

## BIG CHANGES TO COLORADO'S ANTI-DISCRIMINATION ACT TO AFFECT COLORADO BUSINESSES

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On January 1, 2015, legislation amending Colorado's Anti-Discrimination Act (CADA) will take effect significantly impacting Colorado businesses. The amendments stem from the *Colorado Job Protection and Civil Rights Enforcement Act of 2013* (the Job Protection Act or the Act), signed by Governor John Hickenlooper on May 6, 2013.<sup>1</sup> The Act is intended to prevent workplace discrimination and to create one uniform standard for protection against discrimination.<sup>2</sup> The Job Protection Act reforms current provisions of CADA to allow for rights and remedies previously unavailable, including compensatory and punitive damages, as well as attorney fees, against employers in employment discrimination cases where intentional discrimination is proven.<sup>3</sup>

Due to the considerable impact this legislation will have on Colorado employers, the language in the Act deferred implementation until 2015 to allow businesses to educate their employees and update their employment procedures.<sup>4</sup> Colorado businesses, particularly small businesses employing less than 15 employees, should ensure that their employees and employment manuals and handbooks are up to date on anti-discrimination regulations. This article discusses the changes the Job Protection Act will have on CADA, including the significant financial ramifications Colorado's small businesses may face if forced to litigate CADA claims beginning in 2015.

### I. BACKGROUND OF THE COLORADO ANTI-DISCRIMINATION ACT.

The Colorado Anti-Discrimination Act is Colorado's version of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, rolled into one. CADA covers virtually all private employers with Colorado employees. CADA provides broader protections than its federal counterparts by making it a discriminatory or unfair labor practice for

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1. H.B. 13-1136, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013), *available at* [http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont2/A82168D492556FE687257AF000556F1A/\\$FILE/1136\\_enr.pdf](http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont2/A82168D492556FE687257AF000556F1A/$FILE/1136_enr.pdf).

2. *Id.*

3. COLO. REV. STAT. §§ 24-34-301(1), 24-34-405(3)(b)(I), (3)(c), (4), (5) (2014).

4. COLO. REV. STAT. § 24-34-305(1)(II) (2014).

an employer “to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry.”<sup>5</sup> CADA further prohibits both employers and employees from aiding, abetting, or attempting to commit such discriminatory or unfair labor practices.<sup>6</sup>

CADA also provides a greater scope of protection than federal statutory anti-discrimination statutes. Specifically, whereas similar federal anti-discrimination statutes generally require fifteen or more employees to qualify for protection, CADA applies to employers of *any size*.<sup>7</sup> Small businesses in Colorado that can avoid liability under federal anti-discrimination laws are therefore vulnerable to claims under CADA. While CADA offers broader protections against discrimination compared to federal law, until the Job Protection Act was passed, CADA provided less meaningful equitable remedies.

Before seeking relief from a district court for discriminatory or unfair employment practices, individuals must exhaust their administrative remedies with the Colorado Civil Rights Division (CCRD).<sup>8</sup> Employment claims brought under CADA are processed and investigated by the CCRD.<sup>9</sup> Individuals who believe that they have been subject to discriminatory or unfair employment practices must file a verified Charge of Discrimination with the CCRD within six months of the discriminatory or unfair employment practice.<sup>10</sup> Following investigation by the CCRD, the discrimination or unfair employment practice charge(s) will either be dismissed, or a finding of probable cause or no probable cause of discrimination will be issued.<sup>11</sup> If the charge(s) are dismissed by the CCRD, or it finds that there is no probable cause that discrimination or unfair employment practices occurred, the CCRD will issue a Right to Sue letter to the charging party. Once the charging party receives the Right to Sue letter, the administrative process is complete, and the charging party may proceed with filing an action in court within ninety days after the date the CCRD mails the letter.<sup>12</sup>

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5. COLO. REV. STAT. § 24-34-402(1)(a); *see also* Brooke v. Rest. Servs., 906 P.2d 66, 69 (Colo. 1995) (noting that the Act is intended to eradicate discriminatory practices by employers).

6. §§ 24-34-402(1)(e)(I), (III); *see also* Horodyskyj v. Karanian, 32 P.3d 470, 479 (Colo. 2001).

7. § 24-34-402(1)(a).

8. COLO. REV. STAT. §§ 24-34-306(14)-(15) (2014); *see also* Brooke, 906 P.2d at 72 (noting CADA requires exhaustion of administrative remedies before filing claims that are brought pursuant to the Act).

9. § 24-34-306.

10. COLO. REV. STAT. § 24-34-403 (2014).

11. § 24-34-306(2)(b)(I)-(II).

12. § 24-34-306(2)(b)(I).

On the other hand, if the CCRD finds that there is probable cause that discrimination or unfair employment practices occurred, the CCRD provides the employer with notice of the charge(s) and requires the parties participate in mediation.<sup>13</sup> If no resolution is obtained during the mediation, the charging party may request a Right to Sue letter to proceed with filing a complaint in civil court. Also, if no resolution is achieved during the mediation, the CCRD may determine – if it deems necessary under the circumstances – to hold an administrative hearing before an Administrative Law Judge (ALJ) to assess whether discriminatory or unfair employment practices occurred.<sup>14</sup> If the parties proceed to an administrative hearing, the ALJ will assess the merits of the case and either dismiss the charge(s) or issue a cease and desist order invoking equitable relief authorized by CADA.<sup>15</sup> Under the Job Protection Act, if an ALJ concludes that discriminatory or unfair employment practices have occurred, the prevailing plaintiff may file a complaint in court to obtain compensatory and punitive damages in addition to the equitable relief awardable by the ALJ.<sup>16</sup>

## II. RIGHTS AND REMEDIES CURRENTLY AVAILABLE UNDER CADA.

The principal purpose of CADA was to remedy discrimination through equitable relief, such as requiring offending employers to reinstate wrongfully terminated employees and prohibiting discrimination.<sup>17</sup> The goal of these remedies was to make the charging party whole within a particular setting, *i.e.*, to place the charging party in the position she would have been in but for the discriminatory conduct.<sup>18</sup> Equitable relief authorized under CADA generally includes:

- requiring an employer to cease and desist from a discriminatory practice or conduct;
  - requiring an employer to take action regarding hiring, reinstating, or upgrading an employee;
  - requiring an employer to pay an employee back and/or front pay;
- or

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13. § 24–34–306(2)(b)(II).

14. § 24–34–306(4).

15. § 24–34–306(9)–(10).

16. COLO. REV. STAT. § 24–34–405(8)(c)(I) (2014).

17. *City of Colorado Springs v. Connors*, 993 P.2d 1167, 1174 (Colo. 2000) (citing *Brooke*, 906 P.2d at 68–69, 71) (“[CADA] was not designed primarily to compensate individual claimants but rather to eliminate discriminatory practices as defined by the Act.”).

18. *Id.*

- requiring on-the-job training programs, the posting of notices, and the making of reports regarding compliance with CADA.<sup>19</sup>

Other equitable relief may also be ordered. Because CADA claims have previously been characterized by the Colorado Supreme Court as equitable and non-compensatory in nature, plaintiffs do not have the right to a jury trial.<sup>20</sup>

### III. RIGHTS AND REMEDIES AVAILABLE TO EMPLOYEES UNDER THE JOB PROTECTION ACT.

The Act will amend CADA to bring the remedies available for individuals in line with federal statutory protections.<sup>21</sup> Effective January 1, 2015, the Act significantly expands available rights and remedies for individuals in Colorado claiming workplace discrimination or unfair employment practices:

#### A. *Protection for individuals age seventy and over.*

Under the current provisions of CADA, individuals seventy years old and older are not protected. The Job Protection Act removes the maximum age limit cap currently prohibiting those individuals from filing a claim of age discrimination.<sup>22</sup> Therefore, beginning on January 1, 2015, CADA will define “age” as anyone “of at least forty years.”<sup>23</sup> The amendment brings CADA in line with the requirements under the ADEA which protects “[i]ndividuals at least 40 years of age.”<sup>24</sup> And any person who is 40 years old and older will be permitted to file a charge of age discrimination under CADA.<sup>25</sup>

The Job Protection Act treats remedies for age discrimination claims differently than other claims of discrimination. Under the Act, individuals subjected to age discrimination are only entitled to recover the traditional equitable remedies under CADA and those provided by

19. See, e.g., *Conners*, 993 P.2d at 1174; *Churchill v. Univ. of Colorado at Boulder*, 285 P.3d 986, 994 (Colo. 2012) (citing *Black v. Waterman*, 83 P.3d 1130, 1133 (Colo. App. 2003)).

20. *Watson v. Public Serv. Co. of Colo.*, 207 P.3d 860 (Colo. App. 2008) (determining that a jury trial is required only if enforcement of legal rather than equitable rights and remedies is sought).

21. COLO. REV. STAT. § 24-34-405(6) (2014) (“Except when federal law is silent on the issue, this section shall be construed, interpreted, and applied in a manner that is consistent with standards established through judicial interpretation of Title VII of the federal ‘Civil Rights Act of 1964’, as amended, 42 U.S.C. sec. 2000e *et seq.*; the federal ‘Age Discrimination in Employment Act of 1967’, as amended, 29 U.S.C. sec. 621 *et seq.*; titles I and V of the federal ‘Americans with Disabilities Act of 1990’, as amended, 42 U.S.C. sec. 12111 *et seq.*; and the federal ‘Civil Rights Act of 1991’, 42 U.S.C. sec. 1981a.”).

22. See COLO. REV. STAT. § 24-34-301(1) (2014).

23. *Id.*

24. 29 U.S.C. § 631(a) (2012).

25. Compare § 24-34-301(1) (“‘Age’ means a chronological age of at least forty years”), with 29 U.S.C. § 631 (“The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.”).

the ADEA and Fair Labor Standards Act (FLSA).<sup>26</sup> While the equitable remedies under the ADEA and FLSA are similar to the equitable remedies under CADA, the federal statutes further allow for the recovery of liquidated damages.<sup>27</sup> Liquidated damages are potentially double the amount of the total monetary damages, and the court awards such damages when there is a willful violation.<sup>28</sup> Individuals asserting a claim for age discrimination under CADA are therefore not entitled to request compensatory or punitive damages.

*B. Right to recover compensatory damages.*

Except for age discrimination, the Act amends CADA to allow plaintiffs to recover compensatory damages for discriminatory or unfair employment practices. Under the Act, in a civil action brought against a defendant who is found to have engaged in an intentional discriminatory or unfair employment practice, the plaintiff may recover compensatory damages for “other pecuniary losses, emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.”<sup>29</sup>

*C. Right to recover punitive damages.*

In addition to compensatory damages, the Act also amends CADA to allow plaintiffs to recover punitive damages.<sup>30</sup> Punitive damages are available where a plaintiff can demonstrate “by clear and convincing evidence that the defendant engaged in a discriminatory or unfair employment practice with malice or reckless indifference to the rights of the plaintiff.”<sup>31</sup>

However, employers faced with civil actions asserting claims for punitive damages may rely on a “good-faith” defense. If an employer can demonstrate its good-faith efforts to comply with CADA and to prevent discriminatory and unfair employment practices in the workplace, punitive damages are not warranted.<sup>32</sup> Likewise, in cases involving a claim of failure to make a reasonable accommodation for a person with a disability, punitive damages are not warranted if the employer can demonstrate good-faith efforts to identify and make a reasonable accommodation that would provide the person with a disability an equally effective oppor-

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26. § 24-34-405(3)(g) (“In a civil action involving a claim of discrimination based on age, the plaintiff is entitled only to the relief authorized in subsection (2) of this section and in 29 U.S.C. sec. 626(b) and 29 U.S.C. sec. 216(b) if the court finds that the defendant engaged in a discriminatory or unfair employment practice based on age.”).

27. 29 U.S.C. § 626(b) (2012).

28. 29 U.S.C. § 216(b) (2012).

29. §§ 24-34-405(3)(a), (c).

30. § 24-34-405(3)(b)(I).

31. *Id.*

32. § 24-34-405(3)(b)(I).

tunity, and would not cause an undue hardship on the operation of the employer's business.<sup>33</sup>

The Act does provide employers subject to compensatory and punitive damages a limited safeguard by implementing caps on the damages. In determining the appropriate level of damages to award a plaintiff who has been the victim of an intentional discriminatory or unfair employment practice, the fact-finder is required to consider the size and assets of the defendant and the egregiousness of the intentional discriminatory or unfair employment practice.<sup>34</sup> However, any amount of damages awarded to a plaintiff is subject to a cap based on the number of employees:

Number of Employees	Remedy Cap
1-4	\$10,000
5-14	\$25,000
15-100	\$50,000
101-200	\$100,000
201-500	\$200,000
501+	\$300,000

#### *D. Right to recover attorney's fees.*

Prevailing plaintiffs under the Job Protection Act are also entitled to reasonable attorney fees and costs.<sup>35</sup> While the Act caps the amount of damages a prevailing plaintiff may recover for compensatory and punitive damages, notably, the Act does not cap the amount of attorney fees and costs awardable to the plaintiff. Therefore, while an individual found victim of discriminatory or unfair employment factors will have their damages capped depending on the amount of employees at the business, there is no cap on the amount of recoverable attorney fees. Given the high cost of proceeding to and preparing for litigation, businesses facing a judgment capped at \$10,000 could still be required to pay attorneys' fees and costs many multiples of that amount. Such costs could be devastating to Colorado businesses unprepared for the Act.

Employers who successfully defend against a claim are not automatically entitled to their attorney's fees and costs. Rather, a prevailing employer may only recover its attorney's fees and costs if it can meet prove that the action was frivolous, groundless, or vexatious, a tough threshold to meet.<sup>36</sup>

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33. § 24-34-405(3)(b)(II).

34. § 24-34-405(3)(d)(III).

35. § 24-34-405(5).

36. *Id.*

*E. Right to a jury trial.*

Despite contrary common law precedent that CADA does not provide a right to a jury trial,<sup>37</sup> the Act expressly amends CADA to provide plaintiffs a trial by jury.<sup>38</sup>

## IV. CONCLUSION

Beginning January 1, 2015, the Job Protection Act significantly amends CADA to enhance the remedies available to victims of discrimination or unfair employment practices. Because federal anti-discrimination statutes protect employees of companies with generally 15 or more employees, small businesses in Colorado will be vulnerable under the amendments to CADA. Colorado businesses large and small should therefore make good-faith efforts to encourage compliance with anti-discrimination practices, including: conducting training for employees on anti-discrimination laws and the appropriate methods for taking action and responding to discriminatory or unfair employment practices, as well as implementing and/or updating policies and procedures regarding discrimination, harassment, and retaliation in the workplace. Given the financial remedies now available to plaintiffs and their counsel under the Act, Colorado businesses need to be prepared to avoid expensive litigation costs.

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37. *Watson*, 207 P.3d 865-67.

38. § 24-34-405(4) ("If a plaintiff in a civil action filed under this part 4 seeks compensatory or punitive damages pursuant to subsection (3) of this section, any party to the civil action may demand a trial by jury.").