

THE POWR ACT: Protecting Opportunities and Workers Rights
SB21-176 by Sens. Winter & Pettersen, Reps Lontine & Gray



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The POWR ACT seeks to:

1. Expand the Colorado Anti-Discrimination Act (CADA) to Cover Independent Contractors, Subcontractors, and Unpaid Interns

The Problem: Workers who are classified as “independent contractors” have very little protection against workplace discrimination and sexual harassment because Colorado law currently extends those protections only to workers defined as “employees.”

The Solution: The bill’s amendments to CADA solve this problem by:

- Aligning Colorado’s legal protections for workers with the economic reality of the modern workplace, by *including independent contractors, subcontractors, and unpaid interns*
- *Closing a loophole* that allows businesses to opt out of anti-discrimination laws by choosing to call their workers “contractors” instead of “employees”

Other States: Delaware, Illinois, New York, Maryland, South Dakota, Vermont

2. Replace “Severe or Pervasive” with a Modernized Definition of “Hostile Work Environment”

The Problem. The “severe or pervasive” standard was established by the U.S. Supreme Court *more than three decades ago*. The standard *assumes that some harassment is tolerable as long as it is not “severe” and does not happen frequently*. It allows employers to tolerate a level of groping, touching, crude sexual comments and other offensive behavior, whether or not that conduct makes it more difficult for the targets of that behavior to work with dignity. It severely restricts the victims of discriminatory harassment from being able to receive justice.

The Solution. The bill eliminates the excessive “severe or pervasive” hostile work environment requirements and replaces it with one that instead considers an *employee’s sense of well-being and safety*.

Other States: New York, California

3. Extend Deadline to File Claims

The Problem: All claims under CADA, including claims for sexual harassment, *are time barred after 6 months*. Low wage workers are particularly harmed by the short filing timeline. Most workplace sexual harassment is never reported due to lack of education and fear of retaliation. Often times, *victims aren’t ready to come forward until their deadline has passed*.

The Solution: The bill will amend CADA to extend the current 6-month time limit for filing an administrative charge with the CCRD to 300 days, making it consistent with EEOC and giving victims additional time to seek administrative and civil remedies for CADA claims.

Other States: California, Connecticut, Maryland, New York City, New York State, Oregon

4. Modernize Non-Disclosure Agreements

The Problem. All too often, people who bring claims of sexual harassment against their employer under CADA are *denied the opportunity* to resolve their claims with the company unless they agree to terms and conditions that would prohibit employees from disclosing the facts of the sexual harassment they experienced. This leads to *a lack of accountability* on the part of the employer, protects serial predators, provides little to no incentive for the company to correct what may be a systemic and cultural problem, *and leaves the door open for sexual harassment to continue.*

The Solution: The bill amends CADA to solve this problem by:

- Making non-disclosure and confidentiality agreements that protect the identity of the employer *unenforceable.*
- Maintaining the employee's right to set forth terms of any settlement agreement that require the employer to keep confidential his or her identity, while maintaining any contractual agreement maintaining confidentiality regarding the amount of a settlement.

Other States: Arizona, California, Hawaii, Illinois, Louisiana, Maryland, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Vermont, Virginia, Washington State

5. Modernize an Employer's Affirmative Defense

The Problem: Currently, under CADA an employer is not liable for sexual harassment if the employee who was harassed fails to report the harassment to an appropriate authority at the workplace. Essentially, *without a report, the harassment is not illegal.* In many cases, employees would have to report their harassment to the superior harassing them. Even if the employee reports the harassment, "an employer may avoid liability by arguing that it initiated a "reasonable investigation" and that "prompt remedial action," was taken if appropriate. Often times, remedial action is never taken, and the employee must choose between repeatedly facing their harasser at work or finding new employment.

The Solution: The bill raises the threshold that an employer must reach to qualify for the affirmative defense.

Other States: New York, California

6. Treat Age Discrimination Claims the Same as Other Claims

The Problem: Unlike all other protected groups in Colorado, under CADA, victims of age discrimination are currently prohibited from receiving compensatory or punitive damages. Additionally, age discrimination claims are treated differently from claims such as race, sex, or disability in the standard the individual must prove to receive any relief. Currently, age must be the decisive reason for the employer's actions, not just one of several reasons. This is a lack of equity for individuals over age 40.

The Solution: The bill solves this differential treatment of victims of age discrimination by repealing the applicable subsection in CADA that causes these inequities.

Other States:

7. Treat Marital Status Consistently

The Problem: CADA currently mentions “marital status” inconsistently.

The Solution: The bill treats “marital status” in employment situations the same as every other protected characteristic.

8. Protect Caregivers from Discrimination

The Problem: During the pandemic it has become glaringly obvious that we must protect the segment of the workforce with caregiving responsibilities. Women have left the workforce at four times the rate of men since March 2020, and the economic ramifications will be felt for years to come. This intersection of work and personal responsibilities is complex and employer efforts to support caregivers must be encouraged in order for our workforce to recover. Education is necessary to avoid “benevolent discrimination,” which is a particular risk for caregivers.

The Solution: The bill extends protection against discrimination to caregivers, and defines the term in addition to “care recipient.” Employers will be prohibited from making decisions about terms and conditions of employment based on caregiving status.

9. Make Administrative Exhaustion Optional While Preserving Notice Requirement

The Problem: The Colorado Civil Rights Division strives to process complaints in an efficient and timely manner but the demand for the Division’s services is rising. The process can be extremely helpful for many claimants, especially in situations where no communication is taking place between the parties. We greatly appreciate the hard work of CCRD staff. However, going through the CCRD process can take up to 450 days. Additionally, the statistical likelihood that the CCRD will agree with a complainant is low, and even if that happens, the employer is not required to enter into a settlement agreement.

The Solution: The bill brings CADA into alignment with other employment legislation in Colorado which makes agency exhaustion optional (CWCA, HFWA, CEPEWA), and permits employees to file in a court of competent jurisdiction after providing notice to the employer. Employers will be more likely to act swiftly to discuss and address complaints, and less likely to ignore the situation in the hope that the employee will disappear or not be able to sustain an objection (because of termination, resignation, dealing with health issues, etc.).

Other States: Nebraska, Minnesota, DC