

**WORKERS’ RIGHTS DURING A PUBLIC HEALTH EMERGENCY:
IMPORTANT PROTECTIONS UNDER COLORADO’S
PUBLIC HEALTH EMERGENCY WHISTLEBLOWER LAW (“PHEW”)**

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In July, 2020, the Colorado legislature passed the Healthy Families and Workplaces Act (“HFWA”), which requires Colorado employers to provide paid sick leave for Colorado employees.¹ In conjunction with the passage of the HFWA, the Colorado legislature also enacted the Public Health Emergency Whistleblower Law (“PHEW”), which provides numerous “whistleblower” protections for employees who are directly impacted in their workplaces by the COVID-19 pandemic.

We have all heard of COVID-19 workplace outbreaks across the country, specifically in meat-processing and packaging plants. Plant workers, many of whom are foreign-born, work closely together, often elbow-to-elbow and face-to-face, and do not have the ability to “socially distance” due to inherent work conditions. In 2020, over three hundred employees at JBS USA, a meatpacking plant in Greeley, Colorado, were diagnosed with COVID-19, and seven died. Allegations regarding JBS’s alleged failure to adequately respond to the first outbreak in April 2020 were rampant and included JBS’s alleged failure to follow CDC guidelines and to provide employees with COVID-19 information, Personal Protective Equipment (“PPE”), testing and sick leave (paid or unpaid) for those who experienced COVID-19 symptoms. The Colorado legislature responded promptly and PHEW was enacted on July 11, 2020.

PHEW prohibits a “principal”² from discriminating, retaliating, or taking adverse action against any worker who:

- In good faith, raises any reasonable concern about workplace violations of government health or safety rules, or a significant workplace threat to health or safety related to a public health emergency to:
 - a principal or principal's agent;
 - other workers;
 - a government agency; or

¹ See C.R.S. § 8-13.3-401, *et. seq.*; Employer-Paid Sick Leave in Colorado: Important Paid Sick Leave Requirements Under Colorado’s Healthy Family & Workplaces Act (“HFWA”), J.Trent, Coan, Payton & Payne, LLC, www.cp2law.com.

² A “principal” is defined much more broadly than an “employer” and includes, in addition to an “employer” as defined in the Fair Labor Standards Act, labor contractors, state and local governments and political subdivisions, and entities which contract with 5 or more independent contractors in a year.

- the public, if the principal controls the workplace conditions giving rise to the threat or violation.
- Voluntarily wears their PPE at the workplace if such PPE provides a higher level of protection than equipment provided by the principal, is recommended by a federal, state or local public health agency with jurisdiction over the workplace, and does not render the worker incapable of performing their duties; and
- Opposes a practice the worker reasonably believes is unlawful or makes a charge, testifies, assists, or participates in an investigation, proceeding, or hearing of alleged unlawful acts.

Additionally, a principal is prohibited from requiring or attempting to require a worker to sign a contract or other agreement that limits or prevents the worker from disclosing information about workplace health and safety practices or hazards related to a public health emergency. Any contract that violates this prohibition is “void and unenforceable.”

These PHEW protections do not apply to a worker who knowingly discloses false information or discloses information with reckless disregard for the truth or falsity of the information.

Principals are required to post notice of workers’ PHEW protections. This requirement can be met by posting a Colorado Department of Labor and Employment poster (specifically, the Colorado Workplace Public Health Rights Poster: Paid Leave, Whistleblowing, & Protective Equipment poster) in an “easily accessible” place.

The enforcement portion of PHEW is similar to the anti-discrimination enforcement process, which requires a person to “exhaust their administrative remedies” before proceeding in court. A person may seek relief for PHEW violations by:

- Filing a complaint with the Colorado Department of Labor and Employment, Division of Labor Standards and Statistics (the “Division”);³
- Bringing an action in district court, after exhausting administrative remedies; or
- Bringing a whistleblower action in the name of the state in district court, after exhausting administrative remedies.

A complaint must be filed with the Division within two years of the alleged violation. The Division must either investigate the violations or authorize the worker to proceed with an action in court.

³ Until the Division creates a PHEW complaint form (which had not been created as of February 10, 2021), complaints may be filed in any format, including by email.

If a Division investigation yields a determination that a violation has occurred, the Division may award the worker back pay, reinstate them, award them front pay if reinstatement is not feasible, award them reasonable attorney fees, and impose fines on the principal of no less than \$100.00 per violation pursuant to C.R.S. § 8-1-140(2) (if multiple employees are affected, the violation of each employee's rights constitutes a separate violation).

If the Division authorizes a worker to proceed with a court action, the worker must file a claim in court within 90 days of receiving such authorization. If the court finds in favor of the worker, the court may, in addition to the remedies set forth above, award front and back pay or the greater of \$10,000.00, and "any other equitable relief the court deems appropriate." If a worker asserts that a principal acted with "malice or reckless indifference" and has not demonstrated "good faith efforts to comply" with PHEW, either party may demand a jury trial. If the worker prevails on that issue, a court may award compensatory damages including damages resulting from emotional pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life, *as well as punitive damages*. The size and assets of the defendant and the egregiousness of the employment practice at issue *shall* be taken into account in awarding punitive damages. Thus, the Occupational Safety and Health Administration \$15,615.00 fine imposed on JBS for its 2020 COVID-19 related violations is a thing of the past in Colorado, at least in cases where a principal acts with "malice or reckless indifference."

It should be noted that the court *requires* an award of reasonable attorney fees to a worker who prevails in a court action. There is no fee-shifting provision for principals who prevail.

Finally, when PHEW rights are enforced in court by a worker on behalf of the state, i.e., in a *qui tam* capacity⁴ and if the state intervenes in that action, any proceeds of a judgment are distributed 75% to the Division and 25% to the worker.

It is obvious that a principal/employer:

- (1) Should know and comply with applicable government health and safety rules, especially as they relate to a public health emergency; and
- (2) Should not curtail or prohibit employees' right to report perceived violations of those rules.

However, employers should also review and, if necessary, revise their employment policies and manuals to avoid less readily recognizable violations of PHEW. For example, many companies have social media policies that prohibit employees from "airing grievances" or making "disparaging comments" about the company on social media. Those companies are in violation of PHEW if they take any adverse action against an employee under that policy if the employee's

⁴ *Qui tam* is short for a Latin phrase which roughly translates to "he who brings an action for the king as well as for himself."

comments/social posts deal with how the company is (mis)handling a public health emergency in the workplace.

Given the two-year window to file a PHEW complaint with the Division, it is unclear how many PHEW complaints/lawsuits will arise due to COVID-19. What is clear is that Colorado is serious about protecting workers who publicize their public health emergency workplace concerns from companies who retaliate against them.

Questions? Please contact Julie Trent at jtrent@cp2law.com or (303) 861-8888. Ms. Trent is a senior attorney with Coan, Payton & Payne, LLC, and practices in all areas of general commercial litigation and employment law, assisting many types of businesses and financial institutions in a wide range of cases.

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