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DGS EMPLOYMENT LAW UPDATE:
WHAT COLORADO EMPLOYERS NEED TO KNOW
ABOUT NEW EMPLOYMENT LAWS WEBINAR

JANUARY 6, 2021

A LexMundi Member

AGENDA

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- Colorado Equal Pay for Equal Work Act (“CEPA”)
- Healthy Families and Workplaces Act (“HFWA”)
- Colorado Overtime and Minimum Pay Standards (“COMPS Order #37”)
- Miscellaneous:
 - Families First Coronavirus Response Act update;
 - Mandatory vaccinations;
 - Denver minimum wage increase.

- Went into effect on January 1, 2021 and contains two parts:
 - Part I (C.R.S. §§ 8-5-101 – 8-5-104) creates a private cause of action broader than the federal Equal Pay Act (the “EPA”); and
 - Part II (C.R.S. §§ 8-5-201 – 8-5-203) is designed to provide employees with transparency about promotional opportunities and pay ranges for job openings.

COLORADO EQUAL PAY FOR EQUAL WORK ACT

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- An employer shall not discriminate between employees on the basis of sex, or on the basis of sex in combination with another protected status . . . by paying an employee of one sex a wage rate less than the rate paid to an employee of a different sex for ***substantially similar work, regardless of job title, based on a composite of skill; effort, which may include consideration of shift work; and responsibility***, except when the employer demonstrates any of the six exceptions.
 - Sex is defined as an employee’s gender identity (not biological sex or binary gender).
 - Sex “in combination with another protected status” is referred to as “sex plus.”

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- Exceptions (affirmative defenses):
 - A seniority system;
 - A merit system;
 - A system measuring earnings by quantity or quality of production;
 - The geographic location where the work is performed;
 - Education, training, or experience to the extent that they are reasonably related to the work in question; or
 - Travel, if regular and necessary for the work performed.

- Burden to establish exceptions:
 - (1) The employer reasonably relied on the asserted factor;
 - (2) The asserted factor accounts for the *entire wage differential*; and
 - (3) The prior wage rate history was not relied on to justify a disparity in current wage rates.

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- Merit system elements:
 - Not gender based;
 - Organized and structured procedure;
 - Employees evaluated systematically;
 - Reasonable reliance on predetermined objective criteria, such as
 - Attendance
 - Experience
 - Education
 - Seniority
 - Performance evaluations on a set scale based on objective factors
 - Employees receive advance notice of the merit system.

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- Quality or quantity of production:
 - Quantify factors and compensate for them in a uniform, objective, and gender-neutral fashion. For instance,
 - Pay based on revenue generation (e.g., commissions or other revenue-based incentives);
 - Pay based on amount of product produced;
 - Pay based on low product defect rates.
 - System should be in writing and decisions must be made per the system.
 - Review factors with managers, supervisors, and anyone else responsible for making compensation decisions.

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- Good faith defense:
 - Pay audit performed within 2 years before action comparing total compensation packages of workers performing substantially similar work by gender and other protected classes;
 - Establishes no pay disparity; or
 - Employer makes modifications to eliminate disparity.
 - Eliminates exposure for liquidated damages;
 - Does not limit back pay, economic damages, or attorneys' fees;
 - Attorney involvement and privilege/work product protections.

- Posting:
 - An employer must post, or otherwise make known to current employees, all opportunities for promotion on the same it becomes available, including:
 - The job title and means for application;
 - The actual compensation or a reasonable estimate of the range of compensation for each job opening; and
 - A general description of all benefits (such as health care, retirement, and paid time off) and other compensation to be offered, including bonuses and incentive awards.

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- Special considerations:
 - The employer must notify all employees of all promotional opportunities and may not limit notice to those employees it deems qualified for the position.
 - However, the employer may state that applications are open only to those with certain qualifications and may screen or reject candidates based on such qualifications.

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- Postings not required where:
 - There is a need for confidentiality because the current incumbent in the position could be separated;
 - The position is an automatic promotion after a trial period; or
 - For temporary or interim hires.
- For employers who operate in other states besides Colorado:
 - (1) The promotion posting requirements do not apply to employees entirely outside Colorado; and
 - (2) The compensation posting requirements do not apply either to
 - (a) jobs to be performed entirely outside Colorado (excludes remote positions), or
 - (b) postings entirely outside Colorado.
- If a 2020 job posting extends past January 1, 2021, it is not covered posting under the CEPA unless it remains posted on or after February 1, 2021.

- Salary inquiries:
 - Explicitly banned under the CEPA;
 - An applicant may volunteer it without solicitation, **so long as the employer does not rely on it;**
 - Best practice is to stay away from the topic of an employee's past pay.

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- Exposure:
 - Back pay (not to exceed 3 years);
 - Economic damages;
 - Attorneys' fees;
 - Liquidated damages in an amount equal to actual damages if good faith defense is not established;
 - Fines between \$500 and \$10,000 per posting violation;
 - Posting requirements administered only by the CDLE (no private right of action);
 - Failure to post one promotional opportunity or the compensation associated with a single job opening are each considered individual violations subject to penalty.

HEALTHY WORKPLACES AND FAMILIES ACT

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- Effective January 1, 2021, the HFWA requires Colorado employers with 15 or more employees to provide mandatory paid sick leave. C.R.S. § 8-13.3-403(1).
- Effective January 1, 2022, the requirement applies to all employers, regardless of size.
- For purposes of calculating employer size, the HFWA's definition of employee excludes independent contractors.

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- All employees must accrue at least one hour of mandatory paid sick leave for 30 hours worked (40-hour workweek is assumed), up to a maximum of 48 hours per year.
- Accrual requirements may be satisfied by providing an amount of paid sick leave that meets or exceeds the law's requirements at the beginning of the year.
 - Written notice of alternative leave should be provided;
 - Make clear that use of leave for non-HWFA purposes exhausts leave.

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- Key components:
 - No waiting period for use (can be used as accrued);
 - Accrued but unused sick leave carries over to the subsequent year;
 - Employers can limit use to 48 hours per year, so carryover does not compound perpetually;
 - No need to pay out at termination;
 - Sick leave paid at the same hourly rate or salary, which does not include overtime, bonuses, or holiday pay;
 - Employees receiving commissions or other sales-based pay must receive the greater of either their hourly or salaried rate, or minimum wage.

- Paid sick leave may be used for the following:
 - Mental or physical illness, injury, or health condition of the employee or family member;
 - Medical diagnosis, care, or treatment related to an employee's or employee's family member's illness, injury, or condition; or
 - Preventive medical care; and

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- If an employee or family member is the victim of domestic abuse, sexual assault, or harassment, s/he may use the leave for the following:
 - Seeking medical attention to recover from a mental or physical illness, injury, or health condition caused by the domestic abuse, sexual assault, or harassment;
 - Obtaining services from a victim services organization;
 - Obtaining mental health or other counseling;
 - Seeking relocation due to the domestic abuse, sexual assault, or harassment; or
 - Seeking legal services, including preparing for or participating in a civil or criminal proceeding relating to or resulting from the domestic abuse, sexual assault, or harassment.

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- “Family member” includes:
 - An employee’s immediate family member (a person related by blood, marriage, civil union, or adoption):
 - A child to whom the employee stands *in loco parentis*;
 - A person who stood *in loco parentis* to the employee when the employee was a minor; and
 - A person for whom the employee is responsible for providing or arranging health- or safety-related care.

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- Additional sick pay hours are required in the event of (a) a public health emergency, or (b) a public order closing either an employee's place of business or the school or place of care of an employee's child requiring childcare:
 - For full-time employees, at least 80 hours of paid sick leave.
 - For part-time employees, the amount of time the employee is scheduled to work for 14 days, or the amount of time the employee actually works on average in 14 days, whichever is greater.
- Accrued paid sick leave counts towards this supplemental leave.
- The employer cannot require documentation for this leave.

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- Employees may use public health emergency (“PHE”) leave for any of the following reasons:
 - Self-isolation (or to care for a family member who is self-isolating) due to a diagnosis with, or experience of symptoms of, the illness that is the cause for the public health emergency;
 - Seeking or obtaining (or care for a family member who needs) medical diagnosis, care, or treatment if experiencing symptoms associated with the illness;
 - Seeking (for oneself or a family member) preventive care concerning the illness;
 - Where the employee’s presence would jeopardize the health of others because of the individual’s exposure to the illness or because the employee is exhibiting symptoms of the illness (regardless of diagnosis), as determined by local officials or the employer;
 - To care for a child or other family member when the child’s care provider is unavailable due to a PHE, or if the child’s or family member’s school or place of care has been closed by a local, state, or federal public official or at the discretion of the school or place of care due to a PHE, including if a school or place of care is physically closed but providing instruction remotely; or
 - If an employee is unable to work because the employee has a health condition that may increase susceptibility to or risk of communicable illness that is the cause of the PHE.

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- No retaliation if an employee:
 - Requests or takes paid leave under the HFWA, or attempts to exercise other HFWA rights;
 - Informs another person about, or supports his/her exercise of, HFWA rights; or
 - Files a HFWA complaint or cooperates in any investigation or other proceeding about HFWA rights.

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- Other considerations:
 - Leave request may be made orally, in writing, or electronically, and, when possible, include the absence's expected duration.
 - Employers may create a flexible written policy containing reasonable procedures for a request but cannot deny leave based on noncompliance.
 - Employers may require documentation (no more than that needed to show a valid reason for the leave) if an employee needs leave for 4 or more consecutive workdays.
 - Employers may not require details about the need for leave.
 - An employer must post notice of an employee's leave rights.
 - An employer must keep records documenting hours worked, paid sick leave accrued, and paid sick leave used under the HFWA.

COLORADO OVERTIME AND MINIMUM PAY STANDARDS ORDER

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- COMPS Order #37:
 - Applies to most Colorado employers;
 - Revamped transportation worker exemption;
 - Revised administrative, professional, and highly technical computer-related occupation exemptions, including a salary basis of \$778.85 per week (\$40,500.20 per year) effective 1/1/21;
 - New rules applicable to field staff of seasonal camps or seasonal outdoor education programs;
 - The standard minimum wage increased from \$12.00 an hour to \$12.32 an hour, while the minimum cash wage for tipped employees increased from \$8.98 an hour to \$9.30 an hour (the maximum \$3.02 tip credit remains the same).

- Families First Coronavirus Response Act (“FFCRA”):
 - Mandatory provisions expired 12/31/20;
 - Continued voluntary compliance encouraged;
 - Tax credits available through 3/31/21;
 - Available to employees who have not yet exhausted the benefits.

- Mandatory vaccinations for COVID-19 permitted, except when:
 - An accommodation is necessary for an employee with a disability; or
 - An accommodation is necessary due to an employee's religious beliefs.

- Denver minimum wage requirements:
 - Increases from \$12.85 per hour to \$14.77 per hour effective January 1, 2021;
 - Increases from \$15 per hour to \$15.87 per hour effective January 1, 2022.

REFERENCE LINKS

- Colorado Equal Pay for Equal Work Act:
 - https://leg.colorado.gov/sites/default/files/2019a_085_signed.pdf
- Healthy Families and Workplaces Act:
 - https://leg.colorado.gov/sites/default/files/2020a_205_signed.pdf
- CDLE guidance and notice/poster forms:
 - <https://cdle.colorado.gov/interpretive-notice-formal-opinions-infos-other-published-guidance>
- COMPS Order #37:
 - <https://cdle.colorado.gov/sites/cdle/files/7%20CCR%201103-1%20COMPS%20Order%20%2337%20ADOPTED%20%28Clean%29.pdf>
 - <https://cdle.colorado.gov/posters-0>

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