2021-22 LEGISLATIVE, CASE LAW, ETC. UPDATE

PRESENTED BY

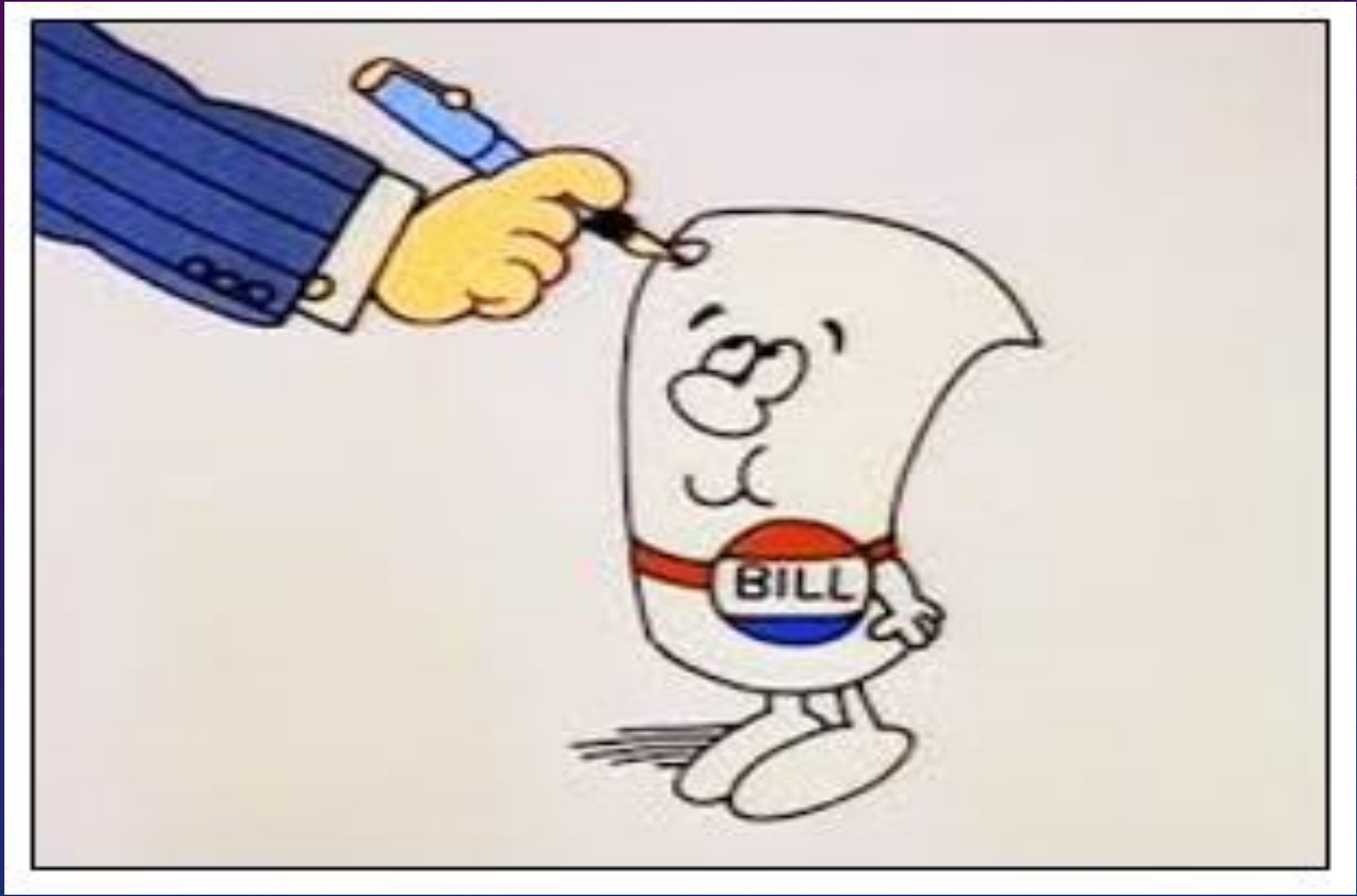
BECHTEL & SANTO

205 NORTH 4TH STREET, SUITE 401

GRAND JUNCTION, COLORADO

(970) 683-5888

2020-22 STATE LEGISLATION


BILL

HOW A COLORADO BILL BECOMES A LAW – GOVERNOR'S TURN

- The amount of time that the governor has to take action on a bill is set forth in Article IV, section 11 of the Colorado constitution:
- "…If any bill shall not be returned by the governor within ten days after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the general assembly shall by their adjournment prevent its return, in which case it shall be filed with his objections in the office of the secretary of state, within thirty days after such adjournment, or else become a law."

HOW A COLORADO BILL BECOMES A LAW – GOVERNOR'S TURN

- In other words, if the General Assembly delivers a bill to the governor, and there are 10 or more days left in the session, then the governor only has 10 days to sign or veto the bill.
- If he doesn't act within that time, the bill automatically becomes law without his signature.
- If the General Assembly delivers a bill to the governor when there are fewer than 10 days left in the session, then the governor has 30 days after the date of adjournment to act on the bill or the bill automatically becomes law without his signature.

COLORADO BILLS THAT DID NOT BECOME A LAW

- **Exception To Employer Sick Leave (HFWA) Requirement (HB22-1130)**
- **Prohibit Employer Adverse Action for Marijuana Usage (HB22-1152)**
- **Paid Family Medical Leave Premium Reduction (HB22-1305).**
- **A repeat of the POWR Act like in 2021.**

UPDATES TO EMPLOYMENT DISCRIMINATION LAWS
HB22-1367

- **Expands the definition of "employee" to include individuals in domestic service; and**
- **Extends the time limit to file a charge with the Colorado Civil Rights commission from 6 months to 300 days after the alleged discriminatory or unfair employment practice occurred.**
- **Extends the time deadline to notice a hearing from 270 to 450 days.**
- **As of May 9, 2022, the bill had passed the Colorado Senate and the House. So, it's currently sitting on the Governor's desk.**

EEOC'S CAREGIVER GUIDANCE

- The EEOC recently issued guidance explaining that employees who act as "caregivers" for their family and friends may be protected by existing anti-discrimination laws. The EEOC didn't define the phrase "caregiver," and, therefore, presumably intending it in a general dictionary sense.
- Caregiver discrimination violates federal employment discrimination laws when it is based on an applicant's or employee's sex (including pregnancy, sexual orientation, or gender identity), race, color, religion, national origin, age (40 or older), disability, or genetic information (such as family medical history).
- Caregiver discrimination is also unlawful if it is based on an applicant's or employee's association with an individual with a disability, within the meaning of the ADA, or on the race, ethnicity, or other protected characteristic of the individual for whom care is provided.

IMPLEMENTATION OF COLORADO SECURE SAVINGS PROGRAM (SB20-200)

- The Colorado Secure Savings requires the following employers to enroll in the Secure Savings Program:
  - Employs five (5) or more employees
  - Been in business for at least two (2) years
  - Are not offering a workplace retirement savings plan.
- Employers have the option of sponsoring their own plans or enrolling in the Secure Savings Program
- The Program will be administered at no cost to employers.
  - No employer fees or fiduciary liability
  - No employer matching contribution

IMPLEMENTATION OF COLORADO SECURE SAVINGS PROGRAM (SB20-200)

Retirement accounts will be funded by employee wages. The Program Board will set a contribution rate for payroll deduction.

- Employees are automatically enrolled but may opt out if they choose.

Employers can face a penalty for non-compliance, such as failure to enroll eligible employees, of $100 per eligible employee per year and up to a max of $5,000 annually.

IMPLEMENTATION OF COLORADO SECURE SAVINGS PROGRAM (SB20-200)

- Upcoming Deadlines
  - March 2022: Rulemaking begins
  - July 2022: Rules are finalized
  - October 2022: Pilot program launches
  - January 2023: Enrollment begins

RESTRICTIVE EMPLOYMENT AGREEMENTS HB22-1317

- **The bill declares that a restrictive employment agreement or covenant not to compete that restricts the right of any person to receive compensation for performance of labor for any employer is void, with certain exceptions.**
- **Additionally, if the employer provides proper notice of the restrictive employment agreement or covenant not to compete to the employee or prospective employee, the following agreements or covenants are not prohibited:**

RESTRICTIVE EMPLOYMENT AGREEMENTS HB22-1317

- **A provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than 2 years, unless the education and training was primarily for the benefit or convenience of the employer;**

RESTRICTIVE EMPLOYMENT AGREEMENTS HB22-1317

- **A reasonable confidentiality provision relevant to the employer's business that does not prohibit disclosure of information that arises from the employee's general training, knowledge, skill, or experience, whether gained on the job or otherwise, or information that is readily ascertainable to the public; and**

RESTRICTIVE EMPLOYMENT AGREEMENTS HB22-1317

- **Agreements or covenants with a person earning annual cash compensation greater than the threshold amount for highly compensated employees**

RESTRICTIVE EMPLOYMENT AGREEMENTS HB22-1317

- The bill limits choice of law and choice of venue provisions in restrictive employment agreements and covenants not to compete.
- The bill prohibits an employer from entering into, presenting to an employee or prospective employee as a term of employment, or attempting to enforce any restrictive employment agreement or covenant not to compete that is void under the bill.
- An employer who violates this provision is subject to a penalty of $5,000 for each employee or prospective employee, injunctive relief, and actual damages.

RESTRICTIVE EMPLOYMENT AGREEMENTS HB22-1317

- **Any covenant not to compete that is otherwise permissible under this Statute is void unless notice of the covenant not to compete and the terms of the covenant not to compete are:**
  - **Provided to a prospective worker before the worker accepts the employer's offer of employment; or**

RESTRICTIVE EMPLOYMENT AGREEMENTS HB22-1317

Provided to a current worker at least fourteen days before the earlier of

a. The effective date of the covenant; or

b. The effective date of any additional compensation or change in the terms or conditions of employment that provides consideration for the covenant.

RESTRICTIVE EMPLOYMENT AGREEMENTS HB22-1317

The covenant must also be:

a. In a separate document from any other covenants

b. Clear and conspicuous terms in the language

c. Signed by the worker

RESTRICTIVE EMPLOYMENT AGREEMENTS HB22-1317

Any covenant not to compete provision of an employment, partnership, or corporate agreement between physicians that restricts the right of a physician to practice medicine upon termination of the agreement is void; except that all other provisions of the agreement enforceable at law, including provisions that require the payment of damages in an amount that is reasonably related to the injury suffered by reason of termination of the agreement, are enforceable.

RESTRICTIVE EMPLOYMENT AGREEMENTS HB22-1317

- **A worker who is a party to a covenant, or a subsequent employer that has hired or is considering hiring the worker, may seek a declaratory judgment from a court of competent jurisdiction or an arbitrator that the covenant not to compete is unenforceable.**
- **LAST ACTION: 05/10/2022 | Passed by House and Senate. Sent to Governor.**

RESTRICTIVE EMPLOYMENT AGREEMENTS HB22-1317

- **As of March 1, 2022, revisions to Colorado's sentencing law created criminal liability for knowingly using non-competes that violate Colorado non-compete law.**
- **Colorado Senate Bill 2021-271, which is primarily geared toward reforming sentences of misdemeanor and petty offenses, states that "a person who violates [C.R.S. § 8-2-113] commits a class 2 misdemeanor" punishable by up to 120 days in jail, a fine up to $750, or both.**

RESTRICTIVE EMPLOYMENT AGREEMENTS HB22-1317

- **These criminal penalties will apply to both unlawful non-competes and unlawful non-solicitation agreements.**
- **These revisions do not change underlying Colorado non-compete law, so if employers are following existing law, there is no cause for concern**

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

- **On March 3, 2022, President Joe Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.**
- **The Act amends the Federal Arbitration Act and gives individuals asserting sexual assault or sexual harassment claims under federal, state, or tribal law the option to bring those claims in court even if they had agreed to arbitrate such disputes before the claims arose.**
- **In addition, those individuals or a named representative bringing sexual assault or sexual harassment claims may choose to proceed via a class or collective action, even if they had waived the right to proceed collectively before the claims arose.**

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

- **The Act is effective immediately and applies to arbitration and class- and collective-action waiver agreements entered into by employees before its effective date.**
- **Parties can still enter into enforceable arbitration agreements or class- or collective-action waivers with respect to sexual harassment and sexual assault claims after such claims arise.**
- **Courts, not arbitrators, according to the law have the power to determine whether the Act applies and whether the agreement requiring arbitration of pre-dispute sexual assault or sexual harassment claims is enforceable.**

RESTORE UNEMPLOYMENT INSURANCE FUND BALANCE SB22-066

- Requires the state treasurer to transfer $1.1 billion from the general fund to the unemployment compensation fund to restore the balance of the fund to its pandemic level; and
- Requires the director of the division of unemployment insurance to repay the federal government for $1.014 billion of advances received from the federal government in response to the COVID-19 pandemic.
- Last Action: January 19, 2022. Introduced In Senate - Assigned to State, Veterans, & Military Affairs

UNEMPLOYMENT COMPENSATION (SB22-234) UNEMPLOYMENT

- Bill puts more than $600 million towards financially stabilizing the State's Unemployment System. Plus, the bill identifies that insolvency surcharges won't stop until the trust fund fills its $1 billion hole. To get the fund fully solvent, it needs $2 billion to $2.5 billion, according to Colorado Department of Labor and Employment officials.
- Made a temporary increase in partial unemployment benefits permanent.
- Repealed the requirement that an individual wait at least one week before becoming eligible for unemployment compensation

UNEMPLOYMENT COMPENSATION (SB22-234) UNEMPLOYMENT

- At time of separation, employer must provide the employee:
  - The employer's name and address;
  - The employee's name and address;
  - The employee's identification number or the last four numbers of the employee's social security number;
  - The employee start date, date of last day worked, year-to-date earnings, and wage for the last week the employee worked;
  - The reason the employee separated from the employer.

UNEMPLOYMENT COMPENSATION (SB22-234) UNEMPLOYMENT

- **Since October 30, 2020, Code of Colorado Regulations 7CCR 1101-2 (7.3.2.), requires Colorado employers to provide:**
  - **a notice to employees upon separation from employment that informs them of the availability of unemployment insurance for those that meet the eligibility requirements;**
  - Contact information to file a claim;
  - Information the worker will need to file a claim; and
  - Contact information to inquire about the status of their claim after it is filed.

WORKERS' COMPENSATION INJURY NOTICES HB22-1112

- **Current (for now) law requires:**
  - **An injured employee, or someone else with knowledge of the injury, to notify the employer within 4 days after the occurrence of an on-the-job injury;**
  - **Authorizes a reduction in compensation to the injured employee for failure to timely notify the employer;**
  - **Tolls the 4-day period if the employer has failed to post a notice specifying the injured employee's notification deadline.**

WORKERS' COMPENSATION INJURY NOTICES HB22-1112

- **HB22-1112 changes the 4-day notice period to a 10-day notice period and repeals the tolling and compensation reduction provisions.**
- **If an employer fails to provide a copy of the notice of the injury to the employee or fails to post the required notice to employees, the bill specifies that the time period allotted to the employee is tolled for the duration of the failure.**
- **If the employer already has notice of the injury or the employee shows good cause for the failure to report the injury, the employee does not lose compensation for the failure to report.**

WORKERS' COMPENSATION INJURY NOTICES HB22-1112

- The bill also changes the notice that an employer is required to post in the workplace so that it states the name and contact information of the insurer and that the:
    - Employer is responsible for payment of workers' compensation insurance;
    - Injured employee has rights under the law if the employer fails to carry workers' compensation insurance;
    - Employee should seek medical attention; and
    - Injury must be reported in writing to the employer.

WORKERS' COMPENSATION INJURY NOTICES HB22-1112

- **With regard to occupational diseases, the bill also:**
  - **Repeals the requirement that an employee notify the employer of an occupational disease within 30 days of contraction of the diseas,e and instead requires an employee to notify the employer upon manifestation of the disease; and**
  - **Repeals the provision that states that an employer is deemed to waive a failure to give notice of an occupational disease or death resulting from the disease unless the employer objects at a hearing on the claim prior to any award or decision.**

WORKERS' COMPENSATION INJURY NOTICES HB22-1112

- **With regard to occupational diseases, the bill also:**
  - **Repeals the provision that allows the director of the division of workers' compensation to reduce the compensation to be paid if the required notice is not made in a timely manner.**
- **Signed by the Governor on March 24, 2022**
- **Becomes effective September 2022**

WORKERS' COMPENSATION UPDATES HB22-1347

- The bill amends the "Workers' Compensation Act of Colorado" by:
  - Creating a process for a claimant to receive advance payment for mileage expenses for travel that is reasonably necessary and related to obtaining compensable treatment, supplies, or services;
  - Specifying how to determine the benefit amount for medical impairment when the amount payable using the schedule of injuries would exceed the amount payable for nonscheduled injuries;

WORKERS' COMPENSATION UPDATES
HB22-1347

- Increasing the benefit payable for funeral and burial expenses; and
- Requiring reporting of active medical treatments necessary to cure and relieve an injury lasting for a period of more than 180 calendar days after the date of the injury.
- LAST ACTION: 05/10/2022 | Passed both Senate and House. Sent to the Governor on June 6, 2022.

COLORADO'S NEW PUBLIC HEALTH EMERGENCY WHISTLEBLOWER LAW

- On the same date that Governor Polis signed HFWA into law, the Governor signed the Public Health Emergency Whistleblower Law into Law. C.R.S. §8-14.4-102.
- The PHEW Act protects workers who suffer adverse action, discrimination, or retaliation for concerns expressed in good faith regarding "any reasonable concern about workplace violations of government health or safety rules, or an otherwise significant workplace threat to health or safety, related to a public health emergency."

COLORADO'S NEW PUBLIC HEALTH EMERGENCY WHISTLEBLOWER LAW

- PHEW is consistent with other Colorado laws that protect health care employees from receiving an adverse action in retaliation for making a good-faith report or disclosure. See C.R.S. §8-2-123.
- A good-faith report or disclosure is when the health care worker identifies concern regarding patient safety information or quality of patient care and makes that disclosure/report without malice or personal consideration and when the health-care worker has "reasonable cause" to believe that the report/disclosure is true.

COLORADO'S NEW PUBLIC HEALTH EMERGENCY WHISTLEBLOWER LAW

- Most Colorado laws cover only "employers" and "employees," but PHEW covers any "worker" (i.e., not sure "employees") for any "principal" (not just "employers").
- What is a "covered principal":
  - Employers
  - Any entity that contracts with five or more independent contractors in the state
  - State and local government employers (but not the federal government)

COLORADO'S NEW PUBLIC HEALTH EMERGENCY WHISTLEBLOWER LAW

- Both perceived violations of state and federal public health orders <u>and</u> any perceived threat to health or safety that are expressed in good faith are protected.
- In essence, as explained in CDLE Interpretive Notice #5, workers are protected simply if their belief is reasonable and in good faith; being correct is irrelevant.
- Workers are not protected if the report is "knowingly false" or shares information protected by federal law (e.g., HIPAA).

COLORADO'S NEW PUBLIC HEALTH EMERGENCY WHISTLEBLOWER LAW

- PHEW creates new claims "COPs" who:
  - Raise Concerns about perceived health threats or violations of the myriad, complex, and ever-changing state and local COVID-19 public health orders;
  - Engage in Opposition to conduct made unlawful by the PHEW law; or
  - Participate in protected activity under the PHEW law.

COLORADO'S NEW PUBLIC HEALTH EMERGENCY WHISTLEBLOWER LAW

- In short, PHEW creates a new claim for adverse action, discrimination or retaliation against "workers" who, in good faith, raise "any reasonable concern about workplace violations of government health or safety rules, or an otherwise significant workplace threat to health or safety, related to a public health emergency."
- Once a concern is raised, PHEW provides that a principal may not discriminate, retaliate, or take adverse action against any worker opposing any practice the worker reasonably believes is unlawful under the PHEW law.

COLORADO'S NEW PUBLIC HEALTH EMERGENCY WHISTLEBLOWER LAW

- Principals are required to post notice of workers' PHEW protections. See https://cdle.colorado.gov/sites/cdle/files/Poster%2C%20Paid%20Leave%20%26%20Whistleblower%20-%202021%20poster.pdf
- Further, principals may not have an agreement that would prevent a worker from disclosing information regarding the workplace health and safety practices related to a public health emergency.

WHISTLEBLOWER PROTECTION HEALTH & SAFETY SB22-097

- **Current law provides whistleblower protections for workers who raise a reasonable concern about health or safety related to a public health emergency. The bill expands the protection to all health and safety concerns regardless of whether there is a declared public health emergency.**
- **Passed Colorado Senate in March; currently moving its way through the Colorado House.**

WAGE THEFT EMPLOYEE MISCLASSIFICATION ENFORCEMENT (SB22-161)

- Requires an employer to provide notice to an employee, within 10 days after the employment terminates, before deducting from wages any amount of money or property the employee failed to return or repay upon termination of employment; pay the employee the deducted amount within 14 days after the employee returns or repays the money or property if the employee did so within 14 days after notice is provided; and pay 2 times the amount of the deduction if the employer fails to provide the required notice.
- Current Colorado law provides employers 10 days after termination to audit and adjust an employee's account and then deduct the value from the employee's last paycheck pursuant to a written agreement.

WAGE THEFT EMPLOYEE MISCLASSIFICATION ENFORCEMENT (SB22-161)

- **Repeals the requirement that an employee dismiss an action against an employer after the employer makes a legal tender for the full amount claimed in the action, and eliminates the authority of a court to award an employer reasonable attorney fees and costs in an action in which the employee claimed wages in excess of the greater of $7,500 or the jurisdictional limit for small claims court and the employee does not recover an amount greater than the amount the employer tendered.**
- **Signed by the Governor on June 3, 2022.**

WAGE RECORDS RETENTION

- **Colorado laws have traditionally indicated that the requirement for employers to retain wage records is three (3) years. This requirement is mostly due to the three (3) year statute of limitations on claims under the FLSA and Colorado's Wage Claim Act. This means that an employee can only bring wage claims going back two to three years under these laws.**
- **But in the last year, some federal courts have started ruling that certain wage claims, specifically claims for minimum wage, have a six (6) year statute of limitations.**

WAGE RECORDS RETENTION

- **The argument is that Colorado's minimum wage law does not have a specific statute of limitations written into the law.**
- **As a result, these Federal Courts have applied the statute of limitations for contract claims, which is six (6) years. Accordingly, while these decisions are still changing, we recommend that employers now retain pay records for six (6) years in case such a claim may come along.**

REVISIONS TO WAGE PROTECTION RULES RE: PTO PAYOUT

- **That was until the CDLE issued Wage Protection Rule 2.17 that defined "vacation leave" as:**

  > **Pay for leave, regardless of its label, that is usable at the employee's discretion (other than procedural requirements such as notice and approval of particular dates), rather than leave usable only upon occurrence of a qualifying event (for example, a medical need, caretaking requirement, bereavement, or holiday).**

- **Under this, PTO policies that have an element of leave that is at the employee's discretion, like traditional vacation policies, are now also subject to full pay upon termination; just like vacation policies.**
- **So, does that mean employers need to pay out PTO leave if it identifies it also includes Colorado Healthy Families Act Leave, which is specifically not paid upon termination?**

CDLE INTERPRETIVE NOTICE #14

- **Requirement To Pay Earned Vacation When Employment Ends**
  - **Employers are not required to offer paid vacation, but (as with other wages) may do so in writing, verbally, or based on their custom or practice. Employers who do offer paid vacation may set key terms, including:**
    - **The amount of paid vacation time;**
    - **How vacation pay is earned (accrued) — for example, based on hours, weeks, or years of work;**
    - **Whether there is a "cap," or maximum, on the amount of paid vacation that employees can save up.**

CDLE INTERPRETIVE NOTICE #14

- To be payable upon separation, the amount of vacation must be "determinable" — able to be calculated. The calculation can be from a written document, verbal policy, or informal practice. If an employer provides "unlimited PTO," that ordinarily is not payable upon separation, because the amount isn't "determinable." If an employer says it offers "unlimited PTO," yet actually doesn't let employees take more than a certain amount of paid time off, then what it provides isn't really "unlimited" PTO; it's PTO with a specific, determinable amount.

CDLE INTERPRETIVE NOTICE #14

- <u>Example</u>. ABC Company states that it provides "unlimited" PTO but doesn't actually let employees take over 120 hours in any year. What Company C provides isn't actually "unlimited" PTO, it's 120 hours of PTO per year. So, it must pay departing employees any unused portion of their 120-hour allotment.
- Employers can choose to pay out vacation before employees take the time off, or make employees take time off to use their vacation. If so, the employer still must pay, or let employees keep, any remaining unused vacation. But no employer practice can leave employees with less paid leave than HFWA requires. So, if an employer covers all absences, including HFWA paid leave, with a general PTO policy, then a payout of PTO can't leave employees with less paid sick leave than HFWA requires.

CDLE INTERPRETIVE NOTICE #16

- **The Colorado Wage Act prohibits employers from deducting earned wages from employees' paychecks, except in certain cases.**
- **The Colorado Wage Act doesn't allow any deduction that would take employee wages below minimum wage, even an otherwise allowable deduction type. But if an employee was paid at least minimum wage, then:**
  - **Withholding taxes (or similar assessments) owed by employees doesn't bring wages below minimum.**
  - **Similarly, withholding amounts to repay advances of wages doesn't bring wages below minimum.**

COLORADO FAMLI

- **As passed by Colorado voters in November 2020, FAMLI will provide most Colorado employees with up to 12 weeks of partial pay and job security for various family- and medical related absences from work, plus four additional weeks of paid leave if workers have a serious health condition related to pregnancy or childbirth complications.**
- **In *Chronos Builders v. CDLE,* Chronos Builders argues that FAMLI violates TABOR. In response, a trial court dismissed the argument and determined that FAMLI did not amount to a change in the income tax laws, so the TABOR did not apply. Denver District Judge Michael Martinez wrote that the funding mechanism isn't an income tax but was approved by voters as a separate law.**
- **Colorado's Supreme Court accepted a direct appeal of the case due to upcoming deadlines.**

EMPLOYMENT LAW FOR BUSINESSES

ATTORNEYS

Michael C. Santo / Christina M. Harney
Molly K. Reinhardt / Keslie R. Cooper

- Employee Handbooks and Policies
- Day-to-Day Employment-Law Questions
- Wage and Hour Issues
- Contracts/Agreements
- HR and Manager Training
- Recruiting and Hiring Procedures
- Termination Letters/Separation Agreements
- Department of Labor Audits
- Compliance with FMLA, ADA, FLSA, etc.
- Defending Your Organization Against Employee Claims, Charges, and Litigations
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admin@bechtelsanto.com

205 N. 4th Street, Suite 401. Grand Junction, CO 81501 . 970-683-5888. bechtelsanto.com

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