

Second Regular Session
Seventy-second General Assembly
STATE OF COLORADO

UNEDITED
UNREVISED
DRAFT
5.21.20

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LLS NO. 20-1239.01 Yelana Love x2295

HOUSE BILL

HOUSE SPONSORSHIP

Garnett,

SENATE SPONSORSHIP

(None),

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

A BILL FOR AN ACT

101 CONCERNING AN EMPLOYEE'S RIGHTS IN THE WORKPLACE FOR
102 CONDUCT RELATED TO AN EMPLOYER'S ACTIONS DURING A
103 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.

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

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

4 **8-14.4-101. Definitions.** AS USED IN THIS ARTICLE 14.4, UNLESS
5 THE CONTEXT OTHERWISE REQUIRES:

6 (1) "DEPARTMENT" MEANS THE DEPARTMENT OF LABOR AND
7 EMPLOYMENT.

8 (2) "DIVISION" MEANS THE DIVISION OF LABOR STANDARDS AND
9 STATISTICS IN THE DEPARTMENT.

10 (3) "EMPLOYEE" MEANS ANY PERSON, INCLUDING A MIGRATORY
11 LABORER, PERFORMING LABOR OR SERVICES FOR THE BENEFIT OF AN
12 EMPLOYER. FOR THE PURPOSE OF THIS ARTICLE 14.4, RELEVANT FACTORS
13 IN DETERMINING WHETHER A PERSON IS AN EMPLOYEE INCLUDE THE
14 DEGREE OF CONTROL THE EMPLOYER MAY OR DOES EXERCISE OVER THE
15 PERSON AND THE DEGREE TO WHICH THE PERSON PERFORMS WORK THAT
16 IS THE PRIMARY WORK OF THE EMPLOYER; EXCEPT THAT AN INDIVIDUAL
17 PRIMARILY FREE FROM CONTROL AND DIRECTION IN THE PERFORMANCE OF
18 THE SERVICE, BOTH UNDER HIS OR HER CONTRACT FOR THE PERFORMANCE
19 OF SERVICE AND IN FACT, AND WHO IS CUSTOMARILY ENGAGED IN AN
20 INDEPENDENT TRADE, OCCUPATION, PROFESSION, OR BUSINESS RELATED
21 TO THE SERVICE PERFORMED IS NOT AN "EMPLOYEE" UNLESS THE
22 INDIVIDUAL WORKS FOR AN EMPLOYER THAT RELIES ON INDEPENDENT
23 CONTRACTORS FOR SEVENTY-FIVE PERCENT OR MORE OF ITS WORKFORCE.

24 (4) (a) "EMPLOYER" HAS THE SAME MEANING AS SET FORTH IN THE
25 FEDERAL "FAIR LABOR STANDARDS ACT", 29 U.S.C. sec. 203 (d), AND
26 INCLUDES A FOREIGN LABOR CONTRACTOR AND A MIGRATORY FIELD
27 LABOR CONTRACTOR OR CREW LEADER. "EMPLOYER" INCLUDES THE STATE
28 OF COLORADO, LOCAL GOVERNMENTS, AND POLITICAL SUBDIVISIONS OF

1 THE STATE AS DEFINED IN SECTION 1-7.5-103 (6).

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

5 (5) "PUBLIC HEALTH EMERGENCY" MEANS:

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

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

10 **8-14.4-102. Prohibition against discrimination based on**
11 **whistleblower claims related to a public health emergency.** (1) AN

12 EMPLOYER SHALL NOT DISCRIMINATE OR TAKE ADVERSE ACTION AGAINST
13 ANY EMPLOYEE WHO RAISES ANY CONCERN ABOUT WORKPLACE HEALTH
14 AND SAFETY PRACTICES OR HAZARDS RELATED TO A PUBLIC HEALTH
15 EMERGENCY TO THE EMPLOYER, THE EMPLOYER'S AGENT, OTHER
16 WORKERS, A GOVERNMENT AGENCY, OR TO THE PUBLIC, IF THE
17 WORKPLACE HEALTH AND SAFETY PRACTICES FAIL TO MEET GUIDELINES
18 ESTABLISHED BY A FEDERAL, STATE, OR LOCAL PUBLIC HEALTH AGENCY
19 WITH JURISDICTION OVER THE WORKPLACE.

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

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

1 OF THIS ARTICLE.

2 (3) AN EMPLOYER SHALL NOT DISCRIMINATE OR TAKE ADVERSE
3 ACTION AGAINST AN EMPLOYEE WHO VOLUNTARILY WEARS AT THE
4 EMPLOYEE'S WORKPLACE THE EMPLOYEE'S OWN PERSONAL PROTECTIVE
5 EQUIPMENT, SUCH AS A MASK, FACEGUARD, OR GLOVES, IF THE PERSONAL
6 PROTECTIVE EQUIPMENT:

7 (a) PROVIDES A HIGHER LEVEL OF PROTECTION THAN THE
8 EQUIPMENT PROVIDED BY THE EMPLOYER;

9 (b) IS RECOMMENDED BY A FEDERAL, STATE, OR LOCAL PUBLIC
10 HEALTH AGENCY WITH JURISDICTION OVER THE EMPLOYEE'S WORKPLACE;
11 AND

12 (c) DOES NOT RENDER THE EMPLOYEE INCAPABLE OF PERFORMING
13 THE EMPLOYEE'S JOB.

14 (4) AN EMPLOYER SHALL NOT DISCRIMINATE AGAINST AN
15 EMPLOYEE OR APPLICANT FOR OPPOSING ANY PRACTICE THE EMPLOYEE
16 REASONABLY BELIEVE IS UNLAWFUL UNDER THIS ARTICLE 14.4 OR FOR
17 MAKING A CHARGE, TESTIFYING, ASSISTING, OR PARTICIPATING IN ANY
18 MANNER IN AN INVESTIGATION, PROCEEDING, OR HEARING AS TO ANY
19 MATTER THE EMPLOYEE REASONABLY BELIEVES TO BE UNLAWFUL UNDER
20 THIS ARTICLE 14.4.

21 (4) IF AN EMPLOYER DISCRIMINATES OR RETALIATES AGAINST AN
22 EMPLOYEE OR WITHIN NINETY DAYS AFTER THE EMPLOYEE'S ENGAGEMENT
23 OR ATTEMPT TO ENGAGE IN ACTIVITIES PROTECTED BY THIS ARTICLE 14.4,
24 SUCH CONDUCT RAISES A PRESUMPTION THAT THE ACTION IS
25 DISCRIMINATION OR RETALIATION IN VIOLATION OF THIS ARTICLE 14.4.
26 THE PRESUMPTION MAY BE REBUTTED BY CLEAR AND CONVINCING
27 EVIDENCE THAT THE ACTION WAS TAKEN FOR OTHER PERMISSIBLE
28 REASONS.

29 **8-14.4-103. Employer notice.** (1) AN EMPLOYER SHALL POST

1 NOTICE OF AN EMPLOYEE'S RIGHTS UNDER THIS ARTICLE 14.4 IN A
2 CONSPICUOUS LOCATION ON THE EMPLOYER'S PREMISES AS DETERMINED
3 BY THE DIVISION BY RULE.

4 (2) THE DIVISION SHALL PROMULGATE RULES TO ESTABLISH THE
5 FORM OF THE NOTICE REQUIRED IN SUBSECTION (1) OF THIS SECTION.

6 **8-14.4-104. Remedies.** (1) A PERSON MAY SEEK RELIEF FOR A
7 VIOLATION OF THIS ARTICLE 14.4 BY:

8 (a) FILING A COMPLAINT WITH THE DIVISION PURSUANT TO SECTION
9 8-14.4-105;

10 (b) BRINGING AN ACTION IN A COURT OF COMPETENT JURISDICTION
11 PURSUANT TO SECTION 8-14.4-106; OR

12 (c) BRINGING AN ACTION IN THE NAME OF THE STATE IN A COURT
13 OF COMPETENT JURISDICTION PURSUANT TO SECTION 8-14.4-107.

14 (2) A PERSON IS NOT REQUIRED TO EXHAUST ADMINISTRATIVE
15 REMEDIES PRIOR TO BRINGING AN ACTION IN COURT.

16 **8-14.4-105. Enforcement by the division.** (1) AN AGGRIEVED
17 INDIVIDUAL MAY FILE A CLAIM AGAINST AN EMPLOYER WITH THE DIVISION
18 IN FORM AND MANNER DETERMINED BY THE DIVISION BY RULE.

19 (2) (a) THE DIVISION MAY INVESTIGATE:

20 (I) EMPLOYER RETALIATION IN VIOLATION OF THIS ARTICLE 14.4;

21 AND

22 (II) CLAIMS FILED WITH THE DIVISION BY AGGRIEVED
23 INDIVIDUALS.

24 (b) THE DIVISION SHALL PROVIDE INFORMATION ON RIGHTS AND
25 REMEDIES AVAILABLE TO AGGRIEVED INDIVIDUALS WITH CLAIMS THE
26 DIVISION DOES NOT INVESTIGATE.

27 (2) IN AN INVESTIGATION OF EMPLOYER RETALIATION OR
28 INTERFERENCE WITH EMPLOYEE RIGHTS, IF AN INVESTIGATION YIELDS A
29 DETERMINATION THAT:

1 (a) A VIOLATION HAS OCCURRED, THE DIVISION MAY IMPOSE FINES
2 PURSUANT TO SECTION 8-1-140 (2).

3 (b) RIGHTS OF MULTIPLE EMPLOYEES HAVE BEEN VIOLATED, THE
4 VIOLATION AS TO EACH EMPLOYEE IS A SEPARATE VIOLATION FOR
5 PURPOSES OF FINES, PENALTIES, OR OTHER REMEDIES.

6 (b) A VIOLATION COST AN EMPLOYEE THE EMPLOYEE'S JOB OR PAY,
7 THE DETERMINATION MAY INCLUDE AN ORDER TO REINSTATE THE
8 EMPLOYEE, TO PAY THE EMPLOYEE'S LOST PAY UNTIL REINSTATEMENT OR
9 FOR A REASONABLE PERIOD IF REINSTATEMENT IS DETERMINED NOT TO BE
10 FEASIBLE, OR BOTH.

11 (3) DETERMINATIONS MADE BY THE DIVISION UNDER THIS SECTION
12 ARE APPEALABLE PURSUANT TO SECTION 8-4-111.5 AND RULES
13 PROMULGATED BY THE DEPARTMENT REGARDING APPEALS AND STRATEGIC
14 ENFORCEMENT.

15 **8-14.4-106. Relief authorized.** (1) AN AGGRIEVED INDIVIDUAL
16 MAY COMMENCE IN ACTION IN A CIVIL COURT OF COMPETENT JURISDICTION
17 AGAINST AN EMPLOYER FOR VIOLATION OF THIS ARTICLE 14.4.

18 (2) (a) A COURT MAY ORDER AFFIRMATIVE RELIEF THAT THE
19 COURT DETERMINES TO BE APPROPRIATE, INCLUDING THE FOLLOWING
20 RELIEF, AGAINST A RESPONDENT WHO IS FOUND TO HAVE ENGAGED IN
21 DISCRIMINATORY OR RETALIATORY EMPLOYMENT PRACTICE PROHIBITED
22 BY THIS ARTICLE 14.4:

23 (I) STATUTORY DAMAGES OF ____ DOLLARS;

24 (II) REINSTATEMENT OR HIRING OF AN EMPLOYEE, WITH OR
25 WITHOUT BACK PAY. IF THE COURT ORDERS BACK PAY, THE EMPLOYER
26 RESPONSIBLE FOR THE DISCRIMINATORY OR RETALIATORY EMPLOYMENT
27 PRACTICE SHALL PAY THE BACK PAY TO THE PERSON WHO WAS THE VICTIM
28 OF THE PRACTICE.

29 (II) FRONT PAY; OR

1 (III) ANY OTHER EQUITABLE RELIEF THE COURT DEEMS
2 APPROPRIATE.

3 (b) THE COURT SHALL REDUCE AN AWARD OF BACK PAY BY ANY
4 AMOUNT OF ACTUAL EARNINGS OF, OR AMOUNTS THAT COULD HAVE BEEN
5 EARNED WITH REASONABLE DILIGENCE BY, THE PERSON WHO WAS THE
6 VICTIM OF THE DISCRIMINATORY OR RETALIATORY EMPLOYMENT
7 PRACTICE. IF THE TOTAL AMOUNT OF BACK PAY IS LESS THAN TEN
8 THOUSAND DOLLARS, THEN THE COURT SHALL ADD A CIVIL PENALTY
9 ADDED IN AN AMOUNT THAT RAISES TOTAL MONETARY RELIEF TO TEN
10 THOUSAND DOLLARS.

11 (3) (a) IN ADDITION TO THE RELIEF AVAILABLE PURSUANT TO
12 SUBSECTION (1) OF THIS SECTION, AND EXCEPT AS PROVIDED IN
13 SUBSECTION (4)(g) OF THIS SECTION, IN A CIVIL ACTION BROUGHT BY A
14 PLAINTIFF UNDER THIS PART 14.4 AGAINST A DEFENDANT WHO IS FOUND
15 TO HAVE ENGAGED IN AN INTENTIONAL DISCRIMINATORY OR RETALIATORY
16 EMPLOYMENT PRACTICE, THE PLAINTIFF MAY RECOVER COMPENSATORY
17 AND PUNITIVE DAMAGES AS SPECIFIED IN THIS SUBSECTION (3).

18 (b) A PLAINTIFF MAY RECOVER PUNITIVE DAMAGES AGAINST A
19 DEFENDANT, IF THE PLAINTIFF DEMONSTRATES BY CLEAR AND CONVINCING
20 EVIDENCE THAT THE DEFENDANT ENGAGED IN A DISCRIMINATORY OR
21 RETALIATORY EMPLOYMENT PRACTICE WITH MALICE OR RECKLESS
22 INDIFFERENCE TO THE RIGHTS OF THE PLAINTIFF. HOWEVER, IF THE
23 DEFENDANT DEMONSTRATES GOOD-FAITH EFFORTS TO COMPLY WITH THIS
24 PART 14.4 AND TO PREVENT DISCRIMINATORY AND RETALIATORY
25 EMPLOYMENT PRACTICES IN THE WORKPLACE, THE COURT SHALL NOT
26 AWARD PUNITIVE DAMAGES AGAINST THE DEFENDANT.

27 (c) A PLAINTIFF MAY RECOVER COMPENSATORY DAMAGES
28 AGAINST A DEFENDANT FOR OTHER PECUNIARY LOSSES, EMOTIONAL PAIN

1 AND SUFFERING, INCONVENIENCE, MENTAL ANGUISH, LOSS OF ENJOYMENT
2 OF LIFE, AND OTHER NONPECUNIARY LOSSES.

3 (d) THE TOTAL AMOUNT OF COMPENSATORY AND PUNITIVE
4 DAMAGES AWARDED PURSUANT TO THIS SUBSECTION (4) SHALL NOT
5 EXCEED _____.

6 (III) IN DETERMINING THE APPROPRIATE LEVEL OF DAMAGES TO
7 AWARD A PLAINTIFF WHO HAS BEEN THE VICTIM OF AN INTENTIONAL
8 DISCRIMINATORY OR RETALIATORY EMPLOYMENT PRACTICE, THE COURT
9 SHALL CONSIDER THE SIZE AND ASSETS OF THE DEFENDANT AND THE
10 EGREGIOUSNESS OF THE DISCRIMINATORY OR RETALIATORY EMPLOYMENT
11 PRACTICE.

12 (e) COMPENSATORY OR PUNITIVE DAMAGES AWARDED PURSUANT
13 TO THIS SUBSECTION (4) ARE IN ADDITION TO, AND DO NOT INCLUDE,
14 FRONT PAY, BACK PAY, INTEREST ON BACK PAY, OR ANY OTHER TYPE OF
15 RELIEF AWARDED PURSUANT TO SUBSECTION (3) OF THIS SECTION.

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

20 (6) IN ANY CIVIL ACTION UNDER THIS PART 4, THE COURT MAY
21 AWARD REASONABLE ATTORNEY FEES AND COSTS TO THE PREVAILING
22 PLAINTIFF. IF THE COURT FINDS THAT AN ACTION OR DEFENSE BROUGHT
23 PURSUANT TO THIS PART 4 WAS FRIVOLOUS, GROUNDLESS, OR VEXATIOUS
24 AS PROVIDED IN ARTICLE 17 OF TITLE 13, THE COURT MAY AWARD COSTS
25 AND ATTORNEY FEES TO THE DEFENDANT IN THE ACTION.

26 **8-14.4-107. Qui tam enforcement.** (1) THE RELIEF SPECIFIED IN
27 SECTION 8-14.4-106 (2)(a)(I) MAY BE RECOVERED THROUGH A CIVIL
28 ACTION BROUGHT ON BEHALF OF THE DIVISION IN A COURT OF COMPETENT

*Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.*

1 JURISDICTION BY A WHISTLEBLOWER PURSUANT TO THIS SECTION.

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

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

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

9 (b) ____ PERCENT TO THE WHISTLEBLOWER.

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

14 **8-14.4-108. Rulemaking.** THE DIVISION MAY PROMULGATE RULES
15 NECESSARY TO IMPLEMENT THIS ARTICLE 14.4.

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