

Labor and Employment Law

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Employees are a company's greatest asset, but they can also be its greatest liability. Federal and State lawmakers have created a vast array of complex laws that govern the employer-employee relationship. Employees have rights under these laws that are sometimes not apparent to employers until faced with an agency investigation or law suit. Knowing the basics of labor and employment law can help employers from inadvertently taking actions that subject the company, or the individual decision-maker, to liability. The size of the employer, type of business, job position, past practices, promises and policies, and the protected status of the employees, can all affect what action is proper and legal.

Below is a brief summary of some basics of labor and employment law. This information is generic, and does not address specific circumstances.

At-Will Employment. Colorado is an at-will employment state. This means that employees who are hired for an indefinite period of time are free to quit their jobs at any time, with or without cause or prior notice. Similarly, employers are free to terminate employees at any time, with or without cause or prior notice. But, employers are not free to terminate employees on the basis of a "protected status," in retaliation for exercising a legal right, for reasons that violate public policy, or in breach of an express or implied contract between the employee and the employer.

Protected Status. Employers can discriminate when making employment decisions based upon many factors, like skill-level, past experience, education, degrees, past job performance, and recommendations from past employers. But they can not engage in unlawful discrimination based on race, sex (including pregnancy), sexual orientation, national origin, religion, disability, age (40 and above), political affiliation, military status, union affiliation, or genetic information. Liability for unlawful discrimination can be based on intentional discrimination, as well as the disparate impact of an apparently neutral policy or practice on a protected group. Liability for unlawful discrimination includes harassment based on a protected status, where the harassment is unwelcome, severe or pervasive, and creates a hostile work environment.

Exercise of Legal Right. Employees have the legal right to engage in certain activities and conduct without being retaliated against by their employer. In Colorado, the law prohibits employers from terminating employees because of their legal activities off the job and off the premises of the employer, unless the restriction is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of a conflict of interest. Employees also have the legal right to make workers' compensation claims when injured on the job, to file wage claims, civil rights claims, claims of unfair labor practices, and OSHA claims against their employers, to file bankruptcy and have their wages garnished, to be volunteer firefighters and report to a fire, to unionize, to serve on a jury, to respond to a subpoena, among other legal rights, without being subjected to coercion or retaliation by their employer. Making employment decisions that are adverse to the employee based on the employee's exercise of these legal rights can subject the employer to liability.

Breach of Express or Implied Contract. An employer can hinder its right to terminate an employee at will by making promises to the employee that are contrary to either party being able to terminate the relationship at any time without cause or prior notice. For example, if an employer makes a two-year employment offer, the employer can not terminate the employee before the two years are completed, unless the employer can prove that the employee breached the obligations under their employment agreement. Promising evaluations, raises, future benefits, and progressive discipline before termination, can also create an express or implied contract with the employee for which the employer is liable if the promises are not fulfilled. Employers must be cautious in their offer letters, handbooks, policies, and practices that they do not make promises to employees that destroy the employment-at-will status, or that create obligations the employer may be accused of failing to fulfill.

Compensation. There are several laws that affect how employers can compensate employees. The primary laws are the Fair Labor Standards Act, Colorado's Wage Act, and Colorado's Minimum Wage Order. The Fair Labor Standards Act is a federal law that requires employers to pay their employees minimum wage, and overtime at time-and-a-half their regular rate of pay for time worked in excess of 40 hours in a workweek. The minimum wage in Colorado is adjusted annually by the Consumer Price Index for Colorado. For 2011, the effective minimum wage is \$7.36, which is the minimum wage under Colorado law (Federal minimum wage is \$7.25). There are many exemptions to the minimum wage and overtime requirements, but it is the employer's burden to prove that an exemption applies, if challenged. Simply paying an employee on a salary-basis is not all that is required in order to make the employee exempt from overtime. Salaried employees are not exempt from overtime unless their job duties also satisfy the requirements of the exemption upon which the employer is relying. Private employers can not satisfy the requirement of paying overtime by allowing non-exempt employees to accumulate compensatory time that is carried over into other pay periods.

Colorado's Wage Act sets limitations for private employers regarding when employees must be paid, deductions from pay, and form of payment. For example, under this Act, employers cannot require employees to receive wages by direct deposit to a bank account; and cannot deduct from an employee's wages for damages the employee's negligent acts cause the employer. With certain exceptions, pay periods must be monthly or more frequent, and pay day must be within ten days following the end of a pay period. If an employer fails to pay an employee what is owed at the time of termination of employment, the employer can be liable for up to 10 day's pay or 125% of the first \$7,500 owed and 50% of the amount owed in excess of \$7,500 (whichever is greater) as a penalty. An additional penalty of 50% may be awarded for willful violations.

Employers covered by Colorado's Minimum Wage Order must pay overtime after 12 hours in a work day or 12 consecutive hours worked, as well as after 40 hours in a workweek. Colorado's Minimum Wage Order requires that covered employers give their employees breaks (10 minutes within each 4 hours worked) and meal periods (30 minutes if the employee's work shift exceeds 5 hours).

The laws, regulations and court decisions governing compensation are complex and unforgiving. Employers are liable for violating these laws even if the violation was unintentional, in good faith,

or agreed to by the employee.

Examples of Labor and Employment Laws Affecting Employers. Listed below are the five labor and employment laws that we find employees most frequently rely upon in bringing claims against their employers:

- **Age Discrimination in Employment Act** - Prohibits discrimination based on age for persons 40 and older. This applies to employers with 20 or more employees for 20 or more work weeks in either the current calendar year or the preceding calendar year.
- **Americans with Disabilities Act** - Prohibits discrimination against individuals, who are otherwise qualified, based on a mental or physical impairment that substantially limits a major life activity. Employers must reasonably accommodate such individuals. The law also protects individuals who are not disabled but who have a record of a disability or are regarded as disabled. This applies to employers with 15 or more employees for 20 or more work weeks in the current calendar year or the preceding calendar year.
- **Civil Rights Act of 1964, Title VII** - Prohibits discrimination and harassment based on sex (including pregnancy), race, national origin, and religion. This applies to employers with 15 or more employees for 20 or more work weeks in the current calendar year or the preceding calendar year.
- **Fair Labor Standards Act** - Concerns employers' obligation to pay minimum wage, overtime and to abide by child labor restrictions.
- **Family and Medical Leave Act** - Provides up to 12 weeks in 12 months of unpaid medical or family leave for employees who have worked for the employer for 12 months or more, have worked 1,250 hours in the past 12 months, and who are working at a location where the employer has 50 or more employees within a 75-mile radius. It also allows up to 26 weeks of Service Member Family Leave to employees who are the parent, spouse, child or next of kin of a service member who suffers a serious injury or illness while on active duty.

TRAINING FOR MANAGERS. Bechtel & Santo, LLP provides employment law training for managers and supervisors regarding each topic discussed above. In particular, the firm has presented seminars on such topics as "Hiring and Firing," "Complying with the Fair Labor Standards Act," "Avoiding Discrimination and Harassment Liability," "Employee Handbooks," "The Americans with Disabilities Act," "The Family and Medical Leave Act," and "Handling Unemployment Claims." The firm also publishes a quarterly newsletter, *The Employer's Advisory*, available at this website, which gives Colorado employers practical information about new developments in labor and employment law, and how these developments affect their employment policies and practices.

