Chapter 33
Employment Discrimination

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SYNOPSIS

Federal and state laws prohibit discrimination, harassment, and retaliation against employees based upon a person's age, race, color, religion, sex, national origin, disability, and use of job-protected leave.

The federal Age Discrimination in Employment Act (ADEA) makes it illegal for an employer to discriminate against employees because of their age; specifically, this law prohibits discrimination against persons 40 years of age or older.

Another federal law, Title VII of the Civil Rights Act of 1964 (Title VII), as amended, protects individuals from discrimination, harassment, and retaliation because of their race, color, religion, sex (including sexual harassment and pregnancy discrimination), and national origin.

Under the federal Americans with Disabilities Act (ADA), it is illegal to discriminate against people with mental and physical impairments that qualify as disabilities under the Act.

In addition to these federal laws, Colorado has a state law known as the Colorado Anti-Discrimination Act (CADA). Like the federal laws noted above, this state law prohibits discrimination against individuals in employment based on their disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry. However, in addition, Colorado law also prohibits discrimination on the basis of sexual orientation and being married to another employee, neither of which are currently covered by federal law.

The Family and Medical Leave Act (FMLA) is another important federal law, which provides eligible employees of covered employers with unpaid job-protected leave for up to 12 weeks of leave within a 12-month period of time.

Employers are prohibited from discriminating in a variety of employment issues, such as job advertisements; hiring; pay and benefits that affect compensation; promotion; demotion; and termination. Employers are also prohibited from retaliating against an employee who complains of discrimination or participates in the investigation of a discrimination complaint under the ADEA, Title VII, the ADA, or CADA. Finally, an employer cannot interfere with an employee's right to take job-protected leave, or retaliate against an employee for taking job-protected leave under the FMLA.

Employment discrimination includes adverse actions directly motivated by discriminatory intent, as well as adverse actions that may not be caused by a discriminatory intent but nevertheless have an adverse impact on employees in a protected group.

33-1. Age

The Federal Age Discrimination in Employment Act (ADEA) makes it illegal for an employer to discriminate against a qualified employee because of his or her age. Employers are prohibited from treating qualified workers who are 40 years old or older less favorably than other employees because of the older worker's age. Employers covered by this statute include those who employ 20 or more employees. It does not matter if the employee who is being treated more favorably is also over the age of 40, as long as one employee is being mistreated because of age.

The Older Workers Benefit Protection Act (OWBPA) is an amendment to the ADEA limiting the manner in which an employee 40 years or older may waive his or her protections under the ADEA. Under the OWBPA, an individual may not waive any right or claim under the ADEA unless the waiver is understood and voluntary. Any release executed by an employee is not considered valid unless the following minimum guidelines of the OWBPA are met:

- The waiver is part of an understandable written agreement that specifically refers to rights under the ADEA;
- The individual does not waive rights that may arise after the date the waiver is executed;
- The waiver must be accompanied by consideration (*i.e.*, money) in addition to severance or other benefits that the employee is already entitled to receive;
- The waiver must advise the individual in writing to consult with an attorney before executing the waiver;
- The employee must be granted a period of at least 21 days within which to consider the agreement; and
- The waiver also must state that the offer remains revocable for at least seven days after the date of signature.

If the waiver is requested as part of an exit incentive, group layoff, or other program offered to a class of employees, then these requirements are altered somewhat. Rather than having 21 days to consider the terms, 45 days must be given. Also, the employer must provide information about how eligibility for the program was determined and the job titles and ages for those selected or eligible, as well as for those not selected or eligible.

CADA prohibits discrimination based on age and applies to all employers, regardless of size, though there is an exemption for religious institutions. The Colorado statute prohibiting age discrimination contains an exception permitting employers to compel retirement for workers between the ages of 65 and 70 who have held executive or policy-making positions and have

access to immediate retirement benefits of at least a certain amount. The ADEA was amended to eliminate this upper-age exception. Employers covered by the Colorado statute include those who employ two or more employees. In 2022, the Colorado legislature agreed that employees subjected to age discrimination should be able to recover the same categories of damages available under other types of discrimination; under CADA, damages available include economic damages, compensatory damages including emotional distress, and attorney fees and costs.

These statutes were enacted to protect older workers from stereotypes, including beliefs that older workers are slow, unable to adapt to change, unable to learn current technology or procedures, or that they should retire at a certain age.

33-2. Race, Color, Religion, Sex, and National Origin

Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (Title VII), prohibits employment discrimination and/or harassment based on race, color, religion, sex, and national origin. Employers covered by this statute include those who employ 15 or more employees.

CADA prohibits discrimination based on race, color, religion, sex, and national origin and applies to all employers, regardless of size, though there is an exemption for religious institutions. Additionally, CADA also prohibits discrimination based on creed, pregnancy, sexual orientation, transgender status, and, for employers with more than 25 employees, generally prohibits discriminating against a person because his or her spouse or fiancé(e) is an employee.

The damages available for these types of claims include economic damages; compensatory damages, including emotional distress; and attorney fees and costs.

33-3. Disability

Title I of the Americans with Disabilities Act (ADA) offers protection from employment discrimination based on disability for qualified people with disabilities. The law covers employers with 15 or more workers.

Another federal law, Section 504 of the Rehabilitation Act, states that no qualified individual with a disability will be "excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." This includes employment.

The Colorado Anti-Discrimination Act protects employees with disabilities from discrimination regardless of the number of workers employed.

Definition of Disability and Qualified Individual with a Disability

Under the civil rights protections listed above, the term "disability" means, with respect to an individual:

- A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- A record of such an impairment; or
- Being regarded as having such an impairment.

In order to be considered a "qualified individual with a disability," a worker must be able to perform the essential functions of his or her job, with or without a reasonable accommodation. Essential functions are the necessary duties and activities of the job position.

Reasonable Accommodations

A "reasonable accommodation" is any change in the work environment or the way things are usually done that enables a person with a disability to perform the essential functions of the job. An accommodation is considered reasonable if it is feasible and meets the needs of the person with a disability.

An employer must make a reasonable accommodation to an employee with a known disability, unless the employer can show that the accommodation would cause an undue financial burden or hardship on the operations of its business, or that providing the accommodation would pose a direct threat to the health or safety of the employee or others. There is no magic language required when requesting an accommodation.

Reasonable accommodations may be needed:

- During the application/interview process;
- To perform the essential functions of the job; or
- For the enjoyment of equal terms, conditions, and privileges of employment.

When an employee requests an accommodation, the employer can request medical documentation of the claimed disability and the need for the accommodation. Any medical information provided to the employer is to be treated as confidential and kept in a record separate from the employee personnel file.

An employee need not provide all of his or her medical files. The employee need only submit medical information relevant to the claimed disability and potential accommodation.

Requests for reasonable accommodations may include, but are not limited to:

- Changes in physical accessibility of the location or work site;
- Job restructuring;
- Modified work schedule;
- Acquisition or modification of work equipment;
- Modification of training materials or examinations;
- Modifications of policies;
- Altering how an essential function of the job is performed; or
- Reassignment to a vacant position.

Creating a reasonable accommodation is an individualized process and will vary from situation to situation, based on a person's limitations, the job, and the employer's business. The purpose of a reasonable accommodation is to enable the employee to perform the essential functions of the job.

An employee's request for a reasonable accommodation may, but need not, be written. The employer is required to enter into an interactive process with the employee to determine

a reasonable accommodation. If a specific accommodation is requested by the employee, the employer should consider the specified request, but may provide an effective alternative. No employer is required to suffer an undue hardship in providing an accommodation; whether a requested accommodation is an undue hardship must be based on an individualized assessment of current circumstances showing that a specific reasonable accommodation would cause significant difficulty or expense to the employer.

The damages available for disability claims include economic damages; compensatory damages, including emotional distress; and attorney fees and costs.

33-4. Before Filing a Charge of Discrimination

If you suspect you have been the subject of employment discrimination covered by these federal or state laws, you have the right to file a complaint, known as a Charge of Discrimination, with the Equal Employment Opportunity Commission (EEOC), or the Colorado Civil Rights Division (CCRD). Before doing so, you should consider whether there are routes to open lines of communication within your employment setting:

- Are you represented by a union that can advocate for your rights?
- Does your company employ an EEO or ADA coordinator or someone who monitors compliance with discrimination laws? (You might be able to find this information through your human resources department.)
- Are you a federal or state employee who may be required to enter into an internal process before filing a charge with the EEOC or CCRD?
- Is there an internal grievance procedure, an administrator with decision-making powers, or a board where your issues will be heard and addressed?
- Is there an opportunity to negotiate or mediate with your employer?
- Would you like to meet with an attorney who practices in this area to help you understand the strength of your potential claims and to discuss strategies for resolution?

33-5. Filing a Charge of Discrimination

Where to file a charge of employment discrimination:

Colorado Civil Rights Division (CCRD)
1560 Broadway, Ste. 825
Denver, CO 80202
(303) 894-2997
TTY through Relay Colorado (711 plus regular phone number)
https://ccrd.colorado.gov (click on "Start a Complaint")

The CCRD has jurisdiction over businesses regardless of the number of employees. The CCRD may offer either group or individual intakes about a complaint. There is an online filing system at the CCRD that allows you to complete an intake form on their website, and then a Division employee will contact you to continue the process. For the purposes of timely filing, do not mistake the submission of an intake form as officially filing your Charge of Discrimination.

Equal Employment Opportunity Commission (EEOC)
950 17th St., Ste. 300
Denver, CO 80202
(800) 669-4000
(800) 669-6820 (TTY)

The EEOC has jurisdiction for businesses with 15 or more employees for Title VII and the ADA, and 20 or more employees for the ADEA.

Timelines for Filing to Protect Your Legal Rights

You must file a Charge of Discrimination with the EEOC or CCRD within 300 days from the date of employment discrimination, harassment, or retaliation, or you forfeit the chance to pursue your claims.

Federal, state, and/or union employees may have mandatory prerequisites to the deadlines listed above, and these deadlines can be very short, sometimes within a few days. Requirements may include filing with an internal EEO officer. Additionally, other employment claims may have different filing requirements and deadlines.

You generally must file a sworn written statement in order to file a charge with the EEOC or CCRD. Also, before a private lawsuit may be filed in court, you must exhaust administrative remedies with the agency. Prior to filing such a suit, you must receive a right-to-sue letter from the EEOC or CCRD (see "Filing a Charge," below).

Filing a Charge

There is no cost for filing a Charge of Discrimination with the EEOC or the CCRD. You do not need to have an attorney for this process, but it is often helpful. As the charging party, you should be prepared to provide the who, what, when, where, and how concerning your complaint:

- Your name, address, and telephone number.
- Your employer's name, address, telephone number, and number of employees, if known.
- A description and timeline of events, with any available documentation, to support your claim of discrimination.
- The names, addresses, and phone numbers of anyone who could support your claim of employment discrimination (witnesses).
- Documentation of your disability, if applicable.

When you file a charge of discrimination with the EEOC or CCRD, you will be assigned a charge number. An investigator will have primary responsibility for handling your complaint. The employer that you filed a charge against will have the opportunity to respond to your statements alleging discrimination.

You may be offered the chance to mediate with your employer. This step is voluntary.

You may be requested to submit additional information related to your charge.

After the claim has been investigated, the EEOC or CCRD will determine if there is "cause" to your complaint that may initiate further agency action.

If the EEOC or CCRD finds that there is "cause," it may require conciliation efforts, choose to pursue a lawsuit on your behalf, or provide you with a right-to-sue letter.

Even if the EEOC or CCRD does not find that there is "cause," you will still be provided with a right-to-sue letter that enables you to file a lawsuit asserting discrimination in a federal or state court. You will lose your right to sue if you do not file the complaint in court within 90 days from your receipt of the letter.

33-6. Family and Medical Leave Act

Eligibility

The Family and Medical Leave Act was enacted in 1993 to require covered employers to provide employees with job-protected and unpaid leave for qualified medical and family reasons. The FMLA requires that covered employers communicate the law's protections to eligible employees, both by posting a notice and providing a written notice directly to employees.

For an employee to have protection under the FMLA, three things are required. An employee must: (1) have worked for the employer for at least 12 months; (2) have worked at least 1,250 hours in the last 12 months preceding the start of leave; and (3) be employed at a worksite where the employer has at least 50 employees within 75 miles.

There are specific reasons that an employee can use job-protected leave under the FMLA:

- The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care, and to bond with the newborn or newly placed child;
- To care for a spouse, son, daughter, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care;
- For a serious health condition that makes the employee unable to perform the essential functions of his or her job, including incapacity due to pregnancy and for prenatal medical care; or
- For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status.

Under certain circumstances, an employee is entitled to take FMLA leave on an intermittent or reduced-schedule basis. In addition to providing eligible employees an entitlement to leave, the FMLA requires that employers maintain employees' health benefits during leave and restore employees to their same or an equivalent job after leave.

The damages available for an FMLA violation include economic damages and attorney fees. And although compensatory damages are not permitted under the FMLA, if you can prove the discrimination was "willful," you can be awarded double damages ("liquidated damages").

Statute of Limitations

The EEOC and CCRD do not have jurisdiction over claims under the Family and Medical Leave Act, so there is no requirement that you file a Charge of Discrimination to exhaust administrative remedies in order to pursue a claim under the FMLA. Instead, there is a two-year statute of limitations to file a lawsuit against the employer.