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# NEW COLORADO LAWS GRANT EMPLOYEES ACCESS TO PERSONNEL FILES, RIGHT TO PREGNANCY ACCOMMODATIONS

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The Colorado General Assembly ended the 2016 session by passing significant employment legislation. In June 2016, Colorado Governor John Hickenlooper signed into law House Bill 16-1432, granting employees access to personnel files upon request, and House Bill 16-1438 expanding protections for pregnant employees. All Colorado employers should familiarize themselves with these new laws and update related policies before they take effect.

## PERSONNEL FILES

House Bill 16-1432 grants current and former employees the right to access their personnel files upon request. When the Act takes effect, likely on January 1, 2017, the provisions will be found at C.R.S. § 8-2-129.

### *Summary*

This new law provides current and former employees access to their personnel files and allows current employees to obtain a copy of their personnel files.

### *Defining "Personnel Files"*

The Act defines personnel files as "the personnel records of an employee, in the manner maintained by the employer and using reasonable efforts by the employer to collect, that are used or have been used to determine the employee's qualifications for employment, promotion, additional compensation, or employment termination or other disciplinary action." H.B. 16-1432, § 2.

The Act excludes the following documents from the definition of personnel files:

- Documents required by state or federal law to be kept in separate files;
- Confidential reports from previous employers;
- Documents relating to active criminal or regulatory investigations;

- Documents relating to active disciplinary investigations by the employer; and
- Documents or records that identify an individual who made a confidential accusation about the employee requesting access to the files.

***Employer Obligations***

The Act requires employers to permit current employees, upon request, to inspect their personnel files and obtain a copy of any part of their personnel files at least once per year. Former employees are permitted one inspection of their personnel file after termination. Although current employees have the right to both inspect and obtain a copy of their personnel files, the Act appears to only grant former employees the right to inspect their files.

The inspection shall occur at the employer's office and at a time convenient to both the employer and employee. Employers "may restrict the employee's or former employee's access to his or her files to be only in the presence of the person responsible for managing personnel data on behalf of the employer or another employee designated by the employer," suggesting that employers may refuse to permit attorneys at the investigation. *Id.* Employers may require payment of the reasonable cost of duplicating the personnel files.

Significantly, the Act does not require employers to create or maintain personnel files for any employee or to retain documents that are or were in an employee's personnel file for any specific period of time.

***Exceptions***

The new law does not apply to banks, trust companies, savings institutions, credit unions, or other financial institutions chartered and supervised under state or federal law. The Act does not cover public employees, who have access to their personnel files under the Colorado Open Records Act.

***Effective Date***

These provisions are scheduled to take effect on January 1, 2017.

***Enforcement***

The Act does not set forth an enforcement mechanism and expressly states that it neither "[c]reates [n]or authorizes a private cause of action by a person aggrieved by this section." *Id.*

***Recommended Actions***

Bryan Cave recommends that all Colorado employers promptly establish policies regarding personnel file creation and retention. These policies should detail what information, if any, is stored in personnel files, where personnel files are located, and a retention schedule for personnel files. With respect to retention and destruction schedules, the policies should include procedures for

retention in connection with litigation holds. Additionally, the policy should detail inspection procedures including the process for requesting access, limitations on who may be present during the inspection, procedures for obtaining copies of personnel files, and applicable copying fees.

Bryan Cave also recommends that Colorado employers review their existing personnel files to verify that they comply with Company policy. Specifically, existing personnel files should be purged to omit documents not required to be kept under Company policy. Employers cannot avoid the Act's inspection requirements by calling a personnel file by another name or by storing documents in another file. Because the Act permits inspection of documents obtained "using reasonable efforts by the employer to collect," Bryan Cave cautions against supervisors maintaining separate personnel files for employees, particularly if copies of the same documents are not maintained in the Company's official personnel file.

## PREGNANCY ACCOMMODATION

House Bill 16-1438 amends the Colorado Anti-Discrimination Act ("CADA") to provide additional protections for pregnant employees and applicants. When the Act takes effect, likely on August 10, 2016, the amendments will be located at C.R.S. §§ 24-34-401 and 24-34-402.3. CADA applies to all Colorado employers, regardless of size.

### *Summary*

Borrowing from the ADA, this law treats pregnancy like a disability and requires employers, after engaging in the interactive process, to reasonably accommodate women who are disabled by pregnancy or childbirth unless doing so imposes an "undue burden."

### *Employer Obligations*

The Amendments require employers to "[p]rovide reasonable accommodations to perform the essential functions of the job to an applicant for employment or an employee for health conditions related to pregnancy or the physical recovery from childbirth, if the applicant or employee requests the reasonable accommodations, unless the accommodation would impose an undue hardship on the employer's business." H.B. 16-1438, § 3.

Once an applicant or employee requests an accommodation, the employer is required to engage in a timely, good-faith, and interactive process to determine reasonable accommodations for conditions related to pregnancy, physical recovery from childbirth, or related conditions. Employers may not require applicants or employees to accept accommodations that they have not requested.

Under the act, "reasonable accommodations" may include "the provision of more frequent or longer break periods; more frequent restroom, food, and water breaks; acquisition or modification of equipment or seating; limitations on lifting, temporary transfer to a less strenuous or hazardous

position if available, with return to the current position after pregnancy; job restructuring; light duty, if available; assistance with manual labor; or modified work schedules." *Id.*

Employers may require applicants or employees to provide a note from a licensed health care provider stating the necessity of a reasonable accommodation.

***Undue Hardship***

The Act defines the phrase "undue hardship" as "an action requiring significant difficulty or expense to the employer. In determining undue hardship, the following factors may be considered: (A) [t]he nature and cost of the accommodation; (B) [t]he overall financial resources of the employer; (C) the overall size of the employer's business with respect to the number of employees and the number, type, and location of the available facilities; and (D) [t]he Accommodation's effect on expenses and resources or its effect upon the operations of the employer." *Id.*

Employers are not required to provide an accommodation that requires the employer to:

- Hire new employees that the employer would not have otherwise hired;
- Discharge an employee;
- Transfer another employee with more seniority;
- Promote another employee who is not qualified to perform the new job;
- Create a new position;
- Create a light duty position unless a light duty position would have been provided for another equivalent employee; or
- Provide paid leave beyond what is provided to similarly situated employees.

***Anti-Retaliation Provisions***

The Act prohibits employers from taking adverse action against employees that request or use a reasonable accommodation related to pregnancy, physical recovery from childbirth, or a related condition. The Act also prohibits employers from denying employment opportunities to an employee or applicant based on the need for a reasonable accommodation related to pregnancy, physical recovery from child birth, or related condition.

***Effective Date***

The amendments are scheduled to take effect on August 10, 2016.

***Notice Requirements***

The Act requires employers to provide employees with multiple forms of written notice of their rights under the Act. All employers are required to post notice in a conspicuous place accessible to all employees. Additionally, employers must give notice to existing employees within 120 days of the Act's effective date. As noted above, unless a referendum petition is filed, the Act will take effect on August 10, 2016. Finally, employers must give notice to new employees at the start of their employment.

***Recommended Actions***

The Act requires immediate action from all Colorado employers. Bryan Cave recommends that employers:

- Draft a notice to post in a conspicuous place accessible to all employees;
- Draft a notice to existing employees and distribute those notices within 120 days of the Act's effective date;
- Draft a notice for new employees (or include such notice in the employee handbook provided to all new employees)
- Update all employee handbooks and policies including, without limitation, any policies addressing employee benefits, leave, accommodations, and/or discrimination policies; and
- Train all HR employees and supervisors on the Amendments.

If you have questions about the Amendments or would like assistance preparing notices or updating company policies, handbooks, or job descriptions, please contact a member of Bryan Cave's Labor and Employment Client Service Group.

## MEET THE TEAM

**Merrit M. Jones**

San Francisco

merrit.jones@bclplaw.com
+1 415 675 3435

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