

Colorado Governor Expected to Sign Bill Providing New Whistleblower Protections Related to Public Health Emergencies

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The Colorado General Assembly recently passed legislation intended to protect employees and certain independent contractors from discrimination and/or retaliation if they raise health and safety concerns related to a public health emergency. House Bill (HB) 20-1415, which Governor Jared Polis is expected to sign, appears to be in direct response to the COVID-19 pandemic, although it will ultimately apply to health and safety concerns unrelated to COVID-19.



The Colorado General Assembly recently passed legislation intended to protect employees and certain independent contractors from discrimination and/or retaliation if they raise health and safety concerns related to a public health emergency. [House Bill \(HB\) 20-1415](#), which Governor Jared Polis is expected to sign, appears to be in direct response to the COVID-19 pandemic, although it will ultimately apply to health and safety concerns unrelated to COVID-19. Under the bill, a “public health emergency” is defined as: “(a) a public health order issued by a state or local public health agency; or (b) a disaster emergency declared by the governor based on a public health concern.”

HB 20-1415 prohibits a “principal” from discriminating, retaliating, or taking any adverse action against a worker who, “in good faith,” raises any reasonable concern about workplace health and safety practices or hazards related to a public health emergency. The bill defines “principal” to include “[a]n ‘employer’ as set forth in the federal ‘Fair Labor Standards Act of 1938’”; “[a] foreign labor contractor and a migratory field labor contractor or crew leader”; “[t]he state of Colorado, local governments, and political subdivisions of the state”; and “[a]n entity that contracts with five or more independent contractors in the state each year.”

To be covered under HB 20-1415, the worker must raise his or her concerns “to the principal [directly], other workers, a government agency, or the public if the principal controls the workplace conditions giving rise to the threat or violation.” The bill expressly states its protections do not apply when the worker discloses information he or she “knows to be false” or “[w]ith reckless disregard for the truth or

falsity of the information.” Further, the bill does not authorize “a worker to share individual health information that is otherwise prohibited from disclosure under state or federal law.”

HB 20-1415 also protects workers who voluntarily wear their own personal protective equipment (PPE) at the workplace, such as a mask, faceguard, or gloves. The worker’s PPE, however, must “provide[] a higher level of protection than the equipment provided by the principal” and must be “recommended by a federal, state, or local public health agency with jurisdiction over the worker’s workplace.” Notably, however, the PPE must “not render the worker incapable of performing the worker’s job or prevent [the] worker from fulfilling the duties of [his or her] position.” For example, if a worker’s job duties require extensive verbal communication, a large faceguard that makes speaking difficult or limits the worker’s ability to be heard may render the worker incapable of performing his or her job.

A person may seek relief for a violation of HB 20-1415 by: 1) filing a complaint with the Colorado Department of Labor and Employment’s Division of Labor Standards and Statistics (DLSS); 2) bringing an action in district court; or 3) bringing a whistleblower action on behalf of the state in district court. Prior to filing a lawsuit, the worker must first exhaust his or her administrative remedies by filing a complaint with the DLSS. An employee must bring an action within two years after suffering an adverse employment action based on raising a whistleblower concern under the bill.

The DLSS is authorized to provide the following remedies, if it determines a violation has occurred: reasonable attorneys’ fees, reinstatement, back pay, and front pay. The DLSS may also impose penalties of not less than \$100 for each day a principal fails to comply with an order of the DLSS.

If the matter proceeds to court, the individual may recover the following remedies: 1) reinstatement with or without back pay; 2) the greater of \$10,000 or “[a]ny lost pay resulting from the violation, including back pay for a reinstated or rehired worker and front pay for a worker who is not reinstated or rehired”; 3) “[a]ny other equitable relief the court deems appropriate”; and 4) attorneys’ fees to the prevailing plaintiff. In addition, if the court finds the principal’s conduct was “intentional,” the court may order: 1) punitive damages if the plaintiff demonstrates by “clear and convincing evidence” that the principal “engaged in a discriminatory, adverse, or retaliatory employment practice with malice or reckless indifference to the rights of the plaintiff”; and 2) compensatory damages. Courts are expressly required to “consider the size and assets” of the principal and the “egregiousness” of the alleged conduct when determining the appropriate level of damages to award.

Key Considerations

Assuming HB 20-1415 is signed into the law by the governor, employers may want to keep in mind the following considerations.

- Employers should consider documenting the rationale behind disciplining an employee.

- Employers should consider employees' requests to wear their own PPE in light of the requirements of the pending legislation.
- As local, state, and federal requirements related to health and safety continue to evolve during the COVID-19 crisis, employers may want to stay apprised of these requirements in order to implement any changes to their policies and procedures as soon as possible.
- Under HB 20-1415, principals cannot "require or attempt to require a worker to sign a contract or other agreement that would limit or prevent the worker from disclosing information about workplace health and safety practices or hazards related to a public health emergency." Any such agreement is "void and unenforceable as contrary to the public policy of [the state of Colorado]."
- Employers will ultimately be required to post a notice of workers' rights under HB 20-1415 "in a conspicuous location on the principal's premises." The DLSS is authorized under the bill to promulgate rules to establish the form of the required notice.

Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm's [Coronavirus \(COVID-19\) Resource Center](#) as additional information becomes available. Important information for employers is also available via the firm's [webinar programs](#).

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