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# EMPLOYMENT LAW UPDATE

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A LexMundi Member

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## EMPLOYMENT LAW UPDATE: AGENDA

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1. Proposed Colorado legislation:
  - Paid family and medical leave
  - Equal Pay for Equal Work Act
  - Job applicants with criminal histories
2. Employee theft and other misconduct involving company records and property
3. #MeToo movement and its impact in 2019

## PROPOSED CHANGES TO COLORADO LAW

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- Paid family and medical leave
- Equal Pay for Equal Work Act
- Job applicants with criminal histories

## PAID FAMILY AND MEDICAL LEAVE

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- Family and Medical Leave Insurance Act (FAMLI)
  - New version expected to be introduced this week
  - Does not require employers to pay employees directly
  - Requires employers and employees to pay premium into a statewide fund (like unemployment insurance)
  - Prior versions have failed, but this time democrats control both chambers and governorship

## FAMILY AND MEDICAL LEAVE INSURANCE ACT (FAMLI)

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- Coverage and leave requirements
  - Covers all employers, regardless of size
  - Worker can take leave for medical reason or to care for:
    - Immediate family member
    - Someone with whom the worker has a “significant personal bond that is or is like a family relationship”
  - Worker can take up to 12 weeks in a 52-week period and can take an additional four weeks if there is a “separate qualifying event”

## FAMILY AND MEDICAL LEAVE INSURANCE ACT (FAMLI)

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- Benefits and premiums
  - Worker receives between 66% and 95% of wages during leave period
  - Employer and employee share cost 50/50
  - Premium in first year will be 0.52% of salary
  - After that, director of new FAMLI Division can adjust premium to ensure financial viability
- Congress is considering similar proposal at federal level

## EQUAL PAY FOR EQUAL WORK ACT

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- Introduced on January 17, 2019
- Prohibits pay discrimination based on sex
- Changes existing Colorado law in several ways
  - Creates private right of action
  - Requires equal pay for “substantially similar work” based on skill, effort, and responsibility

## EQUAL PAY FOR EQUAL WORK ACT

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- Ban on salary history
  - Prohibits employer from seeking or relying on candidate’s salary history in setting wage rate
- Pay transparency
  - Requires employers to announce advancement opportunities and job openings to all employees
  - Must include pay range in posting

## EQUAL PAY FOR EQUAL WORK ACT

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- Any wage differential must be based on:
  - a seniority system;
  - a merit system; or
  - a system that measures earnings by quantity or quality of production

## “BAN THE BOX” ACT

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- Introduced on January 4, 2019 and passed committee on January 29, 2019
- Prohibits employers from inquiring about criminal history on an initial job application
- Also prohibits employers from:
  - advertising that a person with a criminal history may not apply; and
  - making such a statement on a job application

## “BAN THE BOX” ACT (HB19-1025)

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- An employer can still obtain an applicant’s criminal history at any time but just can’t ask about it on initial application
- Exceptions for:
  - positions that require background checks or bar people with certain criminal histories; and
  - employers that participate in a program to encourage employment of people with criminal histories

## “BAN THE BOX” ACT (HB19-1025)

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- Enforcement:
  - No private right of action
  - Enforced by Department of Labor and Employment
    - Authority to issue warnings for first violations
    - Subsequent violations can result in civil penalties

## EMPLOYEE THEFT AND OTHER MISCONDUCT INVOLVING RECORDS AND PROPERTY

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- Employee misconduct is on the rise
  - Factors:
    - Data-driven economy
    - Electronic document storage capabilities
    - More mobile employee populations

## DATA-DRIVEN ECONOMY

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- Company information stored electronically
- Access through password
- Virtually all information electronic
- Security systems evolving

## ELECTRONIC DATA CAPABILITIES

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- Employees access information on multiple devices
  - (e.g., laptop, phone, and office computer)
- Inadequate oversight of downloading information
- Inadequate oversight and visibility of remote access

## MOBILE POPULATIONS

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- Job movement
- Remote work
- Employee departure protocols

## SECRECY

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- Critical for companies to maintain secrecy of information
  - Restrict access on cell phones
  - Restrict access through computer systems
  - Best practice is to mark documents electronically as confidential

## CASE

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- Company sued former employee who took customer information and started competing business
  - Court: Company did not maintain secrecy of information enough to prevent employee from taking and using it
    - Encouraged employee to keep customer information on cellphone and personal laptop
    - Didn't mark information as confidential;
    - Didn't instruct employee to secure information on personal devices; and
    - Didn't instruct employee to return or delete the information upon departure

## ANOTHER CASE

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- Employee copied more than 1,500 documents from company's servers onto a removable hard drive in the six months before their departure.
- Court found that company took reasonable measures to protect information by:
  - limiting network access to employees in “important roles”; and
  - requiring employees to sign acknowledgment that they had reviewed the employee handbook containing its trade secret confidentiality policy.

## MONITORING EMPLOYEE COMMUNICATIONS

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- Policy of no expectation of privacy
- Suspicious departures
- Check for downloading or other suspicious activities

## #METOO MOVEMENT

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- Majority of Americans now say that sexual harassment is a serious problem
- 2011: 47%
- 2018: 64%
- Two thirds say men who harass women usually get away with it

## #METOO MOVEMENT

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- Update on the importance of investigations:
  - EEOC filed 50% more sexual harassment lawsuits in FY2018 compared to the previous year; recovered nearly \$70 million.
  - Private lawsuits also increased.

## #METOO MOVEMENT

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- Employers are responding
  - Notable examples:
    - Federal courts formed committee to review policies and address sexual harassment in the judiciary.
    - Colorado legislature hired consultant to review internal policies and formed bipartisan committee to draft new legislation to address the issue.

## #METOO MOVEMENT

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- Role of technology in sexual harassment cases
  - Email and text messaging (Jeff Bezos story)
  - Facebook, Twitter, and other social media platforms
- All written communication can create a record of inappropriate conduct
  - Can impact liability analysis under *Faragher/ Ellerth: Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182 (5th Cir. 2012) (finding employer vicariously liable where it discovered text messages that corroborated plaintiff's allegations and employer failed to take remedial action)
  - Important to include in investigation but be mindful of privacy concerns

# THANK YOU FOR ATTENDING

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