



University of Colorado

Boulder | Colorado Springs | Denver | Anschutz Medical Campus

TO: Regent Governance Committee

FROM: Valerie Simons, Chief Compliance Officer and System Title IX Coordinator

DATE: August 14, 2023

RE: Recommended Technical Changes to Appropriate Sections of Article 8 and Policy 8:
Conduct of Members of the University Community

Introduction

During the legislative session, SB23-172 passed and the legislature added “marital status” as a protected class under the Colorado Anti-Discrimination Act (CADA). Thus, as of August 7, 2023, it is a discriminatory practice in Colorado for employers to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation, terms, conditions, or privileges of employment against any individual otherwise qualified because of marital status. To maintain compliance with the law, we recommend adding the term “marital status” to Article 8.A: Nondiscrimination and Policy 8.A: Principles of Ethical Behavior. We recommend doing this to ensure our campuses have authority to prevent, address and eliminate discrimination (which may include harassing behavior) based on marital status; thus severely mitigating litigation risk.

Current Process and How it Works with the Statutory Changes

Currently, the university has mandatory reporting requirements for discrimination or harassment based on the protected classes outlined in Article 8.A. Once the campus equity offices receive a report of something that could be considered protected class discrimination, they are able to address the issue in accordance with established procedures.

Amending regent law to include “marital status” provides the equity offices the authority to address and/or investigate reported discriminatory and/or harassing behavior. This will generally prevent litigation because the person who has faced the perceived discrimination will have the opportunity to utilize campus-based processes to successfully remediate the issue.

Furthermore, SB23-172 lowered the standard for what equates to discriminatory harassment which could open the university to additional liability. However, the law also introduced an affirmative defense that can only be utilized if:

(I)THE EMPLOYER HAS ESTABLISHED A PROGRAM THAT IS REASONABLY DESIGNED TO PREVENT HARASSMENT, DETER FUTURE HARASSERS, AND PROTECT EMPLOYEES FROM HARASSMENT. AN EMPLOYER'S PROGRAM SATISFIES THIS SUBSECTION (1.5)(a)(I) IF THE EMPLOYER CAN DEMONSTRATE THAT: (A) THE EMPLOYER TAKES PROMPT, REASONABLE ACTION TO INVESTIGATE OR ADDRESS ALLEGED DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES, AS DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION; AND (B) THE EMPLOYER TAKES PROMPT, REASONABLE REMEDIAL ACTIONS, WHEN WARRANTED, IN RESPONSE TO COMPLAINTS OF DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES, AS DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION.

Thus, if the Board of Regents adds “marital status” to Article 8.A, the university can use the affirmative defense because the campuses will include the reporting requirement for instances of marital status discrimination and the equity offices will have the authority to address and/or investigate the behavior once it is reported.

Conclusion

Including “marital status” in the list of protected classes outlined in Article 8.A: Nondiscrimination and Policy 8.A: Principles of Ethical Behavior, will assure the University’s compliance with state law, and enable the campuses to create a reporting requirement which gives the equity offices the ability to address instances of what could be perceived as discrimination based on marital status, thus preventing litigation. Additionally, the university would have the ability to assert the affirmative defense if litigation does occur.

To ensure immediate compliance and pending regent approval, the campuses are adding “marital status” to their campus policies to enforce mandatory reporting requirements and prevent, address and potentially investigate any claims based on marital status brought on or after August 7, 2023.