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Revised Fiscal Note

(replaces fiscal note dated March 22, 2023)

Drafting Number:	LLS 23-0705	Date:	April 11, 2023
Prime Sponsors:	Sen. Winter F.; Gonzales Rep. Weissman; Bacon	Bill Status:	Senate Appropriations
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Bill Topic: **PROTECTING OPPORTUNITIES & WORKERS' RIGHTS ACT**

Summary of Fiscal Impact:	<input checked="" type="checkbox"/> State Revenue	<input type="checkbox"/> TABOR Refund
	<input checked="" type="checkbox"/> State Expenditure	<input checked="" type="checkbox"/> Local Government
	<input type="checkbox"/> State Transfer	<input type="checkbox"/> Statutory Public Entity

The bill makes changes to state law regarding discriminatory and unfair labor practices, and non-disclosure agreements. The bill increases state and local expenditures, and may increase state revenue, on an ongoing basis.

Appropriation Summary: For FY 2023-24, the bill requires an appropriation of \$1.2 million to multiple state agencies.

Fiscal Note Status: The fiscal note reflects the introduced bill, as amended by the Senate Judiciary Committee.

**Table 1
State Fiscal Impacts Under SB 23-172**

		Budget Year FY 2023-24	Out Year FY 2024-25
Revenue		-	-
Expenditures	General Fund	\$1,248,170	\$1,709,691
	Centrally Appropriated	\$258,571	\$344,026
	Total Expenditures	\$1,506,741	\$2,053,717
	Total FTE	15.4 FTE	21.6 FTE
Transfers		-	-
Other Budget Impacts	General Fund Reserve	\$187,226	\$256,453

Summary of Legislation

Discriminatory and unfair labor practices. The bill redefines harassment in Colorado's anti-discrimination laws as unwelcome conduct or communication related to an individual's membership in a protected class where submission to the conduct is a condition of the individual's employment, is used as a basis for employment decisions or interferes with the individual's work, or would objectively be offensive to a reasonable person in the same protected class. The bill specifies the following:

- that harassment does not need to be severe or pervasive to constitute a discriminatory or unfair practice;
- that petty slights or annoyances or lack of good manners do not constitute harassment unless it meets the totality of the circumstances and the standards in the bill; and
- various factors to be considered under the totality of the circumstances.

In addition, the bill makes the following changes to anti-discrimination laws:

- requires the Civil Rights Division (CCRD) in the Department of Regulatory Agencies (DORA) to include harassment as a type of discrimination or unfair practice on its complaint intake forms;
- adds protections for individuals based on their marital status;
- eliminates the ability of an employer to assert that an individual's disability has a significant impact on the job as a rationale for being unable to accommodate an individual who is otherwise qualified for the job;
- requires employers to preserve records of complaints related to discriminatory or unfair labor practices for at least five years; and
- establishes an affirmative defense for an employer if the employer meets certain requirements, including a harassment prevention program and maintaining accurate records of complaints for at least five years. A harassment prevention program satisfies the affirmative defense if the employer promptly investigates complaints and takes reasonable remedial actions when warranted.

Non-disclosure agreements. The bill prohibits a non-disclosure agreement between an employer and an employee from limiting the ability of the employee to discuss or disclose any alleged discriminatory or unfair employment practice, unless certain requirements are met. Any employer that includes a nondisclosure provision that violates the bill requirements is liable for actual damages and a fine of \$5,000 per violation.

The bill allows the Civil Rights Commission and an employee presented with a non-disclosure provision that violates the bill's requirements to immediately bring an action for relief, including actual damages, reasonable costs, and attorney fees. A court may reduce relief if the employer shows that the act leading to the action was in good faith and had reasonable grounds for believing their actions were in compliance with the law.

Background

Under current law, an individual aggrieved by certain discriminatory or unfair employment practices may file a complaint with the Civil Rights Commission in DORA. The commission, a commissioner, or the Attorney General may also file a complaint if the alleged discrimination or unfair practice imposes a significant societal or community impact. The commission is charged with investigating complaints, conducting hearings, and issuing decisions. A person is not permitted to file a civil action in district court alleging certain discrimination or unfair employment practice without filing a complaint with the Civil Rights Commission.

State Revenue

To the extent that the bill increases civil case filings with the trial courts, state revenue to the Judicial Department from filing fees will increase beginning in FY 2023-24. This fee revenue is subject to TABOR. Additionally, the bill may increase revenue from the civil penalty for violations related to non-disclosure agreements. This revenue is not subject to TABOR.

State Expenditures

The bill increases state expenditures by \$1.5 million in FY 2023-24 and \$2.0 million in FY 2024-25 for multiple state agencies. Costs are assumed to be paid from the General Fund. The bill also minimally increases workload for the Department of Labor and Employment and the Judicial Department. Expenditures are shown in Table 2 and detailed below. First-year costs for personal services are prorated for a September 1 start date and the General Fund pay date shift.

**Table 2
 Expenditures Under SB 23-172**

	FY 2023-24	FY 2024-25
Department of Regulatory Agencies		
Personal Services	\$191,383	\$255,176
Operating Expenses	\$3,375	\$4,050
Capital Outlay Costs	\$20,010	-
Software Updates	\$2,100	-
Legal Services	\$31,722	-
Centrally Appropriated Costs ¹	\$43,267	\$56,955
FTE – Personal Services	2.3 FTE	3.0 FTE
FTE – Legal Services	0.2 FTE	-
DORA Subtotal	\$291,857	\$316,181

**Table 2
 Expenditures Under SB 23-172 (Cont.)**

	FY 2023-24	FY 2024-25
Department of Personnel and Administration		
Personal Services	\$80,935	\$107,913
Operating Expenses	\$1,485	\$1,755
Capital Outlay Costs	\$6,670	-
Centrally Appropriated Costs ¹	\$18,598	\$24,431
FTE – Personal Services	1.0 FTE	1.3 FTE
DPA Subtotal	\$107,688	\$134,099
All State Agencies		
Personal Services	\$736,128	\$981,504
Operating Expenses	\$17,415	\$20,925
Capital Outlay Costs	\$106,720	-
Legal Services	\$50,227	\$338,368
Centrally Appropriated Costs ¹	\$196,706	\$262,640
FTE – Personal Services	11.6 FTE	15.5 FTE
FTE – Legal Services	0.3 FTE	1.8 FTE
All State Agencies Subtotal	\$1,107,196	\$1,603,437
Total Costs	\$1,506,741	\$2,053,717
Total FTE	15.4 FTE	21.6 FTE

¹ Centrally appropriated costs are not included in the bill's appropriation.

Department of Regulatory Agencies. The bill will increase expenditures for the Civil Rights Division (CCRD) in DORA to handle additional complaints and modify the complaint intake forms. DORA will also incur human resources expenditures, as discussed in the all state agencies section below.

- **Staffing.** The CCRD in DORA will require 3.0 FTE to handle the increased complaints filed. The CCRD receives about 1,160 complaints related to employment per year. The fiscal note assumes a 13 percent increase in case filings, based on broadening the definition of harassment, adding marital status as a protected group, and removing that an employer may assert that an individual's disability has a significant impact on the job as a rationale for not accommodating an otherwise qualified individual. The fiscal note assumes about 40 hours of staff time per complaint.
- **Software updates.** DORA must also make modifications to add marital status and harassment to the case management system and complaint form. Costs are estimated at \$2,100 in FY 2023-24 only, based on an assumed 20 hours at a rate of \$105 per hour.

- **Federal funding.** The CCRD has a cooperative agreement with the federal Equal Employment Opportunity Commission to handle complaints where there is both federal and state jurisdiction, and the CCRD receives federal payments for this purpose. In 2022, CCRD received \$672,750, approximately 20 percent of total CCRD funding. Under the bill, the state and federal definitions of harassment will no longer align and the CCRD may no longer be able to receive federal funding to handle complaints with dual jurisdiction. DORA is expected to require 300 hours of legal services for issues related to the agreement with EEOC. The fiscal note assumes that any impact to the CCRD ongoing budget will depend on modifications to the cooperative agreement and that any changes to CCRD funding will be handled through the budget process.

Department of Personnel and Administration. The bill will increase expenditures in the State Personnel Board to handle appeals of CCRD decisions and in the state's Risk Management Division to pay claims or settlements. Actual costs will depend on the number and complexity of cases, case outcomes, and the timing of cases and judgements. The board currently hears an average of 7 to 8 cases per year; the fiscal note assumes an additional 1 to 3 per year. Potential costs include:

- **State Personnel Board.** To the extent this bill increases the number of cases heard by the State Personnel Board, workload will increase. The bill also limits non-disclosure provisions in settlements, which may lead to fewer cases being settled and increased workload for the board. The expected increase in cases will require 0.3 FTE of additional administrative law judges.
- **Risk Management Liability Program.** To the extent that more civil cases are filed, this bill may result in an increase in the number of liability claims received by the state. The bill also expands the number of people eligible to bring claims and lowers the standards to prove harassment or a hostile work environment. To handle the anticipated increase in cases, as well as to support state harassment prevention training, the Risk Management Division will require 1.0 FTE in additional administrative staff to support all state agencies.

In addition, to the extent fewer cases are settled are more claims are paid, expenditures from the Risk Management Fund will increase. The fiscal note assumes that any change in appropriations will be handled through the annual budget process. For informational purposes, the average cost for employment claims paid in the last three years was about \$145,000, including liability and settlements. Should more cases go to trial, risk management costs may further increase.

All state agencies. The bill is anticipated to increase the number of grievances and claims filed and investigated in each state agency's internal human resources department and may increase workload to adjust record keeping requirements, which will require additional human resource staff in each agency. It may also require state agencies to create or modify a harassment training and prevention program as part of a potential affirmative defense. In addition, the Department of Law will represent state agencies in discrimination cases that are heard by the CCRD, the State Personnel Board, and that go to trial. Table 3 includes a breakdown of both HR staffing and legal costs for each agency.

- **Legal services.** Based on current cases, it is anticipated that Department of Law will require 475 hours in FY 2022-23 and 3,200 in subsequent years. This equates to 0.3 FTE in FY 2023-24 and 1.8 FTE in subsequent years. The fiscal note assumes that these hours will be apportioned to state agencies based on their portion of state employees, except that state agencies with less than

500 employees can accommodate legal hours within their current allotment. Adjustments to actual legal needs will be handled through the annual legal services budgeting process.

- **Human resources staff.** To calculate the number of additional HR staff that each state agency will require, the fiscal note assumes a ratio of 1 additional FTE per 2,000 state employees, except that state agencies with less than 500 employees will not require additional staff. In total, this will increase HR staff by 15.5 FTE across all state agencies. In FY 2023-24, staff is prorated to 11.6 FTE.
- **Agencies under staffing threshold.** As noted above, Table 3 does not include HR staff or legal services for the departments of Agriculture, Early Childhood, Higher Education, Legislative, Local Affairs, Military and Veterans Affairs, Personnel and Administration, State, or Treasury, as those agencies all employ under 500 covered employees and do not meet the staffing threshold assumed by the fiscal note.
- **Institutions of higher education.** Table 3 does not include HR staff or legal services for institutions of higher education. The bill may increase workload and staffing costs for institutions, with the impact on each individual institution varying by size. Smaller institutions are assumed to manage costs within existing resources, larger institutions may require staffing and legal services, which the fiscal note assumes will be covered within institutional resources or handled within the budget process.

**Table 3
 Human Resources Staff and Legal Services Costs by Department**

Agency	FY 2023-24			FY 2024-25	
	HR FTE	Legal Hours	Total Cost	Legal Hours	Total Cost
Corrections	2.6	81	\$152,866	546	\$225,883
Education	0.4	12	\$23,469	78	\$34,117
Governor's Office	0.6	20	\$35,415	132	\$52,762
Health Care Policy & Financing	0.4	11	\$23,363	74	\$33,694
Human Services	2.2	66	\$129,081	448	\$189,652
Judicial	2.5	77	\$146,894	520	\$216,667
Labor & Employment	0.8	23	\$46,833	156	\$68,233
Law	0.3	10	\$17,708	61	\$25,852
Natural Resources	1.3	39	\$76,276	265	\$112,096
Public Health & Environment	0.9	28	\$52,912	191	\$78,402
Public Safety	0.9	28	\$52,912	191	\$78,402
Regulatory Agencies	0.3	10	\$17,708	60	\$25,746
Revenue	0.8	25	\$47,045	170	\$69,714
Transportation	1.5	45	\$88,008	308	\$129,577
Total	15.5 FTE	475 hrs	\$910,490	3,200 hrs	\$1,340,797
Legal Services FTE		0.3 FTE		1.8 FTE	

Department of Labor and Employment. The bill increases workload by a minimal amount for the Department of Labor to handle questions and inquiries related to the bill. No change in appropriations is required.

Judicial Department. The bill increases workload for the trial courts in the Judicial Department by a minimal amount to handle any additional cases filed as a result of the bill. No change in appropriations is required.

Centrally appropriated costs. Pursuant to a Joint Budget Committee policy, certain costs associated with this bill are addressed through the annual budget process and centrally appropriated in the Long Bill or supplemental appropriations bills, rather than in this bill. These costs, which include employee insurance and supplemental employee retirement payments, are shown in Table 2.

Other Budget Impacts

General Fund reserve. Under current law, an amount equal to 15 percent of General Fund appropriations must be set aside in the General Fund statutory reserve. Based on this fiscal note, the bill is expected to increase the amount of General Fund held in reserve by the amounts shown in Table 1, decreasing the amount of General Fund available for other purposes.

Local Government

Similar to the state as an employer, to the extent there is an increase in the number of claims relating to local government entities and employees, costs and workload will increase for local governments. In addition, expanded liability for local governments will increase costs for legal representation and settlements and record keeping requirements may impact workload and costs. Actual costs for a particular local government will vary based on the number of cases filed in its jurisdiction.

Effective Date

The bill takes effect 90 days following adjournment of the General Assembly sine die, assuming no referendum petition is filed. It applies to employment practices occurring on or after that date.

State Appropriations

For FY 2023-24, the bill requires the following General Fund appropriations:

- \$248,590 to the Department of Regulatory Agencies, and 2.3 FTE, of which \$31,722 is reappropriated to the Department of Law, with 0.2 FTE;
- \$89,090 to the Department of Personnel and Administration, and 1.0 FTE; and
- \$910,490 to multiple state agencies, based on the information in Table 3, and 11.6 FTE. Of that amount, \$50,227 is reappropriated to the Department of Law, with an additional 0.3 FTE. An agency cost breakdown is available upon request.

Departmental Difference

The amendments adopted in the Senate Judiciary Committee modified the definition of harassment and the affirmative defense for employers. While state agencies generally agreed with the potential costs included in fiscal note for the introduced bill, state agencies, including the DPA, Department of Law, and DORA disagree with the assumptions used in this revised fiscal note that result in lower estimated costs. This revised fiscal note is based on the assumption that the definition of harassment will result in a smaller increase in complaints and that change to the affirmative will allow the state to access it in many cases. Specific differences with DPA, the Department of Agriculture, the Department of Early Childhood, and institutions of higher education are discussed below.

Department of Personnel and Administration. DPA estimates that the department will require an additional 1.8 FTE in HR staff to implement an anti-discrimination program that meets the bill's parameters, conduct staff training, and handle additional complaint investigations. In addition, the department estimates that expenditures from the Risk Management Fund for settlements, legal defense costs, and complainant awards will increase by \$6.6 million per year.

Because DPA has fewer than 500 employees, additional HR staff was not included for DPA, in line with assumptions used for all agencies described above. For risk management impacts, the timing and amounts of legal awards, fees, and settlements under the bill are unknown and are unlikely to occur immediately; thus, the fiscal note assumes that these costs are best addressed through the annual budget process.

Department of Agriculture. The Department of Agriculture (CDA) estimates that 1.0 FTE will be required to handle complaints, provide quarterly staff trainings, and develop ongoing anti-harassment program, based on the number of both permanent and seasonal employees. In addition, CDA estimates that travel costs are required for staff to provide trainings around the state and additional legal costs will be required due to the number of temporary seasonal staff.

Because CDA has fewer than 500 permanent employees, the fiscal note does not include additional HR staff or legal services hours for CDA, in line with assumptions used for all agencies described above, and assumes that agencies will not incur significant training to meet the bill's requirements.

Department of Early Childhood. The Department of Early Childhood (CDEC) estimates that 0.5 FTE and 12 legal hours will be required to implement the bill, as CDEC is a new agency that doesn't have full capability to absorb work associated with additional complaints. The fiscal note does not include additional HR staff or legal services hours for CDEC, in line with assumptions used for all agencies described above.

Institutions of higher education. Estimates for state institutions of higher education ranged from 1.5 FTE at small institutions to 58.9 FTE at a large state institution. The fiscal note assumes that because of the wide variety of possible impacts between institutions, any changes to appropriations will be requested through the annual budget process.

State and Local Government Contacts

All State Agencies