.gov/laws-regulations-guidance>.

<sup>3</sup> The CSD Pool and the Colorado Special District Association (SDA) co-sponsored a special salary survey for members, available at this link: <https://www.sdaco.org/resources>. The SDA hosted a webinar training on applying a salary survey on October 22, 2020, and a recording is available at this link: <https://www.sdaco.org/webinars>.

<sup>4</sup> The CSD Pool hosted a webinar training on implementing the Colorado Equal Pay Act on November 5, 2020, and a recording is available on the calendar at this link: <https://csdpool.org/events>.

- Disclose in each job posting the hourly or salary compensation, or a range, and a general description of benefits and other compensation offered; and retain documentation;
- Review and update job descriptions to include any factors that may affect compensation and retain documentation to demonstrate good faith effort to keep job descriptions updated;
- Apply data from a salary survey to employment positions to determine the necessity of any equity adjustments in compensation and retain documentation with details of the posting;<sup>5</sup>
- Depending on the number of employees your District has, consider periodic reviews of your job descriptions and conduct regular pay audits and retain documentation to demonstrate good faith efforts;
- Remove any solicitation of wage information from processes to apply for employment or promotional opportunities;
- Do not verbally solicit prior wage information;
- When making an offer, do not consider prior wage to set compensation;
- When making an offer, document any of the factors on which you based the compensation and retain documentation to demonstrate that any discrepancies in pay with similar positions is based on good faith, rather than discriminatory, grounds;
- Review interview and other application processes and remove any questions that could constitute a violation of the Equal Pay Act, or that could raise questions about fair evaluation of an applicant’s skills or qualifications;
- Review your Employment Manual to determine if an employee’s avenues to report retaliation include Equal Pay Act violations – resolving these disputes internally can avoid a complaint with the Department or a lawsuit; and
- Maintain records of job descriptions and wage rate history for each employee while employed and for two years after the employment ends.

B. 2020 Legislative Changes: Paid Sick Leave and Whistleblower Protection (COVID)

SB20-205 and HB20-1415, introduced in the 2020 session of the Colorado General Assembly, took effect upon the Governor’s signature in June 2020.

Some provisions of SB20-205 and the entirety of HB20-1415 place statutory requirements on employers (both public and private) in the context of the continuing COVID-19 public health crisis.

The Division posted Interpretive Notice & Formal Opinions (“INFOS”) #5, #6A, #6B, and #6C to help employers (and principals) take actions in the near term to implement these laws.<sup>6</sup>

1. Colorado’s Paid Leave Law – During a Public Health Emergency

SB20-205, the Healthy Families and Workplaces Act (“HFWA”), was in the news in 2020 for requiring that employers provide at least 48 hours of paid leave. As described below, those provisions took effect in 2021 or 2022, depending on the size of the organization and its employees. However, HFWA also took effect in 2020 for COVID-19-related leave requirements, known as the

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<sup>5</sup> See footnote #2, above, for links to resources.

<sup>6</sup> All INFOS, including these, are available <https://cdle.colorado.gov/infos>. The posters and/or notice to employees of HFWA and PHEW are available at this link: <https://cdle.colorado.gov/posters-0>.

Public health Emergency (PHE) Leave. Please note that as of the publication date of this overview, in April 2022, PHE Leave is still in effect – check the link at this footnote for current effect.<sup>7</sup>

a. Summary of COVID-19 PHE Leave

Starting on January 1, 2021, employers of any size (both public and private) were required to provide up to two weeks/80 hours of PHE Leave to employees in three (3) categories relating to COVID-19:

- having COVID-19 symptoms and seeking a medical diagnosis;
- being ordered by a government agent, or advised by a health provider, to quarantine or isolate due to a risk of COVID-19; or
- taking care of someone else due to COVID-19, including caring for another person ordered to quarantine/isolate or for a child whose school, place of care, or child care is closed.<sup>8</sup>

In 2022, employees may still have PHE hours available to use if they did not use them in 2021. However, please note the following for 2022:

- employees do not receive up to 80 hours of PHE Leave each time they have a COVID-related need, and
- employees do not receive a new bank of PHE Leave in 2022, except for newly hired full-time employees; and
- employees may use PHE leave until four weeks after a PHE Leave ends.

b. Enforcement of Rights under the COVID-19 PHE Leave provisions of HFWA

An employee can file a complaint with the Division; or, the employee can make a written demand to the employer. An employee making a written demand must wait 14 days, but thereafter may file a claim in court against the employer for lost pay, for reinstatement, or for fines/penalties.

c. What does my District need to do to implement the COVID-19 PHE Leave provisions of HFWA?

- In general, refer to the INFO #6C and the Division rules<sup>9</sup> to best understand how this law will interface with your current practices and what steps your District will need to take towards implementation.

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<sup>7</sup> An overview of the PHE Leave and explanation of its ongoing application in 2022 during the COVID public health emergency is available at the following link: <https://cdle.colorado.gov/hfwa>. Please see at link in footnote #6, INFO #6C: How Health Families and Workplaces Act Paid Leave Differs in 2020, 2021, and Beyond, and How it Differs from Federal Law, Prior Colorado Law, and Paid Family/Medical Leave.

<sup>8</sup> Note that the definition of “family member” for purposes of HFWA is broad: “‘Family member’ means: (a) An employee’s immediate family member, as defined in section 2-4-401(3.7); (b) A child to whom the employee stands in loco parentis or a person who stood in loco parentis to the employee when the employee was a minor; or (c) A person for whom the employee is responsible for providing or arranging health- or safety-related care.” C.R.S. § 8-13.3-4-2(6).

<sup>9</sup> The Division has incorporated the provisions of HFWA into the Colorado Wage Protection Rules, codified in 7 CCR 1103-7, and available at <https://cdle.colorado.gov/laws-regulations-guidance>.

- Notify employees in writing of the right to take this leave. INFO #6A provides how an employer can meet these requirements, including by providing information to employees by electronic transmittal.
- Review your Employment Manual or other practices that might limit or prohibit leave required during a public health emergency, including child care. These provisions continue.
- Revise your Employment Manual or other practices to allow leave required under this law for an employee of any status (hourly, temporary, part-time).
- Revise your Employment Manual or other practices to adopt the statutory definition of “family member.”
- Revise leave request policies for the following:
  - for less than 4 days in a row of leave, employers may not require an employee to give advanced notice or submit documentation;
  - for more than 4 days in a row of leave, employers may only require an employee to submit documentation after the leave has been taken; and no more than is reasonably necessary to verify;
- Revise your Employment Manual provisions relating to reporting complaints or retaliation to include Paid Leave violations.
- If the federal Family Medical Leave Act applies to your District, make sure to review FMLA provisions in your Employment Manual relating to requesting paid leave to care for a family member. Processes or documentation authorized for the federal FMLA may not comply with the Colorado Paid Leave Law (when an employee is using paid leave under state law). Your District may need to address state paid leave separately from federal FMLA.
- If you receive any complaints, investigate and document.
- Maintain documentation relating to employees’ requests for leave, leave granted, leave balances, and leave accrual.

2. Colorado’s Paid Leave law (HFWA) – 48 hours of Annual Leave for Full-Time Equivalents – Took Effect January 1, 2021 or 2022

Beyond a public health emergency, SB20-205/HFWA, requires employers to comply with the on-going provisions of the law on January 1, 2021 (for 16+ employees) or January 1, 2022 (for 15 or fewer employees). On these effective dates, employers must have provided a minimum of 48 hours (for full time employees or equivalents) of paid leave and implemented other provisions of the law.

a. Summary of HFWA for 2021 or 2022 effective provisions

Paid leave must be provided for various health- and safety-related needs, including:

- having a mental or physical illness, injury, or health condition that prevents an employee from working; getting preventative care (diagnosis or treatment);
- caring for a “family member” who needs preventative, diagnosis, or treatment of any mental or physical illness, injury, or health condition;
- needing leave for care or other services relating to the employee’s or family member’s domestic abuse, sexual assault, or criminal harassment; and

- caring for the employee’s child whose school, when the place of care, or child care is closed due to a public health emergency.

Note that the definition of “family member” for purposes of HFWA is broad.<sup>10</sup>

b. Enforcement of Rights under HFWA, for 2021 or 2022

An employee can file a complaint with the Division for unlawful retaliation or interference with rights; or, the employee can make a written demand to the employer. An employee making a written demand must wait 14 days, but thereafter may file a claim in court against the employer for lost pay, for reinstatement, or for fines/penalties.

c. What does my District need to do to comply with HFWA?

- In general, refer to the INFO #6B and the Division rules<sup>11</sup> to best understand how this law will interface with your current practices and what steps your District will need to take towards implementation.
- Notify employees in writing of the right to take this leave. INFO #6B provides how an employer can meet these requirements, including by providing information to employees by electronic transmittal.
- Review your Employment Manual or other practices that might limit or prohibit leave required during a public health emergency, including child care. These provisions continue.
- Revise your Employment Manual or other practices to allow leave required under this law for an employee of any status (hourly, temporary, part-time).
- Revise your Employment Manual or other practices to adopt the statutory definition of “family member.”
- Revise leave request policies for the following:
  - for less than 4 days in a row of leave, employers may not require an employee to give advanced notice or submit documentation;
  - for more than 4 days in a row of leave, employers may only require an employee to submit documentation after the leave has been taken; and no more than is reasonably necessary to verify;
- Revise your Employment Manual provisions relating to reporting complaints or retaliation to include Paid Leave violations.
- If the federal Family Medical Leave Act applies to your District, make sure to review FMLA provisions in your Employment Manual relating to requesting paid leave to care for a family member. Processes or documentation authorized for the federal FMLA may not be comply with the Colorado Paid Leave Law (when an employee is using paid leave under state law). Your District may need to address state paid leave separately from federal FMLA.
- If you receive any complaints, investigate and document.

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<sup>10</sup> See above C.R.S. § 8-13.3-4-2(6).

<sup>11</sup> The Division has incorporated the provisions of HFWA into the Colorado Wage Protection Rules, codified in 7 CCR 1103-7, and available at <https://cdle.colorado.gov/laws-regulations-guidance>.

- Maintain documentation relating to employees’ requests for leave, leave granted, leave balances, and leave accrual.

### 3. Public Health Emergency Whistleblower law (PHEW)

HB20-1415, the Public Health Emergency Whistleblower law (PHEW), is best understood in the context of the COVID-19 pandemic because the law prohibits a “principal” (a “principal” is any employers and any entity that contracts with 5 or more independent contractors) from retaliating against a worker who raises reasonable concerns regarding health or safety during a public health emergency. [SB22-097 expended these protections, regardless of whether there is a declared public health emergency.](#)

#### a. Enforcement of Rights under the PHEW

A worker can file a complaint of retaliation or interference with the Division. After filing with the Division and if Division does not investigate, a worker may file a claim in court against the principal for lost pay, for reinstatement, and/or for fines/penalties.

#### b. What actions does my District need to take to implement PHEW?

- In general, refer to the INFO #5 and the Division rules<sup>12</sup> to best understand how this law will interface with your current practices and what steps your District will need to take towards implementation.
- Post notice of a worker’s rights in a conspicuous location. The Division’s poster indicates that the poster can be shared with remote workers electronically.
- Review the direction from state and federal authorities, including OSHA, on safety precautions.
- Revise your safety policies and procedures to include health, welfare, and safety requirements during a public health emergency.
- Revise your Employment Manual provisions relating to reporting retaliation to include PHEW violations.
- If you receive any complaints, investigate and document.
- Communicate with contractors about health, welfare, and safety requirements during a public health emergency. Draft provisions in new contracts that contemplate PHEW requirements.

## **II. Colorado’s Civil Rights Laws that Apply to Hiring and Employment**

The Colorado Anti-Discrimination Act (CADA), which is enforced by the Colorado Civil Rights Division (CCRD), prohibits discrimination in employment, housing, and places of public accommodation.

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<sup>12</sup> The Division rules have been finalized as the Colorado Whistleblower, Anti-Retaliation, Non-interference, and Notice-Giving Rules, codified in 7 CCR 1103-11, and available at <https://cdle.colorado.gov/laws-regulations-guidance>.

In the employment context, CADA applies, in general, to all employers, regardless of size, public or private. C.R.S. § 24-34-401(3). In contrast, some federal protections (described below) apply to employers above a certain size.

#### A. Prohibited Actions under CADA

Employment Practices Prohibited as Discriminatory or Unfair under CADA, C.R.S. § 24-34-402, based on or because of a person's protected class or in retaliation for engaging in a protected activity include:

- refusal to hire;
- discharging;
- refusal of promotion;
- demotion;
- harassment during the course of employment;
- discrimination in matters of compensation; or
- discrimination in the terms, conditions, or privileges of employment.

#### B. Reasonable Accommodation under CADA

Under CADA, C.R.S. §§ 24-34-402 and 24-34-402.3, employers have a duty to provide reasonable accommodations that may be necessary because of an employee's or applicant's:

- disability; or
- pregnancy, childbirth, or a condition related to pregnancy or childbirth.

Please note that federal law also requires reasonable accommodation for a person's religious beliefs. See below.

#### C. Protected Classes in Employment under CADA:

- Disability (a mental or physical impairment which substantially limits a major life activity)
- Race (includes hair texture, hair type, or a protective hairstyle commonly or historically associated with race, such as braids, locs, twists, tight coils or curls, cornrows, Bantu knots, Afros, and headwraps)
- Creed
- Color
- Sex
- Sexual Orientation (which is statutorily defined as "including transgender status" - i.e. Gender Identity)
- Religion
- Age (40+) – [please note that HB22-1367 expands age-based discrimination claims under CADA, allowing a state claim for age discrimination only \(rather than mixed claims, requiring other types of discrimination to be alleged\)](#)
- National Origin
- Ancestry
- Marriage to a Co-Worker (applies in limited circumstances)
- Pregnancy, childbirth, and related conditions

Persons making complaints of employment discrimination must file with the CCRD within ~~6 months~~ 300 days after the alleged discriminatory or unfair employment practice. C.R.S. § 24-34-403. HB22-1367.

### **III. Provisions of Federal Law that Apply to Hiring and Employment**

The below describes some, but not all, federal laws that impact hiring and employment practices. Please note that many of rights are also protected, sometimes more broadly, under Colorado law.

#### **A. The Americans with Disabilities Act of 1990 (ADA)**

The ADA prohibits employers (with 15 or more employees), including state and local governments, from discriminating against qualified individuals with disabilities during job recruitment, hiring, compensation, promotion, job training, and termination.<sup>13</sup> The ADA requires employers to make reasonable accommodations to remove barriers for a person with a disability. Notice to applicants and employees of their rights is required under the ADA.

#### **B. The Age Discrimination in Employment Act of 1967 (ADEA)**

Employees 40 years and older are protected by the ADEA from age-related discrimination in employment-related decision (for most employers of 20 and more employees).

#### **C. Civil Rights Act**

The Civil Rights Act was enacted, and has been amended many times, to protect the constitutional rights of individuals and prevent employment discrimination based on race, color, sex, religion, national origin or age for most employers, including state and local governments. Notice to applicants and employees of their rights is required.<sup>14</sup>

Please note that the Pregnancy Discrimination Act of 1978 (PDA) was an amendment to Title VII of the Civil Rights Act of 1964, protecting employees from discrimination in the workplace based on pregnancy, childbirth or related medical conditions.<sup>15</sup>

The Civil Rights Act further prohibits employers, including state and local governments, from discriminating against applicants or employees on the basis of religion.<sup>16</sup> Please note that, while the federal law applies to employers with 15 or more employees, Colorado's protections apply to any employer with at least 1 employee. Employers should be aware that questions regarding an applicant's religious affiliation or beliefs are not generally related to job qualifications and are

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<sup>13</sup> EEOC, "The ADA: Your Responsibilities as an Employer," <https://www.eeoc.gov/laws/guidance/ada-your-responsibilities-employer>.

<sup>14</sup> See "EEO is the Law" posters, available at: <https://www.eeoc.gov/employers/eo-law-poster#:~:text=The%20law%20requires%20an%20employer.pay%2C%20disability%20or%20genetic%20infor mation>. For an example of an EEO policy statement, please see the version posted by the U.S. Secretary of Labor: <https://www.dol.gov/sites/dolgov/files/OASAM/crc/EEOPolicy.pdf>.

<sup>15</sup> For additional information, see <https://www.eeoc.gov/pregnancy-discrimination>.

<sup>16</sup> EEOC, "Religious Discrimination," <https://www.eeoc.gov/religious-discrimination>.

problematic under federal law.<sup>17</sup> The law also requires that employers must make reasonable accommodations to allow applicants or employees to practice or observe their religion.<sup>18</sup>

Many of the protections for employees in the Civil Rights Act are enforced by the federal Equal Employment Opportunity Commission (EEOC), including complaints on harassment and retaliation. An employee can file an action under Title VII of the Civil Rights Act (and also, if a government action is involved, can sue under a different provision of federal law enacted to enforce the 14<sup>th</sup> Amendment: 42 U.S.C. § 1983).

#### D. Fair Labor Standards Act (FLSA)

The FLSA establishes wage and hour guidelines, including for employees of state and local governments.<sup>19</sup> Further, it regulates child labor by limiting hours, types of work, and requiring minimum wages. The U.S. Department of Labor enforces these provisions, and can recover back wages for violations of minimum wage, overtime, and other issues. Notice to employees of their rights is required.<sup>20</sup>

#### E. Family and Medical Leave Act (FMLA)

The FMLA authorizes eligible employees of covered employers (state and local governments; private employers with 50 or more employees) to take unpaid, protected leave for family and medical reasons, up to 12 weeks in a year.<sup>21</sup> Notice to employees of their rights is required.<sup>22</sup>

#### F. Occupational Safety and Health Act (OSHA)

OSHA protects employee from work-related injuries, illnesses, and deaths by setting standards for working conditions that are safe and free from any health hazards for all employees. In Colorado, private sectors are under federal OSHA jurisdiction, but state and local government workers are not.

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<sup>17</sup> EEOC, “Pre-Employment Inquiries and Religious Affiliation or Beliefs,” <https://www.eeoc.gov/pre-employment-inquiries-and-religious-affiliation-or-beliefs>.

<sup>18</sup> EEOC, “Religious Accommodation Tips,” <https://www.eeoc.gov/employers/small-business/religious-accommodations-tips>.

<sup>19</sup> See “Handy Reference Guide to the Fair Labor Standards Act,” <https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa>.

<sup>20</sup> The FLSA Poster for State and Local Government Employees is available at: <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh1385State.pdf>

<sup>21</sup> The U.S. Department of Labor site on FMLA, <https://www.dol.gov/agencies/whd/fmla>, has links to many resources. The Employer’s Guide to the FMLA is available at: <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf>

<sup>22</sup> A downloadable FMLA poster is available at: <https://www.dol.gov/agencies/whd/posters/fmla>.

#### **IV. Check Lists**

Below are checklists for typical provisions or questions to address in hiring and employment policies and practices.

##### **A. Procedural questions to begin your review of your District's employment and hiring practices:**

- Are we watching employment and hiring trends and keeping up-to-date with best practices?
- Are we updating or reviewing our employment and hiring practices frequently? *Making small housekeeping updates is easier than a complete revision. Also, documenting changes in your employment and hiring practices is important; for example, if your District starts letting some employees work remotely, consider memorializing the practice as a policy to ensure that you are setting up a fair and formal approach as an employer.*
- How long has it been since we have used salary survey data and done a pay audit?
- If not in our Employment Manual, do we have a regular process for employee performance reviews and documentation to keep in the employee's file?
- Do we have a regular process for employee performance improvement and discipline and documentation to keep in the employee's file?
- Do we understand how we would investigate and document our process around a complaint or report of discrimination, harassment, retaliation (including against a whistleblower)?
- If we are considering major changes to our practices, do we have the authority and resources to make these changes? *We all recognize that resources are limited – and that we may need to seek authority to adopt significant changes, especially in compensation.*
- Are we being proactive? *It is easier to resolve an employment or hiring issue when the problem is addressed quickly.*
- Are we reaching out to our colleagues when we need help, advice, or perspective? *You have resources and people to help you.*

##### **B. Substantive questions to begin your review of your District's employment and hiring practices:**

- Are we tracking changes in federal and state laws, including administrative rules, relating to employment and hiring?
- Do we understand what classes of persons are considered “protected” under state and federal law?
- Do we know what questions or processes may fairly raise questions about our understanding of the laws that prohibit discrimination in hiring and employment?
- Do we have training for employment and hiring processes? Does our training include protected classes, and that we cannot ask questions based on protected classes during interviews? along with a reminder that no employment decisions can be made based upon a protected class
- Does our training include an overview of persons in protected classes under state and federal law? Is it clear from our training and practices that employers are not able to ask applicants questions based on their status in a protected class during interviews?
- Is it clear from our training and practices that employers cannot make hiring and employment decisions based on a person's protected class?
- If we get a request for an ADA accommodation, do we know what to do?
- If we get a request for pregnancy accommodation, do we know what to do?
- If we get a request for religious accommodation, do we know what to do?

### C. Posting or other Notice Requirements

- Posters required under Colorado Law:<sup>23</sup>
  - Overtime and minimum pay standards
  - Civil Rights/Anti-Discrimination Notice for Employment
  - Unemployment Insurance
  - Workers' Compensation (2 posters, notification of rights and explanation of "notice to employer of injury")
  - Notice of Paydays
  - Pregnant Workers Fairness Act
- Posters required under Federal Law<sup>24</sup>

### D. Recruitment/Hiring

- Review your District's records retention policy, which should address:
  - The length records relating to recruitment and hiring will be retained/destroyed; and
  - The manner in which confidential or other sensitive information will be protected
- Retain job announcement and information regarding where announcements were published, posted, or otherwise distributed – including internally posted promotional opportunities for the Colorado Equal Pay Act.
- Review your District's advertisement, recruitment, interview process (questions, prepared in advanced or oral), reference checks, employment verification, and negotiations to set compensation for compliance with the Colorado Equal Pay Act, including the following:
  - Do not solicit information about an applicant's previous wage or salary. Train District staff on this requirement to make sure that no one asks about an applicant's prior salary level at some point in the process.
  - Focus on reasonable and objective skills and experience – and document that your District's decisions throughout the hiring process are grounded in these considerations.
  - Keep a critical perspective on your District's communication with applicants throughout the process. You are getting to know these applicants, and having informal, off-the-cuff conversation puts everyone at ease. However, questions relating to an applicant's age, race, marital status, gender, gender identity, sexual orientation, pregnancy, citizenship, religious affiliation, disabilities, or previous drug or alcohol addiction disorders may constitute discrimination. *Please note: there are lawful means to solicit relevant information to the position from applicants, even on topics related to marital status (for example, for purposes of identifying conflicts or nepotism), legal-status as eligible to work, whether an applicant can fulfill essential functions of the job, and whether an applicant is currently using illegal drugs.*

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<sup>23</sup> Link to posters required under Colorado Law, see: <https://www.colorado.gov/pacific/cdle/posters>.

<sup>24</sup> Link to some of the posters required under federal Law, see: <https://www.dol.gov/general/topics/posters>. Please note special notification/poster requirements under the Families First Coronavirus Response Act for the remainder of CY2020. The U.S. Department of Labor further provides a FirstStep Poster Advisor to help employers comply with poster requirements; please see [https://webapps.dol.gov/elaws/posters.htm?\\_ga=2.197613868.2010694487.1597699612-362595025.1583426116](https://webapps.dol.gov/elaws/posters.htm?_ga=2.197613868.2010694487.1597699612-362595025.1583426116). Other required notifications of employee rights under federal law are discussed under I.B. above.

- Retain a copy the job description for the position. If there is an “essential function” for the position, make sure to articulate that in the job description; and, review similar positions to make sure that an “essential function” is likewise included.
- Include documentation of methodology used to determine salary/compensation in the file for Colorado’s Equal Pay Act (how recently was the position surveyed? What comparable positions were considered, if position was not surveyed? Are there any reasonable and objective factors that may influence this position’s compensation, including experience or regional cost-of-living?)
- Retain employment verification and/or reference check documentation for the positions your District hires. Some employers require that an applicant execute a written waiver for reference checks.
- Obtain written authorization from an application to perform a background check. Keep the background check report in the successful applicant’s personnel file. If there is confidential information in the report, consider keeping it with medical records, rather than in the personnel file.
- Consider using the same set of questions for each applicant interviewed – and keep notations of all answers. This demonstrates your District’s fairness to each applicant, affording each individual the same opportunity to respond to similar questions. Retain questions and notations of answers for interviews.

E. Disciplinary Actions

- Proper documentation of disciplinary actions to be added to a personnel file may include:
  - Warnings
  - Progressive disciplinary measures, such as additional oversight or coaching
  - Professional or progressive improvement plans, signed by employee
  - Notices of disciplinary action, and any rights to appeal
  - Termination of employment

Written documentation, signed or acknowledged by employee is best.

Summaries of verbal warnings or disciplinary actions can be relevant documentation, if memorialized in writing with details such as the date, names and titles of the participants in the communication, an objective description of the discussion, the basis of any action in the employer’s procedures (Employment Manual, for example), any progressive discipline follow-up actions required of the participants, a description of the communication of any right the employee may have under law or policy to appeal or escalate the situation, and a report on any actions taken. Such summaries can also constitute a written report to be signed by the employee as an acknowledgment of the earlier verbal communication.

F. Other Employment Related Files to Keep

- For OSHA, keep a file of required safety trainings so that your District does not have to go through each employee’s personnel file to respond to request for training records. Include information in the file relating to the topic, date, and participants in the training. And, in addition to placing documentation of any corrective actions or discipline taken for an employee’s safety violation in his/her individual personnel file, keep a copy of these records in the combined “OSHA” file.

- Retain employment verification and/or reference check documentation for your District's previous employees who have left the district in order to document that the information provided was non-discriminatory (for example, a District may keep a log with a date, participants in the communication, previous employee involved, and nature of discussion; or, for employment verification, retain the letter or email sent in response). Clarify with the person calling/communicating with your District regarding a previous employee whether an employment verification or a reference check is required. Some employers will only provide verification of employment.

#### G. Employment Manual

Your District's Employment Manual is the document setting forth compensation, conditions of work, and expectations. The below check-list includes typical provisions – but does not necessarily include all the sections your District may want or will need. A general rule as you approach drafting or reviewing is that an Employment Manual should articulate your District's processes as an employer – and establishing the objective and non-discriminatory bases of your District's employment policies.

Typical Provisions of an Employment Manual include:

- Description of your District, History, Mission Statement...
- Normal Business Hours
- EEO policy statement
- Employment statuses (FT, PT, temp...); at-will relationships should be clear
- Wage types (hourly, salaried)
- Benefits, including minimum 48 hours of annual paid leave for all employment statuses (full-time equivalent) in 2021, 2022 (depending on size of employer).
- Revised paid leave request policy for Colorado's Paid Leave law
- Drug and alcohol abuse
- Dress policy (review to ensure that requirements are non-discriminatory)
- Employee safety
- Process to report whistleblower, sexual harassment, discrimination; prohibition of retaliation; identify to whom reports should be made
- Disciplinary policy (if steps are included, qualify that your District may follow some or none of the steps, depending on the issues involved)
- Conduct policy (are there behaviors that are not professional or not tolerated as discriminatory or unsafe?)
- Emergency procedures; consider whether to include public health or other public emergencies
- Flex work (if applicable):
  - During only a public health crisis or other emergency – or at all times?
  - Permitted for employees of a certain tenure with the employer?
  - Have you articulated your process and the non-discriminatory bases of your flex work policies?
  - Flex place (remote or telework) – how many days? how to apply/approve? Will your District require an agreement in writing, including that an employee must abide by certain requirements or the approval will be revoked? Will you reserve the right to revoke in the future, if your District's needs to change? Do employees need to have adequate internet access and equipment at home?

- Flex schedule – what schedules are appropriate? (For example, 9-9s, 4-10s?) how to apply/approve? Will your District require an agreement in writing, including that an employee must abide by certain requirements or the approval will be revoked? Will you reserve the right to revoke in the future, if your District’s needs to change?
- Other types of provisions (if applicable):
  - Bereavement or funeral leave
  - Leave for jury service
  - Expanded or extended family or parental leave
  - Volunteer leave
  - Prohibition/approval/notification of outside employment

H. Job Description

- Position Title
- Pay Range
- Employment Status: contract/bargained/at-will, exempt/non-exempt, full-time/part-time, permanent/temporary
- Description of job duties
- Description of necessary skills, required licenses/certifications/education/credentials, educational requirements, years of experience required, or years of experience that substitute for other requirements – these qualifications, if non-discriminatory, may be the grounds for your District’s decision to compensate similar jobs differently.
- Description of any essential functions of the job (must be objective, must be imperative for the position, must be the task or result – not how the action is performed, should apply to similar positions); may include a description of physical requirements
- Reporting authority

I. Employment Records and Documentation

- Review your District’s records retention policy, which should address:
  - The length employment records will be retained/destroyed; and
  - Description of how confidential or other sensitive information will be protected.
- Keep documentation related to FMLA, ADA, medical benefits, sick leave requests, workers’ comp claims, OSHA reports, drug testing, and any other confidential or health information (protected under HIPAA) in separate, confidential file. Remember, Colorado’s Paid Leave law requires an employer to keep records relating to paid sick leave for two (2) years.
- Consider putting procedures in place to respond to an employee’s request to review his/her personnel file. (Colorado law provides that employees of non-public entities may review their file once a year, C.R.S. § 8-2-129.) For employees of a public employer, most items in a personnel file are subject to a request to review as a “public record” for under the Colorado Open Records Act (see definition “personnel files” in C.R.S. § 24-72-202(4.5)).
- Maintain all actions related to an employee in an individual personnel file, including the following records:
  - Job announcement and job description
  - Employee’s original employment application
  - Employee’s interview report form

- Reference checks/employment verification, and copy of applicant's permission (if required)
- Copies of required certifications/certifications (for eg, if CDL if required, driving records if relevant to position)
- Copy of background check, if required, and applicant's permission to execute
- Signed offer letter (if applicable)
- Signed acknowledgment of receipt & review of Employment Manual
- Signature or other acknowledgment of on-boarding/training – including safety training (but keep separate aggregate training file for OSHA)
- Training requests and attendance
- Vacation leave requests
- Benefit documentation
- Attendance records
- Performance reviews – signed or otherwise acknowledged by the employee
- Changes to work assignment, work conditions, or compensation – promotional opportunities must be posted internally, per Colorado Equal Pay Act
- Commendations
- Warnings
- Signed professional improvement plan (PIP) actions and follow-up, including basis of action in policies or manual
- Disciplinary actions, including warnings or other progressive discipline
- Employee complaints or reports of harassment or retaliation, including employer's investigation and any subsequent action or decisions
- Other records, such as telework or flex schedule agreements
- Quit notices/resignation letters
- Report from exit interview