

COLORADO

I. AT-WILL EMPLOYMENT

A. Statute

The at-will employment doctrine is not codified in Colorado.

B. Case Law

“An employee who is hired in Colorado for an indefinite period of time is an ‘at-will employee,’ whose employment may be terminated by either party without cause and without notice, and whose termination does not give rise to a cause of action.” *Cont’l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 711 (Colo. 1987).

Colorado law presumes the employment relationship to be terminable at-will by either party without liability.¹ *Jaynes v. Centura Health Corp.*, 148 P.3d 241, 243 (Colo. App. 2006). “Under common law, either an employer or an employee can terminate an at-will employment relationship without incurring legal liability for this termination.” *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 666 (Colo. 1999). Generally, absent a violation of constitutional rights, judicial review is not available to second-guess the firing of an employee who is terminable at-will. *Fremont RE-1 Sch. Dist. v. Jacobs*, 737 P.2d 816, 820 (Colo. 1987). Because at-will employees may be dismissed without cause and without notice, termination does not give rise to a cause of action. *Adams County Sch. Dist. No. 50 v. Dickey*, 791 P.2d 688, 691 (Colo. 1990). Absent statutory or contractual requirements, at-will employees are not entitled to notice or a hearing when facing dismissal. *Widder v. Durango Sch. Dist. No. 9-R*, 85 P.3d 518, 526 (Colo. 2004).

“The employee may, however, rebut the effect of that rule by proving that an explicit term of the employment contract restricts the employer’s right to discharge . . .” *DeFranco v. Storage Tech. Corp.*, 622 F.3d 1296, 1305 (10th Cir. 2010) (quoting *Schur v. Storage Tech. Corp.*, 878 P.2d 51, 53 (Colo. App. 1994)); see

¹ Colorado has modified the at will status of sheriff’s deputies by statute. See C.R.S. § 30-10-506 (requiring sheriffs to “adopt personnel policies” and to notify deputies of the reasons for termination and give deputies an opportunity to be heard by the sheriff); see also *Cummings v. Arapahoe Cty. Sheriff’s Dept.*, 2018 COA 136, 2018 Colo. App. LEXIS 1246 (Colo. App. 2018) (interpreting § 30-10-506 and holding that the requirement that sheriffs adopt personnel policies does not alter the settled law that a clear and conspicuous disclaimer can bar an implied contract claim based on an employee manual, but clarifying that a disclaimer cannot bar the statutory right for a deputy to be notified and to have an opportunity to be heard by the sheriff).

also *Cont'l Air Lines, Inc.*, 731 P.2d at 711. An employee hired without an express contract has the burden of pleading and proving one of these exceptions. *Jaynes*, 148 P.3d at 243.

A contract stating a definite term of employment or requiring an employee to perform prerequisites to employment, if sufficient to expect holding a position for a certain period of time, guarantees employment for a specific term. *Pickell v. Ariz. Components Co.*, 931 P.2d 1184, 1186 (Colo. 1997). However, employer statements forecasting an employee's likely career progression are too indefinite to be reasonably relied upon as an offer or promise of employment for a specific term. *Jaynes*, 148 P.3d at 247.

Unless the circumstances indicate otherwise, employment contracts that guarantee an annual salary, but state no definite term of employment are considered to be indefinite employment, terminable at the will of either party without incurring liability for breach of contract. *Justice v. Stanley Aviation Corp.*, 530 P.2d 984, 985 (Colo. App. 1974). Thus, where an employment contract provided for compensation at a yearly rate, since there was no term for a year stated in the contract and uncontradicted testimony that a one-year term was never intended, the employment was terminable at-will. *Id.* at 986.

Even though an employment contract does not state a definite term, its provisions may imply that the employment relationship was not terminable at will. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 914-15 (Colo. 1996). Because the contract guaranteed stock options for several specific years after employment, outlined salary increases for several specific years, and generally referred to the plaintiff as a long-term employee, it was ambiguous as to any applicable term of employment. *Id.* at 910. The plaintiff was entitled to present extrinsic evidence indicating he was a term, rather than at-will, employee. *Id.* at 916.

Further, where an employer promises an employee a job for a definite length of time, it will be enforced even if the term is not stated. *Pickell*, 931 P.2d at 1186. The Colorado Supreme Court determined that an employer's promise to keep the plaintiff employed for a "reasonable time" was "certainly not only two months." *Id.* at 1185. The trial court awarded Plaintiff one year of compensation. *Id.* The Colorado Supreme Court deferred to the trial court's factual determination of term of employment for a "reasonable time." *Id.* at 1186.

"In the absence of special consideration or an express stipulation as to the duration of the employment, a contract for permanent employment is no more than an indefinite, general hiring terminable at the will of either party." *Justice*, 530 P.2d at 986. It is ordinarily for the jury to ascertain the meaning of "permanent" used in an oral employment contract in the light of all the circumstances surrounding the making of the agreement. *Pittman v. Larson Distributing Co.*, 724 P.2d 1379, 1383 (Colo. App. 1986); see also *Schur*, 878 P.2d at 53 (same).

Where the contract lacks specific provisions with regard to certain situations that may arise, trade usage, and customs may be used to arrive at the intent of the parties to the oral employment contract. *Alden Sign Co. v. Roblee*, 217 P.2d 867, 870 (Colo. 1950). The custom or usage must be "one that has existed for such length of time as to become generally known; it must be one certain, continuous, and uniform in its operation, and so general and universal in character that knowledge essential to the binding effect upon the party to be charged may be presumed." *Id.* It must also be reasonable; not in conflict with established rules of law, whether defined by statute or by the common law; and "not inconsistent with good morals or public policy or with the terms of the contract itself." *Id.*

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

“An employee can prevail on an implied contract theory if the employee proves that the employer made an offer and that the employee’s initial or continued employment constituted acceptance.” *Watson v. Pub. Serv. Co.*, 207 P.3d 860, 868 (Colo. App. 2008). In *Watson*, the plaintiff argued that an application submitted in response to an internet posting constituted acceptance to an offer and thus created an implied contract. *Id.* at 863. The Court of Appeals rejected this argument and reasoned that “the employer must manifest its willingness to enter into a bargain in such a way as to justify the employee in understanding that assent was invited by the employer and that the employee’s assent would conclude the bargain.” *Id.* at 868. The internet posting was determined to be an advertisement and thus a mere notice for solicitation of an offer creating no power of acceptance in the recipient. *Id.* at 868-69. Because the internet posting did not mention a salary or a start date, the key terms were not clear or defined and thus the Court found the posting only solicited responses from persons wishing to be included in the pool of applicants to be interviewed and did not give the plaintiff the power of acceptance. *Id.* at 869.

Defenses may exist for implied contracts. For example, Colorado courts apply basic principles of law and equity to allow an employer to avoid liability for breach of implied contract or promissory estoppel claims arising from an employment relationship when the relationship is induced by an employee’s fraud. *Crawford Rehab. Servs. v. Weissman*, 938 P.2d 540, 547 (Colo. 1997) (discussing after acquired evidence defense). A party fraudulently induced to enter into a contract may rescind the contract to restore the status quo. *Id.* Applying that axiom, an employer fraudulently induced to hire an employee by false statements in an employment application may rescind the implied employment agreement arising from termination procedures in the employee manual and cannot be held liable under a theory of breach of implied contract for failure to adhere to such procedures. *Id.*

1. Employee Handbooks and Personnel Materials

To rebut the presumption of employment “at-will” and enforce termination procedures found in an employee manual or handbook, an employee must demonstrate the manual or handbook resulted in a contract between the employer and the employee or that it formed the basis for a promissory estoppel claim. *Cont’l Airlines, Inc.*, 731 P.2d at 711-12. If an employee seeks to rely on an employee handbook or other written policy of the employer as the basis for an implied employment contract claim, the employee must accept the whole of that policy. *Collins v. Colo. Mt. College*, 56 P.3d 1132, 1134 (Colo. App. 2002). The employee may not accept only the favorable portions of the policy and reject the unfavorable portions. *Id.* To establish that an employment manual resulted in a contract, the employee must prove the employer’s actions manifested to a reasonable person an intent to be bound by the provisions of the manual or handbook. *Evenson v. Colorado Farm Bureau Mut. Ins. Co.*, 879 P.2d 402, 409 (Colo. App. 1993). In *Evenson*, the Court overturned a directed verdict on the issue of whether there was an implied employment contract. *Id.* at 410. The Court determined that the employment manual, on its face, was not intended to create a binding obligation. *Id.* at 409. However, because a number of Farm Bureau managers testified that the disciplinary procedures in the manual were considered by them to be mandatory, the Court found that there existed conflicting evidence as to whether the disciplinary procedures had to be followed before terminating an employee. *Id.*

In *Continental Airlines*, the Plaintiff was employed for seven and one-half years. 731 P.2d at 711. Before then, Continental published a policy manual that contained a corporate hearing procedure for management employees who wished to challenge job actions taken against them. *Id.* Prior to Plaintiff's promotion to management, Continental revised this hearing procedure, as well as other provisions of the policy manual. *Id.* Continental terminated Plaintiff and denied his request for a hearing pursuant to the corporate hearing procedures. *Id.* Plaintiff sued under implied contract and promissory estoppel theories. *Id.* at 710. Because Plaintiff admitted he did not rely on the employee manual when he accepted employment, the trial court granted Continental's motion for summary judgment and Plaintiff appealed. *Id.* The Colorado Supreme Court reversed because the trial court incorrectly assumed company termination procedures appearing in the employee manual could not, under any circumstances, be binding on the employer in a case where the employee was originally terminable at-will. *Id.* at 713.

In *Saxe v. Board of Trustees of Metro State College of Denver*, 179 P.3d 67, 75 (Colo. App. 2007), the Court of Appeals recognized that there may be limits to an employer's ability to unilaterally modify provisions of an employee handbook that are central to the terms of employment. The Court held that, to the extent an employment handbook provides an employee vested rights that are substantive rather than procedural rights, an employer cannot unilaterally modify the handbook to relegate such rights. *Id.* at 74-75.

2. Provisions Regarding Fair Treatment

Assurances of fair treatment or "mere vague assurances" are unenforceable. *Hoyt v. Target Stores*, 981 P.2d 188, 194 (Colo. App. 1998). In *Hoyt*, Plaintiff presented testimony of a former human resources manager who testified that Target managers employed "industrial due process" to "keep fair and consistent policy throughout the store." *Id.* The Court found that these vague assurances could not, as a matter of law, form the basis of an underlying contract. *Id.* In order to constitute an enforceable promise, a statement by the employer must (1) disclose a promissory intent or be one that the employee could reasonably conclude constituted a commitment by the employer and (2) be sufficiently definite to allow a court to understand the nature of the obligation undertaken. *Id.*

3. Disclaimers

While statements made in an employee handbook limiting an employer's right to discharge employees may be the basis for breach of implied contract and promissory estoppel claims by discharged employees, summary judgment is appropriate if the employer clearly and conspicuously disclaimed intent to enter into a contract limiting the right to discharge employees. *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1198 (Colo. App. 1997). If the handbook contains such a clear and conspicuous disclaimer, then, without more, the handbook will not be construed as a contract limiting the employer's right to discharge its employees. *Id.*

"Termination procedures set forth in an employee manual or handbook do not create an implied contract where a clear disclaimer of any contractual rights appears." *Jaynes*, 148 P.3d at 248. In *Jaynes*, the Colorado Court of Appeals found that although the employer's employment handbook contained progressive termination procedures, it also contained clear and conspicuous language disclaiming any intent to form an employment contract, which was sufficient to apprise the plaintiff that no principles or guidelines created an express or implied contract. *Id.*

However, while a clear and conspicuous disclaimer may preclude an implied contract claim, as a matter of law, because parties can modify a contract by words or conduct, such disclaimer language is not determinative when other legally sufficient evidence in the record creates a question of fact concerning modification. *Fair v. Red Lion Inn*, 920 P.2d 820, 825 (Colo. App. 1995), *aff'd*, 943 P.2d 431 (Colo. 1997). In *Red Lion*, the employee brought an action alleging that Red Lion breached an implied contract not to discharge her if she complied with its medical leave policy. *Id.* at 826. Even though the employment was at-will and the employee manual indicated that none of the provisions of the manual were intended to create binding contractual obligations, the employee presented evidence of a written medical leave absence form and of assurances given by Red Lion's Human Resources director that the presentation of a full medical release by a specified date would be acceptable. *Id.* A reasonable fact finder could determine that the employee's at-will status was modified and that such words could manifest to a reasonable person an offer to be bound by the special promises contained in the medical leave of absence form and in the supervisor's oral assurance despite any disclaimer in the manual. *Id.*

4. Implied Covenants of Good Faith and Fair Dealing

No tort claim for breach of a covenant of good faith and fair dealing is recognized in Colorado for employment contracts because an employee has a tort claim for wrongful discharge in violation of public policy. *Decker v. Browning-Ferris Indus.*, 931 P.2d 436, 445 (Colo. 1997).

Although "every contract contains an implied duty of good faith and fair dealing," the plaintiff could not rely on such a duty to circumvent the terms for which he expressly bargained. *Grossman v. Columbine Med. Group*, 12 P.3d 269, 271 (Colo. App. 1999). In *Grossman*, the plaintiff doctor entered into a service agreement with a medical group wherein he agreed to provide services to patients who were members of a certain managed health care plan. *Id.* at 270. The service agreement provided that either party could terminate the agreement with or without cause upon providing the other party with ninety days written notice. *Id.* After the group sent a letter to the plaintiff informing him that it was exercising its right to terminate the agreement, he brought suit and alleged that the termination without cause provision in the agreement was void as against public policy. *Id.* at 271. The Court of Appeals affirmed the grant of summary judgment in favor of the group.

B. Public Policy Exceptions

1. General

"The Colorado Supreme Court has stated that the public policy exception to the at-will employment is not subject to precise definition, yet is grounded in the notion that an employer should be prohibited from discharging an employee with impunity for reasons that contravene widely accepted and substantial public policies." *Kearl v. Portage Envtl., Inc.*, 205 P.3d 496, 498 (Colo. App. 2008). To justify interference with an employer's business decision, the public policy at issue in the termination must be one that truly affects the public. *Crawford Rehabilitation Serv., Inc.*, 938 P.2d at 553. A plaintiff may state a claim for retaliatory discharge in violation of public policy by alleging that he or she was employed by the defendant; that the defendant discharged him or her; and that the defendant discharged him or her in retaliation for exercising a job-related right or performing a specific statutory duty, or that the termination would undermine a clearly expressed public policy. *Kearl*, 205 P.3d at 499.

2. Exercising a Legal Right

A plaintiff seeking to assert a claim based on retaliatory discharge for exercising a job-related right must show that (1) the plaintiff was employed by the defendant; (2) the defendant discharged the plaintiff; and (3) the plaintiff was discharged for exercising a job-related right or privilege to which he or she was entitled. *Herrera v. San Luis Cent. R.R. Co.*, 997 P.2d 1238, 1240 (Colo. App. 1999). In *Herrera*, the plaintiff suffered an on-the-job injury and filed a claim under the Federal Employers' Liability Act (FELA). *Id.* at 1239. Fifteen days after a jury returned a verdict in the plaintiff's favor, the defendant terminated his employment. *Id.* The plaintiff filed a wrongful discharge claim alleging that he was terminated for asserting his right to seek benefits. *Id.* The trial court dismissed the complaint because no federal or state statute granted an express right to a private cause of action or established a public policy exception to Colorado's at-will policy of employment. *Id.* The Colorado Court of Appeals reversed the trial court's ruling and agreed with the plaintiff's argument that because he is entitled to seek compensation for his work-related injury and because he was required to proceed on his claim under FELA, rather than workers' compensation, the right was a recognized public policy exception to the at-will employment doctrine. *Id.* at 1240.

Importantly, the Court in *Herrera* noted that although FELA itself does not create a private cause of action to sue an employer for retaliation under the statute, the plaintiff was not bringing suit pursuant to FELA. *Id.* Rather, the plaintiff was asserting a state common law claim of retaliatory termination, relying on the public policy exception to at-will employment concerning his right to pursue a remedy under FELA without reprisal. *Id.*

In *Slaughter v. John Elway Dodge*, 107 P.3d 1165, 1167 (Colo. App. 2005), the plaintiff filed suit for wrongful termination in violation of public policy. Shortly after being hired, she took a drug test and continued in her employment for nearly a year without receiving the results. *Id.* The defendant eventually informed her that the test was overlooked and the results were positive for marijuana. *Id.* She consented to take a second drug that was inconclusive. *Id.* When she refused another test, she was informed she would be terminated. *Id.* The plaintiff filed for a temporary restraining order. *Id.* She claimed she was terminated in retaliation for filing the motion for a temporary restraining order and for refusing to take a drug test, which violated public policy. *Id.* The Court of Appeals rejected the plaintiff's reliance on Colorado's Freedom of Legislative and Judicial Access Act, §8-2.5.101, finding "no basis to conclude that the statute clearly expresses a public policy that forbids an employer from terminating an employee for filing a motion or a lawsuit against the employer." *Id.* at 1168. The Court of Appeals also reasoned that "an employer with a previously established written drug policy who directs an employee to take a drug test does not undermine public policy relating to the employee's rights as a worker." *Id.* at 1170.

By contrast, in *Hoyt*, 981 P.2d at 192, the Colorado Court of Appeals allowed a claim for public policy wrongful discharge when the plaintiff alleged that Target discouraged employees from taking overtime and claiming pay for time traveling between Target stores, both actions protected by Colorado's Wage Claim Act. Not only was filing a complaint with a regulatory board not a prerequisite to filing a public policy wrongful discharge suit, Target's policy of discouraging employees from filing such claims and exercising their rights under the Wage Claim Act supported a claim for wrongful termination in violation of public policy. *Id.*

However, in *Krauss v. Catholic Health Initiatives Mountain Region*, 66 P.3d 195, 203 (Colo. App. 2003), the Colorado Court of Appeals determined that a plaintiff may not bring a public policy wrongful discharge claim based upon an employer's alleged violation of the Family Medical Leave Act. The Court of

Appeals reasoned that the Family Medical Leave Act provided an internal remedy for violations. *Id.*, see also *Armani v. Maxim Healthcare Servs., Inc.*, 53 F. Supp. 2d 1120, 1132 (D. Colo. 1999) (holding that public policy wrongful termination claim is not available for alleged violations of overtime laws because the Fair Labor Standards Act contains internal enforcement provisions).

3. Refusing to Violate the Law

To claim a wrongful discharge under the Colorado public policy exception to the at-will doctrine, a claimant must assert the following elements: (1) the employer directed the employee to perform an illegal act as part of the employee's work related duties; (2) the action directed by the employer would violate a statute or clearly expressed public policy; (3) the employee was terminated as a result of refusing to perform the illegal act; and (4) the employer was aware or should have been aware that the employee's refusal was based upon the employee's reasonable belief that the act was illegal. *Coors Brewing Co.*, 978 P.2d at 667. "The public policy exception protects an employee from being forced to choose between committing a crime and losing his or her job." *Id.*

In *Coors*, the plaintiff, an investigator for the Security Department at Coors, allegedly acted on instructions from senior executives to perform a surreptitious narcotics investigation on Coors employees. *Id.* at 664. Eventually, Coors devised a scheme to launder Coors funds to be used in these investigations by fraudulently billing for legal services. *Id.* In August 1992, Coors executives met and planned the plaintiff's termination to protect themselves from liability for the drug investigations and money laundering. *Id.* at 665. In October of 1992, the plaintiff was terminated for stated reasons unrelated to the illegal scheme, which he claimed were pretextual. *Id.* In assessing the wrongful termination action, the Court refused to apply the public policy exception because the plaintiff committed a series of crimes and only pointed a finger at Coors after he had been fired. *Id.* at 667. Thus, the Court reasoned that an at-will employee who participates in a criminal enterprise and does nothing to blow the whistle on the criminal enterprise does not gain special protection from discharge simply because the employer was complicit in the crimes committed. *Id.*

4. Exposing Illegal Activity (Whistleblowers)

Colorado has a clearly expressed public policy against terminating an employee in retaliation for the employee's good faith attempt to prevent the employer's participation in defrauding the government. *Kearl*, 205 P.3d at 500. In *Kearl*, the plaintiff performed scientific analysis regarding the effectiveness of a particular cleanup technology. *Id.* at 497. He criticized the technology, but his findings were left out of a final report. *Id.* After issuance of the report, the plaintiff sent e-mails to his superiors explaining his objections to the results. *Id.* As the plaintiff became more concerned, he again e-mailed his superiors. *Id.* The next day, he found a copy of his e-mail taped to his office door with a note that said, "Pete NO JOKE YOUR [sic] FIRED DAVE." *Id.* The Colorado Court of Appeals reasoned that the plaintiff's ongoing complaints were consistent with his professional duties as a scientist and concerned what he in good faith believed to be a fraud on the government at the price of public health. *Id.* at 499. The Court found that the plaintiff sufficiently alleged that the defendant knew or should have known that he reasonably believed he was acting in furtherance of a legally cognizable public duty. *Id.*

Professional ethical codes may, in certain circumstances, be a source of public policy. *Rocky Mt. Hosp. & Medical Serv. v. Mariani*, 916 P.2d 519, 525 (Colo. 1996). The plaintiff, a licensed certified public accountant who had complained to her supervisors about questionable accounting practices satisfied this requirement because the Colorado State Board of Accountancy was established by statute for the

purpose of making appropriate rules of professional conduct to establish and maintain a high standard of integrity in the profession of public accountancy. *Id.* at 526. Such rules have an important public purpose in that they ensure the accurate reporting of financial information to the public and allow the public and the business community to rely with confidence on financial reporting. *Id.*

III. CONSTRUCTIVE DISCHARGE

“The doctrine of constructive discharge has been developed largely through the federal courts in cases involving unfair labor practices.” *Wilson v. Adams Board of County Comm’rs*, 703 P.2d 1257, 1259 (Colo. 1985). To prove constructive discharge, a plaintiff must present sufficient evidence establishing deliberate action on the part of the employer that makes or allows the employee’s working conditions to become so difficult or intolerable that a reasonable person in the employee’s position would have no other choice but to resign. *Montemayor v. Jacor Communs., Inc.*, 64 P.3d 916, 922 (Colo. App. 2002). A successful argument for constructive discharge depends upon whether a reasonable person under the same or similar circumstances would view the working conditions as intolerable. *Id.* “The test requires an objective evaluation of the acts of the employer and their effects on the employee, and is not dependent upon the employee’s subjective view.” *Christie v. San Miguel County School Dist.*, 759 P.2d 779, 783 (Colo. App. 1998).

A request for resignation will not support a claim of constructive discharge unless accompanied by harassment, coercion, or other employer conduct which makes the working conditions intolerable. *Christie*, 759 P.2d at 783. Discharged employees may have a basis for contesting the employer’s stated reason for termination. However, there is no basis for relief under a theory of constructive discharge where the employer makes the option of resignation available after the termination. *Koinis v. Colo. Dep’t of Pub. Safety*, 97 P.3d 193, 196 (Colo. App. 2003) (comparing when an employee was first presented with an option to resign or were told to resign or they would be fired).

In *Boulder Valley School District R-2 v. Price*, 805 P.2d 1085, 1087 (Colo. 1991), *overruled on other grounds by Community Hospital v. Fail*, 969 P.2d 667 (Colo. 1998), the plaintiff claimed he was constructively discharged even though he signed a resignation letter. The plaintiff claimed he signed his resignation letter while in a weakened mental condition. *Id.* He also asserted he signed the resignation letter only after the school principal told him that if he did not sign, there would be a hearing regarding his continued employment. *Id.* Based on the evidence adduced at trial, the Court of Appeals held that the trial court erred by entering a judgment notwithstanding the verdict for the employer after determining there was evidence in the record from which a jury could conclude that the plaintiff was constructively discharged. *Id.*

In *Wilson*, Colorado Supreme Court held that where an employee’s change in duties was consistent with her previous duties, her unwillingness or inability to assume the responsibility due to emotional or medical pressures associated with the work was not sufficient to constitute a constructive discharge. 703 P.2d at 1260. The plaintiff was initially hired as a receptionist. After 11 years, she assumed clerical and secretarial responsibilities and, though classified as a clerk, periodically “filled in” as receptionist when the full-time receptionist was ill or on leave. *Id.* After nearly 17 years of employment, the plaintiff was instructed to assume primary responsibility for answering the phone to address complaints from the public. *Id.* She refused to perform such “back-up” duties, in part, given her seniority in the office. *Id.* at 1258-59. She refused to return to work and her employer viewed her failure to return to work as a voluntary resignation and terminated her. *Id.* at 1259.

IV. WRITTEN AGREEMENTS

Breach of an employment contract follows the same general rule as other breach of contract claims. A plaintiff must demonstrate: “(1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff.” *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Invs. II, LLC*, 887 F.3d 1003, 1033 (10th Cir. 2018). “[W]here a plaintiff seeks to recover for breach of an employment contract, the plaintiff bears the burden of proving by a preponderance of the evidence that he substantially performed his part of the contract or that there existed some justifiable reason for nonperformance, such as, for example, the defendant’s conduct in rendering performance impracticable or impossible.” *Western Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). Once the plaintiff has established a prima facie case of breach of contract, the defendant may, but is not required to, produce evidence to rebut the plaintiff’s claim. *Id.* The burden of proof on the elements of the contractual claim remains on the plaintiff. *Id.* at 1059.

A. Standard "For Cause" Termination

For more than a century, the Colorado Supreme Court has held that “where one is employed to serve for a definite term . . . and is discharged before the expiration of the term, without fault on his part, he has a right of recovery either for the balance of wages due, or damages for the loss he may have suffered by reason of the wrongful discharge.” *Id.* at 1059 (quoting *Saxonia Mining & Reduction Co. v. Cook*, 4 P. 1111, 1112-13 (Colo. 1884)).

An employee’s duty to obey reasonable instructions of the employer is an implicit term in an employment contract and the willful refusal of an employee to obey reasonable directions is a material breach that justifies immediate discharge. *Magnuson v. Smith & Saetveit, P.C.*, 722 P.2d 1020, 1022 (Colo. App. 1986). In that case, an employee with a one-year employment contract was terminated by his employer after he refused to obey the corporation’s directives regarding the office telephone, reporting to work, and the change in his workplace space. *Id.* The Court held that a central element in an employer-employee relationship is the right of the employer to control the details of performance of the employee’s duties, and that an employee has a duty to obey all reasonable directions in regard to the manner of performing the service he was contracted to perform. *Id.* The Court of Appeals found a factual dispute regarding whether the corporation’s directives were reasonable under the circumstances, and remanded to the trial court for additional findings of fact. *Id.*

B. Status of Arbitration Clauses

Colorado courts favor arbitration. *See, e.g., Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003); *Austin v. U.S. West, Inc.*, 926 P.2d 181, 183 (Colo. App. 1996). Colorado also adopted the Uniform Arbitration Act of 1975, C.R.S. § 13-22-201 (2014), *et seq.*, which was enacted “to provide a uniform statutory framework for arbitration and to encourage settlement of disputes through the arbitration process.” *Farmers Ins. Exch. v. Taylor*, 45 P.3d 759, 761 (Colo. App. 2001).

In *Austin*, the plaintiffs filed suit against the defendants after a failed business venture. 926 P.2d at 182. The plaintiffs alleged claims of fraudulent inducement and outrageous conduct based on the defendant’s misrepresentations that the plaintiffs would be provided with quality housing in Russia and sound financial backing for the venture. *Id.* The defendants moved to compel arbitration pursuant to the arbitration clause contained in the employment agreement, and the trial court denied the motion. *Id.*

The Court of Appeals reversed and noted that fraud and outrageous conduct claims may be subject to arbitration. *Id.* at 183. The Court also concluded that while Colorado favors arbitration, a trial court cannot order arbitration without first determining whether a conflict is within the scope of an arbitration clause. “[A] court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim.” *Id.* at 184.

The arbitration clause in *Austin* provided that “any dispute with respect to the performance and interpretation of this Agreement shall be submitted to arbitration in the State of Colorado.” *Id.* at 183. The Court of Appeals concluded the plaintiffs’ “claims for fraud in the inducement and outrageous conduct are essentially based on the allegations that defendants misrepresented the type and quality of housing and other living conditions to be provided and misrepresented the financial and business status of the joint venture.” *Id.* at 184. Because “[h]ousing and the joint venture are both subjects addressed in the employment agreements,” the court concluded that the plaintiffs’ claims were within the scope of the arbitration clause at issue. *Id.*

In *Galbraith v. Clark*, 122 P.3d 1061, 1065 (Colo. App. 2005), the Colorado Court of Appeals concluded the plaintiff could not avoid an arbitration clause in a written employment agreement merely by asserting that the defendant managers were acting in their individual capacities when they terminated her employment. *See also Sopko v. Clear Channel Satellite Servs.*, 151 P.3d 663, 667 (Colo. App. 2006) (holding that “contractual and statutory time requirements for issuance of an award are directory, not mandatory or jurisdictional”).

The Colorado Court of Appeals also upheld an agreement to arbitrate between an employer and employee subject to the Federal Arbitration Act (“FAA”) in *Grohn v. Sisters of Charity Health Servs. Colo.*, 960 P.2d 722, 728 (Colo. App. 1998) (“[T]he FAA is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the FAA is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”); *Medina v. Sonic-Denver T, Inc.*, 252 P.3d 1216, 1219 (Colo. App. 2011); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that Section 1 of the FAA exempts only contracts of employment of transportation workers and would not exclude all employment contracts).

Agreements to arbitrate “implemented in the course of an at-will employment are enforceable if independently supported by consideration.” *Crawford v. United Servs. Auto. Ass’n Ins.*, 2006 U.S. Dist. Lexis 46433, *28 (D. Colo. July 7, 2006) (applying Colorado contract law to an agreement to arbitrate governed by FAA). Generally, one party’s agreement to arbitrate is adequate consideration for the other party’s agreement to arbitrate. *Id.* at *25. An arbitration agreement in the employment context is not illusory where: (1) consideration exists in the form of the parties’ mutual promises to forego litigation and substitute arbitration of claims; (2) the employer may only amend or terminate the agreement upon giving ten days’ notice to employees; and (3) neither an amendment nor termination will affect proceedings already initiated under the agreement. *Id.* at *29-*30.

V. ORAL AGREEMENTS

A. Promissory Estoppel

An employee may rebut the presumption of at-will employment under a promissory estoppel theory. *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). As with all promissory estoppel cases, the elements in employment situations are: “(1) A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) action or forbearance induced by that promise; and (3) the existence of circumstances such that injustice can be avoided only by enforcement of the promise.” *Chidester v. E. Gas & Fuel Assocs.*, 859 P.2d 224, 224-25 (Colo. App. 1992). In determining whether “injustice” or unconscionable injury has occurred, a number of factors, such as the nature of the representation made by the employer, promise of future financial rewards, the nature of the employee’s action in reliance, and the relinquishment of prior/other employment, are relevant. *Id.* at 225. If all three elements are present, neither the lack of a written contract under the statute of frauds nor the absence of fraudulent conduct can defeat plaintiff’s claim. *Id.* at 224-25.

These elements are satisfied where an employee can demonstrate that the employer should reasonably have expected the employee to consider the employee manual as a commitment from the employer to follow the termination procedures, that the employee reasonably relied on the termination procedures to his detriment, and that injustice can be avoided only by enforcement of the termination procedures. *Cont'l Air Lines, Inc.*, 731 P.2d at 712.

B. Fraud

No Colorado court has squarely addressed the issue of fraud arising out of an oral employment agreement. *But see Chidester*, 859 P.2d at 228 (fraud claim barred by statute of limitations).

C. Statute of Frauds

Statute of frauds applies only to employment contracts which are by their terms impossible of performance in one year. *Woodall v. Davis-Creswell Mfg. Co.*, 48 P. 670, 671 (Colo. App. 1897); *see also Kuhlmann v. McCormack*, 180 P.2d 863, 864 (Colo. 1947). However, an employee’s full or partial performance of an oral agreement, when done in reasonable justifiable reliance thereon, is sufficient to overcome a statute of frauds defense. *Keily v. St. Germain*, 670 P.2d 764, 769 (Colo. 1983). The Colorado Supreme Court approved the following equitable balancing test in Section 139 of the Restatement (Second) of Contracts:

§ 139 Enforcement by Virtue of Action in Reliance

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:

- (a) the availability and adequacy of other remedies, particularly cancellation and restitution;
- (b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
- (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
- (d) the reasonableness of the action or forbearance;
- (e) the extent to which the action or forbearance was foreseeable by the promisor.

Id. at 769.

VI. DEFAMATION

A. General Rule

“A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Pittman v. Larson Distributing Co.*, 724 P.2d 1379, 1387 (Colo. App. 1986) (citing Restatement (Second) of Torts §559; *Burns v. McGraw-Hill Broad. Co., Inc.*, 659 P.2d 1351, 1357 (Colo. 1983)).

1. Libel

“A libelous publication is one which charges or imputes to any person that which renders him liable to punishment; or, which is calculated to make him the subject of hatred, odium, contempt or ridicule.” *Republican Pub. Co. v. Miner*, 34 P. 485, 488 (Colo. App. 1893) (citing *Republican Pub. Co. v. Mosman*, 24 P. 1051, 1054 (Colo. 1890)).

Colorado provides a cause of action for either libel *per se* or libel *per quod*. CJI-Civ. 22:4; CJI-Civ. 22:5.

Libel may be defamatory *per se* when the statements are recognized as inherently injurious to reputation.” *Denver Publ’g Co. v. Bueno*, 54 P.3d 893, 898 (Colo. 2002) (citing William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 417 (1960)).

Before a Plaintiff can recover on a cause of action for libel *per se* the court must make an initial determination:

- (a) whether the statement was libelous *per se* (defamatory on its face and about the plaintiff); and
- (b) at the time of the alleged publication, the plaintiff was a private person and the statement pertained to a private matter as distinguished from a matter of public interest or general concern. See Notes on Use, n. 3, CJI Civ. 22:4.

The determination as to whether the statement was actually made or if the defendant has proven his affirmative defense is made by the jury. CJI-Civ. 22:4.

“Statements are defamatory *per quod* when extrinsic facts are necessary to illustrate their libelous nature by way of innuendo.” *Denver Publ’g Co.*, 54 P.3d at 898. Before a plaintiff can recover on a cause of action for libel *per quod*, the court makes an initial determination:

(a) the statement was not libelous *per se* (because extrinsic evidence was required to show either how the statement could be taken as being ‘of and concerning’ the plaintiff or how it could be defamatory of the plaintiff, or is an oral statement not within the *per se* categories), (b) that the statement is capable of bearing a defamatory meaning, and (c) that at the time of the alleged publication the plaintiff was a private person and the statement pertained to a private matter as distinguished from a matter of public interest or general concern. *See* Notes on Use, n. 1, CJI-Civ. 22:5.

2. Slander

As with libel, Colorado recognizes slander *per se* and slander *per quod*. CJI-Civ. 22:4; CJI-Civ. 22:5.

Elements of a cause of action for slander *per se* are: “(1) an oral statement, (2) published to a third party, (3) which is defamatory of the plaintiff’s trade, business, or profession, and (4) requires no extrinsic evidence to show how it might be taken as concerning the plaintiff or defaming him in his trade or business.” *Pittman*, 724 P.2d at 1387 (citing *Bernstein v. Dun & Bradstreet, Inc.*, 368 P.2d 780, 783-84 (Colo. 1962); *Dorr v. C.B. Johnson, Inc.*, 660 P.2d 517, 519 (Colo. App. 1983)).

“In an action by a private person plaintiff involving a statement which is not a matter of public interest or general concern, a claim for slander *per se* does not require proof of damages; they are presumed.” *Id.* (citing *Diversified Mgmt., Inc., v. Denver Post, Inc.*, 653 P.2d 1103, 1109 (Colo. 1982); *Rowe v. Metz*, 579 P.2d 83, 84 (Colo. 1978)).

A statement is defamatory *per quod* if it requires innuendo or extrinsic evidence to establish its defamatory nature. *Keohane v. Wilkerson*, 859 P.2d 291, 301 (Colo. App. 1993). A plaintiff asserting a claim of slander *per quod* must also plead and prove special damages. *Id.* “A finding that a statement is defamatory *per quod* must be predicated on the context of the entire statement and the common meaning of the words utilized.” *Id.* at 301-02.

B. References

Colorado employers have the following qualified and limited statutory privilege with respect to providing references for current or former employees:

Any employer who provides information about a current or former employee’s job history or job performance to a prospective employer of the current or former employee upon request of the prospective employer or the current or former employee is immune from civil liability and is not liable in civil damages for the disclosure or any consequences of the disclosure. This immunity shall not apply when such employee shows by a preponderance of the evidence both of the following: (a) The information disclosed by the current or

former employer was false; and (b) the employer providing the information knew or reasonably should have known that the information was false.

C.R.S. § 8-2-114(3).

As specifically defined in the statute, “‘job performance’ means [t]he suitability of the employee for reemployment; [t]he employee’s work-related skills, abilities and habits as they may relate to suitability for future employment; and [i]n the case of a former employee, the reason for the employee’s separation.” C.R.S. § 8-2-114(1). The qualified privilege set forth in C.R.S. § 8-2-114(3) applies to “any employee, agent, or other representative of the current or former employer who is authorized to provide and who provides information in accordance with this section.” C.R.S. § 8-2-114(4).

C. Privileges

Although the qualified privilege extends to communications regarding an employee’s discipline and ultimate termination, statements regarding termination may still satisfy the publication requirement in a defamation lawsuit. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1343 (Colo. 1988) (certain foreseeable “self-publication” can impose responsibility for publication on an originator, when the originator of the defamatory statement has reason to believe the person defamed will be under strong compulsion to disclose contents of defamatory statement to third party).

A qualified privilege may also exist for those communications made by a “party with a legitimate interest to persons having a corresponding interest and communications promoting legitimate individual, group, or public interests.” *Dominquez v. Babcock*, 727 P.2d 362, 365 (Colo. 1986) (citing *Coopersmith v. Williams*, 468 P.2d 739, 741 (Colo. 1980)).

In *Dominquez*, the university did not renew a professor’s employment contract after numerous faculty members forwarded a memorandum outlining deficiencies in his performance. *Id.* at 363-64. The Colorado Supreme Court affirmed the decision holding the memorandum was subject to a qualified privilege “because it was published by persons having a common interest in the subject matter to persons sharing that interest.” *Id.* at 365. The Supreme Court relied on Section 596 of the Restatement (Second) of Torts, which provides: “an occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know.” *Id.* (citing Restatement (Second) of Torts, § 596 (1977)).

The Colorado Supreme Court reiterated that Colorado case law has “extended a qualified privilege to communications by a party with a legitimate interest to persons having a corresponding interest and communications promoting legitimate individual, group, or public interests. *Id.* (citing *Coopersmith*, 468 P.2d at 741; *Denver Pub. Warehouse Co. v. Holloway*, 83 P. 131, 133 (Colo. 1905)). “In balancing the interest of the defamed person in the protection of his reputation against the interest of the publisher, third persons, and the public in allowing the publication, we believe that the publication in this case is subject to a qualified privilege because the interest in employee and peer comment to supervisors concerning rehiring are of sufficient importance to require fault greater than negligence.” *Id.* at 366 (citing Restatement (Second) of Torts (1977), § 596, cmt. b).

D. Other Defenses

1. Truth

Substantial truth is an absolute defense to a defamation claim. *Lindemuth v. Jefferson Cnty. Sch. Dist. R-1*, 765 P.2d 1057, 1058 (Colo. App. 1988); Restatement (Second) of Torts § 652(d) cmt. B; *see also Churchey*, 759 P.2d at 1341 (citing Colo. Const. art. II, § 10; C.R.S. §13-25-125 (1987)). It is not necessary for every word to be true, rather, a statement is substantially true if “the substance, the gist, [or] the sting” of the statement is true. *Gomba v. McLaughlin*, 504 P.2d 337, 339 (Colo. 1973).

2. No Publication

Colorado codified the publication requirement in C.R.S. § 13-25-125.5. “Publication of a defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.” *Card v. Blakeslee*, 937 P.2d 846, 850 (Colo. App. 1996) (citing Restatement (Second) of Torts § 577 (1977)).

3. Self-Publication

In *Churchey*, the Colorado Supreme Court recognized an employer’s potential liability for an employee’s self-publication of statements related to the reasons for her discharge. 759 P.2d at 1343. The employee was terminated for “dishonest reasons” that were communicated among her supervisors. *Id.* She claimed injury because she had to “self-publish” the reason for her termination to prospective employers. *Id.*

The Colorado General Assembly subsequently enacted C.R.S. § 13-25-125.5, which provided for absolute immunity against self-publication, as follows:

No action for libel or slander may be brought or maintained unless the party charged with such defamation has published, either orally or in writing, the defamatory statement to a person other than the person making the allegation of libel or slander. Self-publication, either orally or in writing, of the defamatory statement to a third person by the person making such allegation shall not give rise to a claim for libel or slander against the person who originally communicated the defamatory statement.

This statute was applied by the Colorado Court of Appeals in *Card v. Blakeslee*, 937 P.2d 846 (Colo. App. 1996), affirming summary judgment in favor of a therapist on the grounds that the plaintiff failed to rebut evidence that the therapist did not author the letters that were the subject of the defamation claim.

4. Invited Libel

There are no pertinent Colorado decisions addressing the defense of invited libel to an action for defamation. However, “the consent of another to the publication of defamatory matter concerning him is a complete defense to his actions for defamation.” *Dominguez v. Babcock*, 727 P.2d 362, 364 (Colo. 1986) (citing *Melcher v. Beeler*, 110 P.181 (Colo. 1910)); Restatement (Second) of Torts, §583 (1977). As used in Section 583, “consent” means a willingness in fact for conduct to occur. *Id.*

5. Opinion

Colorado follows the reasoning in the United States Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that some expressions of opinion are entitled to constitutional protection. *Burns*, 659 P.2d at 1358; *see also Bucher v. Roberts*, 595 P.2d 239, 241 (Colo. 1979).

In *Burns*, the plaintiff and her children brought suit alleging defamation for a news report published by McGraw-Hill stating they "deserted" their husband and father after he was badly injured by an on the job explosion. 659 P.2d at 1354. The defendant argued that the term "deserted" was a constitutionally protected opinion. *Id.* The jury disagreed and awarded the plaintiffs compensatory damages which were subsequently reduced by the trial court. *Id.*

On appeal from a reversal by the Colorado Court of Appeals, the Colorado Supreme Court reiterated its prior holding in *Bucher* that whether or not statements are constitutionally protected "opinion" should be narrowly construed. *Id.* at 1358 (citing *Bucher*, 595 P.2d at 241). The Supreme Court referred to the Restatement (Second) of Torts § 566 (1976), which contained important limitations on the scope of a protected opinion. *Burns*, 659 P.2d at 1358. "[A] plaintiff may recover in defamation if the expressed opinion is based on undisclosed or assumed defamatory facts of which the listener is unaware. The opinion must appear reasonably to the listener to be based on defamatory facts which the reporter has not disclosed to the audience but which the audience can reasonably expect to exist." *Id.* (citing *Orr v. Argue-Press Co.*, 586 F.2d 1108 (6th Cir.1978); *Ollman v. Evans*, 479 F. Supp. 292 (D.D.C. 1979); *Beckman v. Dunn*, 419 A.2d 583 (Pa. 1980)).

To aid in the determination of whether the opinion is actionable as defamation, the *Burns* court approved the following three-part analysis, used to examine when speech which might be considered protected opinion is at issue:

First, whether the statement complained of is cautiously phrased in terms of apparenacy. For example, the use of 'in my opinion,' while not determinative, may provide the reasonable listener with grounds to discount that which follows. Second, the entire published statement must be examined in context, not just the objectionable word or phrase. Third, all the circumstances surrounding the statement, including the medium through which it is disseminated and the audience to whom it is directed, should be considered.

Burns, 659 P.2d at 1360 (internal quotations and citation omitted).

E. Job References and Blacklisting Statutes

Colorado has codified prohibitions on both the maintenance and the use of blacklists and has adopted criminal penalties for violations. C.R.S. § 8-2-111.7(1). C.R.S. § 8-2-110 provides:

No corporation, company, or individual shall blacklist, or publish, or cause to be blacklisted or published any employee, mechanic, or laborer discharged by such corporation, company, or individual, with the intent and for the purpose of preventing such employee, mechanic, or laborer from engaging in or securing similar or other employment from any other corporation, company, or individual.

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Violating the prohibition against blacklisting can result in the imposition of a misdemeanor, imprisonment, and fine. C.R.S. § 8-2-111; *see also Pittman*, 724 P.2d at 1384.

The Colorado Court of Appeals justifies the prohibition against blacklisting by comparing it to a form of coercion. In *Pittman*, the court of appeals held that, “[t]he threat of blacklisting an employee in an industry is a form of coercion that constitutes duress as a matter of law, and formation of an employment contract under such duress is ineffective.” *Id.* at 1384 (citing *Mayerson v. Washington Mfg. Co.*, 58 F.R.D. 377 (E.D. Pa. 1972) (citing Restatement of Contracts § 493 (1932))).

F. Non-Disparagement Clauses

No Colorado court addressed the propriety of non-disparagement clauses within the context of employment agreements to date.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotion distress is also known as outrageous conduct. The elements of outrageous conduct are: “(1) the defendant engaged in extreme and outrageous conduct, (2) recklessly or with the intent of causing the plaintiff severe emotional distress, and (3) causing the plaintiff severe emotional distress.” *Green v. Qwest Serv. Corp.*, 155 P.3d 383, 385 (Colo. App. 2006).

The question whether conduct is outrageous is generally one of fact to be determined by a jury. *McCarty v. Kaiser-Hill Co., LLC*, 15 P.3d 1122, 1126 (Colo. App. 2000). Nonetheless, before a claim of outrageous conduct may be submitted to a jury, the court must rule on the threshold issue of whether the plaintiff has alleged conduct that is outrageous as a matter of law. *Green*, 155 P.3d at 385. Whether reasonable persons could differ on the outrageousness of conduct is a question of law. *Id.*

In Colorado, the threshold to create liability for intentional infliction of emotional distress is extremely high. *Id.* Liability has been found only where the conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Id.*

For example, in *Coors Brewing Co. v. Floyd*, the Colorado Supreme Court determined that, even assuming the employer engaged in an extensive criminal conspiracy involving illegal drugs and money laundering, which the plaintiff participated in, and terminated the plaintiff in order to escape liability, the plaintiff failed to sufficiently state a claim for intentional infliction of emotional distress. 978 P.2d 663, 666 (Colo. 1999). The court reasoned that the employer’s alleged criminal conduct to society was not relevant and that no reasonable person could find that Coors’s alleged scapegoating of the plaintiff arose to the high level of outrageousness required by our case law. *Id.*

Furthermore, the “mere firing an employee, without more, is not enough to support a claim of outrageous conduct.” *Bigby v. Big 3 Supply Co.*, 937 P.2d 794, 800 (Colo. App. 1996) (citing *Grandchamp v. United Airlines, Inc.*, 854 F.2d 381 (10th Cir. 1988)). Additionally, “while an employer may be aware that firing an employee could cause emotional distress, an employer who is legally entitled to fire an employee will not be held liable for any emotional distress incidental to that discharge.” *Id.* at 800 (citing Restatement (Second) of Torts § 46 cmt. g (1965)). However, an action in tort may lie when an employer,

intending to cause emotional distress, fires an employee in a manner specifically calculated to cause emotional distress. *Id.* (citing *Churchey*, 759 P.2d at 1350).

B. Negligent Infliction of Emotional Distress

To establish negligent infliction of emotional distress, a plaintiff must show that defendant's negligence subjected her to an unreasonable risk of bodily harm and caused her to be put in fear for her own safety, plaintiff's fear was shown by physical consequences or long-continued emotional disturbance, and plaintiff's fear was the cause of the damages she claimed. *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89, 93 (Colo. App. 1997) (citing *Towns v. Anderson*, 195 Colo. 517, 579 P.2d 1163 (Colo. 1978)).

Thus, where a plaintiff-employee's loss was purely economic, she cannot recover in negligence for emotional distress because they were not subject to an unreasonable risk of bodily harm. *Chellsen*, 857 P.2d at 477. "[T]he fact that an employer may know or reasonably expect the termination of an at-will employee to cause emotional distress does not impose upon the employer a legal duty to refrain from firing employees." *Bigby*, 937 P.2d at 801 (citing *Wing v. JMB Prop. Mgmt. Corp.*, 714 P.2d 916, 918 (Colo. App. 1985) (affirming dismissal of claim for negligent termination); *Chellsen v. Pena*, 857 P.2d 472, 477 (Colo. App. 1992) (termination of employment should not be translated into a tort in order to avoid an obstacle to recovery on a contract theory). Further, an action for negligent infliction of emotional distress cannot be premised solely upon a violation of the Colorado Anti-Discrimination Act, which is discussed in greater detail under Section XIII. *Bigby*, 937 P.2d at 801.

VIII. PRIVACY RIGHTS

A. Generally

The right to privacy protects "the individual interest in avoiding disclosure of personal matters." *Corbetta v. Albertson's, Inc.*, 975 P.2d 718, 720 (Colo. 1999) (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)); see also *Martinelli v. Denver Dist. Court*, 612 P.2d 1083, 1091 (Colo. 1980). In Colorado, invasion of privacy encompasses three separate torts: (1) unreasonable intrusion upon the seclusion of another (seclusion); (2) unreasonable publicity given to another's private life (disclosure); and (3) appropriation of another's name or likeness (appropriation). *Pearson v. Kancilia*, 70 P.3d 594, 598-99 (Colo. App. 2003) (reversed on other grounds by *Kancilia v. Pearson*, 187 P.3d 542 (Colo. 2008)) (citing *Denver Publ'g Co.*, 54 P.3d at 897); see also *Martinelli*, 612 P.2d at 1091 (right of action for invasion of privacy can be raised as "right to confidentiality," and "power to control what we shall reveal about our intimate selves, to whom, and for what purpose").

To prevail on a claim of unreasonable intrusion upon the seclusion of another, "a plaintiff must show that another has intentionally intruded, physically or otherwise, upon the plaintiff's seclusion or solitude, and that such intrusion would be considered offensive by a reasonable person." *Pearson*, 70 P.3d at 599 (quoting *Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060, 1065 (Colo. App. 1998)). In *Pearson*, the plaintiff's employer intruded on his employee's seclusion when he allegedly went to the employee's home for the purpose of engaging in sex and she did so because she felt she had no choice and feared losing her job. *Id.* at 596.

An employee has a right to privacy concerning public disclosure of private facts. *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 377 (Colo. 1997) (employee whose manager disclosed to the entire firm that the employee had to undergo testing for the human immunodeficiency virus asserted a claim for

invasion of privacy recognized by Colorado law). Colorado recognizes a tort claim for invasion of privacy in the nature of unreasonable publicity given to one's private life. *Id.* In order to prevail on such a claim, the following requirements must be met: (1) the fact or facts disclosed must be private in nature; (2) the disclosure must be made to the public; (3) the disclosure must be one which would be highly offensive to a reasonable person; (4) the fact or facts disclosed cannot be of legitimate concern to the public; and (5) the defendant acted with reckless disregard of the private nature of the fact or facts disclosed. *Id.* The public disclosure element "requires communication to the public in general or to a large number of persons rather than to just one individual or a few." *Id.* at 379.

The fourth element incorporates the First Amendment privilege for matters of public or general concern. *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 307 (10th Cir. 1981). Thus, where the publicized facts are "plausibly" relevant to a matter of legitimate public interest, a claim cannot be based thereon. *Id.* at 308. This is the case even where the publicized information is embarrassing. *Id.* Even with the passage of time, information within the public domain does not become private, nor is the legitimate public interest in the issue erased. *Id.* at 1059; *Lindemuth*, 765 P.2d at 1059.

Colorado also recognizes the tort of invasion of privacy by appropriation of another's name or likeness. *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995, 997 (Colo. 2001). A plaintiff's claim of invasion of privacy by appropriation of her name and likeness will not succeed, however, if the defendant's use of the plaintiff's name and likeness is privileged under the First Amendment. *Id.*

The elements of an invasion of privacy by appropriation claim are: (1) the defendant used the plaintiff's name or likeness; (2) the use of the plaintiff's name or likeness was for the defendant's own purposes or benefit, commercially or otherwise; (3) the plaintiff suffered damages; and (4) the defendant caused the damages incurred. *Id.* at 1000.

A First Amendment privilege permits the use of a plaintiff's name or likeness when that use is made in the context of, and reasonably relates to, a publication concerning a matter that is newsworthy or of legitimate public concern. *Id.* at 1003. To resolve this question, courts must determine whether the character of the publication is primarily noncommercial, in which case the privilege will apply, or primarily commercial, in which case the privilege will not apply. *Id.* Commercial speech is speech that proposes a commercial transaction. *Id.* at 1004. It is the content of the speech, not the motivation of the speaker, which determines whether particular speech is commercial. *Id.* The publication of a plaintiff's name and likeness in connection with a truthful article regarding the plaintiff's felony conviction is privileged. *Id.*

Effective July 1, 2014, an employer is statutorily prohibited from using consumer credit information for employment purposes unless the information is substantially related to the employee's current or potential job. C.R.S. § 8-2-126(3). Employers may require an employee to consent to a request for a credit score only under the exceptions set forth in C.R.S. § 8-2-126(3).

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

Under federal law, employers may not hire an unauthorized alien. Pursuant to C.R.S. § 24-21-112(2), the Colorado Secretary of State is required to post on its website "information pertaining to the prohibition against hiring or continuing to employ an unauthorized alien, as defined in 8 U.S.C. sec. 1324a

(h) (3), and the availability of and the requirements for participation in the electronic verification program as a means for employers to verify the work eligibility status of new employees.” This statute also requires that the web site “provide a link to the e-verify web site available through the internet portal for the United States citizenship and immigration services, or its successor agency.” *Id.* Under this statute, an employer is defined as “a person transacting business in Colorado who, at any time, employs another person to perform services of any nature and who has control of the payment of wages for such services or is the officer, agent, or employee of the person having control of the payment of wages.” C.R.S. § 24-21-112(1); *see also* C.R.S. § 8-2-124 (concerning definitions for the electronic verification program, availability, notice to employers and definitions).

2. Background Checks

Colorado law prohibits employers with 11 or more employees from: (1) stating in an advertisement for an employment position that a person with a criminal history may not apply; (2) stating in an employment application that a person with a criminal history may not apply; or (3) inquiring into, or requiring disclosure of, an applicant’s criminal history on an initial employment application. C.R.S. § 8-2-130(3). These provisions will apply to all employers, regardless of size, beginning September 1, 2021. An employer may still obtain the publicly available criminal background report of an applicant at any time. *Id.*

These requirements do not apply state or local governments or to any quasi-governmental entity or political subdivision of the state. *Id.* § 130(2)(c)(II). The requirements also do not apply if: (1) federal, state, or local law or regulation prohibits employing a person with a specific criminal history in the subject position; (2) the position is part of a government program to encourage employment of people with criminal histories; or (3) the employer is required by law to conduct a criminal history check for the subject position. *Id.* §130(4).

This statute defines “employer” broadly, as “a person that regularly engages the services of individuals to perform services of any nature.” *Id.* § 130(2)(c)(I). No Colorado courts have construed this statute yet, but the broad definition of “employer” suggests the statute applies to the hiring of both employees and independent contractors. “Employer” is also defined to include “[a]n agent, representative, or designee of an employer” and an employment agency. *Id.* § 130(2)(c)(I)(A-B).

Violations of the statute are investigated by the Colorado Department of Labor and may be punished by civil penalties of up to \$2,000.

C. Other Specific Issues

1. Workplace Searches

The U.S. Supreme Court found that employees may possess little or no expectation of privacy from their employer, but may still maintain a reasonable expectation of privacy from government intrusion. *People v. Galvado*, 103 P.3d 923, 932 (Colo. 2005). The protection afforded by the Fourth Amendment is not limited to houses and extends beyond the home and may be asserted in the workplace. *Id.* at 928. The reasonable expectation test is applied to determine whether a person’s privacy interests are protected from government intrusion as afforded by the Fourth Amendment. *Id.* at 929. “Judicial review of Fourth Amendment standing is made on a case-by-case basis, looking to the totality of circumstances to determine if the defendant maintained a reasonable expectation of privacy in the place searched.” *Id.* at 930 (citations omitted). In *Galvado*, an employee of a liquor store had a reasonable

expectation of privacy from government intrusion in the back room of the store despite the surveillance camera in that room and, thus, the suppression of evidence from the back room under the Fourth Amendment was proper. *Id.* at 935.

2. Electronic Monitoring

Colorado courts have not addressed the extent to which employers may engage in electronic monitoring of their employees' actions.

However, to avoid criminal liability, a Colorado employer must give reasonable notice to its employees and the public if their telephone calls are being monitored. *See People v. McCauley*, 561 P.2d 335, 336 (Colo. 1977); C.R.S. § 18-9-305(1). The fact that a person is acting as an employee of another constitutes no defense in a criminal prosecution where the individual charged intentionally violated the law. *McCauley*, 561 P.2d at 337.

In *Everitt Lumber Co. v. Indus. Comm'n*, 565 P.2d 967, 969 (Colo. App. 1977), two Colorado employees were terminated after they refused to take a polygraph examination requested by the company and refused to execute a written waiver of their Fifth Amendment rights concerning the results of the polygraph examination. The Court of Appeals held that a full award of unemployment benefits was warranted because invoking the protections of the Fifth Amendment may not be used as the basis for denying benefits. *Id.*

Federal law regulates an employer's ability to administer polygraph tests to its employees. *See* Employee Polygraph Protection Act, 29 U.S.C. §§ 2001 to 2009 (2006).

As to emails, the Colorado Supreme Court determined Colorado's Open Records Act did not require the government to make public several explicit emails and other electronic communications recovered from the computers of two government employees. *Denver Publ. Co. v. Bd. of County Comm'rs of County of Arapahoe*, 121 P.3d 190, 191-92 (Colo. 2005). The Colorado Supreme Court based its decision entirely upon terminology used in the Open Records Act, expressly declining to analyze the issue as a constitutional privacy concern. *Id.* at 194; see also *In re: Bd. of C'ty Comm'rs*, 95 P.3d 593, 599-600 (Colo. App. 2003) (reversed in part on other grounds by *Denver Publ. Co.*, 121 P.3d at 190) (analyzing case in terms of constitutional privacy concerns outlined in *Martinelli*, 612 P.2d at 1091, and determining that state employees had limited expectation of privacy because employees may assume that telephone conversations and electronic messages are recorded and will be released in least intrusive manner possible).

3. Social Media

In 2013, the Colorado General Assembly enacted C.R.S. § 8-2-127 concerning employer access to personal information through electronic communication devices. The statute prohibits, among other things, an employer from suggesting, requesting, requiring, or causing an employee or applicant for employment to disclose a username, password, or other means for accessing a personal account or service through an electronic communications device. The statute also prohibits an employer from compelling an employee or applicant to add anyone, including the employer, to the employee's or applicant's list of contacts associated with a social media account or from requiring, requesting, suggesting, or causing an employee or applicant to change a privacy setting. The statute does not apply to non-personal accounts or services that provide access to the employer's internal computers or

information systems. The statute also prohibits an employer from discharging, disciplining, penalizing, or refusing to hire an employee or applicant who does not provide access to personal accounts or services.

4. Taping of Employees

In Colorado, it is prohibited wiretapping under the criminal code for someone to record a phone or electronic communication without the consent of either the sender or receiver of the conversation. C.R.S. § 18-9-303.

5. Release of Personal Information on Employees

As discussed above, an employee has a right to privacy concerning public disclosure of private facts. *Robert C. Ozer, P.C.*, 940 P.2d at 377. The right of privacy includes the right to control personal information. *Slaughter*, 107 P.3d at 1169. Personnel records are treated as confidential. *Corbetta*, 975 P.2d at 720.

Personnel files of public employees fall within an exception to the Colorado Open Records Act (CORA) and are not subject to disclosure under this Act. *Daniels v. City of Commerce City*, 988 P.2d 648, 651 (Colo. App. 1999) (citing C.R.S. § 24-72-204(3)(a)(II)(A) (1998)). CORA defines “personnel files” to include “home addresses, telephone numbers, financial information, and other information maintained because of the employer-employee relationship, and other documents specifically exempt from disclosure under this part 2 or any other provision of law.” C.R.S. § 24-72-202(4.5). However, a public entity may not restrict access to information by merely placing a record in a personnel file; a legitimate expectation of privacy must exist. C.R.S. § 24-72-204(3)(a)(II)(A). Thus, where the records requested were not contained within any specific personnel file, the trial court properly refused to apply the exception. *Daniels*, 988 P.2d at 651

To the extent employers are faced with discovery requests or subpoenas seeking personnel files, trial courts should apply the following comprehensive framework to all discovery requests implicating the right to privacy, such as requests for personnel files and income documents:

The party requesting the information must always first prove that the information requested is relevant to the subject of the action. Next, the party opposing the discovery request must show that it has a legitimate expectation that the requested materials or information is confidential and will not be disclosed. If the trial court determines that there is a legitimate expectation of privacy in the materials or information, the requesting party must prove either that disclosure is required to serve a compelling state interest or that there is a compelling need for the information. If the requesting party is successful in proving one of these two elements, it must then also show that the information is not available from other sources. Lastly, if the information is available from other sources, the requesting party must prove that it is using the least intrusive means to obtain the information.

Judd v. Cedar St. Venture (In Re: District Court, City and County of Denver), 256 P.3d 687, 691-92 (Colo. 2011).

6. Medical Information

The physician-patient relationship is one of the “particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate” and which is protected by C.R.S. § 13-90-107. This statute generally provides that certain medical professionals may not be examined without the consent of the patient “as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient.” C.R.S. § 13-90-107(1)(d).

When an employee is injured on the job, the filing of a claim for compensation is deemed to be a limited waiver of the doctor-patient privilege to persons who are necessary to resolve the claim. C.R.S. § 8-47-203(1).

Drug screenings and tests performed as condition of employment are not medical records where the tests are not conducted for the patient in course of treatment. *People v. Palomo*, 31 P.3d 879, 883 (Colo. 2001).

IX. WORKPLACE SAFETY

In *Canape v. Petersen*, 897 P.2d 762, 767 (Colo. 1995), the Colorado Supreme Court held that the Occupational Safety and Health Act (“OSHA”) regulations do not create a private cause of action and therefore a plaintiff could not establish a negligence *per se* claim by alleging a defendant violated an OSHA regulation.

In a negligence action, however, evidence of an OSHA violation is admissible as some indication of the standard of care with which a reasonable person in the defendant's position should comply. *Scott v. Matlack, Inc.*, 39 P.3d 1160, 1169-70 (Colo. 2002).

A. Negligent Hiring

Colorado recognizes the tort of negligent hiring. *Connes v. Molalla Trans. Sys., Inc.*, 831 P.2d 1316, 1321 (Colo. 1992). Negligent hiring cases are complex because:

[T]hey involve the employer’s responsibility for the dangerous propensities of the employee, which were known or should have been known by the employer at the time of hiring, gauged in relation to the duties of the job for which the employer hires the employee. The employee’s later intentional or non-intentional tort is the predicate for the plaintiff’s action against the employer, so proof in the case involves both the employer’s and the employee’s tortious conduct.

Raleigh v. Performance Plumbing and Heating, Inc., 130 P.3d 1011, 1016 (Colo. 2006).

In *Raleigh*, Plaintiffs filed suit against an employer arising out of an accident with an employee who was commuting home after work. *Id.* at 1015. The Colorado Supreme Court concluded the

employer's duty extended only to those members of the public exposed to the employee's unsafe driving in the performance of his job duties. *Id.* at 1018. The Court explained:

The lesson to be learned from a successful negligent hiring suit is that the employer should not have hired the employee in light of that person's dangerous propensities or, having hired him or her, must exercise that degree of control over the employee necessary to avert that employee from injuring persons to whom the employer owed the duty of care when making the hiring decision. But, '[a] negligence claim against an employer will fail if it is based on circumstances in which the employer owed no duty of care.'

Id. at 1016 (citing John R. Paddock, Jr., *Colorado Employment Law and Practice*, § 14.21 at 913 (2005)).

The scope of the employer's legal duty is based upon the employer's actual knowledge at the time of hiring or reason to believe that the person being hired, by reason of some attribute of character or prior conduct, would create an undue risk of harm in carrying out his or her employment responsibilities. *Id.* The foreseeability of harm to the plaintiff is a prime factor in the duty analysis. *Id.* A court should also weigh the social utility of the defendant's conduct, the magnitude of the burden of guarding against the harm caused to the plaintiff, the practical consequences of placing such a burden on the defendant, and any additional elements disclosed by the particular circumstances of the case; no one factor is controlling. *Id.* The question whether a duty should be imposed in a particular case is essentially one of fairness under contemporary standards – whether reasonable persons would recognize a duty and agree that it exists. *Id.* The employer's duty to members of the public in both negligent hiring and negligent supervision cases stems from the principle that the employer receives benefits from having customers and business invitees and incurs responsibilities to them. *Id.* at 1017.

When the duties of the job will bring the employee into frequent contact with members of the public, or will involve close contact with particular individuals as a result of a special relationship between such persons and the employer, some courts have expanded the employer's duty and have required the employer to go beyond the job application and make an independent inquiry into the applicant's background. However, when the employment calls for incidental contact between the employee and other persons, there may be no reason for an employer to conduct any investigation of the applicant's background beyond obtaining past employment information and personal data during the application process. *Id.* at 1016-17. Thus, employers of commercial drivers have a duty to investigate an applicant's driving record, in addition to what is provided in response to application questions or an employment interview. *Id.* at 1017.

The tort of negligent hiring is independent of a respondeat superior theory; under appropriate circumstances, this tort may apply to impose liability even though the employee is acting outside the scope of the employment. *Connes*, 831 P.2d at 1320-21. However, the tort of negligent hiring does not function as an insurance policy for all persons injured by persons an employer hires. *Id.* at 1321.

B. Negligent Supervision /Retention

Colorado courts treat claims for negligent supervision and negligent retention the same. See *Valles v. Gen-X Echo B, Inc.*, 2013 U.S. Dist. LEXIS 155630, *22, n. 1 (D. Colo. Oct. 8, 2013) (reporter

citation unavailable)(citing *Van Osdol v. Vogt*, 892 P.2d 402 (Colo. App. 1994)(state court appears to treat "negligent supervision" and "negligent retention" as the same claim).

To prove negligent supervision, a plaintiff must prove (1) the defendant owed the plaintiff a legal duty to supervise others; (2) the defendant breached that duty; and (3) the breach of the duty caused the harm that resulted in damages to the plaintiff. *Kelle r v. Ko ca*, 111 P.3d 445, 447 (Colo. 2005).

An employer "who knows or should have known that an employee's conduct would subject third parties to an unreasonable risk of harm may be directly liable to third parties for harm proximately caused by his conduct." *Destefano v. Grabrian*, 763 P.2d 275, 288 (Colo. 1988) (adopting doctrine of negligent supervision in Colorado).

While the tort of negligent supervision applies to instances where the employee is acting outside his scope of employment, it does not extend to all acts undertaken by an employee that are actionable in tort. *Kelle r*, 111 P.3d at 448. Thus, the question of whether the employer owes a duty of care to the injured third party boils down to issues of knowledge and causation – whether the employee's acts are "so connected with the employment in time and place" such that the employer knows that harm may result from the employee's conduct and that the employer is given the opportunity to control such conduct. *Id.* at 448-49. There must be a connection between the employer's knowledge of the employee's dangerous propensities and the harm caused. *Id.* at 450.

However, Colorado courts do not embrace a theory of negligent supervision that would be an open invitation to sue an employer for the intentional torts of an employee founded upon a generalized knowledge of that employee's prior conduct. *Id.* at 450-51.

In a case of first impression, the Colorado Supreme Court recently examined the issue of whether a claim for negligent supervision must be dismissed where the employer admits to vicarious liability for an employee's alleged negligence. See *Ferrer v. Okbamicael*, 390 P.3d 836 (Colo. 2017) (modified and rehearing denied by *Ferrer v. Okbamicael*, 2017 Colo. LEXIS 256 (Colo. Mar. 27, 2017) (reporter citation unavailable)).

Prior to *Ferrer, supra*, other courts had addressed this issue and held that a plaintiff cannot maintain a direct claim for negligent supervision against an employer once the employer acknowledges respondeat superior liability for its employee's alleged negligence. See *Houlihan v. McCall*, 78 A.2d 661 (Md. 1951) (where an employer admits that the allegedly negligent employee acted as its agent, it is unnecessary to pursue an alternative theory of negligence against the corporate defendant such that evidence of a history of allegedly negligent conduct on the part of the employee may be excluded from trial); *Armenta v. Churchill*, 267 P.2d 303 (Cal. 1954) (same). The most frequently cited out-of-state case for this proposition is *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995) (adopting the "majority view" that once an employer admits respondeat superior liability for a driver's negligence, it is improper to allow a plaintiff to proceed against the employer on other theories of imputed liability such as negligent supervision or entrustment).

In *Ferrer*, the plaintiff was injured when a taxicab struck her as she crossed the street. The plaintiff filed suit against both the driver of the cab and the taxi company, seeking damages for the injuries she suffered in the collision. *Id.* She asserted claims against the driver for negligence and negligence *per se*. *Id.* She asserted claims against the taxi company under the doctrine of vicarious

liability/respondeat superior. She also asserted claims against the taxi company for direct negligence, specifically, negligence as a common carrier and negligent supervision/ entrustment. *Id.* In its amended answer to the complaint, the taxi company admitted that the driver was an employee acting within the scope of his employment at the time of the accident. *Id.*

The defendants then moved for partial judgment on the pleadings, seeking to dismiss the plaintiff's direct negligence claims against the taxi company. *Id.*

The trial court granted the defendants' motion, applying the rule articulated in *McHaffie, supra*, that an employer's admission of vicarious liability for an employee's negligence bars a plaintiff's direct negligence claims against the employer. The plaintiff subsequently petitioned for relief under C.A.R. 21, requesting that the Colorado Supreme Court vacate the trial court's order granting the defendants' motion for partial judgment on the pleadings and dismissing her direct negligence claims against the taxi company. *Id.* at 841.

The Colorado Supreme Court affirmed the trial court's order, and adopted the *McHaffie* rule, holding that "where an employer acknowledges vicarious liability for its employee's negligence, a plaintiff's direct negligence claims against the employer are barred." *Id.* at 841-42. The *Ferrer* Court reasoned that "where an employer has conceded it is subject to respondeat superior liability for its employee's negligence, direct negligence claims against the employer that are nonetheless still tethered to the employee's negligence become redundant and wasteful." *Id.* at 844. The *Ferrer* Court further explained: "Direct negligence claims provide an alternate means of recovery when vicarious liability is unavailable against an employer because the tortfeasor- employee was not acting within the scope of his employment at the time of his alleged negligence." *Id.*

C. Interplay with Worker 's Compensation Benefits

Where an employee fails to act safely, the employee's workers' compensation benefits will be reduced by 50% in the following circumstances:

- (a) Where injury is caused by the willful failure of the employee to use safety devices provided by the employer;
- (b) Where injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee; or...
- (c) Where the employee willfully misleads an employer concerning the employee's physical ability to perform the job, and the employee is subsequently injured on the job as a result of the physical ability about which the employee willfully misled the employer.

C.R.S. § 8-42-112(1).

D. Firearms in the Workplace

In Colorado, private employers may limit, restrict, or prohibit weapons in the workplace, including those brought to the workplace by individuals who have been issued a concealed weapon permit by the state. A permit to carry a concealed weapon does not authorize a person to bring a handgun into a place where carrying firearms is prohibited by federal law, into a public building with security personnel or electronic weapon screening permanently in place, or onto the property of an elementary, middle, junior high, or high school (unless stored in the individual's locked vehicle or permitted individual is a security officer employed or retained by a school district or charter school). C.R.S. § 18-12-214.

E. Use of Mobile Devices

There is no reported Colorado employment case law or statute concerning workplace safety and use of mobile devices. However, a person is prohibited from using a mobile device to text while driving. C.R.S. § 42-4-239(3).

X. TORT LIABILITYA. Respondeat Superior Liability

Colorado recognizes vicarious liability against an employer under respondeat superior based on the acts or omissions of the employee. *Sandoval v. Archdiocese of Denver*, 8 P.3d 598, 603 (Colo. App. 2000). It is a general rule of law that a master is liable in an action by a third party for any damages resulting from any act of his servant during the employment if the act is within the scope of the servant's employment. *Cooley v. Eskridge*, 241 P.2d 851, 855 (Colo. 1952). An employee is acting within the scope of his employment if he is doing the work assigned to him by his employer, or what is necessarily incidental to that work, or customary in the employer's business. *Destefano*, 763 P.2d at 284.

A “principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud.” *Grease Monkey Int’l v. Montoya*, 904 P.2d 468, 472 (Colo. 1995). Because the master's peculiar liability is based on the physical activities of servants, including their batteries, he is liable only if the servant's conduct was in some way caused by an intent to serve his employer's interests and connected with his authorized acts. *Id.* at 473.

Under the theory of respondeat superior, the question of whether an employee is acting within the scope of the employment is a question of fact. *N.J. Fid. & Plate Glass Ins. Co. v. Patterson*, 284 P. 334, 336 (Colo. 1929). If an employee commits an intentional tort solely for reasons that do not further his employer's business or cannot be considered a natural incident of employment, the employer cannot be vicariously liable. *Cooley*, 241 P.2d at 856. A finding that an employee is not negligent requires a finding that the employer is not legally responsible. *Gallegos v. City of Monte Vista*, 976 P.2d 299, 301 (Colo. App. 1998). Whether an individual is an employee (rather than an independent contractor) requires an expansive inquiry into the dynamics of the relationship between the putative employee and the employer. *W. Logistics, Inc. v. Indus. Claim Appeals Office*, 325 P.3d 550, 551 (Colo. 2014). Another

rationale for vicarious liability is the borrowed servant doctrine. *Kiefer Concrete, Inc. v. Hoffman*, 562 P.2d 745, 746 (Colo. 1977). Under this doctrine, a person or entity may be liable for negligent acts committed by someone employed by another person or entity. *Id.* For this doctrine to apply, the person or entity must have the employer's consent to supervise and control the employee and be in a position to do so. *Id.* In such circumstances, the employee is a "borrowed servant" and the "borrowing" person or entity may be liable for the employee's negligence. *Id.*

A designation of nonparty at fault based only on an employer's vicarious liability must fail; a named defendant cannot rely on the vicarious liability of a nonparty to establish the nonparty's fault. *Just in Case Bus. Lighthouse, LLC v. Murray*, 383 P.3d 1, 16 (Colo. App. July 18, 2013)(affirmed in part and reversed in part on other grounds in *Murray v. Just in Case Bus. Lighthouse, LLC*, 374 P.3d 443 (Colo. June 20, 2016)). Requiring a defendant to designate the underlying tortfeasor who breached a duty, rather than the nonparty who may be vicariously liable but did not breach a duty, furthers the notice function of C.R.S. § 13-21-111.5. *Id.* at 17.

B. Tortious Interference with Business/Contractual Relations

Colorado recognizes the tort of intentional interference with prospective business relations. *MDM Grp. Assocs., Inc. v. CX Reinsurance Co. Ltd.*, 165 P.3d 882, 886 (Colo. 2007) (citing *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 500 (Colo. 1995)); *Dolton v. Capitol Fed. Sav. & Loan Ass'n*, 642 P.2d 21, 22 (Colo. App. 1981).

In Colorado, "[w]hile the existence of an underlying contract is not required for this tort, there must be a showing of improper and intentional interference by the defendant that prevents the formation of a contract between the plaintiff and a third party." *MDM Grp. Assoc., Inc.*, 165 P.3d at 886 (citing *Omedelena v. Denver Options, Inc.*, 60 P.3d 717, 721 (Colo. App. 2002); *Wasalco, Inc. v. El Paso Cnty.*, 689 P.2d 730, 732 (Colo. App. 1984)); *see also Trimble v. City and Cnty. of Denver*, 697 P.2d 716, 726 (Colo. 1985) (citing Restatement (Second) of Torts §766 (1979)). In *Trimble*, the court held, "[a]n employer may sue an employee for tortious interference with contractual relations between the employer and other persons." 697 P.2d at 726 (superseded on other grounds by statute as explained in *Colo. DOT v. Brown Grp. Retail, Inc.*, 182 P.3d 687, 689-90 (Colo. 2008)).

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

There is a strong public policy against the enforcement of restrictive covenants in Colorado. *See Colorado Accounting Mach., Inc. v. Mergenthaler*, 609 P.2d 1125, 1126 (Colo. App. 1980). To be valid, non-compete agreements must fit within a statutory exception and be reasonable under the specific circumstances of the case. *Zeff, Farrington & Assocs., Inc. v. Farrington*, 449 P.2d 813, 814 (Colo. 1969).

In Colorado, enforcement of non-competition covenants is restricted by C.R.S. § 8-2- 113(2). This statute is intended to protect employees from noncompetition clauses except in carefully defined circumstances. *Colorado Accounting Machs.*, 609 P.2d at 1126. The statute provides that non-compete clauses are generally void, with the following exceptions:

Any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void, but this subsection shall not apply to:

- (a) Any contract for the purchase and sale of a business or the assets of a business;
- (b) Any contract for the protection of trade secrets;
- (c) Any contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years;
- (d) Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.

C.R.S. § 8-2-113(2)(a)-(d).

Covenants not to compete in connection with contracts for the purchase and sale of a business or the assets of a business are permitted. C.R.S. § 8-2-113(2)(a). When ancillary to the sale of a business, such covenants protect the buyer's right to enjoy the business' good will for which it paid. *Reed Mill & Lumber Co. v. Jensen*, 165 P.3d 733, 736 (Colo. App. 2006) (citing *Gibson v. Eberle*, 762 P.2d 777, 779 (Colo. App. 1988)). Good will "is an incident of a continuing business having a particular locality or name," and includes "the expectation of continued and repeated public patronage." *Id.* (quoting *Nat'l Propane Corp. v. Miller*, 18 P.3d 782, 786 (Colo. App. 2000)).

The statute provides an exception for management personnel. C.R.S. § 8-2-113(2)(d). The Colorado Court of Appeals interpreted this provision to include only "those persons who, while qualifying as 'professionals' and reporting to managers or executives, primarily serve as key members of the manager's or executive's staff in the implementation of management or executive functions." *Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, 842 (Colo. App. 2007).

A person who conducts or supervises a business is "management personnel." A person who supervises 50 employees in a division with a ten-million-dollar budget is "management personnel" and therefore falls under the management personnel exception, which is broader than covering merely a few key personnel. *DISH Network Corp. v. Altomari*, 224 P.3d 362, 366 (Colo. App. 2009). However, the management exception to the statutory limit on noncompetition clauses does not apply when an employee does not manage any other employees and there are three levels of management employees above the employee. *Atmel Corp. v. Vitesse Semiconductor Corp.*, 30 P.3d 789, 795 (Colo. App. 2001) (rev'd on other grounds, *Ingold v. Aimco/Bluffs, LLC*, 159 P.3d 116 (Colo. 2007)). Whether an employee was "executive and management personnel" or "professional staff to executive and management personnel" is a question of fact for the trial court. *Porter Indus., Inc. v. Higgins*, 680 P.2d 1339, 1342 (Colo. App. 1984).

The statute provides that any covenant not to compete provision of an employment, partnership, or corporate agreement between physicians that restricts the right of a physician to practice medicine upon termination of such agreement is void. C.R.S. § 8-2-113(3). The other provisions of such agreements are enforceable at law, "including provisions which require the payment of

damages in an amount that is reasonably related to the injury suffered by reason of termination of the agreement. *Wojtowicz v. Greeley Anesthesia Servs. P.C.*, 961 P.2d 520, 522 (Colo. App. 1997).

The exceptions to the general prohibition against covenants not to compete must be narrowly construed. See *Colo. Accounting Mach., Inc.*, 609 P.2d at 1125-26. The party seeking to enforce a restrictive covenant has the burden of proving that one of the exceptions applies. *Higgins*, 680 P.2d at 1342.

The intent of the statute is to preserve the requirement that non-competition covenants must be reasonable as to time and geographic scope. *Nutting v. RAM S.W., Inc.*, 106 F. Supp. 2d 1121, 1126 (D. Colo. 2000); *Nat'l Graphics Co. v. Dilley*, 681 P.2d 546, 547 (Colo. App. 1984). The test as to whether a covenant of this kind will be enforced by injunction hinges on a determination of the reasonableness of the restriction under all the facts and circumstances of each case. *Knoebel Mercantile Co. v. Siders*, 439 P.2d 355, 358 (Colo. 1968). The restrictions must not impose undue hardship, must be no wider than necessary to afford the required protection, and each case must stand on its own facts. *Id.* (citations omitted); see also *Nat'l Graphics Co.*, 681 P.2d at 547. For example, a noncompetition agreement perpetually limiting a swimming instructor's ability to train other instructors in the skill of teaching swimming to infants and children worldwide is unenforceable covenant. *Harvey Barnett, Inc. v. Shidler*, 143 F. Supp. 2d 1247, 1253-54 (D. Colo. 2001), but see *Gold Messenger v. McGuay*, 937 P.2d 907, 910 (Colo. App. 1997) (upholding three-year and fifty-mile non-compete covenant as reasonable and necessary to protect trade secrets).

Because an employer may terminate an at-will employee at any time as a matter of right, an employer that forbears from terminating an existing at-will employee forbears from exercising a legal right, and that therefore such forbearance constitutes adequate consideration for a noncompetition agreement. *Lucht's Concrete Pumping v. Horner*, 255 P.3d 1058, 1061 (Colo. 2011).

B. Blue Penciling

When a court applies the "blue pencil" test, the court severs portions of the offending covenant and then enforces the modified contract. *Xantrex Tech. Inc. v. Advanced Energy Indus.*, 2008 U.S. Dist. LEXIS 41206, at *58-59, n. 2 (D. Colo. May 23, 2008) (reporter citation unavailable). No Colorado case specifically addresses blue penciling. However, some federal courts applying Colorado law tangentially addressed the issue.

In *Haggard v. Synthes Spine*, 2009 U.S. Dist. LEXIS 54818 (D. Colo. June 12, 2009) (reporter citation unavailable), the court construed a "Confidentiality and Innovation Agreement" containing a non-competition covenant pursuant to C.R.S. § 8-2-113. The court determined the confidentiality provision of the agreement described various types of trade secret information and that Synthes Spine had taken appropriate steps to protect its trade secrets. *Id.* at *21-23. The non-solicitation covenant "unreasonably prohibits Plaintiff from using non-protected information..." and the court narrowed the covenant to mean the plaintiff was precluded only from contacting customers with whom he had actual contact during his employment with Synthes Spine. *Id.* at *32. Thus, without expressly changing the terms of the covenant with a "blue pencil," the Court interpreted the contract to allow its enforcement against Plaintiff. *Id.*

Even where a non-competition agreement does not contain a reasonable territorial restriction, it is enforceable, and the court has the authority to reform it under Colorado law. *Alexander & Alexander, Inc. v. Frank B. Hall & Co., Inc.*, 1990 U.S. Dist. LEXIS 21024, at *18 (D. Colo. Jan. 31, 1990) (reporter citation unavailable) (citing *Nat'l Graphics Co. v. Dilley*, 681 P.2d 546, 547 (Colo. Ct. App. 1984)).

C. Confidentiality Agreements

To the extent that a confidentiality agreement cannot be performed within one year, it must be in writing to be enforceable under the statute of frauds. C.R.S. § 38-10-112. Whether a confidentiality provision in an employment agreement is enforceable, depends upon whether such a contract is reasonable, and this is dependent upon the peculiar facts in each case. *Julius Hyman & Co. v. Velsicol Corp.*, 233 P.2d 977, 1002 (Colo. 1951) (holding that employment agreement requiring secrecy was not void or voidable as against public policy or in restraint of trade). Generally, an agreement by an employee to hold secret confidential information or knowledge acquired by him during his employment, and afterwards, and which is necessary for the protection of the employer's business and is reasonable in its terms, will be upheld as valid. *Id.*

Only confidential information acquired during the course of employment may be protected, not the general knowledge of a business operation, information already known to competitors or readily ascertainable elsewhere, or general ability and know-how an employee brings into employment. *Mulei v. Jet Courier Service, Inc.*, 739 P.2d 889, 892-93 (Colo. App. 1987), *rev'd on other grounds by Jet Courier Service, Inc. v. Mulei*, 771 P.2d 486 (Colo. 1989). The determination of what constitutes "confidential information" is a question for the trier of fact. *Id.* at 893.

D. Trade Secrets Statute

Colorado's Uniform Trade Secrets Act, C.R.S. §§ 7-74-101 to 7-74-110, governs the confidentiality of trade secrets in the State of Colorado. The statute prohibits the misappropriation of trade secrets, which are defined as:

the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a "trade secret" the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

C.R.S. § 7-74-102(4). Courts also consider the similar definition in the Restatement of Torts, Section 757, comment b: "A trade secret may consist of any . . . information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 762 P.2d 763, 765 (Colo. App. 1988); *see also Hertz v. Luzenac Group*, 576 F.3d 1103, 1109 (10th Cir. 2009) (recognizing that under Colorado law "a trade secret can exist in a combination of characteristics and components each of which, is in the public domain, but the unified process, design, and operation of which, in unique combination, affords a competitive advantage and is a protectable trade secret"); *Harvey Barnett, Inc. v. Shidler*, 338 F.3d 1125, 1129 (10th Cir. 2003) (same); *Rivendall Forest Prods., Ltd. v. Georgia-Pacific Corp.*, 28 F.3d 1042, 1045 (10th Cir. 1994) (trade

secret can include system where elements are in public domain, but there is an effective, successful, and valuable integration of public domain elements and trade secrets gave claimant a competitive advantage that is protected from misappropriation).

What constitutes a trade secret is a question of fact for the trial court, *Porter Indus., Inc.*, 680 P.2d at 1341, which does not lend itself to an exact definition. *Atmel Corp. v. Vitessee Semiconductor Corp.*, 30 P.3d 789, 795 (Colo. App. 2001). The following factors are considered in determining whether a covenant not to compete was for purposes of protecting trade secrets:

(1) the extent to which the information is known outside the business, (2) the extent to which it is known to those inside the business, *i.e.*, by the employees, (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information, (4) the savings effected and the value to the holder in having the information as against competitors, (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

Id. (citing *Porter Indus., Inc.*, 680 P.2d at 1341).

Trade secrets are property interests entitled to protection under the Fifth Amendment of the United States Constitution. *Northglenn v. Grynberg*, 846 P.2d 175, 183 (Colo. 1993).

E. Fiduciary Duty and their Considerations

Colorado has considered whether an employee's actions in preparation for competing with his employer constitute a breach of the employee's duty of loyalty. *Jet Courier Serv., Inc. v. Mulej*, 771 P.2d 486, 491 (Colo. 1989) (adopting the Restatement Second of Torts and discussing whether an employee breaches his fiduciary duty by soliciting co-employees and customers prior to termination of the employment relationship). The duty of loyalty is an agent's "duty not to compete with the principal concerning the subject matter of his agency." *Id.* at 492-93 (citing Restatement (Second) Agency § 393); *see also Life Care Ctrs. of Am. V. East Hampden Assocs. Ltd. P'Ship*, 903 P.2d 1180, 1184 (Colo. App. 1995) (recognizing general rule unless the principal understands that the agent is to compete or a course of dealing between the agent and the principal indicate this understanding). A limiting consideration in delineating the scope of an agent's duty not to compete is society's interest in fostering free and vigorous economic competition. *Id.* at 493. In attempting to accommodate the competing policy considerations of honesty and fair dealing on the one hand and free and vigorous economic competition on the other, Colorado recognizes a privilege in favor of employees, which enables them to prepare or make arrangements to compete with their employers prior to leaving the employ of their prospective rivals without fear of incurring liability for breach of their fiduciary duty of loyalty. *Id.* (citing *Maryland Metals v. Metzner*, 382 A.2d 564, 569 (Md. App. 1978)). The line separating mere preparation from active competition may be difficult to discern in some cases. *Id.* Thus, it is the nature of the employee's preparations which is significant in determining whether a breach has occurred. *Id.*

XII. DRUG TESTING LAWS

A. Public Employers

“Drug testing of *public* employees constitutes a search under the Fourth and Fourteenth Amendments and, therefore, a public employer may not conduct such a test without individualized suspicion of wrongdoing.” *Slaughter v. John Elway Dodge S.W./Autonation*, 107 P.3d 1165, 1169 (Colo App. 2005) (emphasis added) (citing *Chandler v. Miller*, 520 U.S. 305, 313-14 (1997)); *Timm v. Reitz*, 39 P.3d 1252, 1257-61 (Colo. App. 2001) (reversing trial court’s order to require drug testing of dog trainers employed by Colorado Department of Revenue Division of Racing and Colorado Racing Commission because no special needs existed beyond normal need to support law enforcement by drug testing); *but see City & Cnty. of Denver v. Casados*, 862 P.2d 908, 915 (Colo. 1993)(interpreting mayor’s executive order as requiring reasonable suspicion for drug testing of employees in safety sensitive positions for on- or off-duty alcohol or drug use impairment and holding order not facially invalid under Fourth Amendment).

In a civil case involving government employee termination proceedings, where the employee tested positive for marijuana, the Colorado Supreme Court declined to apply the exclusionary rule typically applied in a criminal case barring evidence from trial that police obtain by violating an accused’s constitutional right to privacy. *Ahart v. Colorado Dep’t of Corrections*, 964 P.2d 517, 519 (Colo. 1998). In civil proceedings, courts must decide whether the exclusionary rule applies on a case by case basis. *Id.* at 523. (“The existence of certain factors does not automatically trigger application of the rule. In circumstances where some factors strongly support the rule’s application – e.g., the Fourth Amendment violation is intra-sovereign; the proceeding at issue is quasi-criminal – a court’s determination as to the applicability of the exclusionary rule cannot be legally sufficient unless the court weighs the benefits against the costs of applying the rule”).

B. Private Employers

To date, Colorado enacted no statutory prohibitions or limitations on the ability of a private employer to engage in drug testing. *Slaughter*, 107 P.3d at 1169. The *Slaughter* case states:

Based on our constitution and statutes [the Colorado Court of Appeals] conclude[d] that Colorado does not have a clearly expressed employee right to refuse drug testing. Art. II, § 3 of the Colorado Constitution provides as follows: ‘Inalienable rights. All persons have certain natural and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.’

Id. at 1170. The Court held “an employer with a previously established written drug policy who directs an employee to take a drug test does not undermine public policy relating to the employee’s rights as a worker.” *Id.* Thus, an employer that had a written drug policy had the right to terminate an employee whose drug test showed the presence of marijuana. *Id.* at 1171; *see also Bd. of Water Comm’rs, Denver Water Dep’t v. Indus. Claim Appeals*, 881 P.2d 476, 478 (Colo. App. 1994) (where employer has established drug testing requirement that employee, as condition of employment, was required to pass, consequences of failing to meet test is willful and positive test results support determination that employee at fault for termination).

Even with use of medical marijuana, an employee who tests positive for marijuana use may be terminated. The Colorado Supreme Court held in *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. June 15, 2015) that an employee's use of medical marijuana is not a lawful activity and not subject to protection. This case is discussed in greater detail under Section XVI, Subpart E.

XIII. STATE ANTI-DISCRIMINATION STATUTES

A. Employers/Employees Covered

Colorado's unfair employment practices statutes define an "employer" as the State of Colorado and every other person employing persons within the State. C.R.S. § 24-34-401(3). It does not, however, include religious organizations or associations unless supported in whole or in part by money raised by taxation or public borrowing. *Id.*

An "employee" is defined as "any person employed by an employer, except a person in the domestic service of any person." C.R.S. § 24-34-401(2).

B. Types of Conduct Prohibited

The Colorado Anti-Discrimination Act ("CADA") and prohibited employment practices are codified at C.R.S. § 24-34-402. It is a discriminatory or unfair employment practice "[f]or an employer to refuse to hire or discharge, promote, demote, harass, discriminate on matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified, on the basis of disability, race, creed, color, sex, sexual orientation, religion, age, national origin or ancestry." C.R.S. § 24-34-402(1)(a). As used here, "harass" is defined as "to create a hostile work environment based upon an individual's race, national origin, sex, sexual orientation, disability, age, or religion." *Id.* Notwithstanding these provisions, "harassment is not an illegal act unless a complaint is filed with the appropriate authority at the complainant's workplace and such authority fails to initiate a reasonable investigation of a complaint and take prompt remedial action if appropriate." *Id.*

CADA further sets forth what constitutes discriminatory or unfair employment practices by an employment agency, labor organization, and in employment advertising. C.R.S. § 24-34-402(1)(b)-(d). CADA prohibits any person from aiding the doing of any prohibited employment practice and retaliation against any person who filed a charge of discrimination or participated in any related investigation or proceeding. C.R.S. § 24-34-402(1)(e)-(f). CADA also prohibits employers from refusing to hire because the person did not apply through a private employment agency, from discharging an employee because that employee plans to marry another employee (except under certain conditions), and from discharging or imposing disciplinary action because an employee discusses wages or requiring non-disclosure of wages as condition of employment. C.R.S. § 24-34-402(1)(g)-(i).

Effective August 10, 2016, CADA was amended to require Colorado employers to provide reasonable accommodations for employees who cannot perform the essential functions of the job because of health conditions related to pregnancy or childbirth, unless the accommodation would impose an undue hardship on the employer's business. C.R.S. § 24-34-402.3(1)(a)(I). Colorado employers are also prohibited from taking adverse action against an employee who requests or uses a reasonable accommodation related to pregnancy, physical recovery from childbirth, or a related condition. C.R.S. § 24-34-402.3(1)(a)(II). Under this amendment, Colorado employers cannot require an employee to take

leave if the employer can provide another reasonable accommodation for the employee's pregnancy, physical recovery from childbirth, or related condition. C.R.S. § 24-34-402.3(1)(a)(V).

C. Administrative Requirements

A charge of discrimination must be filed with the Colorado Civil Rights Commission ("CCRC") within six months after occurrence of the alleged discriminatory act or the claim will be barred. C.R.S. § 24-34-403.

The Colorado Civil Rights Division, the administrative agency charged with investigations of claims made under the CADA, loses jurisdiction over a charge of discrimination if: (1) written notice that a formal hearing will be held is not served within 270 days after filing of a charge; (2) the charging party requests and receives a notice of right to sue; or (3) a formal hearing is not commenced within 120 days after service of a notice and complaint following the failure to conciliate a charge. C.R.S. § 24-34-306(11). After such period passes, the charging party must commence a civil action in district court within 90 days of the date the CCRC's jurisdiction ceased or the action is barred. *Id.* These time periods may be extended for good cause. Extensions of time shall not exceed a total of 90 days each. *Id.* However, the total of all extensions cannot exceed 180 days. *Id.*

D. Remedies Available

The CADA defines the remedies available to an employee subject to unfair or discriminatory employment practices. C.R.S. § 24-34-405. The pertinent section allows an employee to file suit in *state* court against an employer of *any size* for claims asserting intentional discrimination and/or unfair employment practices and is referred to as the Job Protection and Civil Rights Enforcement Act of 2013. *Id.*

In addition to an order to cease and desist discriminatory practices (C.R.S. § 24-34-306(9)), the CCRC or court may order affirmative relief against an employer who is found to have engaged in an unfair or discriminatory employment practice as follows:

- (I) Reinstatement or hiring of employees, with or without back pay. If the commission or court orders back pay, the employer, employment agency, or labor organization responsible for the discriminatory or unfair employment practice shall pay the back pay to the person who was the victim of the practice.
- (II) Front pay; or
- (III) Any other equitable relief the commission or court deems appropriate.

C.R.S. § 24-34-405(2).

Where an employer engages in an intentional discriminatory or unfair employment practice, the plaintiff may recover compensatory or other pecuniary losses, including emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses. C.R.S. § 24-34-405(3)(a),(c). Except as limited by the Colorado Governmental Immunity Act (CGIA), the employee may recover punitive damages she demonstrates by clear and convincing evidence that the defendant engaged in a discriminatory or unfair employment practice with malice or reckless indifference to her rights. C.R.S.

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§ 24-34-405(3)(b). If a plaintiff seeks compensatory or punitive damages pursuant to this subsection (3), any party in the civil action may demand a trial by jury. C.R.S. § 24-34-405(4). In any civil action under Part 4 (regarding employment practices), the court may award reasonable attorney fees and costs to the prevailing plaintiff. C.R.S. § 24-34-405(5). If the court finds that an action or defense was frivolous, groundless, or vexatious, the court may award costs and attorney fees to the defendant in the action. *Id.*

This statute now requires state courts to apply federal case law in state cases unless federal law is silent on the issue. C.R.S. § 24-34-405(6) (“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. 2000, 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”).

This statute also sets forth a specific process for addressing complaints by an applicant or employee of the state personnel system and provides that these kinds of actions are not subject to the CGIA. C.R.S. § 24-34-405(8).

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

Colorado employers may not discharge an employee who takes time off to serve on a jury. C.R.S. § 13-71-134.

B. Voting

Colorado employers may not discharge an employee who takes time off to vote. C.R.S. § 1-7-102.

C. Family/Medical Leave

As of January 1, 2021, the Colorado Healthy Families and Workplaces Act (“HFWA”), C.R.S. §§ 8-13.3-401 – 8-13.3-418, requires employers with 16 or more employees to provide up to 48 hours of paid sick and safe leave to eligible employees. See C.R.S. § 8-13.3-403(1)(b). Employers with fewer than 16 employees must provide up to 48 hours of paid sick and safe time leave to their eligible employees starting on January 1, 2022. C.R.S. § 8-13.3-403(1)(c).

Pursuant to HFWA, employees will accrue at least one hour of paid sick and safe time for every 30 hours worked, up to 48 hours each year. C.R.S. § 8-13.3-403(2)(a). Up to 48 hours of paid leave that an employee accrues in year but does not use carries forward to, and may be used in, a subsequent year. C.R.S. § 8-13.3-403(3)(b). An employer may permit, but is not required, to allow an employee to carry forward more than 48 hours of unused paid leave from one benefit year to the next. C.R.S. §§ 8-13.3-403(3)(b)-413.

Pursuant to C.R.S. § 8-13.3-404(1), leave can be taken under HFWA for:

- The employee’s own mental or physical illness, injury, or health condition that prevents the employee from working;

- The employee's own need to obtain a medical diagnosis, care or treatment of a mental or physical illness, injury, or health condition or other preventive medical care;
- The employee's need to care for a family member who has a mental or physical illness, injury or health condition; or who needs the care identified above;
- The employee or the employee's family member has been the victim of domestic abuse, sexual assault or criminal harassment and needs leave to seek medical attention, obtain services from a victim services organization, obtain mental health or other counseling, seek relocation, or seek legal services; or
- Due to a public health emergency, a public official has ordered closure of the employee's place of business or the school or place of care of the employee's child and the employee needs to be absent from work to care for the child.

Under HFWA, "family member" includes an employee's immediate family member (related by blood, adoption, marriage, or civil union) and a person for whom the employee is responsible for providing or arranging health-related or safety-related care. C.R.S. § 8-13.3-402(6).

HFWA leave must be paid at the same rate and with the same benefits, including health benefits, as the employee typically earns during hours worked, not including overtime, bonuses, or holiday pay. C.R.S. § 8-13.3-402(8). The number of hours of paid HFWA leave an employee can take is the number of hours the employer would have reasonably anticipated the employee would have worked during the period of leave. 7 CCR 1103-7, Rule 3.5.2(B).

Employees may use leave as soon as they accrue it, and they can use leave intermittently. *See* C.R.S. § 8-13.3-403(3)(a). Employers cannot count HFWA absences against employees for attendance purposes but can enforce attendance expectations once leave is exhausted. *See* 7 CCR 1103-7, Rule 3.5.3(C).

Employers can use general paid time off (PTO) policies to comply with HFWA if they make clear to their employees, in writing in advance of an actual or anticipated leave request, that their policies provide leave: (1) in at least an amount of hours and with pay sufficient to satisfy HFWA (including, if a public health emergency is declared, a supplemental amount of leave required); (2) for all the same purposes covered by HFWA; (3) under all the same conditions as HFWA; and (4) additional HFWA leave need not be provided when employees use all of their available PTO for non-HFWA-qualifying reasons (*e.g.*, vacation), except if a public health emergency is declared and the employer must supplement leave to meet HFWA's requirements. 7 CCR 1103-7, Rule 3.5.4.

HFWA also provides supplemental leave for a pandemic health emergency. C.R.S. § 8-13.3-405. On the day a public health emergency is declared, employers are required to immediately provide employees with a one-time grant of supplemental leave. 7 CCR 1103-7, Rule 3.5.1(C). Employees who normally work 40 or more hours per week must receive supplemental leave up to 80 hours. 7 CCR 1103-7, Rule 3.5.1(C)(1). Employees who normally work less than 40 hours per week receive supplemental leave equal to the greater of the number of hours the employee is scheduled for work in the upcoming 14-day period or the number of hours actually worked on average in the 14-day period prior to the declaration of the public health emergency. 7 CCR 1103-7, Rule 3.5.1(C)(2).

During the duration of a public health emergency (the time between the date on which the emergency is declared and for four weeks after its termination or suspension), employers must permit employees to take both sick leave they have accrued prior to the public health emergency and supplemental leave provided for the public health emergency, for any qualifying reason. 7 CCR 1103-7, Rule 3.5.1(D)(1); *see also* C.R.S. § 8-13.3-404(1). Employers remain subject to HFWA's paid sick leave accrual requirement during a public health emergency. 7 CCR 1103-7, Rule 3.5.1(D)(2). Employees continue to accrue paid sick leave at a rate of one hour per 30 hours worked up to 48 hours per benefit year. *Id.* Employers must permit employees to use their public health emergency supplemental leave prior to using previously-accrued paid sick leave if the employee is using leave for a reason that qualifies for both types of leave. 7 CCR 1103-7, Rule 3.5.1(D)(3).

Additionally, pursuant to C.R.S. § 24-34-402.7, an employee may request or take up to three working days of leave from work in any twelve-month period, with or without pay, if the employee is the victim of domestic abuse, stalking, sexual assault, or any other crime related to domestic abuse.

Further, in addition to the leave to which an employee is entitled to under the under the Federal Family and Medical Leave Act of 1993 ("FMLA"), an employee in Colorado is entitled to FMLA leave to care for a person who has a serious health condition if that person is: (1) the employee's partner in a civil union, as defined in C.R.S. § 14-15-103; or (2) the employee's domestic partner. C.R.S. § 8-13.3-203(1)(a)-(b). To qualify, the employee must have: (1) registered the domestic partnership with the municipality in which the person resides or with the State; or (2) is recognized by the employer as the employee's domestic partner. *Id.*

Pursuant to C.R.S. § 8-13.3-203(2), to confirm an employee's relationship, an employer may require the employee to provide reasonable documentation or a written statement of family relationship in accordance with the FMLA. Any FMLA leave taken by an employee under this section runs concurrent with leave under the FMLA and does not increase the total amount of leave to which an employee is entitled during a twelve-month period under the FMLA and permits an employer to deny any leave that exceeds the total amount of leave permitted during a twelve-month period under the FMLA. C.R.S. § 8-13.3-203(3). For violation of this section, an employer is subject to an employee's claims for damages or equitable relief in state court as specified in the FMLA.

D. Pregnancy, Maternity, Paternity Leave

Colorado voters approved a ballot initiative in the November 2020 election—Proposition 118—creating a state-run insurance program that will provide paid family and medical leave to Colorado employees. In order to implement this ballot initiative, the Paid Family and Medical Leave Insurance Act ("PFMLI"), C.R.S. §§ 8-13.3-501 – 8-13.3-524, was created by the Colorado legislature.

Beginning on January 1, 2024, Colorado employees will be able to receive family and medical leave insurance benefits while taking family and medical leave. C.R.S. § 8-13.3-504. Employees will be eligible for such leave and benefits if they have earned at least \$2,500 in wages subject to premiums and need leave for: (1) birth, adoption, or placement through foster care of a child or caring for a new child during the first year after the birth, adoption, or placement of that child; (2) a serious health condition; (3) care for a family member with a serious health condition; or (4) safe leave due to domestic violence. C.R.S. § 8-13.3-501(1),(2).

The maximum number of weeks for which a covered individual may take paid family and medical leave and for which family and medical leave insurance benefits are payable in an application year is 12 weeks. C.R.S. § 8-13.3-505. Benefits, however, are payable up to an additional four weeks to a covered individual with a serious health condition related to pregnancy complications or childbirth complications. *Id.*

The program will be funded through a new payroll tax split evenly between employers and employees. C.R.S. § 8-13.3-507. Employers and employees will begin paying into the program on January 1, 2023. C.R.S. § 8-13.3-507(3)(a).

E. Break Time for Nursing Mothers

Regarding the rights of nursing mothers, C.R.S. § 8-13.5-104 provides that an employer shall provide, “reasonable unpaid break time or permit an employee to use paid break time, meal time, or both, each day to allow the employee to express breast milk for her nursing child for up to two years after the child's birth.” The employer shall make reasonable efforts to provide a room or other location, other than a toilet stall, where an employee can express breast milk in privacy. C.R.S. § 8-13.5-104(2). Before an employee can file suit for a violation of this section, employee and employer must engage in nonbinding mediation. C.R.S. § 8-13.5-104(5).

F. Day of Rest Statutes

There is no Day of Rest Statute in Colorado.

G. Military Leave

C.R.S. § 28-3-601(1) governs military leave for public employees as follows:

[A]ny officer or employee of the state or of any political subdivision, municipal corporation, or other public agency of the state who is a member of the National Guard or any other component of the military forces of the state organized or constituted under state or federal law or who is a member of the reserve forces of the United States, organized or constituted under federal law is entitled to leave of absence from his or her public office or employment without loss of pay, seniority, status, efficiency rating, vacation, sick leave, or other benefits for all the time when he or she is engaged with such organization or component in training or active service ordered or authorized by proper authority pursuant to law, whether for state or federal purposes, but not exceeding fifteen days in any calendar year. Such leave shall be allowed if the required military service is satisfactorily performed, which shall be presumed unless the contrary is established.

C.R.S. § 28-3-609 addresses military leave for private employees as follows:

Any person who is a duly qualified member of the Colorado National Guard or the reserve forces of the United States who in order to receive military training with the armed forces of the United States, not to exceed fifteen days in any one calendar year, leaves a position other than a temporary position in the employ of an employer, and who gives evidence of the satisfactory completion of such training, and who is still qualified to perform the

duties of such position is entitled to be restored to his or her previous or a similar position in the same status, pay, and seniority, and such period of absence for military training shall be construed as an absence with leave and without pay.

H. Leave for Child's Academic Activities

The Colorado statute providing for leave for parental involvement in academic activities, C.R.S. § 8-13.3-101, *et seq.*, was repealed on September 1, 2015. As such, there is no Colorado law applicable to such parental involvement.

I. Leave for Victims of Domestic Abuse

In addition to the leave provided by the Colorado Healthy Families and Workplaces Act, an employer shall, permit an employee to request or take up to three working days of leave from work in any twelve-month period, with or without pay, if the employee is the victim of domestic abuse, sexual assault or, "any other crime the underlying factual basis of which has been found by a court on the record to include an act of domestic violation." C.R.S. § 24-34-402.7 (2014). Colorado also protects victims of domestic abuse seeking protection from unlawful employment action.

"Domestic abuse" means any act, attempted act, or threatened act of violence, stalking, harassment, or coercion that is committed by any person against another person to whom the actor is currently or was formerly related, or with whom the actor is living or has lived in the same domicile, or with whom the actor is involved or has been involved in an intimate relationship. A sexual relationship may be an indicator of an intimate relationship but is never a necessary condition for finding an intimate relationship. For purposes of this subsection (2), "coercion" includes compelling a person by force, threat of force, or intimidation to engage in conduct from which the person has the right or privilege to abstain, or to abstain from conduct in which the person has the right or privilege to engage. C.R.S. § 13-14-101(2).

Domestic abuse may also include any act or attempted act or threatened act of violence against the minor children of either of the parties or an animal owned, possessed, leased, kept, or held by either of the parties or by a minor child of either of the parties, which threat, act or attempted act is intended to coerce, control, punish, intimidate, or exact revenge upon either of the parties or a minor child of either of the parties. *Id.*

XV. STATE WAGE AND HOUR LAWS

The Colorado Wage Claim Act ("CWCA"), C.R.S. §§ 8-4-101 – 8-4-123, addresses Colorado's wage laws. The CWCA is implemented by the Colorado Wage Order and the Colorado Overtime and Minimum Pay Standards Order.

Any agreement, written or oral, by any employee purporting to waive or to modify such employee's rights in violation of Colorado's wage laws shall be void. C.R.S. § 8-4-121. Section 8-4-103, C.R.S., addresses issues such as requirements related to the payment of wages, pay statements, record retention, and tip notification.

C.R.S. § 24-50-104.5 requires the state personnel director to establish the general criteria and processes necessary for the state personnel system to fully comply with all applicable federal employment laws.

A. Current Minimum Wage in State

Colorado's minimum wage is adjusted annually for cost of living increases. See Colo. Const. Art. XVIII, § 15. Effective January 1, 2021, Colorado Minimum Wage Order Number 37 established a new state minimum wage rate of \$12.32 per hour. COMPS Order #37, Rule 3.1. The tipped employee minimum wage is \$9.30 per hour. COMPS Order #37, Rule 6.2.3.

B. Deductions from Pay

C.R.S. § 8-4-105 addresses permitted payroll deductions.

C. Rest and Meal Breaks

Rule 5.1 of the Colorado Minimum Wage Order Number 37 addresses the meal breaks that employers are required to provide their employees:

Employees shall be entitled to an uninterrupted and duty-free meal period of at least a 30-minute duration when the shift exceeds 5 consecutive hours. Such meal periods, to the extent practical, shall be at least one hour after the start, and one hour before the end, of the shift. Employees must be completely relieved of all duties and permitted to pursue personal activities for a period to qualify as non-work, uncompensated time. When the nature of the business activity or other circumstances make an uninterrupted meal period impractical, the employee shall be permitted to consume an on-duty meal while performing duties. Employees shall be permitted to fully consume a meal of choice on the job and be fully compensated for the on-duty meal period without any loss of time or compensation.

Colorado Minimum Wage Order No. 37, Rule 5.1.

Further, Rule 5.2 of the Colorado Minimum Wage Order Number 37 addresses the rest periods that employers are required to provide their employees:

Every employer shall authorize and permit a compensated 10-minute rest period for each 4 hours of work, or major fractions thereof, for all employees, as follows: 0 rest periods required for 2 or less hours; 1 rest period for over 2 and up to 6 hours; 2 rest periods over 6 and up to 10 hours; 3 rest periods over 10 hours and up to 14 hours; 4 rest periods over 14 hours and up to 18 hours; 5 rest periods over 18 hours and up to 22 hours; and 6 rest periods for over 22 hours.

Colorado Minimum Wage Order No. 37, Rule 5.2. It is not necessary that the employee leave the premises for a rest period. COMPS, #37, Rule 5.2.2.

Required rest periods are time worked for the purposes of calculating minimum wage and overtime obligations. COMPS, #37, Rule 5.2.3. A failure by an employer to "authorize and permit" a 10-minute compensated rest period is a failure to pay 10 minutes of wages. COMPS, #37, Rule 5.2.4.

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D. Overtime rules

Colorado Minimum Wage Order Number 37 provides that employees shall be paid time and one-half of the regular rate of pay for any work in excess of:

- (1) forty (40) hours per workweek;
- (2) twelve (12) hours per workday; or
- (3) twelve (12) consecutive hours without regard to the starting and ending time of the workday (excluding duty free meal periods), whichever calculation results in the greater payment of wages.

COMPS Order #37, Rule 4.1.1. This Wage Order also provides that hours worked in two or more work weeks shall not be averaged for computation of overtime. COMPS Order #37, Rule 4.1.3. Performance of work in two or more positions at different pay rates for the same employer shall be computed at the overtime rate based on the regular rate of pay for the position in which the overtime occurs, or at a weighted average of the rates for each position, as provided in the Fair Labor Standards Act. COMPS Order #37, Rule 4.1.4.

C.R.S. § 24-50-104.5(1) provides pay at an overtime rate to essential state employees in instances where they have not actually worked more than 40 hours in a workweek. This statute requires that “[h]olidays and periods of authorized paid leave falling within a regularly scheduled workweek” be counted as work time in determining overtime “for employees performing essential law enforcement, highway maintenance, and other support services directly necessary for the health, safety, and welfare of patients, residents, and inmates of state institutions or state facilities.” *Id.* The requirement that “authorized paid leave” be counted toward the work time of essential employees is a defined statutory right. *Idowu v. Nesbitt*, 338 P.3d 1078, 1087 (Colo. App. 2014) (holding that a state agency may not retroactively cancel previously approved and taken leave time of essential state employees to avoid having to pay the employees overtime compensation pursuant to this section).

E. Time for payment upon termination

C.R.S. § 8-4-109 specifies the requirements and time limits on payment of wages due on termination of employment. When an employee is terminated by the employer’s volition, “the wages or compensation for labor or service earned, vested, determinable, and unpaid at the time of such discharge is due and payable immediately.” C.R.S. § 8-4-109(1)(a). When an employee quits or resigns such employee's employment, the wages or compensation shall become due and payable upon the next regular payday. C.R.S. § 8-4-109(1)(b).

If there is a dispute regarding the compensation claimed, this statute provides that the employee must make a written demand for the payment. C.R.S. § 8-4-109(3)(a). If an employer disputes the compensation claimed by an employee, but pays the undisputed portion within 14 days of the employee’s demand, “the employer shall not be liable for any penalty unless, in a legal proceeding, including a civil action or an administrative procedure under sections 8-4-111 and 8-4-111.5, the employee recovers a greater sum than the amount so tendered.” C.R.S. § 8-4-109(3)(a.5).

If the employee's earned compensation is not mailed within 14 days, the employer:

[S]hall be liable to the employee for the wages or compensation, and a penalty of the sum of the following amounts of wages or compensation due or, if greater, the employee's average daily earnings for each day, not to exceed ten days, until such payment or other settlement satisfactory to the employee is made:

- (I) One hundred twenty-five percent of that amount of such wages or compensation up to and including seven thousand five hundred dollars; and
- (II) Fifty percent of that amount of such wages or compensation that exceed seven thousand five hundred dollars.

C.R.S. § 8-4-109(3)(b). An additional penalty is imposed for an employer's willful failure to pay. C.R.S. § 8-4-109(3)(c).

In a legal proceeding to recover wages, a prevailing employee is presumptively entitled to attorney fees under the CWCA. *Lester v. Career Bldg. Acad.*, 338 P.3d 1054, 1057 (Colo. App. 2014). A prevailing employee's presumptive entitlement to an attorney fee award is rebuttable. *Id.* at 1061. Although the presumption is difficult to rebut, the losing party may do so by showing special circumstances, though unlikely to exist, such as when a plaintiff brings a suit for purposes of delay, or in bad faith; or seeks to harass, embarrass, or abuse another party or the court. *Id.* However, special circumstances do not exist simply because the defendant is shown to have acted in good faith or the plaintiff is capable of paying for his or her own attorney fees. *Id.* Consequently, the presumption in favor of awarding attorney fees to a prevailing plaintiff is so strong that a denial by the trial court on the basis of "special circumstances" is rare and disfavored. *Id.*

F. Violations of CWCA

Persons who claim to be aggrieved by a violation of the Colorado Wage Claim Act, or regulations prescribed pursuant to this Act, may file a civil action against the employer without regard to the exhaustion of any administrative remedies. C.R.S. § 8-4-110(2), C.R.S. Such action must be filed within two years from the date the employee's cause of action accrues or within three years for a willful violation. C.R.S. § 8-4-122, C.R.S.

XVI. EQUAL PAY FOR EQUAL WORK ACT

Colorado's Equal Pay for Equal Work Act (the "Equal Pay Act"), C.R.S. § 8-5-101 *et seq.*, took effect on January 1, 2021. The Equal Pay Act forbids pay discrimination based on gender and includes a newly created right for employees who have suffered such discrimination to sue their employer. It also requires that companies post all job openings internally, list a salary range for the position, and forbids employers from asking about salary history.

The Equal Pay Act prohibits employers from discriminating on the basis of sex (or sex in combination with another protected status) by paying employees of different sexes different amounts for substantially similar work, regardless of job title, based on a composite of skill, effort (which may include consideration of shift work) and responsibility. C.R.S. § 8-5-102(1). Wage differentials may be justified based on: (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or

quality of production; (d) the geographic location where the work is performed; (e) education, training, or experience reasonably related to the work in question; or (f) travel, if the travel is a regular and necessary condition of the work performed. C.R.S. § 8-5-102(1)(a). Employers cannot rely on prior salary history to justify a disparity in pay. C.R.S. § 8-5-102(1)(d).

The Equal Pay Act also prohibits employers from seeking salary history from prospective employees or retaliating against a prospective employee who fails to disclose his or her salary history. C.R.S. § 8-5-102(2)(a),(b). Employers cannot rely on an applicant's salary history to determine his or her current wage. C.R.S. § 8-5-102(2)(a). Employers also cannot prohibit employees from disclosing, comparing or otherwise discussing their wage rate. C.R.S. § 8-5-102(2)(d).

Additionally, the Equal Pay Act requires the disclosure of compensation and benefits in each posting for each job. C.R.S. § 8-5-201(2). Specifically, employers must include in each job posting: (1) the rate of compensation (or a range thereof), including salary and hourly, piece, or day rate compensation; (2) a general description of any bonuses, commissions, or other compensation; and (3) a general description of all benefits the employer is offering for the position. *Id.*

The Equal Pay Act further requires employers to post promotional opportunities to Colorado employees on the same day as positions are externally posted and prior to making promotional decisions. C.R.S. § 8-5-201(1). Employers, however, are not required to post positions externally. CO Dept. of Labor and Employment INFO #9.

Under the Equal Pay Act, a "promotional opportunity" exists "when an employer has or anticipates having a vacancy in an existing or new position that could be considered a promotion for one or more employee(s) in terms of compensation, benefits, status, duties, or access to further advancement." EPT Rule 4.2.1. A vacancy exists where a position the employer intends to fill is open or is held by a departing employee, such as when an incumbent employee gives a resignation notice. CO Dept. of Labor and Employment INFO #9. A vacancy also exists where the employer adds a new position or gives an existing employee a new position, including a title change and/or material change in authority, duties, or opportunity. *Id.* A vacancy does not exist where an employer merely changes pay or adds an externally obtained degree or certification such as "CPA" to an employee's title. *Id.* Accordingly, a vacancy includes lateral job changes and promotions along a fixed, in-line trajectory for current employees. *Id.*

The Equal Pay Act applies to public and private sector employers who employ at least one person in Colorado. C.R.S. § 8-5-101(4), (5). Jobs to be performed entirely outside of Colorado – even if modest travel to Colorado is required – are excluded from the Act's requirement to disclose compensation information. EPT Rule 4.3B. However, remote jobs for covered employers are not excluded from this requirement. CO Dept. of Labor and Employment INFO #9. Likewise, postings made entirely out of state do not need to include compensation information unless they are accessible to Colorado residents. Rule 4.3B.

Further, the Equal Pay Act requires employers to keep records of job descriptions and wage rate history for each employee during that employee's employment and for two years thereafter. C.R.S. § 8-5-202. This helps determine if there is a pattern of wage discrepancy. *Id.*

Persons who claim to be aggrieved by a violation of the wage discrimination and salary history prohibitions may file a civil lawsuit no later than two years after the violation occurs. C.R.S. § 8-5-103(2). They may also file a charge with the Colorado Civil Rights Division. C.R.S. § 8-5-103(5). Employers who

violate these prohibitions may be liable for damages (including backpay), reinstatement, liquidated damages, and attorney fees. C.R.S. §§ 8-5-104(2). Employers may avoid an award of liquidated damages (*i.e.*, a safe harbor) if they show that the violation was in good faith, including a showing that the employer had recently conducted a thorough and comprehensive pay audit. C.R.S. § 8-5-104(1)(b).

Persons who claim to be aggrieved by a violation of the posting or recordkeeping requirements may file complaints with Colorado Department of Labor and Employment within one year after the date they learn of the violation. C.R.S. § 8-5-203(2). Employers may be fined between \$500 and \$10,000 per violation. C.R.S. § 8-5-203(4).

XVII. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in the Workplace

Pursuant to C.R.S. § 25-14-204 (“Colorado Clean Indoor Air Act”), in order to reduce the levels of exposure to environmental tobacco smoke, smoking shall not be permitted and no person shall smoke in any indoor area, including, but not limited to numerous public places, including but not limited to: (I) Any place of employment that is not exempted; and (II) In the case of employers who own facilities otherwise exempted from this part 2, each such employer shall provide a smoke-free work area for each employee requesting not to have to breathe environmental tobacco smoke. Every employee shall have a right to work in an area free of environmental tobacco smoke. C.R.S. § 25-14-204(k).

B. Health Benefit Mandates for Employers

Pursuant to C.R.S. §§ 10-16-104 and 10-16-139, there are numerous mandated health insurance benefits in Colorado. These laws, however, do not apply to self-funded plans, union plans, federal employee benefit plans, or other government plans.

C. Immigration Laws

Under the Colorado Employment Security Act, C.R.S. § 8-70-101, *et seq.*, the term employment “does not include services performed by a nonresident alien individual for the period such individual is temporarily present in the United States.” C.R.S. § 8-70-140.2.

D. Right to Work Laws

Colorado does not have a right-to-work law. *Bldg. Constr. Trades Council v. Am. Bldrs., Inc.*, 337 P.2d 953, 958 (1959).

E. Lawful Activity During Nonworking Hours (including lawful marijuana use)

C.R.S. § 24-34-402.5 prohibits an employer from terminating an employee because the employee engaged in, “*any* lawful activity off the premises of the employer during nonworking hours.” *Watson*, 207 P.3d at 864 (emphasis in original; citing C.R.S. § 254-34-402.5(1)).

The statute “is an exception to an employer's general right to terminate an at-will employee without legal consequence.” *Williams v. Rock-Tenn Servs.*, 370 P.3d 638, 640 (Colo. App. 2016) (citing

Watson, 207 P.3d at 867). “[T]he general purpose of section 24-34-402.5 is to keep an employer’s proverbial nose out of an employee’s off-site off-hours business[.]” *Id.*

“However, an employer may terminate an employee if the activity at issue: (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or (b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.” *Id.* (citing C.R.S. § 24-34-402.5(1)).

The statute reflects a legislative attempt to balance an employee’s right to engage in lawful activity away from work with an employer’s legitimate business interests and needs. *Ruiz v. Hope for Children, Inc.*, 352 P.3d 983, 985-86 (Colo. App. June 6, 2013). The statute was interpreted broadly as the word “any” means “all.” *Watson*, 207 P.3d at 864 (citing *Kauntz v. HCA-Healthone, LLC*, 174 P.3d 813, 817 (Colo. App. 2007)).

Nothing in the statute limits actual or apparent conflicts of interest for which an employee may be terminated to financial conflicts of interest. *Ruiz*, 352 P.3d at 986. Nor does it contain any requirement that a conflict of interest actually interfere with an employee’s ability to perform her job. *Id.* at 987. In fact, the statute “expressly contemplates that an employer may restrict an employee’s lawful, off-the-job activities not only where an actual conflict of interest exists, but also where there is an appearance of such a conflict.” *Id.* (citing § 24-34-402.5(1)(b)). Thus, in *Ruiz*, the termination of an employee who was a family advocate and began dating a client from work who was attending a court ordered fatherhood program was not wrongful. *Id.* at 984.

In *Coats v. Dish Network, LLC*, 350 P.3d 849, 850 (Colo. 2015), the Colorado Supreme Court held that the use of medical marijuana is not a lawful activity under this statute.

By way of background, in 2000, Colorado voters approved an amendment to the Colorado Constitution to allow “[m]edical use of marijuana for persons suffering from debilitating medical condition.” Colo. Const. Art. XVIII, § 14, known as the Medical Marijuana Amendment (“MMA”). This amendment did not legalize marijuana. Rather it “create[d] limited exceptions to the criminal laws of [Colorado] for patients, primary care givers, and physicians concerning the medical use of marijuana by a patient to alleviate an appropriately diagnosed debilitating medical condition.” See C.R.S. § 18-406.3(1)(b); see also, *Beinor v. Indus. Claim Appeals Office of Colo. & Serv. Grp., Inc.*, 262 P.3d 970, 976 (Colo. App. 2011).

In November 2012, the voters of Colorado adopted an amendment to the Colorado Constitution legalizing marijuana under Colorado law. See Colo. Const., Art. XVIII, § 16. Like the provision for medical marijuana, this constitutional provision provides that employers need not allow marijuana use or employees under the influence of marijuana in their workplaces. See Colo. Const., Art. XVIII, § 16(6).

The Colorado Marijuana Code governs the cultivation, manufacture, distribution, and sale of marijuana and medical marijuana. C.R.S. § 44-10-101, *et seq.* (2020). The Marijuana Code does not affect the ability of employers to have policies restricting the use of marijuana by employees. C.R.S. § 44-10-104(5)(a). Nor does the Marijuana Code prohibit an employer from prohibiting or otherwise regulating the possession, consumption, use, display, transfer, distribution, sale, transportation, or cultivation of marijuana on the employer’s property, regardless of whether the property is owned, controlled, or

occupied by the employer. C.R.S. § 44-10-104(5)(b). Accordingly, employees do not have a right to use marijuana in the workplace in Colorado.

A person may not use marijuana or medical marijuana in plain view in public (see Colo. Const. art. XVIII, §16(3)(d); Colo. Const. art. XVIII, §14(5)(a)(II)) and cannot undertake any task while under the influence of medical marijuana, when doing so would constitute negligence or professional malpractice. See C.R.S. § 25-1.5-106(12)(a)-(b); see also *People v. Jensen*, 2011 Colo. Discipl. LEXIS 8 (Jan. 7, 2011) (reporter citation unavailable) (attorney suspended from practice of law in State of Colorado for six months for having violated laws governing the possession of controlled substances; namely, more than six marijuana plants cultivated for her personal medical use).

Despite the lawful activities statute, an employee can lose unemployment benefit entitlements where he has tested positive for the “presence in an individual’s system, during work hours, of not medically prescribed controlled substances.” See *Sosa v. Indus. Claim Appeals Office*, 259 P.3d 558 (Colo. App. 2011) (quoting C.R.S. § 8-7-108(5)(e)(IX.5) and holding employer did not show testing laboratory was licensed or certified to test, panel erred in disqualification of employee under statute).

A Colorado employee may be terminated for violation of the employer’s drug policy and may be denied unemployment benefits, as well. See *Beinor*, 262 P.3d 970, 976. Medical marijuana is not prescribed by a physician. See C.R.S. § 25-1.5-106 (2014). A physician only certifies the patient has a debilitating medical condition and that the patient may benefit from use of medical marijuana. *Id.* The *Beinor* Court concluded “although the medical certification permitting the possession and use of marijuana may insulate claimant from state criminal prosecution, it does not preclude him from being denied unemployment benefits based on a separation from employment for testing positive for marijuana in violation of an employer’s express zero-tolerance drug policy.” *Beinor*, 262 P.3d at 972. The court further concluded that “the medical use of marijuana by an employee holding a registry card under amendment XVIII, § 14 is not pursuant to a prescription, and therefore does not constitute the use of “medically prescribed controlled substances” within the meaning of C.R.S. § 8-73-108(5)(e)(IX.5). Accordingly, the presence of medical marijuana in an individual’s system during working hours is a ground for a disqualification from unemployment benefits under that section.” *Id.* at 975-76.

In *Coats*, an employee who tested positive for medical marijuana was terminated from his employment and challenged his termination under the Lawful Activities Statute, C.R.S. § 24-34-402.5, and an employment discrimination provision of the Colorado Civil Rights Act (“CCRA”) which prohibits an employer from discharging an employee for “engaging in any lawful activity off the premises of the employer during nonworking hours.” 350 P.3d at 850-51.

The employer filed a motion to dismiss the claim, arguing that the plaintiff’s medical marijuana use was not “lawful” for purposes of the Statute. *Id.* at 851. The trial court dismissed the claim, and the appellate court affirmed. The Colorado Supreme Court granted certiorari, examining the question of whether “lawful” activities under the Lawful Activities Statute included activities that are permissible under state law, but prohibited under federal law. *Id.* at 851. In addressing this issue, the *Coats* Court noted that the term “lawful” is not defined in the Statute. *Id.* at 852. As such, the *Coats* Court interpreted the term “lawful” by “giving the statutory language its commonly accepted and understood meaning.” *Id.* (quoting *People v. Schuett*, 833 P.2d 44, 47 (Colo. 1992)). The Colorado Supreme Court agreed with the Court of Appeals that the commonly accepted meaning of the term “lawful” is that which is “permitted by law,” or conversely, “that which is not contrary to, or forbidden by law.” *Id.*

The Colorado Supreme Court affirmed dismissal of plaintiff's claim, finding that a "lawful" activity under the Statute is that which complies with applicable law, which includes both state and federal law. *Id.* Accordingly, the *Coats* Court declined to "engraft a state law limitation onto the statutory language." *Id.* The *Coats* Court held that because the plaintiff's use of medical marijuana was unlawful under federal law, it was not protected by the Lawful Activities Statute. *Id.* at 853.

The possession and use of marijuana remains illegal under federal law. Where the Drug-Free Work Place Act of 1988 applies to an employer's company, the employer is required to agree that it will provide a drug-free workplace as a precondition of receiving a contract or grant from a Federal agency. See 41 U.S.C. § 702. The Drug-Free Workplace Act applies to federal contractors whose organizations have contracts of \$100,000 or more, is not for acquisition of commercial goods, and is performed in the U.S. It also applies to all organizations that are federal grantees and all individuals who receive a contract or grant from the federal government. *Id.*

F. Gender/Transgender Expression

As discussed above, it is a discriminatory or unfair employment practice for an employer to refuse to discriminate on employment matters on the basis of sexual orientation, C.R.S. § 24-34-402(1)(a), which includes a person's transgender status, C.R.S. § 24-34-301(7).

G. Right of Private Sector Employees to Inspect Personnel Files

Effective January 1, 2017, C.R.S. § 8-2-129 provides that "[e]very employer shall, at least annually, upon the request of an employee, permit that employee to inspect and obtain a copy of any part of his or her own personnel file or files at the employer's office and at a time convenient to both the employer and the employee." C.R.S. § 8-2-129(1). "A former employee may make one inspection of his or her personnel file after termination of employment." *Id.* "An employer may restrict the employee's or former employee's access to his or her files to be only in the presence of a person responsible for managing personnel data on behalf of the employer or another employee designated by the employer." *Id.* "The employer may require the employee or former employee to pay the reasonable cost of duplication of documents." *Id.*

The statute does not apply to public sector employers or employees (who already have access to personnel files through the Colorado Open Records Act). C.R.S. § 8-2-129(2)(a)-(b). The statute also does not apply to financial institutions chartered and supervised under state or federal law, including banks, trust companies, savings institutions, and credit unions. C.R.S. § 8-2-129(4).

The statute defines "personnel files" to mean "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." C.R.S. § 8-2-129(2)(c). "Personnel file" does not include "documents or records required to be placed or maintained in a separate file from the regular personnel file by federal or state law or rule; documents or records pertaining to confidential reports from previous employers of the employee; or an active criminal investigation by the employer, or an active investigation by a regulatory agency." C.R.S. § 8-2-129(2)(c). "Personnel file" also does not include "any information in a document or record that identifies any person who made a confidential accusation, as determined by the employer, against the employee who makes a request under subsection (1) of this section." C.R.S. § 8-2-129(2)(c).

The statute does not create a private cause of action for employees who are subject to violations of their right to access their personnel files. C.R.S. § 8-2-129(3)(a). The statute does not require an employer to create, maintain, or retain a personnel file on an employee or former employee. C.R.S. § 8-2-129(3)(b). The statute also does not require an employer to retain any documents that are or were contained in an employee's or former employee's personnel file for any specified period of time. C.R.S. § 8-2-129(3)(c).