A BILL FOR AN ACT

CONCERNING THE CREATION OF REMEDIES IN EMPLOYMENT DISCRIMINATION CASES BROUGHT UNDER STATE LAW.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://www.leg.state.co.us/billsummaries.)

Current law does not permit an award of compensatory or punitive damages or attorney fees and costs to a plaintiff who prevails in a complaint before the Colorado civil rights commission (commission) or in a lawsuit alleging a discriminatory or unfair employment practice under state law, even in cases of intentional discrimination. While federal
employment antidiscrimination laws allow such damages in cases where intentional discrimination is found, and allows an award of reasonable attorney fees and costs, only employers who employ 15 or more employees are subject to federal law. Moreover, victims of employment discrimination on the basis of sexual orientation are not afforded protections under federal law. Thus, employees who work for employers with fewer than 15 employees or who claim employment discrimination on the basis of sexual orientation are not allowed compensatory or punitive damages and cannot recover reasonable attorney fees and costs when they prove a case of intentional employment discrimination.

Additionally, current law precludes a claim of age discrimination by persons 70 years of age or older.

Section 1 of the bill establishes the "Job Protection and Civil Rights Enforcement Act of 2013", which would allow the additional remedies of compensatory and punitive damages in employment discrimination cases brought under state law against employers where intentional discrimination is proven. These damages would be in addition to the remedies allowed under current law, namely, front pay, back pay, interest on back pay, reinstatement or hiring, and other equitable relief that may be awarded. Compensatory damages are to compensate a plaintiff for other pecuniary losses, emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. If the plaintiff shows by a preponderance of the evidence that the defendant engaged in a discriminatory or unfair employment practice with malice or reckless indifference to the rights of the plaintiff, the plaintiff may recover punitive damages.

The bill limits the amount of compensatory and punitive damages to the amounts specified in the federal "Civil Rights Act of 1991" and directs the commission or court to consider the size and assets of the defendant and the egregiousness of the intentional discriminatory or unfair employment practice when determining the amount of damages to award the victim.

When a plaintiff claims compensatory or punitive damages in a civil lawsuit, either party to the action is entitled to demand a jury trial. Additionally, the court may award the prevailing plaintiff reasonable attorney fees and costs and, if the court finds that the action was frivolous, groundless, or vexatious, the court may award attorney fees and costs to the defendant.

Section 2 of the bill removes the maximum age limit for purposes of age discrimination claims, thereby permitting persons 70 years of age or older to pursue a claim based on age discrimination.

Section 3 of the bill authorizes the commission to appoint a working group of employers and employees to assist in education and outreach efforts to foster compliance with laws prohibiting discriminatory or unfair employment practices.
The remedies available under the bill would apply to causes of action alleging discriminatory or unfair employment practices accruing on or after January 1, 2015.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, repeal and reenact, with amendments, 24-34-405 as follows:

24-34-405. Relief authorized - short title. (1) This section shall be known and may be cited as the "Job Protection and Civil Rights Enforcement Act of 2013".

(2) (a) In addition to the relief authorized by section 24-34-306(9), the commission or the court may order affirmative relief that the commission or court determines to be appropriate, including the following relief, against a respondent who is found to have engaged in an unfair or discriminatory employment practice:

(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.

(b) If the commission or court orders back pay, the liability for back pay accrues from a date not more than two years prior to the filing of a charge with the division. The
COMMISSION OR COURT SHALL REDUCE AN AWARD OF BACK PAY BY ANY AMOUNT OF ACTUAL EARNINGS OF, OR AMOUNTS THAT COULD HAVE BEEN EARNED WITH REASONABLE DILIGENCE BY, THE PERSON WHO WAS THE VICTIM OF THE DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE.

(3) (a) IN ADDITION TO THE RELIEF AVAILABLE PURSUANT TO SUBSECTION (2) OF THIS SECTION, AND EXCEPT AS PROVIDED IN PARAGRAPH (g) OF THIS SUBSECTION (3), IN A PROCEEDING OR CIVIL ACTION BROUGHT BY A COMPLAINING PARTY OR PLAINTIFF UNDER THIS PART 4 AGAINST A RESPONDENT OR DEFENDANT WHO IS FOUND TO HAVE ENGAGED IN AN INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE, THE COMPLAINING PARTY OR PLAINTIFF MAY RECOVER COMPENSATORY AND PUNITIVE DAMAGES AS SPECIFIED IN THIS SUBSECTION (3). THE COMMISSION OR COURT SHALL NOT AWARD A COMPLAINING PARTY OR PLAINTIFF COMPENSATORY OR PUNITIVE DAMAGES WHEN THE RESPONDENT OR DEFENDANT IS FOUND TO HAVE ENGAGED IN AN EMPLOYMENT PRACTICE THAT IS UNLAWFUL SOLELY BECAUSE OF ITS DISPARATE IMPACT.

(b) (I) EXCEPT AS LIMITED BY THE "COLORADO GOVERNMENTAL IMMUNITY ACT", ARTICLE 10 OF THIS TITLE, AND EXCEPT AS PROVIDED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH (b), A COMPLAINING PARTY OR PLAINTIFF MAY RECOVER PUNITIVE DAMAGES AGAINST A RESPONDENT OR DEFENDANT, OTHER THAN THE STATE OR ANY POLITICAL SUBDIVISION, COMMISSION, DEPARTMENT, INSTITUTION, OR SCHOOL DISTRICT OF THE STATE, IF THE COMPLAINING PARTY OR PLAINTIFF DEMONSTRATES BY A PREPONDERANCE OF THE EVIDENCE THAT THE RESPONDENT OR DEFENDANT ENGAGED IN A DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE WITH MALICE OR RECKLESS INDIFFERENCE TO THE RIGHTS OF
THE COMPLAINING PARTY OR PLAINTIFF. HOWEVER, IF THE RESPONDENT
OR DEFENDANT DEMONSTRATES GOOD-FAITH EFFORTS TO COMPLY WITH
THIS PART AND TO PREVENT DISCRIMINATORY AND UNFAIR EMPLOYMENT
PRACTICES IN THE WORKPLACE, THE COMMISSION OR COURT SHALL NOT
AWARD PUNITIVE DAMAGES AGAINST THE RESPONDENT OR DEFENDANT.

(II) THE COMMISSION OR COURT SHALL NOT AWARD PUNITIVE
DAMAGES IN A PROCEEDING OR CIVIL ACTION INVOLVING A CLAIM OF
FAILURE TO MAKE A REASONABLE ACCOMMODATION FOR A PERSON WITH
A DISABILITY IF THE RESPONDENT OR DEFENDANT DEMONSTRATES GOOD
FAITH EFFORTS TO IDENTIFY AND MAKE A REASONABLE ACCOMMODATION
THAT WOULD PROVIDE THE PERSON WITH A DISABILITY AN EQUALLY
EFFECTIVE OPPORTUNITY AND WOULD NOT CAUSE AN UNDUE HARDSHIP ON
THE OPERATION OF THE RESPONDENT’S OR DEFENDANT’S BUSINESS.

(c) A COMPLAINING PARTY OR PLAINTIFF MAY RECOVER
COMPENSATORY DAMAGES AGAINST A RESPONDENT OR DEFENDANT FOR
OTHER PECUNIARY LOSSES, EMOTIONAL PAIN AND SUFFERING,
INCONVENIENCE, MENTAL ANGUISH, LOSS OF ENJOYMENT OF LIFE, AND
OTHER NONPECUNIARY LOSSES.

(d) THE TOTAL AMOUNT OF COMPENSATORY AND PUNITIVE
DAMAGES AWARDED PURSUANT TO THIS SUBSECTION (3) SHALL NOT
EXCEED THE AMOUNTS SPECIFIED IN 42 U.S.C. SEC. 1981a (b) (3); EXCEPT
THAT, FOR EMPLOYERS THAT EMPLOY FEWER EMPLOYEES THAN THE
NUMBER SPECIFIED IN 42 U.S.C. SEC. 1981a (b) (3) (A), THE TOTAL
AMOUNT OF COMPENSATORY AND PUNITIVE DAMAGES AWARDED
PURSUANT TO THIS SUBSECTION (3) SHALL NOT EXCEED THE AMOUNT
SPECIFIED IN 42 U.S.C. SEC. 1981a (b) (3) (A). IN DETERMINING THE
APPROPRIATE LEVEL OF DAMAGES TO AWARD A COMPLAINING PARTY OR
PLAINTIFF WHO HAS BEEN THE VICTIM OF AN INTENTIONAL
DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE, THE COMMISSION OR
COURT SHALL CONSIDER THE SIZE AND ASSETS OF THE RESPONDENT OR
DEFENDANT AND THE EGREGIOUSNESS OF THE INTENTIONAL
DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE.

(e) COMPENSATORY OR PUNITIVE DAMAGES AWARDED PURSUANT
TO THIS SUBSECTION (3) ARE IN ADDITION TO, AND DO NOT INCLUDE,
FRONT PAY, BACK PAY, INTEREST ON BACK PAY, OR ANY OTHER TYPE OF
RELIEF AWARDED PURSUANT TO SUBSECTION (2) OF THIS SECTION.

(f) THE REMEDIES SPECIFIED IN THIS SUBSECTION (3) APPLY TO
CAUSES OF ACTION ALLEGING DISCRIMINATORY OR UNFAIR EMPLOYMENT
PRACTICES ACCRUEING ON OR AFTER JANUARY 1, 2015.

(g) IN A PROCEEDING OR CIVIL ACTION INVOLVING A CLAIM OF
DISCRIMINATION BASED ON AGE, THE COMPLAINING PARTY OR PLAINTIFF
IS ENTITLED ONLY TO THE RELIEF AUTHORIZED IN SUBSECTION (2) OF THIS
SECTION AND IN 29 U.S.C. SEC. 626 (b) AND 29 U.S.C. SEC. 216 (b) IF THE
COMMISSION OR COURT FINDS THAT THE RESPONDENT OR DEFENDANT
ENGAGED IN A DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE
BASED ON AGE. IF, IN ADDITION TO ALLEGING DISCRIMINATION BASED ON
AGE, THE COMPLAINING PARTY OR PLAINTIFF ALLEGES DISCRIMINATION
BASED ON ANY OTHER FACTOR SPECIFIED IN SECTION 24-34-402 (1), THIS
PARAGRAPH (g) DOES NOT PRECLUDE A COMPLAINING PARTY OR PLAINTIFF
FROM RECOVERING THE RELIEF AUTHORIZED BY THIS SECTION FOR THAT
DISCRIMINATION CLAIM.

(4) IF A COMPLAINING PARTY OR PLAINTIFF IN A CIVIL ACTION
FILED UNDER THIS PART 4 SEEKS COMPENSATORY OR PUNITIVE DAMAGES
PURSUANT TO SUBSECTION (3) OF THIS SECTION, ANY PARTY TO THE CIVIL
ACTION MAY DEMAND A TRIAL BY JURY.

(5) IN ANY PROCEEDING OR CIVIL ACTION UNDER THIS PART 4, THE COMMISSION OR COURT MAY AWARD REASONABLE ATTORNEY FEES AND COSTS TO THE PREVAILING PLAINTIFF. IF THE COURT FINDS THAT AN ACTION OR DEFENSE BROUGHT PURSUANT TO THIS PART 4 WAS FRIVOLOUS, GROUNDLESS, OR VEXATIOUS AS PROVIDED IN ARTICLE 17 OF TITLE 13, C.R.S., THE COURT MAY AWARD COSTS AND ATTORNEY FEES TO THE DEFENDANT IN THE ACTION.


(7) (a) THE PROCEDURES SET FORTH IN THIS SUBSECTION (7) APPLY TO A COMPLAINT FILED BY AN APPLICANT FOR A POSITION IN THE STATE PERSONNEL SYSTEM OR BY AN EMPLOYEE IN THE STATE PERSONNEL SYSTEM, COLLECTIVELY REFERRED TO IN THIS SUBSECTION (7) AS THE "AGGRIEVED PARTY", ALLEGING AN INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE.

(b) THE STATE PERSONNEL BOARD ESTABLISHED PURSUANT TO SECTION 14 OF ARTICLE XII OF THE STATE CONSTITUTION SHALL NOT AWARD COMPENSATORY DAMAGES TO AN AGGRIEVED PARTY ALLEGING AN INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE. AN AGGRIEVED PARTY WHO IS SEEKING COMPENSATORY DAMAGES AS AUTHORIZED IN SUBSECTION (3) OF THIS SECTION MUST FILE A CIVIL ACTION IN A COURT OF COMPETENT JURISDICTION TO RECOVER COMPENSATORY DAMAGES.

(c) (I) UPON ISSUANCE OF A WRITTEN DECISION BY THE STATE
PERSONNEL BOARD PURSUANT TO SECTION 24-50-125.4 IN WHICH THE
STATE PERSONNEL BOARD MAKES A FINDING OF AN INTENTIONAL
DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE, AN AGGRIEVED
PARTY MAY FILE A CIVIL ACTION IN A DISTRICT COURT IN THIS STATE
SEEKING COMPENSATORY DAMAGES AS AUTHORIZED IN SUBSECTION (3) OF
THIS SECTION.

(II) IF AN ADMINISTRATIVE LAW JUDGE ISSUES THE INITIAL
WRITTEN DECISION ON BEHALF OF THE STATE PERSONNEL BOARD, THE
AGGRIEVED PARTY MAY NOT FILE A CIVIL ACTION UNTIL AFTER THE
EXPIRATION OF THE THIRTY-DAY PERIOD SPECIFIED IN SECTION
24-50-125.4 (4) FOR FILING AN APPEAL. IF A PARTY DOES NOT FILE AN
APPEAL OF THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION WITH THE
STATE PERSONNEL BOARD IN ACCORDANCE WITH SECTION 24-50-125.4 (4),
THE AGGRIEVED PARTY MUST FILE THE CIVIL ACTION FOR COMPENSATORY
DAMAGES WITHIN THIRTY DAYS AFTER THE EXPIRATION OF THE APPEAL
PERIOD SPECIFIED IN SECTION 24-50-125.4 (4). IF A PARTY FILES AN
APPEAL WITH THE STATE PERSONNEL BOARD IN ACCORDANCE WITH
SECTION 24-50-125.4 (4), THE AGGRIEVED PARTY MUST FILE THE CIVIL
ACTION FOR COMPENSATORY DAMAGES WITHIN THIRTY DAYS AFTER THE
DATE THE STATE PERSONNEL BOARD TRANSMITS THE NOTICE OF ITS
DECISION ON THE APPEAL IN ACCORDANCE WITH SECTION 24-50-125.4 (6).

(III) IF THE AGGRIEVED PARTY FAILS TO FILE AN ACTION FOR
COMPENSATORY DAMAGES WITHIN THIRTY DAYS AFTER THE APPEAL
PERIOD EXPIRES OR THE DATE THE STATE PERSONNEL BOARD'S NOTICE OF
DECISION IS TRANSMITTED, WHICHEVER IS APPLICABLE PURSUANT TO
SUBPARAGRAPH (II) OF THIS PARAGRAPH (c), THE ACTION FOR
COMPENSATORY DAMAGES IS BARRED, NO DISTRICT COURT HAS
JURISDICTION TO HEAR THE ACTION, AND THE STATE PERSONNEL BOARD’S DECISION BECOMES FINAL AND IS SUBJECT TO JUDICIAL REVIEW PURSUANT TO SECTIONS 24-50-125.4 (3) AND 24-4-106 (11).

(d) THE AGGRIEVED PARTY AND THE DISTRICT COURT SHALL SERVE A COPY OF THE CIVIL ACTION COMPLAINT ON THE STATE PERSONNEL BOARD, AND UPON RECEIPT OF THE COMPLAINT, THE STATE PERSONNEL BOARD’S DECISION IS AUTOMATICALLY STAYED PENDING THE OUTCOME OF THE CIVIL ACTION, IN WHICH CASE THE STATE PERSONNEL BOARD’S DECISION IS NOT A FINAL ORDER SUBJECT TO JUDICIAL REVIEW PURSUANT TO SECTIONS 24-50-125.4 (3) AND 24-4-106 (11) UNTIL THE DISTRICT COURT ISSUES A FINAL JUDGMENT IN THE CIVIL ACTION FOR COMPENSATORY DAMAGES.

(e)(I) IN A CIVIL ACTION BROUGHT PURSUANT TO THIS SUBSECTION (7) FOR COMPENSATORY DAMAGES AFTER THE STATE PERSONNEL BOARD MAKES A FINDING OF AN INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE, THE DISTRICT COURT SHALL CONSIDER THE ISSUE OF WHETHER THE AGGRIEVED PARTY IS ENTITLED TO COMPENSATORY DAMAGES AND THE AMOUNT OF DAMAGES, IF AWARDED.

(II) THE DISTRICT COURT MAY AWARD ATTORNEY FEES AND COSTS IN CONNECTION WITH THE ACTION FOR COMPENSATORY DAMAGES CONSISTENT WITH SUBSECTION (5) OF THIS SECTION.

(III) THE DISTRICT COURT SHALL EXPEDITE THE ACTION FOR COMPENSATORY DAMAGES AND SET THE MATTER FOR TRIAL AT THE EARLIEST PRACTICAL TIME.

(f) UPON ENTERING A FINAL JUDGMENT IN A CIVIL ACTION BROUGHT PURSUANT TO THIS SUBSECTION (7), THE DISTRICT COURT SHALL SERVE NOTICE OF THE JUDGMENT ON THE PARTIES AND THE STATE
PERSONNEL BOARD. ONCE THE STATE PERSONNEL BOARD RECEIVES A
FINAL JUDGMENT FROM THE DISTRICT COURT, THE STATE PERSONNEL
BOARD SHALL INCORPORATE THE DISTRICT COURT JUDGMENT IN ITS
DECISION, WHICH BECOMES A FINAL ORDER SUBJECT TO JUDICIAL REVIEW
IN ACCORDANCE WITH SECTIONS 24-50-125.4 (3) AND 24-4-106 (11).

(g) A CLAIM FILED PURSUANT TO THIS SUBSECTION (7) BY AN
AGGRIEVED PARTY AGAINST THE STATE FOR COMPENSATORY DAMAGES
FOR AN INTENTIONAL UNFAIR OR DISCRIMINATORY EMPLOYMENT PRACTICE
IS NOT SUBJECT TO THE "COLORADO GOVERNMENTAL IMMUNITY ACT",
ARTICLE 10 OF THIS TITLE:

SECTION 2. In Colorado Revised Statutes, 24-30-1510, amend
(3) (a) as follows:

24-30-1510. Risk management fund - creation - authorized
and unauthorized payments. (3) Expenditures shall be made out of the
risk management fund in accordance with subsection (1) of this section
only for the following purposes:

(a) To pay liability claims and expenses related thereto, brought
against the state, its officials, or its employees pursuant to the "Colorado
Governmental Immunity Act", article 10 of this title; and claims against
the state, its officials, or its employees arising under federal law, which
the state is legally obligated to pay and which are compromised or settled
pursuant to section 24-30-1515 or in which a final money judgment
against the state has been entered; OR CLAIMS FOR COMPENSATORY
DAMAGES AGAINST THE STATE, ITS OFFICIALS, OR ITS EMPLOYEES
PURSUANT TO SECTION 24-34-405;

SECTION 3. In Colorado Revised Statutes, 24-34-301, amend
(1) as follows:
24-34-301. Definitions. As used in parts 3 to 7 of this article, unless the context otherwise requires:

(1) "Age" means a chronological age of at least forty years but less than seventy years.

SECTION 4. In Colorado Revised Statutes, 24-34-305, amend (1) (c) as follows:

24-34-305. Powers and duties of commission. (1) The commission has the following powers and duties:

(c) (I) To investigate and study the existence, character, causes, and extent of unfair or discriminatory practices as defined in parts 4 to 7 of this article and to formulate plans for the elimination thereof by educational or other means.

(II) (A) In furtherance of its educational efforts to reduce instances of discriminatory or unfair employment practices, the commission shall create a volunteer working group representing both employer and employee interests, including human resource professionals, to assist in education and outreach efforts to foster understanding of and compliance with part 4 of this article. The commission may accept and expend gifts, grants, and donations to assist in its duties pursuant to this subparagraph (II).

(B) The commission shall create the volunteer working group by September 1, 2013. The working group shall develop and submit to the commission, by January 1, 2014, an education and outreach plan for the commission to implement for purposes of educating employers and providing outreach regarding part 4 of the article.
(C) In addition to the outreach plan required by sub-subparagraph (B) of this subparagraph (II), the working group shall compile and provide to the commission information on educational resources available to employers regarding the requirements of and compliance with Part 4 of this article, including resources for employers on prevention of discriminatory employment practices. The commission shall post the information on its web site and shall make the information available in an electronic format to all state departments and agencies that interact with private businesses in the state, including the departments of labor and employment, regulatory agencies, revenue, and state and the governor's office of economic development. Those departments and agencies, within existing resources, shall post the information provided by the commission, or links to that information, on their web sites.

SECTION 5. Act subject to petition - effective date - applicability. (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly; except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2014 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) This act applies to causes of action alleging discriminatory or
unfair employment practices accruing on or after January 1, 2015.