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Steps for Colorado Employers to Consider in Light of New Laws Taking Effect in 2024

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New Colorado laws impose sweeping changes to employment practices, such as pay transparency, paid family and medical leave benefits, sick leave, nondisclosure provisions, and more. On January 1, 2024, a flurry of new employment laws, regulations, and programs will go into effect in Colorado. The laws affect a broad range of employment issues, from job posting requirements to the launch of benefits for the State's family-leave insurance program. Read together, these laws and regulations continue to add to Colorado's reputation as one of the most employee-friendly jurisdictions in the United States. In light of these new laws, employers may wish to review their employment policies and practices as they move into 2024. Additional detail about the most notable aspects of these laws is provided below, including steps employers could consider taking to ensure compliance. **I. Ensure Equal Pay for Equal Work Act (EEPEWA) – Effective January 1, 2024** Signed into law on June 5, 2023, the Ensure Equal Pay for Equal Work Act ("EEPEWA") **–** which amends Colorado's pay transparency law, the Equal Pay for Equal Work Act ("EPEWA") **–** goes into effect on January 1, 2024. The EEPEWA, together with the Equal Pay Transparency ("EPT") Rules issued by the Colorado Department of Labor and Employment ("CDLE"), create significant, new disclosure and notice requirements for employers with even one employee in Colorado. ***Steps to consider:*** Most notably, to comply with the amended requirements, covered employers may consider undertaking the following:

1. provide notice of each "job opportunity" to employees;
2. disclose how to apply and the application deadline, in addition to information about compensation and benefits, in both external and internal covered job postings;
3. disclose certain information about selected candidates to employees with whom the candidate will likely work, and about how employees can express interest in similar jobs in the future;
4. provide notice to eligible employees of career-progression positions, including the requirements to progress, compensation, benefits, responsibilities, further advancement, and full-time or part-time status; and
5. continue to preserve records of wages and job descriptions.

Additional detail about the amendments to Colorado's pay transparency law is provided below.

A. The EEPEWA Requires Employers to Announce "Job Opportunities."

Under the EEPEWA, employers are required to take reasonable steps to ensure that every "job opportunity" is announced, posted, or made known to all Colorado employees on the same day and before any selection decisions are made. But employers physically outside Colorado that have fewer than 15 remote employees in Colorado need only provide notice of remote job opportunities through July 1, 2029. The EEPEWA defines a "job opportunity" as a "current or anticipated vacancy" for which an employer is considering or

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interviewing candidates, or that an employer has posted publicly. Notably, a "job opportunity" does not encompass either "career development" or a "career progression." "Career development," as defined in the statute, refers to changes in an employee's terms of "compensation, benefits, full-time or part-time status," or job title that recognize an employee's performance or contributions. And "career progression" means a "regular or automatic" movement from one position to another based on objective metrics, such as time spent in a role.

B. The EEPEWA Requires Disclosing Information About Job Opportunities, Career Progression, and Selected Candidates.

The EPT Rules provide that employers should include in both external job postings and internal job-opportunity notices the application deadline and information about how to apply, in addition to the already-required information about compensation and benefits for any job that can be performed in or from Colorado. Furthermore, within 30 days of selecting a candidate for a job opportunity, the EEPEWA requires the employer to make reasonable efforts internally to disclose certain information about the selected candidate – at a minimum, to employees who will work with the new hire. This includes (a) the candidate's name, (b) their former job title (if the candidate was an internal hire), (c) their new job title, and (d) information on how employees can express interest in similar job opportunities in the future. The regulations provide a limited exception to some of these requirements where disclosure would pose risks to a selected candidate's health or safety. For positions that constitute "career progression," moreover, the EEPEWA requires employers to make available to "eligible employees" information about the requirements for such progression, in addition to information about each position's compensation, benefits, full-time or part-time status, responsibilities, and further advancement. In new regulations issued by the CDLE, "eligible employees" are defined as "those in the position that, when the requirements in the notice are satisfied, would move from their position to another position listed in the notice." Career progression notices should be made available to eligible employees shortly after beginning any position within a career progression, though employers retain discretion in how to provide these notices (e.g., in an employee's new hire packet, on a company intranet page accessible by all eligible employees, etc.).

C. The EEPEWA Requires the CDLE to Take Further Protective and Investigative Measures.

Finally, the EEPEWA requires the CDLE to create and implement systems to accept and mediate complaints regarding violations of the sex-based wage equity provision of the EPEWA and create new rules as necessary to accomplish this purpose. Previously, the EPEWA simply *permitted* the CDLE to take these measures, but did not make them mandatory. Furthermore, the EEPEWA requires the CDLE to investigate complaints or leads related to sex-based wage inequity (employing fact-finding procedures from the EPEWA), promulgate rules as needed, and order compliance and relief if a violation is found. However, these enforcement actions will "not affect or prevent the right of an aggrieved person from commencing a civil action." Moreover, the EEPEWA allows plaintiffs bringing sex-based wage discrimination claims to seek back pay going back twice as long as they could previously: up to six years instead of three. **II. Family and Medical Leave Insurance Program (FAMLI) – Benefits Begin January 1, 2024** In November 2020, Colorado voters approved Proposition 118, which required the establishment of a state-run paid Family and Medical Leave Insurance ("FAMLI") program. The program is mandatory for most employers with one or more employees working in Colorado. While most Colorado employers and employees began paying into the program in 2023, the program will begin providing paid leave benefits to employees starting on January 1, 2024. Under the FAMLI program, workers generally can take off up to twelve weeks in a one-year period to: (1) care for a new child during the first year after their birth, adoption, or foster care placement; (2) care for a family member with a serious health condition; (3) care for an employee's own serious health condition; (4) make arrangements for a family member's military deployment; and/or (5) obtain safe housing, care, and/or legal

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assistance in response to domestic violence, stalking, sexual assault, or sexual abuse. Individuals with serious health conditions caused by pregnancy or childbirth complications are entitled to up to four additional weeks of FAMLI leave. Under the law, employees can take the leave continuously, intermittently, or in the form of a reduced schedule, and there is no minimum amount of time the employee must work with a company to be eligible for leave. Employers are required to preserve the employee's job (or a similar job) for them upon their return if they have worked at the company for at least 180 days. Employees may also choose to use sick leave or other paid time off prior to accessing FAMLI benefits, but cannot be required to do so. In addition, an employer and an employee may mutually agree (in writing) that the employee may use any accrued PTO or other employer-provided leave as a supplement to FAMLI benefits, in an amount not to exceed the difference between the employee's FAMLI wage replacement benefits and the employee's average weekly wage. Finally, employees enrolled in the state-run program apply for leave directly to the FAMLI Division, meaning that employers will receive a notice from the FAMLI Division that an employee has applied for FAMLI leave, then whether that period of leave has been approved, without employer discretion to approve or reject such requests. ***Steps to consider:*** Going into 2024, employers should continue to file their premium payments and wage reports, as was already required in 2023. Employers also can update their total employee headcounts by January 31, 2024, to ensure they are charged the correct premiums each quarter. In addition, employers may want to designate on the "My FAMLI+Employer" portal a dedicated point of contact at the company to receive the relevant documentation from the FAMLI Division when an employee files a claim. Employers also can consider training HR employees and managers who handle leave requests from Colorado employees regarding the employer's obligations and policies pursuant to the FAMLI Act. Further, employers should update their FAMLI notices with the most updated version, available here. And employers may wish to update their leave policies to address the FAMLI program, with an eye toward ensuring compliance with the FAMLI Act's notice and non-retaliation requirements, as well as explaining how FAMLI benefits can be used in coordination with other leave benefits the employer may offer, including those under the federal Family and Medical Leave Act. Employers also may want to consider whether to opt into a private plan instead, now that such plans are available.

III. Colorado Overtime and Minimum Pay Standards Order (COMPS Order) – Changes Effective January 1, 2024 The CDLE adopted the 39th edition of Colorado's wage-and-hour regulations – the Colorado Overtime and Minimum Pay Standards Order ("COMPS" Order) – on November 9, 2023, which will take effect on January 1, 2024. The new Order is mostly consistent with COMPS Order #38, but there are a few significant changes. Most notably, the COMPS Order purports to expand the definition of "time worked" (i.e., time that employers must compensate employees for) to include even an activity (or combination of multiple activities consecutively) of less than one minute, depending "on the balance of the following factors, as shown by the employer: (A) the difficulty of recording the time, or alternatively of reasonably estimating the time; (B) the aggregate amount of compensable time, for each employee as well as for all employees combined; and (C) whether the activity was performed on a regular basis." The Order also clarifies rules around tip sharing, among other updates. ***Steps to consider:*** Importantly, the Division also published the 2024 version of Colorado's wage-and-hour poster and notice, which most employers are required to post and otherwise provide to employees. So employers should update their existing posters/notices with the new poster/notice, which is available here. In addition, employers may wish to consider whether they need to update any of their policies and/or train any employees in connection with the changes created by COMPS Order #39.

IV. Job Application Fairness Act (JAFA) – Effective July 1, 2024 In June 2023, Governor Polis signed into law the Job Application Fairness Act (JAFA), which restricts employers' ability to inquire initially about applicants' age. The law covers all public and private employers in Colorado, regardless of company size or industry. It also covers individuals who are "an agent, a representative, or a designee of the employer." Under the law, employers cannot ask applicants on an initial application to disclose their date of birth, dates of attendance at an educational institution, dates of graduation from an educational institution, or other similar inquiries that would disclose age (e.g., asking which election they first voted in). Employers may still request additional application materials, such as school transcripts, but are required to notify applicants that

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they may redact age-related information prior to submission. The JAFA includes limited exceptions to allow employer compliance with age requirements imposed by or pursuant to: (1) a bona fide occupational qualification related to public or occupational safety, (2) a federal statute or regulation, or (3) a state or local statute or regulation based on a bona fide occupational qualification. However, CDLE guidance makes clear that an employer verifying compliance in an initial application still cannot ask an individual's specific age. For example, federal and state law prohibits minors from selling or serving alcoholic beverages. For an initial application for such a position, the employer could ask whether the applicant would be at least 18 when starting work. Only after a job offer was extended could the employer ask the applicant to provide evidence of their specific age without redacting age information. ***Steps to consider:*** In light of this new law, employers may wish to review their job application materials to ensure they do not include any prohibited age-related inquiries. Employers also could consider training hiring managers and interviewers regarding when they may and may not make age-related inquiries. **V. Sick Leave, Nondisclosure Limitations, and Other Changes – Already in Effect Since August 7, 2023** A number of other Colorado employment laws passed in 2023 already went into effect on August 7, 2023. We've briefly summarized the most notable of these laws below, with additional detail available in our prior client alert about these laws.

A. New Limits on Nondisclosure Provisions and Other Changes

Wide-ranging amendments to Colorado's anti-discrimination law took effect on August 7. The amendments void nondisclosure provisions that limit an employee's ability to disclose or discuss alleged discriminatory or unfair employment practices, unless the nondisclosure provision satisfies certain conditions. Employers who violate this law face a potential $5,000 penalty for each instance in which they include in an agreement a noncompliant nondisclosure provision, as well as potential liability for actual damages, costs, and attorneys' fees. The amendments also modified the definition of harassment and replaced the "severe or pervasive" standard for such claims. In addition, the amendments impose limitations on the circumstances under which an employer may assert an *Ellerth*/*Faragher*-type affirmative defense (providing employers a safe harbor from vicarious liability resulting from sexual harassment claims against a supervisory employee), including requiring that the employer communicated to supervisors and non-supervisors the existence and details of its complaint and investigation/remediation process. In addition, the amendments made "marital status" a protected class in Colorado. The amendments also imposed new recordkeeping mandates, requiring employers to maintain personnel and employment records for a minimum of five years, and to "maintain an accurate, designated repository of all written or oral complaints of discriminatory or unfair employment practices." ***Steps to consider:*** Employers may wish to review any agreements that include nondisclosure provisions, such as separation agreements, settlement agreements, and so on, to ensure those agreements comply with Colorado's new requirements. Employers also could consider taking steps to ensure they are complying with Colorado's expanded recordkeeping obligations. In addition, employers may wish to consider whether to update their handbooks and other EEO-related materials to include information about Colorado's revised definition of harassment, the company's anti-harassment investigation/remediation process, and the inclusion of marital status as a protected class. Employers also could consider training managers and HR employees on these issues.

B. Expansion of Paid Sick Leave

Since August 7, Colorado employees are allowed to take paid "sick" leave for qualifying bereavement- and disaster-related needs, in addition to the other uses of paid sick leave already required under the prior version of Colorado's sick leave statute. The CDLE consequently updated the required paid sick leave poster/notice, which is available here. ***Steps to consider:*** Employers may wish to (1) incorporate Colorado's updated paid sick leave notice into their onboarding documents for Colorado employees and (2) post and provide the updated paid sick leave notice to current Colorado employees by the end of 2023. While not expressly required, it may also make sense to inform or remind HR

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employees and managers who handle leave requests from Colorado employees that the State has expanded the uses for which employees may use paid sick leave. Employers also could consider whether to update their sick leave and/or PTO policies to address Colorado's expansion of paid sick leave.

The following Gibson Dunn attorneys prepared this update: Jessica Brown, Marie Zoglo, and Ming Lee Newcomb.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the following practice leaders and partners: Jessica Brown – Partner, Denver (+1 303.298.5944, jbrown@gibsondunn.com) Jason C. Schwartz – Co-Chair, Washington, D.C. (+1 202.955.8242, jschwartz@gibsondunn.com) Katherine V.A. Smith – Co-Chair, Los Angeles (+1 213.229.7107, ksmith@gibsondunn.com)

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