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## **Major Changes to Colorado Discrimination Law Will Negatively Impact Employers Large and Small**

By Lawrence Marquess and Kalisha Chorba

On May 6, 2013, Colorado Governor John Hickenlooper signed into law the Job Protection and Civil Rights Enforcement Act Of 2013 (Act), which amends the Colorado Anti-Discrimination Act (CADA), the state law prohibiting employment discrimination because of disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry. Beginning with cases arising on or after January 1, 2015, plaintiffs pursuing claims under the CADA may recover both economic and non-economic damages from employers—including small businesses with fewer than 15 employees—who are found liable for engaging in workplace discrimination.

### **Expands Remedies Both the Colorado Civil Rights Commission and Courts May Award to Include Front Pay and “Any Other Equitable Remedies.”**

The Act authorizes new penalties for violations of the CADA. If a court or the Colorado Civil Rights Commission (Commission) finds an employer has engaged in an unfair or discriminatory employment practice, the employee may be entitled to the following relief: (1) reinstatement or hiring, with or without back pay; (2) front pay; and (3) any other equitable relief that either the court or the Commission considers appropriate.

Where the Commission or court orders back pay, the employer’s liability is limited to two years prior to the date on which the plaintiff filed his or her Charge of Discrimination with the Colorado Civil Rights Division. This sum may be offset, however, by the amount of the plaintiff’s actual earnings or the amount of earnings that he or she could have earned with reasonable diligence during the relevant period.

### **Expands Remedies Courts May Award to Include Attorneys’ Fees for the Prevailing Plaintiff.**

The Act authorizes courts to award the prevailing plaintiff reasonable attorneys’ fees and costs. The new law, however, does not extend the same right of recovery to prevailing employers, unless the court deems that the plaintiff’s lawsuit was frivolous, groundless, or vexatious.

## Expands Remedies Courts May Award to Include Compensatory and Punitive Damages, or in Age Discrimination Cases, to Include Liquidated Damages.

Where private sector employers engage in intentional discriminatory or unfair employment practices, the Act also allows courts to award punitive and compensatory damages, except in age discrimination cases. The Act does provide, however, for the recovery of liquidated damages up to twice the employee's pecuniary damages in cases of willful age discrimination. Recovery of non-economic damages does not extend to employment practices that are unlawful solely because of their disparate impact.

For many years, under most federal discrimination laws, employees have been able to recover compensatory and punitive damages from employers with 15 or more employees. For the first time, with the enactment of this new law, employers with fewer than 15 employees may be liable for compensatory and punitive damages, as well as attorney fees, under state law.

### Punitive Damages

To recover punitive damages, the plaintiff must demonstrate by clear and convincing evidence that the employer undertook the unlawful employment action "with malice or reckless indifference to the rights of the plaintiff." However, the court will not award punitive damages if the employer can demonstrate that it made good faith efforts to comply with the CADA to prevent discriminatory and unfair employment practices in the workplace.

Where the plaintiff claims that his or her employer failed to make a reasonable accommodation for the plaintiff's disability, punitive damages are not recoverable if the employer demonstrates that it made a good faith effort to identify and make an effective, reasonable accommodation.

### Compensatory Damages

Aggrieved plaintiffs may be awarded compensatory damages for other pecuniary losses, emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.

### Caps on Combined Compensatory and Punitive Damages

The Act adopted the mandatory caps found in the federal Civil Rights Act of 1991 for employers with 15 or more employees and reduced caps for private entities employing fewer than 15 employees. The Act also directs the court to consider the size and assets of the employer and the egregiousness of the intentional discriminatory or unfair employment practice when making its award determination. The caps are as follows:

Number of Employees In Each of 20 or More Calendar Weeks	Cap on Combined Compensatory & Punitive Damages
501 and more	\$300,000
201 to 500	\$200,000
101 to 200	\$100,000
15 to 100	\$50,000
5 to 14	\$25,000
1 to 4	\$10,000

## Other Salient Provisions

- The Act adopts federal law under Title VII, ADEA, ADA, and Civil Rights Act of 1991, for purposes of interpreting and applying the remedies provisions of the CADA, C.R.S. § 24-34-405.
- The CADA currently precludes individuals under the age of 40 or over the age of 70 from bringing age discrimination claims against their employers. The Act, however, expands the class of potential plaintiffs to all aggrieved persons over the age of 40.
- The addition of compensatory and punitive damages to the CADA makes claims of sexual orientation discrimination much more attractive because federal law does not cover sexual orientation claims.
- Where a plaintiff raises claims of intentional discriminatory or unfair employment practices under both federal and state anti-discrimination laws, the Act does not allow duplicate recoveries for the same damages, injuries, or losses.

## The Commission Will Task a Volunteer Working Group with Educating Employers on the New Remedies

By January 1, 2014, the Commission must create a volunteer working group comprised of parties who represent both employers' and employees' interests. This working group will be responsible for compiling and providing the Commission with educational resources for employers to ensure compliance with state law and the prevention of discriminatory employment practices. The Commission will make these resources readily available on its website, and will disseminate this information to all state departments and agencies that interact with private businesses in the State of Colorado.

## Practical Significance

The terms of the Act are clear: for claims arising on or after January 1, 2015, plaintiffs may recover attorneys' fees, and compensatory and punitive damages, or liquidated damages in age cases, in lawsuits brought under the CADA, regardless of the number of workers the defendant business employs. In Colorado, employers with fewer than 15 employees are likely to see more CADA charges and more employment discrimination lawsuits, because of the significant increase in the plaintiff employee's potential recovery.

Until the Act takes effect, employees of employers covered by the federal discrimination laws will continue to bring their claims under federal law, because they must do so in order to recover compensatory, punitive or liquidated damages and attorneys' fees. When the Act takes effect, employers are likely to see many claims brought only under the CADA and filed in state court, because plaintiffs will not have to file federal claims to recover attorney fees, punitive and compensatory damages, or liquidated damages in age cases. Plaintiffs and their lawyers commonly believe there are significant advantages to filing their claims in state court: for example, that state court judges are less likely to grant motions for summary judgment than are federal judges, resulting in more cases proceeding to trial before a jury; that county jury pools are more plaintiff-friendly than that in federal court; and that plaintiffs residing in parts of Colorado that are distant from the federal courthouse in Denver will be able to file suit in their home county.

Small businesses with fewer than 15 employees will likely be most negatively affected by the Act. Starting in 2015, these businesses will see a significant increase in litigation in an area of law with which they are unfamiliar, and they will see a correlated upsurge in litigation costs. Accordingly, small businesses must ensure they put in place appropriate training for all employees to bar discrimination in the workplace, and update and/or create anti-discrimination handbooks and policies to prohibit discrimination protected under both state and federal law.

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