BILLS

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STATE OF COLORADO
Second Regular Session
Seventy-second General Assembly

HOUSE BILL

LLS NO. 20-1239.01 Yelana Love x2295

HOUSE SPONSORSHIP
Garnett,

SENATE SPONSORSHIP
(None),

BILL TOPIC: "COVID-19 Whistleblower Protection"
DEADLINES: File by: 6/1/2020

A BILL FOR AN ACT
CONCERNING AN EMPLOYEE'S RIGHTS IN THE WORKPLACE FOR
CONDUCT RELATED TO AN EMPLOYER'S ACTIONS DURING A
PUBLIC HEALTH EMERGENCY.

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://leg.colorado.gov.)

The bill summary for this measure has been intentionally omitted and will appear on future redrafts of this measure.

Capital letters or bold & italic numbers indicate new material to be added to existing statute. Dashes through the words indicate deletions from existing statute.
Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, add article 14.4 to title 8 as follows:

8-14.4-101. Definitions. As used in this article 14.4, unless the context otherwise requires:

(1) "Department" means the Department of Labor and Employment.

(2) "Division" means the Division of Labor Standards and Statistics in the Department.

(3) "Employee" means any person, including a migratory laborer, performing labor or services for the benefit of an employer. For the purpose of this article 14.4, relevant factors in determining whether a person is an employee include the degree of control the employer may or does exercise over the person and the degree to which the person performs work that is the primary work of the employer; except that an individual primarily free from control and direction in the performance of the service, both under his or her contract for the performance of service and in fact, and who is customarily engaged in an independent trade, occupation, profession, or business related to the service performed is not an "employee" unless the individual works for an employer that relies on independent contractors for seventy-five percent or more of its workforce.

(4) (a) "Employer" has the same meaning as set forth in the federal "Fair Labor Standards Act", 29 U.S.C. sec. 203 (d), and includes a foreign labor contractor and a migratory field labor contractor or crew leader. "Employer" includes the state of Colorado, local governments, and political subdivisions of...
THE STATE AS DEFINED IN SECTION 1-7.5-103 (6).

(b) "EMPLOYER" INCLUDES AN ENTITY THAT RELIES ON INDEPENDENT CONTRACTORS FOR SEVENTY-FIVE PERCENT OR MORE OF THE ENTITY'S WORKFORCE IN THE STATE.

(5) "PUBLIC HEALTH EMERGENCY" MEANS:

(a) A PUBLIC HEALTH ORDER ISSUED BY A STATE OR LOCAL PUBLIC HEALTH AGENCY; OR

(b) A DISASTER EMERGENCY DECLARED BY THE GOVERNOR BASED ON A PUBLIC HEALTH CONCERN.

8-14.4-102. Prohibition against discrimination based on whistleblower claims related to a public health emergency. (1) An EMPLOYER SHALL NOT DISCRIMINATE OR TAKE ADVERSE ACTION AGAINST ANY EMPLOYEE WHO RAISES ANY CONCERN ABOUT WORKPLACE HEALTH AND SAFETY PRACTICES OR HAZARDS RELATED TO A PUBLIC HEALTH EMERGENCY TO THE EMPLOYER, THE EMPLOYER’S AGENT, OTHER WORKERS, A GOVERNMENT AGENCY, OR TO THE PUBLIC, IF THE WORKPLACE HEALTH AND SAFETY PRACTICES FAIL TO MEET GUIDELINES ESTABLISHED BY A FEDERAL, STATE, OR LOCAL PUBLIC HEALTH AGENCY WITH JURISDICTION OVER THE WORKPLACE.

(b) (I) An EMPLOYER SHALL NOT ATTEMPT TO REQUIRE ANY EMPLOYEE TO SIGN A CONTRACT OR OTHER AGREEMENT THAT WOULD LIMIT OR PREVENT THE EMPLOYEE FROM DISCLOSING INFORMATION ABOUT WORKPLACE HEALTH AND SAFETY PRACTICES OR HAZARDS RELATED TO A PUBLIC HEALTH EMERGENCY OR TO OTHERWISE ABIDE BY A WORKPLACE POLICY THAT WOULD LIMIT OR PREVENT SUCH DISCLOSURES.

(II) A CONTRACT OR AGREEMENT THAT VIOLATES SUBSECTION (2)(b)(I) OF THIS SECTION IS VOID AND UNENFORCEABLE AS CONTRARY TO THE PUBLIC POLICY OF THIS STATE. AN EMPLOYER’S ATTEMPT TO IMPOSE SUCH A CONTRACT OR AGREEMENT IS AN ADVERSE ACTION IN VIOLATION

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(3) An employer shall not discriminate or take adverse action against an employee who voluntarily wears at the employee’s workplace the employee’s own personal protective equipment, such as a mask, faceguard, or gloves, if the personal protective equipment:

(a) Provides a higher level of protection than the equipment provided by the employer;

(b) Is recommended by a federal, state, or local public health agency with jurisdiction over the employee’s workplace;

and

(c) Does not render the employee incapable of performing the employee’s job.

(4) An employer shall not discriminate against an employee or applicant for opposing any practice the employee reasonably believe is unlawful under this article 14.4 or for making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing as to any matter the employee reasonably believes to be unlawful under this article 14.4.

(4) If an employer discriminates or retaliates against an employee or within ninety days after the employee’s engagement or attempt to engage in activities protected by this article 14.4, such conduct raises a presumption that the action is discrimination or retaliation in violation of this article 14.4. The presumption may be rebutted by clear and convincing evidence that the action was taken for other permissible reasons.

8-14.4-103. Employer notice. (1) An employer shall post
NOTICE OF AN EMPLOYEE'S RIGHTS UNDER THIS ARTICLE 14.4 IN A CONSPICUOUS LOCATION ON THE EMPLOYER'S PREMISES AS DETERMINED BY THE DIVISION BY RULE.

(2) The division shall promulgate rules to establish the form of the notice required in subsection (1) of this section.

8-14.4-104. Remedies. (1) A person may seek relief for a violation of this article 14.4 by:

(a) Filing a complaint with the division pursuant to section 8-14.4-105;

(b) Bringing an action in a court of competent jurisdiction pursuant to section 8-14.4-106; or

(c) Bringing an action in the name of the state in a court of competent jurisdiction pursuant to section 8-14.4-107.

(2) A person is not required to exhaust administrative remedies prior to bringing an action in court.

8-14.4-105. Enforcement by the division. (1) An aggrieved individual may file a claim against an employer with the division in form and manner determined by the division by rule.

(2) (a) The division may investigate:

(I) Employer retaliation in violation of this article 14.4;

and

(II) Claims filed with the division by aggrieved individuals.

(b) The division shall provide information on rights and remedies available to aggrieved individuals with claims the division does not investigate.

(2) In an investigation of employer retaliation or interference with employee rights, if an investigation yields a determination that:

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(a) A violation has occurred, the Division may impose fines pursuant to Section 8-1-140 (2).

(b) Rights of multiple employees have been violated, the violation as to each employee is a separate violation for purposes of fines, penalties, or other remedies.

(b) A violation cost an employee the employee's job or pay, the determination may include an order to reinstate the employee, to pay the employee's lost pay until reinstatement or for a reasonable period if reinstatement is determined not to be feasible, or both.

(3) Determinations made by the Division under this section are appealable pursuant to Section 8-4-111.5 and rules promulgated by the Department regarding appeals and strategic enforcement.

8-14.4-106. Relief authorized. (1) An aggrieved individual may commence in action in a civil court of competent jurisdiction against an employer for violation of this Article 14.4.

(2) (a) A court may order affirmative relief that the court determines to be appropriate, including the following relief, against a respondent who is found to have engaged in discriminatory or retaliatory employment practice prohibited by this Article 14.4:

(I) Statutory damages of _____ dollars;

(II) Reinstatement or hiring of an employee, with or without back pay. If the court orders back pay, the employer responsible for the discriminatory or retaliatory 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 court deems appropriate.

(b) The 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 retaliatory employment practice. If the total amount of back pay is less than ten thousand dollars, then the court shall add a civil penalty added in an amount that raises total monetary relief to ten thousand dollars.

(3) (a) In addition to the relief available pursuant to subsection (1) of this section, and except as provided in subsection (4)(g) of this section, in a civil action brought by a plaintiff under this part 14.4 against a defendant who is found to have engaged in an intentional discriminatory or retaliatory employment practice, the plaintiff may recover compensatory and punitive damages as specified in this subsection (3).

(b) A plaintiff may recover punitive damages against a defendant, if the plaintiff demonstrates by clear and convincing evidence that the defendant engaged in a discriminatory or retaliatory employment practice with malice or reckless indifference to the rights of the plaintiff. However, if the defendant demonstrates good-faith efforts to comply with this part 14.4 and to prevent discriminatory and retaliatory employment practices in the workplace, the court shall not award punitive damages against the defendant.

(c) A plaintiff may recover compensatory damages against a 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 (4) shall not exceed _____.

(III) In determining the appropriate level of damages to award a plaintiff who has been the victim of an intentional discriminatory or retaliatory employment practice, the court shall consider the size and assets of the defendant and the egregiousness of the discriminatory or retaliatory employment practice.

(e) Compensatory or punitive damages awarded pursuant to this subsection (4) 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 (3) of this section.

(5) If a plaintiff in a civil action filed under this Part 4 seeks compensatory or punitive damages pursuant to subsection (4) of this section, any party to the civil action may demand a trial by jury.

(6) In any civil action under this Part 4, the 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, the court may award costs and attorney fees to the defendant in the action.

8-14.4-107. Qui tam enforcement. (1) The relief specified in section 8-14.4-106 (2)(a)(I) may be recovered through a civil action brought on behalf of the division in a court of competent jurisdiction.

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5.21.20

JURISDICTION BY A WHISTLEBLOWER PURSUANT TO THIS SECTION.

(2) THE WHISTLEBLOWER SHALL GIVE WRITTEN NOTICE TO THE
DIVISION OF THE SPECIFIC PROVISIONS OF THIS ARTICLE 14.4 ALLEGED TO
HAVE BEEN VIOLATED.

(3) CIVIL PENALTIES RECOVERED PURSUANT TO THIS SUBSECTION
SHALL BE DISTRIBUTED AS FOLLOWS:

(a) ____ PERCENT TO THE DIVISION FOR ENFORCEMENT OF THIS
ARTICLE 14.4; AND

(b) ____ PERCENT TO THE WHISTLEBLOWER.

(4) THE RIGHT TO BRING AN ACTION UNDER THIS SECTION SHALL
NOT BE IMPAIRED BY ANY PRIVATE CONTRACT. A PUBLIC ENFORCEMENT
ACTION SHALL BE TRIED PROMPTLY, WITHOUT REGARD TO CONCURRENT
ADJUDICATION OF PRIVATE CLAIMS.

8-14.4-108. Rulemaking. The division may promulgate rules
necessary to implement this article 14.4.

SECTION 2. Safety clause. The general assembly hereby finds,
determines, and declares that this act is necessary for the immediate
preservation of the public peace, health, or safety.