

**First Regular Session
Seventy-fourth General Assembly
STATE OF COLORADO**

PREAMENDED

*This Unofficial Version Includes Committee
Amendments Not Yet Adopted on Second Reading*

LLS NO. 23-0705.01 Christy Chase x2008

SENATE BILL 23-172

SENATE SPONSORSHIP

Winter F. and Gonzales, Buckner, Cutter, Danielson, Hinrichsen, Jaquez Lewis, Marchman, Moreno, Sullivan

HOUSE SPONSORSHIP

Weissman and Bacon, deGruy Kennedy, Dickson, Epps, Froelich, Garcia, Jodeh, Kipp, Lindsay, Mabrey, Michaelson Jenet, Titone, Vigil, Willford, Woodrow

Senate Committees

Judiciary
Appropriations

House Committees

A BILL FOR AN ACT

101 **CONCERNING PROTECTIONS FOR COLORADO WORKERS AGAINST**
102 **DISCRIMINATORY EMPLOYMENT PRACTICES.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov>.)

For purposes of addressing discriminatory or unfair employment practices pursuant to Colorado's anti-discrimination laws, the bill enacts the "Protecting Opportunities and Workers' Rights (POWR) Act", which:

- Directs the Colorado civil rights division (division) to include "harassment" as a basis or description of discrimination on any charge form or charge intake

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters or bold & italic numbers indicate new material to be added to existing law.
Dashes through the words or numbers indicate deletions from existing law.

- mechanism;
- Adds a new definition of "harass" or "harassment" and repeals the current definition of "harass" that requires creation of a hostile work environment;
- Adds protections from discriminatory or unfair employment practices for individuals based on their "marital status";
- Specifies that in harassment claims, the alleged conduct need not be severe or pervasive to constitute a discriminatory or unfair employment practice;
- For purposes of the exception to otherwise discriminatory practices for an employer that is unable to accommodate an individual with a disability who is otherwise qualified for the job, eliminates the ability for the employer to assert that the individual's disability has a significant impact on the job as a rationale for the employment practice;
- Specifies that it is a discriminatory or an unfair employment practice for an employer to fail to initiate an investigation of a complaint or to fail to take prompt, reasonable, and remedial action;
- Specifies the requirements for an employer to assert an affirmative defense to an employee's proven claim of unlawful harassment by a supervisor; and
- Specifies the requirements that must be satisfied for a nondisclosure provision in an agreement between an employer and an employee or a prospective employee to be enforceable.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1. Short title.** The short title of this act is the
 3 "Protecting Opportunities and Workers' Rights (POWR) Act".

4 **SECTION 2.** In Colorado Revised Statutes, 24-34-306, **amend**
 5 (1)(a) as follows:

6 **24-34-306. Charge - complaint - hearing - procedure -**
 7 **exhaustion of administrative remedies.** (1) (a) (I) Any person claiming
 8 to be aggrieved by a discriminatory or AN unfair practice as defined by
 9 parts 4 to 7 of this ~~article~~ ARTICLE 34 may, by ~~himself or herself~~ ONESELF
 10 or through ~~his or her attorney-at-law~~ THE PERSON'S ATTORNEY, make,

1 sign, and file with the division a verified written charge stating the name
2 and address of the respondent alleged to have committed the
3 discriminatory or unfair practice, setting forth the particulars of the
4 alleged discriminatory or unfair practice, and containing any other
5 information required by the division.

6 (II) THE DIVISION SHALL INCLUDE ON ANY CHARGE FORM OR
7 CHARGE INTAKE MECHANISM AN OPTION TO SELECT "HARASSMENT" AS A
8 BASIS OR DESCRIPTION OF THE TYPE OF DISCRIMINATORY OR UNFAIR
9 EMPLOYMENT PRACTICE THAT IS THE SUBJECT OF THE CHARGE.

10 **SECTION 3.** In Colorado Revised Statutes, **add** 24-34-400.2 as
11 follows:

12 **24-34-400.2. Legislative declaration.** (1) THE GENERAL
13 ASSEMBLY FINDS THAT:

14 (a) ALL COLORADANS SHOULD HAVE AN EQUAL OPPORTUNITY TO
15 SUCCEED IN THE WORKPLACE AND ARE ENTITLED TO A WORKPLACE THAT
16 IS SAFE AND FREE FROM DISCRIMINATION AND HARASSMENT BASED ON
17 THEIR PROTECTED STATUS;

18 (b) WHEN EMPLOYEES HAVE A SAFE WORKPLACE THAT IS FREE
19 FROM DISCRIMINATION AND HARASSMENT, THOSE EMPLOYEES ARE MORE
20 PRODUCTIVE AND ARE MORE INCLINED TO REMAIN IN THEIR JOBS, AND
21 THEIR EMPLOYERS BENEFIT FROM INCREASED EMPLOYEE PRODUCTIVITY
22 AND RETENTION;

23 (c) WHILE MANY EMPLOYERS HAVE MADE GREAT STRIDES IN
24 IMPROVING WORKPLACE ENVIRONMENTS BY MAKING THEM FREE FROM
25 DISCRIMINATION AND HARASSMENT SINCE THIS PART 4 WAS FIRST
26 ENACTED IN 1951, MANY EMPLOYEES IN THIS STATE STILL EXPERIENCE
27 DISCRIMINATION AND HARASSMENT IN THE WORKPLACE, RESULTING IN

1 MENTAL, PHYSICAL, AND ECONOMIC HARM;

2 (d) IT IS CRITICAL THAT EMPLOYERS ENGAGE IN PREVENTIVE AND
3 CORRECTIVE ACTIONS TO ELIMINATE WORKPLACE DISCRIMINATION AND
4 HARASSMENT AND ENSURE A SAFE WORKPLACE ENVIRONMENT FOR ALL
5 THEIR EMPLOYEES; AND

6 (e) COURTS SHOULD APPLY THE LAW CONSISTENTLY TO ALL
7 WORKPLACES.

8 (2) ADDITIONALLY, THE GENERAL ASSEMBLY:

9 (a) FINDS THAT THE "SEVERE OR PERVASIVE" STANDARD CREATED
10 BY COURTS TO DETERMINE IF HARASSMENT AT WORK IS A DISCRIMINATORY
11 OR AN UNFAIR EMPLOYMENT PRACTICE DOES NOT TAKE INTO ACCOUNT
12 THE REALITIES OF THE WORKPLACE OR THE HARM THAT WORKPLACE
13 HARASSMENT CAUSES; AND

14 (b) REJECTS THE "SEVERE OR PERVASIVE" STANDARD FOR PROOF
15 OF WORKPLACE HARASSMENT IN FAVOR OF A STANDARD THAT PROHIBITS
16 UNWELCOME HARASSMENT.

17 (3) THE GENERAL ASSEMBLY FURTHER FINDS AND DECLARES THAT:

18 (a) IT IS THE PUBLIC POLICY OF THE STATE TO ENCOURAGE:

19 (I) EMPLOYERS TO ADOPT EQUAL EMPLOYMENT OPPORTUNITY
20 POLICIES TO PREVENT AND DISINCENTIVIZE ILLEGAL HARASSMENT AND
21 DISCRIMINATION; AND

22 (II) THE FREE REPORTING, DISCUSSION, AND EXPOSURE OF
23 DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES IN ORDER TO
24 BETTER PROTECT EMPLOYEES AND DISCOURAGE DISCRIMINATORY OR
25 UNFAIR EMPLOYMENT PRACTICES; AND

26 (b) ATTEMPTS TO INTERFERE WITH EMPLOYEES' ABILITY TO
27 COMMUNICATE ABOUT AND REPORT ALLEGED DISCRIMINATORY OR UNFAIR

1 EMPLOYMENT PRACTICES ARE CONTRARY TO THE PUBLIC POLICY OF THE
2 STATE.

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4 **SECTION 4.** In Colorado Revised Statutes, 24-34-402, **amend**
5 (1) introductory portion, (1)(a), (1)(b), (1)(c), (1)(d), and (1)(f); and **add**
6 (1.3) and (1.5) as follows:

7 **24-34-402. Discriminatory or unfair employment practices -**
8 **affirmative defense.** (1) It is a discriminatory or AN unfair employment
9 practice:

10 (a) (I) For an employer to refuse to hire, to discharge, to promote
11 or demote, to harass during the course of employment, or to discriminate
12 in matters of compensation, terms, conditions, or privileges of
13 employment against any individual otherwise qualified because of
14 disability, race, creed, color, sex, sexual orientation, gender identity,
15 gender expression, MARITAL STATUS, religion, age, national origin, or
16 ancestry. ~~but,~~

17 (II) With regard to a disability, it is not a discriminatory or an
18 unfair employment practice for an employer to act as provided in this
19 subsection (1)(a) REFUSE TO HIRE, TO DISCHARGE, OR TO PROMOTE OR
20 DEMOTE AN INDIVIDUAL WITH A DISABILITY if there is no reasonable
21 accommodation that the employer can make with regard to the disability
22 THAT WOULD ALLOW THE INDIVIDUAL TO SATISFY THE ESSENTIAL
23 FUNCTIONS OF THE JOB AND the disability actually disqualifies the
24 individual from the job. ~~and the disability has a significant impact on the~~
25 ~~job. For purposes of this subsection (1)(a), "harass" means to create a~~
26 ~~hostile work environment based upon an individual's race, national origin,~~
27 ~~sex, sexual orientation, gender identity, gender expression, disability, age,~~

1 or religion. Notwithstanding the provisions of this subsection (1)(a),
2 harassment is not an illegal act unless a complaint is filed with the
3 appropriate authority at the complainant's workplace and the authority
4 fails to initiate a reasonable investigation of a complaint and take prompt
5 remedial action if appropriate.

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7 (b) (I) For an employment agency to:

8 (A) Refuse to list and properly classify for employment or REFUSE
9 to refer an individual for employment in a known available job for which
10 the individual is otherwise qualified because of disability, race, creed,
11 color, sex, sexual orientation, gender identity, gender expression,
12 MARITAL STATUS, religion, age, national origin, or ancestry; or for an
13 employment agency to

14 (B) Comply with a request from an employer for referral of
15 applicants for employment if the request indicates either directly or
16 indirectly that the employer discriminates in employment on account of
17 disability, race, creed, color, sex, sexual orientation, gender identity,
18 gender expression, MARITAL STATUS, religion, age, national origin, or
19 ancestry. but,

20 (II) With regard to a disability, it is not a discriminatory or an
21 unfair employment practice for an employment agency to refuse to list
22 and properly classify for employment or to refuse to refer an individual
23 for employment in a known available job for which the individual is
24 otherwise qualified if there is no reasonable accommodation that the
25 employer can make with regard to the disability THAT WOULD ALLOW THE
26 INDIVIDUAL TO SATISFY THE ESSENTIAL FUNCTIONS OF THE JOB AND the
27 disability actually disqualifies the applicant from the job. and the

1 ~~disability has a significant impact on the job;~~

2 (c) For a labor organization to exclude any individual otherwise
3 qualified from full membership rights in the labor organization, to expel
4 an individual from membership in the labor organization, or to otherwise
5 discriminate against any of its members in the full enjoyment of work
6 opportunity because of disability, race, creed, color, sex, sexual
7 orientation, gender identity, gender expression, MARITAL STATUS,
8 religion, age, national origin, or ancestry;

9 (d) For any employer, employment agency, or labor organization
10 to print or circulate or cause to be printed or circulated any statement,
11 advertisement, or publication, or to use any form of application for
12 employment or membership, or to make any inquiry in connection with
13 prospective employment or membership that expresses, either directly or
14 indirectly, any limitation, specification, or discrimination as to disability,
15 race, creed, color, sex, sexual orientation, gender identity, gender
16 expression, MARITAL STATUS, religion, age, national origin, or ancestry or
17 intent to make any such limitation, specification, or discrimination, unless
18 based ~~upon~~ ON a bona fide occupational qualification or required by and
19 given to an agency of government for security reasons;

20 (f) For any employer, labor organization, joint apprenticeship
21 committee, SPONSOR OF AN APPRENTICESHIP PROGRAM REGISTERED
22 PURSUANT TO ARTICLE 15.7 OF TITLE 8, or vocational school providing,
23 coordinating, or controlling apprenticeship programs or providing,
24 coordinating, or controlling on-the-job training programs or other
25 instruction, training, or retraining programs:

26 (I) (A) To deny to or withhold from any qualified individual
27 because of disability, race, creed, color, sex, sexual orientation, gender

1 identity, gender expression, MARITAL STATUS, religion, age, national
2 origin, or ancestry the right to be admitted to or participate in an
3 apprenticeship training program, an on-the-job training program, or any
4 other occupational instruction, training, or retraining program. ~~but,~~

5 (B) With regard to a disability, it is not a discriminatory or an
6 unfair employment practice to deny or withhold the right to be admitted
7 to or participate in any such program if there is no reasonable
8 accommodation that can be made with regard to the disability THAT
9 WOULD ALLOW THE INDIVIDUAL TO SATISFY THE ESSENTIAL FUNCTIONS OF
10 THE PROGRAM AND the disability actually disqualifies the individual from
11 the program. ~~and the disability has a significant impact on participation~~
12 ~~in the program;~~

13 (II) To discriminate against any qualified individual in pursuit of
14 such programs or to discriminate against ~~such an~~ THE individual in the
15 terms, conditions, or privileges of such programs because of disability,
16 race, creed, color, sex, sexual orientation, gender identity, gender
17 expression, MARITAL STATUS, religion, age, national origin, or ancestry;
18 OR

19 (III) To print or circulate or cause to be printed or circulated any
20 statement, advertisement, or publication, or to use any form of application
21 for such programs, or to make any inquiry in connection with such
22 programs that expresses, directly or indirectly, any limitation,
23 specification, or discrimination as to disability, race, creed, color, sex,
24 sexual orientation, gender identity, gender expression, MARITAL STATUS,
25 religion, age, national origin, or ancestry or any intent to make any such
26 limitation, specification, or discrimination, unless based on a bona fide
27 occupational qualification;

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(1.3) (a) AS USED IN SUBSECTIONS (1)(a) AND (1.5) OF THIS SECTION AND IN THIS SUBSECTION (1.3), "HARASS" OR "HARASSMENT" MEANS TO ENGAGE IN, OR THE ACT OF ENGAGING IN, ANY UNWELCOME PHYSICAL OR VERBAL CONDUCT OR ANY WRITTEN, PICTORIAL, OR VISUAL COMMUNICATION DIRECTED AT AN INDIVIDUAL OR GROUP OF INDIVIDUALS BECAUSE OF THAT INDIVIDUAL'S OR GROUP'S MEMBERSHIP IN, OR PERCEIVED MEMBERSHIP IN, A PROTECTED CLASS, AS DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION, WHICH CONDUCT OR COMMUNICATION IS SUBJECTIVELY OFFENSIVE TO THE INDIVIDUAL ALLEGING HARASSMENT AND IS OBJECTIVELY OFFENSIVE TO A REASONABLE INDIVIDUAL WHO IS A MEMBER OF THE SAME PROTECTED CLASS. THE CONDUCT OR COMMUNICATION NEED NOT BE SEVERE OR PERVASIVE TO CONSTITUTE A DISCRIMINATORY OR AN UNFAIR EMPLOYMENT PRACTICE UNDER SUBSECTION (1)(a) OF THIS SECTION AND IS A VIOLATION OF SUBSECTION (1)(a) OF THIS SECTION IF:

(I) SUBMISSION TO THE CONDUCT OR COMMUNICATION IS EXPLICITLY OR IMPLICITLY MADE A TERM OR CONDITION OF THE INDIVIDUAL'S EMPLOYMENT;

(II) SUBMISSION TO, OBJECTION TO, OR REJECTION OF THE CONDUCT OR COMMUNICATION IS USED AS A BASIS FOR EMPLOYMENT DECISIONS AFFECTING THE INDIVIDUAL; OR

(III) THE CONDUCT OR COMMUNICATION HAS THE PURPOSE OR EFFECT OF UNREASONABLY INTERFERING WITH THE INDIVIDUAL'S WORK PERFORMANCE OR CREATING AN INTIMIDATING, HOSTILE, OR OFFENSIVE WORKING ENVIRONMENT.

(b) THE NATURE OF THE WORK OR THE FREQUENCY WITH WHICH

1 HARASSMENT IN THE WORKPLACE OCCURRED IN THE PAST IS NOT
2 RELEVANT TO WHETHER THE CONDUCT OR COMMUNICATION IS A
3 DISCRIMINATORY OR AN UNFAIR EMPLOYMENT PRACTICE UNDER
4 SUBSECTION (1)(a) OF THIS SECTION.

5 (c) (I) NOTWITHSTANDING SUBSECTION (1)(a) OF THIS SECTION,
6 PETTY SLIGHTS, MINOR ANNOYANCES, AND LACK OF GOOD MANNERS DO
7 NOT CONSTITUTE HARASSMENT UNLESS THE SLIGHTS, ANNOYANCES, OR
8 LACK OF MANNERS, WHEN TAKEN INDIVIDUALLY OR IN COMBINATION AND
9 UNDER THE TOTALITY OF THE CIRCUMSTANCES, MEET THE STANDARDS SET
10 FORTH IN SUBSECTION (1.3)(a) OF THIS SECTION.

11 (II) FACTORS TO CONSIDER UNDER THE TOTALITY OF THE
12 CIRCUMSTANCES INCLUDE:

13 (A) THE FREQUENCY OF THE CONDUCT OR COMMUNICATION,
14 RECOGNIZING THAT A SINGLE INCIDENT MAY RISE TO THE LEVEL OF
15 HARASSMENT;

16 (B) THE NUMBER OF INDIVIDUALS ENGAGED IN THE CONDUCT OR
17 COMMUNICATION;

18 (C) THE TYPE OR NATURE OF THE CONDUCT OR COMMUNICATION,
19 RECOGNIZING THAT CONDUCT OR COMMUNICATION THAT, AT ONE TIME,
20 WAS OR IS WELCOME BETWEEN TWO OR MORE INDIVIDUALS MAY BECOME
21 UNWELCOME TO ONE OR MORE OF THOSE INDIVIDUALS;

22 (D) THE DURATION OF THE CONDUCT OR COMMUNICATION;

23 (E) THE LOCATION WHERE THE CONDUCT OR COMMUNICATION
24 OCCURRED;

25 (F) WHETHER THE CONDUCT OR COMMUNICATION IS
26 THREATENING;

27 (G) WHETHER ANY POWER DIFFERENTIAL EXISTS BETWEEN THE

1 INDIVIDUAL ALLEGED TO HAVE ENGAGED IN HARASSMENT AND THE
2 INDIVIDUAL ALLEGING THE HARASSMENT;

3 (H) ANY USE OF EPITHETS, SLURS, OR OTHER CONDUCT OR
4 COMMUNICATION THAT IS HUMILIATING OR DEGRADING; AND

5 (I) WHETHER THE CONDUCT OR COMMUNICATION REFLECTS
6 STEREOTYPES ABOUT AN INDIVIDUAL OR GROUP OF INDIVIDUALS IN A
7 PROTECTED CLASS.

8 (1.5) (a) WHEN AN EMPLOYEE PROVES THAT A SUPERVISOR
9 UNLAWFULLY HARASSED THAT EMPLOYEE, THE EMPLOYER MAY ASSERT AN
10 AFFIRMATIVE DEFENSE TO THE HARASSMENT CLAIM ONLY IF THE
11 EMPLOYER ESTABLISHES THAT:

12 (I) THE EMPLOYER HAS ESTABLISHED A PROGRAM THAT IS
13 REASONABLY DESIGNED TO PREVENT HARASSMENT, DETER FUTURE
14 HARASSERS, AND PROTECT EMPLOYEES FROM HARASSMENT. AN
15 EMPLOYER'S PROGRAM SATISFIES THIS SUBSECTION (1.5)(a)(I) IF THE
16 EMPLOYER CAN DEMONSTRATE THAT:

17 (A) THE EMPLOYER CONDUCTS PROMPT, REASONABLE
18 INVESTIGATIONS OF ALLEGED DISCRIMINATORY OR UNFAIR EMPLOYMENT
19 PRACTICES, AS DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION; AND

20 (B) THE EMPLOYER TAKES PROMPT, REASONABLE REMEDIAL
21 ACTIONS, WHEN WARRANTED, IN RESPONSE TO COMPLAINTS OF
22 DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES, AS DESCRIBED IN
23 SUBSECTION (1)(a) OF THIS SECTION.

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25 (II) THE EMPLOYER HAS COMMUNICATED THE EXISTENCE AND
26 DETAILS OF THE PROGRAM SPECIFIED IN SUBSECTION (1.5)(a)(I) OF THIS
27 SECTION TO BOTH ITS SUPERVISORY AND NONSUPERVISORY EMPLOYEES;

1 (III) THE EMPLOYER MAINTAINS AN ACCURATE, DESIGNATED
2 REPOSITORY OF ALL WRITTEN OR ORAL COMPLAINTS OF DISCRIMINATORY
3 OR UNFAIR EMPLOYMENT PRACTICES, AS DESCRIBED IN SUBSECTION (1)(a)
4 OF THIS SECTION, THAT INCLUDES THE DATE OF THE COMPLAINT, THE
5 IDENTITY OF THE COMPLAINING PARTY, THE IDENTITY OF THE ALLEGED
6 PERPETRATOR, AND THE SUBSTANCE OF THE COMPLAINT; AND

7 (IV) THE EMPLOYEE HAS UNREASONABLY FAILED TO TAKE
8 ADVANTAGE OF THE EMPLOYER'S PROGRAM SPECIFIED IN SUBSECTION
9 (1.5)(a)(I) OF THIS SECTION.

10 (b) NOTHING IN THIS SUBSECTION (1.5) SUPERSEDES OR
11 ELIMINATES ANY OTHER ANALYSES, EVALUATIONS, OR STANDARDS OF
12 LIABILITY FOR HARASSMENT ESTABLISHED IN THIS SECTION AND THROUGH
13 JUDICIAL INTERPRETATION OF TITLE VII OF THE FEDERAL "CIVIL RIGHTS
14 ACT OF 1964", AS AMENDED, 42 U.S.C. SEC. 2000e ET SEQ.; THE FEDERAL
15 "AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967", AS AMENDED, 29
16 U.S.C. SEC. 621 ET SEQ.; TITLES I AND V OF THE FEDERAL "AMERICANS
17 WITH DISABILITIES ACT OF 1990", AS AMENDED, 42 U.S.C. SEC. 12111 ET
18 SEQ.; AND THE FEDERAL "CIVIL RIGHTS ACT OF 1991", AS AMENDED, 42
19 U.S.C. SEC. 1981a.

20 **SECTION 5.** In Colorado Revised Statutes, **add 24-34-407 and**
21 **24-34-408** as follows:

22 **24-34-407. Nondisclosure agreements - requirements for**
23 **enforcement - penalties for noncompliance.** (1) A PROVISION IN AN
24 AGREEMENT ENTERED INTO OR RENEWED ON OR AFTER THE EFFECTIVE
25 DATE OF THIS SECTION BETWEEN AN EMPLOYER AND AN EMPLOYEE OR A
26 PROSPECTIVE EMPLOYEE THAT LIMITS THE ABILITY OF THE EMPLOYEE OR
27 PROSPECTIVE EMPLOYEE TO DISCLOSE OR DISCUSS, EITHER ORALLY OR IN

1 WRITING, ANY ALLEGED DISCRIMINATORY OR UNFAIR EMPLOYMENT
2 PRACTICE, WHICH PROVISION IS REFERRED TO IN THIS SECTION AS A
3 "NONDISCLOSURE PROVISION", IS VOID UNLESS:

4 (a) THE NONDISCLOSURE PROVISION APPLIES EQUALLY TO ALL
5 PARTIES TO THE AGREEMENT;

6 (b) THE NONDISCLOSURE PROVISION EXPRESSLY STATES THAT IT
7 DOES NOT RESTRAIN THE EMPLOYEE OR PROSPECTIVE EMPLOYEE FROM
8 DISCLOSING THE UNDERLYING FACTS OF ANY ALLEGED DISCRIMINATORY
9 OR UNFAIR EMPLOYMENT PRACTICE:

10 (I) INCLUDING DISCLOSING THE EXISTENCE AND TERMS OF A
11 SETTLEMENT AGREEMENT, TO THE EMPLOYEE'S OR PROSPECTIVE
12 EMPLOYEE'S IMMEDIATE FAMILY MEMBERS, RELIGIOUS ADVISOR, MEDICAL
13 OR MENTAL HEALTH PROVIDER, MENTAL OR BEHAVIORAL HEALTH
14 THERAPEUTIC SUPPORT GROUP, LEGAL COUNSEL, FINANCIAL ADVISOR, OR
15 TAX PREPARER;

16 (II) TO ANY LOCAL, STATE, OR FEDERAL GOVERNMENT AGENCY
17 FOR ANY REASON, INCLUDING DISCLOSING THE EXISTENCE AND TERMS OF
18 A SETTLEMENT AGREEMENT, WITHOUT FIRST NOTIFYING THE EMPLOYER;

19 (III) IN RESPONSE TO LEGAL PROCESS, SUCH AS A SUBPOENA TO
20 TESTIFY AT A DEPOSITION OR IN A COURT, INCLUDING DISCLOSING THE
21 EXISTENCE AND TERMS OF A SETTLEMENT AGREEMENT, WITHOUT FIRST
22 NOTIFYING THE EMPLOYER; AND

23 (IV) FOR ALL OTHER PURPOSES AS REQUIRED BY LAW;

24 (c) THE NONDISCLOSURE PROVISION EXPRESSLY STATES THAT
25 DISCLOSURE OF THE UNDERLYING FACTS OF ANY ALLEGED
26 DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE WITHIN THE
27 PARAMETERS SPECIFIED IN SUBSECTION (1)(b) OF THIS SECTION DOES NOT

1 CONSTITUTE DISPARAGEMENT;

2 (d) THE AGREEMENT INCLUDES A CONDITION THAT IF A
3 NONDISPARAGEMENT PROVISION IS INCLUDED IN THE AGREEMENT AND THE
4 EMPLOYER DISPARAGES THE EMPLOYEE OR PROSPECTIVE EMPLOYEE TO A
5 THIRD PARTY, THE EMPLOYER MAY NOT SEEK TO ENFORCE THE
6 NONDISPARAGEMENT OR NONDISCLOSURE PROVISIONS OF THE AGREEMENT
7 OR SEEK DAMAGES AGAINST THE EMPLOYEE OR ANY OTHER PARTY TO THE
8 AGREEMENT FOR VIOLATING THOSE PROVISIONS, BUT ALL OTHER
9 REMAINING TERMS OF THE AGREEMENT REMAIN ENFORCEABLE;

10 (e) ANY LIQUIDATED DAMAGES PROVISION IN THE AGREEMENT
11 DOES NOT CONSTITUTE A PENALTY OR PUNISHMENT, AND, TO BE
12 ENFORCED, A LIQUIDATED DAMAGES PROVISION MUST PROVIDE FOR AN
13 AMOUNT OF LIQUIDATED DAMAGES THAT IS:

14 (I) REASONABLE AND PROPORTIONATE IN LIGHT OF THE
15 ANTICIPATED ACTUAL ECONOMIC LOSS THAT A BREACH OF THE
16 AGREEMENT WOULD CAUSE;

17 (II) VARIED BASED ON THE NATURE OR SEVERITY OF THE BREACH;
18 AND

19 (III) NOT PUNITIVE; AND

20 (f) AN ADDENDUM, SIGNED BY ALL PARTIES TO THE AGREEMENT
21 AND ATTESTING TO COMPLIANCE WITH THIS SUBSECTION (1), IS ATTACHED
22 TO THE AGREEMENT.

23 (2) (a) EACH INSTANCE WHEN AN EMPLOYER INCLUDES IN AN
24 AGREEMENT A NONDISCLOSURE PROVISION THAT VIOLATES SUBSECTION
25 (1) OF THIS SECTION CONSTITUTES A VIOLATION OF THIS SECTION. AN
26 EMPLOYER IS LIABLE FOR ACTUAL DAMAGES AND A PENALTY OF FIVE
27 THOUSAND DOLLARS PER VIOLATION.

1 (b) THE COMMISSION AND ANY EMPLOYEE OR PROSPECTIVE
2 EMPLOYEE WHO IS PRESENTED WITH AN AGREEMENT THAT INCLUDES A
3 NONDISCLOSURE PROVISION THAT VIOLATES SUBSECTION (1) OF THIS
4 SECTION MAY IMMEDIATELY BRING AN ACTION FOR INJUNCTIVE RELIEF
5 AND TO RECOVER PENALTIES. IN ADDITION TO PENALTIES, AN EMPLOYEE
6 OR A PROSPECTIVE EMPLOYEE MAY RECOVER ACTUAL DAMAGES,
7 REASONABLE COSTS, AND ATTORNEY FEES IN ANY PRIVATE ACTION
8 BROUGHT PURSUANT TO THIS SECTION.

9 (3) IN ANY CIVIL ACTION INVOLVING A CLAIM OF A
10 DISCRIMINATORY OR AN UNFAIR EMPLOYMENT PRACTICE, A PLAINTIFF MAY
11 PRESENT EVIDENCE THAT THE EMPLOYER AGAINST WHOM THE ACTION WAS
12 FILED ENTERED INTO ONE OR MORE AGREEMENTS THAT INCLUDED A
13 NONDISCLOSURE PROVISION INVOLVING THE CONDUCT OF THE SAME
14 INDIVIDUAL OR INDIVIDUALS WHO ARE ALLEGED IN THE ACTION TO HAVE
15 ENGAGED IN THE DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE. IF
16 SUCH EVIDENCE IS PRESENTED, THE EVIDENCE SHALL BE CONSIDERED
17 EVIDENCE IN SUPPORT OF AN AWARD OF PUNITIVE DAMAGES.

18 (4) IN ANY ACTION BROUGHT UNDER THIS SECTION, IF THE
19 EMPLOYER SHOWS THAT THE ACT OR OMISSION GIVING RISE TO THE ACTION
20 WAS COMMITTED IN GOOD FAITH AND THAT THE EMPLOYER HAS
21 REASONABLE GROUNDS FOR BELIEVING THAT THE EMPLOYER'S ACT OR
22 OMISSION DID NOT VIOLATE THIS SECTION, THE COURT MAY, IN ITS
23 DISCRETION, DECLINE TO AWARD A PENALTY OR REDUCE THE AMOUNT OF
24 THE PENALTY SPECIFIED IN SUBSECTION (2)(a) OF THIS SECTION.

25 **24-34-408. Employer record keeping - definition. (1) AN**
26 **EMPLOYER SHALL PRESERVE ANY PERSONNEL OR EMPLOYMENT RECORD**
27 **THE EMPLOYER MADE, RECEIVED, OR KEPT FOR AT LEAST FIVE YEARS**

1 AFTER THE LATER OF:

2 (a) THE DATE THE EMPLOYER MADE OR RECEIVED THE RECORD; OR

3 (b) THE DATE OF THE PERSONNEL ACTION ABOUT WHICH THE

4 RECORD PERTAINS OR OF THE FINAL DISPOSITION OF A CHARGE OF

5 DISCRIMINATION OR RELATED ACTION, AS APPLICABLE.

6 (2) AS USED IN THIS SECTION, "PERSONNEL OR EMPLOYMENT

7 RECORD" INCLUDES REQUESTS FOR ACCOMMODATION; EMPLOYEE

8 COMPLAINTS OF DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES;

9 APPLICATION FORMS SUBMITTED BY APPLICANTS FOR EMPLOYMENT;

10 OTHER RECORDS RELATED TO HIRING, PROMOTION, DEMOTION, TRANSFER,

11 LAYOFF, TERMINATION, RATES OF PAY OR OTHER TERMS OF

12 COMPENSATION, AND SELECTION FOR TRAINING OR APPRENTICESHIP; AND

13 RECORDS OF TRAINING PROVIDED TO OR FACILITATED FOR EMPLOYEES.

14 **SECTION 6. Act subject to petition - effective date -**

15 **applicability.** (1) This act takes effect at 12:01 a.m. on the day following

16 the expiration of the ninety-day period after final adjournment of the

17 general assembly; except that, if a referendum petition is filed pursuant

18 to section 1 (3) of article V of the state constitution against this act or an

19 item, section, or part of this act within such period, then the act, item,

20 section, or part will not take effect unless approved by the people at the

21 general election to be held in November 2024 and, in such case, will take

22 effect on the date of the official declaration of the vote thereon by the

23 governor.

24 (2) This act applies to employment practices occurring on or after

25 the applicable effective date of this act.