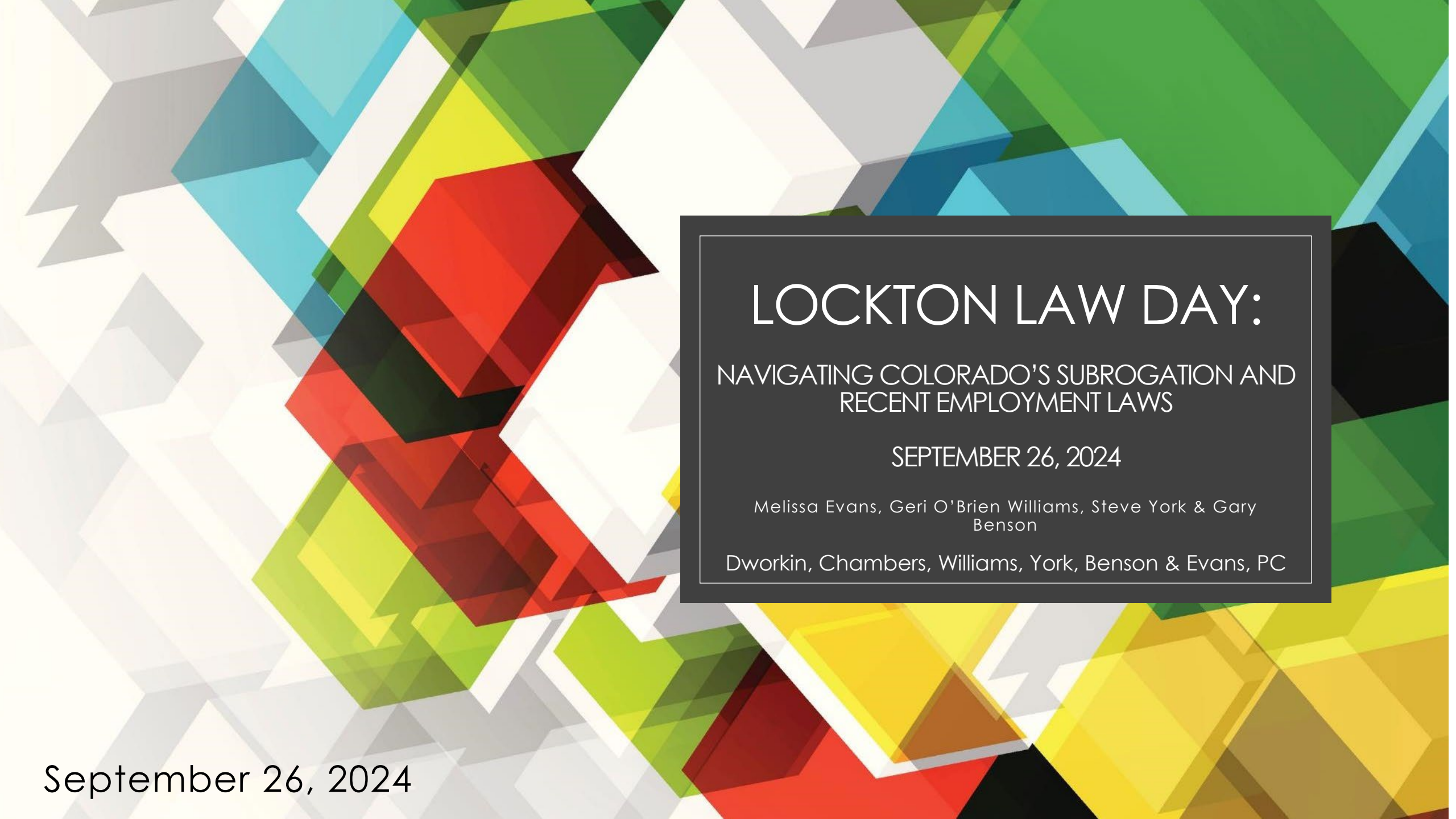




LOCKTON LAW DAY:

NAVIGATING COLORADO'S SUBROGATION AND
RECENT EMPLOYMENT LAWS

SEPTEMBER 26, 2024

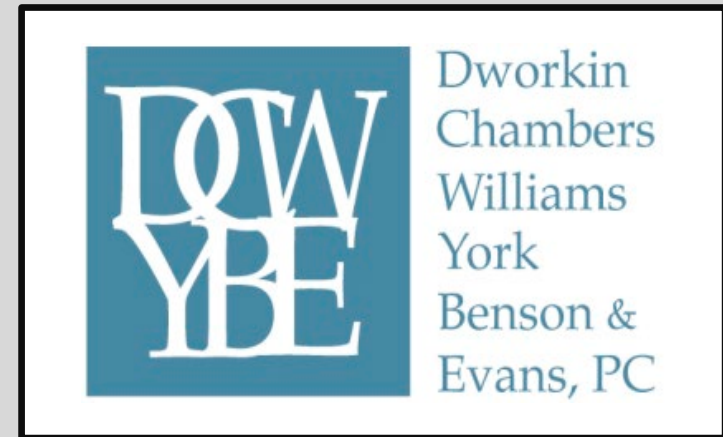
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September 26, 2024

Conflicts of Interest Disclaimer

The following information is presented by an employment attorney engaged in private practice who certifies that he has no affiliation or involvement with any organization or entity with any financial interest or non-financial interest in the subject matter or materials discussed in this webinar.



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POWR Act



Equal Pay Act



Paid Leave Laws



**Job Application
Fairness Act**



POWR Act

- Protecting Opportunities and Workers' Rights Act
- Effective since **August 7, 2023**
- Amends Colorado Anti-Discrimination Act (CADA)
- New conditions for non-disclosure agreements and new record-keeping requirements



Harassment Claims Under CADA

- Old standard for harassment claims – “severe or pervasive” conduct
- New standard – “unwelcome physical or verbal conduct or written, pictorial, or visual communication”
- Directed at individual or group based on membership or perceived membership in a protected class



Harassment Claims Under CADA

- A single incident may qualify as harassment
- Generally, “petty slights, minor annoyances, and lack of good manners do not constitute harassment”
- Slight, annoyances, bad manners may rise to level of harassment based on totality of circumstances (i.e., frequency, number of people involved, etc.)



Harassment Claims Under CADA

- Unwelcome conduct/communication must be:
 1. Subjectively offensive to employee claiming harassment; and
 2. Objectively offensive to reasonable person in protected class



Harassment Claims Under CADA

- Employee alleging harassment must show:
 1. Submission to conduct/communication is explicit or implicit term or condition of employment; or
 2. Submission to, objection to, or rejection of the conduct or communication is used as a basis for employment decisions that affect the employee; or
 3. Conduct/communication has the purpose or effect of unreasonably interfering with performance or creating an intimidating, hostile, or offensive, workplace environment



Harassment Claims Under CADA

- Employer can raise affirmative defense if it shows:
 1. Employer has established a program that is reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment; and
 2. Employer has communicated the existence and details of how to make complaints to both its supervisory and nonsupervisory employees; and
 3. Employee has unreasonably failed to take advantage of this reporting program



Harassment Claims Under CADA

- “Marital status” is now a protected class
- Defense to disability discrimination claims changed
 - Employers can defend by showing (1) there is no reasonable accommodation and (2) disability disqualifies the individual from the job
 - No need to show “significant impact” on the job



New Non-Disclosure Requirements

- Non-disclosure agreements are void if they limit “the ability of the employee or prospective employee to disclose or discuss, either orally or in writing, any alleged discriminatory or unfair employment practice”
- Agreements are enforceable if they meet six conditions



New Non-Disclosure Requirements

1. Applies equally to the employer and employee;
2. Expressly states that it does not restrain the employee from disclosing the underlying facts of any alleged discriminatory or unfair employment practice;
3. Expressly states that disclosure of the underlying facts of any alleged discriminatory or unfair employment practice does not constitute disparagement;
4. Provides that if the agreement contains a non-disparagement provision and the employer subsequently disparages the employee, the employer may not seek to enforce the non-disparagement or non-disclosure provisions or seek damages for an employee violating those provisions;
5. Is free of any liquidated damages provision that constitutes a penalty or punishment or provides for unreasonable, disproportionate, or punitive amount of damages; and
6. Contains an addendum, signed by all parties to the agreement, which attests to the compliance with each of the above requirements.



New Non-Disclosure Requirements

- Applies to agreements executed after August 7, 2023
- Just presenting a non-disclosure agreement that does not satisfy above conditions is a violation
- Actual damages, attorneys' fees and costs, and a \$5,000 penalty per violation



New Record-Keeping Requirements

- Employers must maintain any “personnel or employment record” for at least five years in a designated repository
- Retention period begins on the latest of the following:
 - Date the record was made/received
 - Date the action giving rise to the record occurred
 - Date of the final disposition of a charge of discrimination or related action



Equal Pay for Equal Work Act

- Effective since January 1, 2021
- No sex-based disparity in pay rate (with exceptions)
- Employers cannot request salary/wage history, prevent employees from discussing salary/wage, or retaliate
- Employers must keep records of job descriptions and salary/wages through employment + 2 years



Original Posting Requirements

- Employers must make “reasonable efforts” to announce all “promotional opportunities” to all current CO employees
- Announcements must include:
 - Salary, hourly rate, or good faith range of salary/hourly rate
 - General description of other compensation (i.e., bonuses, commissions)
 - General description of other benefits



Posting Requirements for “Job Opportunities”

- Employers must “make reasonable efforts to announce, post, or otherwise make known each job opportunity to all employees on the same calendar day,” and before the employer selects a candidate for the position
- “Job opportunity” = “a current or anticipated vacancy for which the employer is considering a candidate or candidates or interviewing a candidate or candidates or that the employer externally posts”



Posting Requirements for “Job Opportunities”

- “Job opportunity” ≠ “career development” or “career progression”
- No need to provide notice of lockstep promotion
- Announcements must include:
 - Salary, hourly rate, or good faith range of salary/hourly rate
 - General description of other compensation and benefits
 - **Date application window closes (new)**



Posting Requirements for “Job Opportunities”

- After candidate is selected for a job opportunity, employers must make “reasonable efforts” to “announce, post, or otherwise make known”
 - The name of candidate selected for the job opportunity;
 - Candidate’s previous job title if the selection was internal;
 - The selected candidate’s new job title; and,
 - How employees may demonstrate interest in similar job opportunities in the future



Posting Requirements for “Job Opportunities”

- Information must be made known within 30 days after the selected candidate begins working in the job opportunity
- Information must be made known, at a minimum, to employees the candidate is intended to work with regularly
- Exception: employers must not identify selected candidate in any manner that would violate candidate’s privacy rights under federal, state, or local law or that would place candidate’s health or safety at risk



Career Development vs. Progression

- “Career development” = “change to an employee’s terms of compensation, benefits, full-time or part-time status, duties, or access to further advancement in order to update the employee’s job title or compensate the employee to reflect work performed or contributions already made by the employee.”



Career Development vs. Progression

- “Career progression” = “a regular or automatic movement from one position to another based on time in a specific role or other objective metrics”
- Employers must disclose and make available to all eligible employees the requirements for career progression, along with each position’s terms of compensation, benefits, full-time or part-time status, duties, and access to further advancement



Other Changes

- Recovery period for back pay for employee claiming pay discrimination has been extended from three to six years
- Amendments go into effect January 1, 2024
- CDLE enacted rules to enforce The Equal Pay for Equal Work Act, effective July 1, 2024



Colorado Paid Leave Laws

- Healthy Families and Workplaces Act (HFWA)
 - Applies to all CO employers since January 1, 2022
- Family and Medical Leave Insurance (FAMLI)
 - Employers taxed since January 1, 2023
 - Leave available beginning January 1, 2024



HFWA

- Sets minimum rate to accrue paid “sick leave”
- Leave paid at regular rate
- Reasons employees must be able to use paid leave (i.e., mental/physical illness, obtain diagnosis/care, need to care for family member, etc.)
- Public health emergency supplement



HFWA Updates

- New approved reasons to use paid leave:
 - Grieve, attend funeral services or a memorial, or deal with financial and legal matters that arise after the death of a covered family member
 - Care for a family member whose school or place of care has been closed due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected occurrence or event
 - Evacuate the employee's place of residence due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected occurrence or event



FAMLI Basics

- Up to 12 weeks of partial wage replacement
- Funded by payroll tax split between employee and employer
- Businesses with less than 10 employees are exempt from employer premium match
- Employers who provide their own approved paid leave are exempt



Reasons to Take FAMLI Leave

- Serious health condition of employee or family member
- Caring for child during first year after birth/adoption
- Family member's active-duty service or notice of impending call to service
- Employee or family member is a victim of domestic violence, stalking, or sexual assault or abuse



Job Application Fairness Act

- Employers cannot ask age-related questions on initial application (age, date of birth, dates of attendance/graduation, etc.)
- Employers can ask applicants to verify compliance with age requirements imposed by federal, state, or local law or regulation or a bona fide safety-related qualification



Job Application Fairness Act

- Employers can request certifications, transcripts, other materials created by a third-party at the time of application
- Must notify applicants they can redact information that would identify age, date of birth, or dates of attendance/graduation



Job Application Fairness Act

- Goes into effect July 1, 2024
- No private right of action
- First violation – CDLE will order compliance within 15 days
- Subsequent violations – fines of \$1,000 - \$2,500

Closure – Final Order, Final Admission, Petition to Close for Failure to Prosecute, Abandonment, and Settlement

- Final Admission – Closes a claim if not contested within 30 days
- Petition to Close for Failure to Prosecute – Closes a claim if there is a failure to respond to an order, within 30 days of the order's issuance
- CAN settle full and final in Colorado – Timing is everything
- Settlement – A full and final settlement requires approval by Administrative Law Judge

WC Claims Which Could Give Rise to Subrogation



**Motor vehicle
accidents**



**Machinery
accidents**



Trip/slip & falls

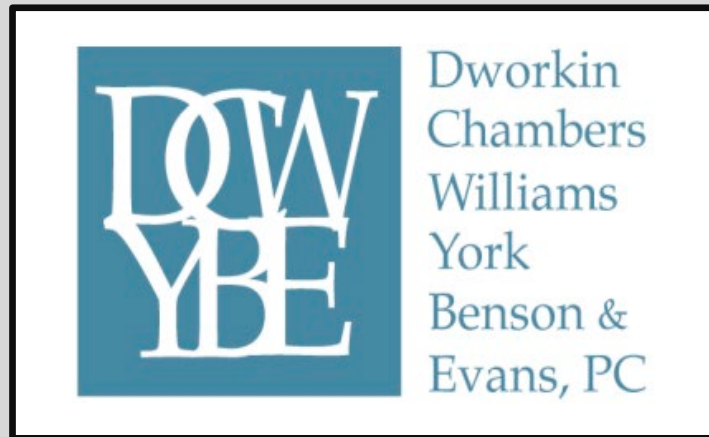


**Animal related
accidents**

Lien for Sale – Delta



Questions?



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