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LEGAL UPDATES

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# Colorado Governor Signs Comprehensive Equal Pay Bill Into Law

**Key Points:**

Colorado's far-reaching equal pay law prohibits pay disparities based on sex and provides a private right of action that includes liquidated damages and recovery of attorneys' fees for employees who prevail in their claims against employers.

Under provisions of this Act, Colorado will require employers to pay men and women the same for substantially similar work, with only narrow exceptions.

The burden to prove a lawful pay disparity will be more difficult to meet and will fall to employers.

The law becomes effective on January 1, 2021.

Employers should begin to assess their compliance with the new law and conduct a privileged comprehensive pay audit as a critical component of their preparation process.

On May 22, 2019, Colorado Governor Jared Polis signed into law the Equal Pay for Equal Work Act (Act), perhaps the nation's most far-reaching equal pay law. Under provisions of this Act, Colorado joins several other states and localities that ban questions about wage history.

More critically, Colorado also stakes its own ground by banning wage differences between the sexes without including a catch-all defense for any "other factor other than sex." Such a defense is typically available to employers under federal and other states' laws.

## Prohibitions Under the Act

The Act, which is applicable to current and prospective employees, seeks to close the pay gap between the sexes by promoting pay equivalence for “substantially similar” work regardless of job title. The law’s legislative declaration cites the aggregate pay disparities between men and women as the driving force behind the legislation. The Act is applicable to employer groups of all sizes.

### *Wage Rate History Ban*

The Act prohibits employers from asking about an applicant’s wage history. This prohibition includes restricting employers from:

Inquiring about or relying on the wage history of prospective employees to determine a wage rate;  
Discriminating or retaliating against prospective employees for failing to disclose their wage history;  
Discharging, discriminating or retaliating against employees for invoking the protections guaranteed by the Act on behalf of themselves or others;  
Requiring employees to waive their right to disclose wage information.

This portion of the law should have a modest impact on human resources practices. As the trend to ban pay inquiries had already begun in other jurisdictions, many employers, particularly multi-state employers, have already moved away from asking about the wage history of applicants. Regardless, for those employers that have a question on applications about an applicant’s previous wage rates or who asked about past wage rates in interviews, they must now come into compliance with the new law.

### *Pay Discrimination Based on Sex*

The more impactful area of the law will be its pay equity provisions. The premise of the Act’s title — Equal Pay for “Equal” Work — is not actually the standard for discrimination applied to employers. Instead, the law bans discrimination on the basis of sex by paying an employee of one sex less than the other sex for substantially similar work. To determine whether work is substantially similar, the courts are to assess a composite of skill, effort and responsibility. The Act does not define what “substantially similar” means, making it difficult for employers to distinguish between work that is substantially similar and subject to potential liability versus work that is merely similar and not subject to liability. This distinction will be a major focus of much of the early litigation of the Act’s provisions.

Employers are able to defend pay differentials for substantially similar work in some limited circumstances. Wage disparities are excepted from the terms of the Act so long as the entire wage differential is the result of one or more of the following factors:

A seniority system;

A merit system;

A system in which earnings are based on quantity or quality of production;

Geographic location;

Education, training or experience reasonably related to the work in question; or

Travel that is a regular and necessary condition of employment.

The absence of a catch-all exception for any other factor other than sex separates this list from other pay equity laws. In effect, the burden will not only rest with an employer to prove that a pay disparity is lawful, but that burden will be difficult to meet as an employer must fit the situation into at least one of these undefined exceptions. As but one of many questions that will arise, it remains unclear whether a merit system references employer's performance reviews and whether comparable performance reviews will require employees to receive identical pay.

#### *Enforcement*

The Act provides for the creation of a complaint and mediation process with the Colorado Division of Labor. An aggrieved party may also file a charge of discrimination and exhaust his or her administrative remedies with the Colorado Civil Rights Division, the agency that has jurisdiction over other discrimination claims in the workforce. The government division assigned enforcement will have little consequence, however, as an aggrieved employee or applicant may also choose to bypass the administrative process altogether and proceed directly to filing a civil lawsuit with a jury trial. The time frame for commencing suit is two years. A separate violation is defined as occurring each time a person is "affected" or receives payment of an unlawful wage rate, incorporating a similar standard as federal wage and hour law.

Damages and fees recoverable under the Act are as follows:

Economic damages equivalent to up to three years of back pay;

Front pay or reinstatement;

Liquidated damages equal to the amount of back pay unless the employer acted in good faith with a reasonable belief that it did not violate the Act. Reliance on the completion of a comprehensive pay

audit to remedy unlawful pay disparities within two years of the initiation of a civil action may constitute good faith; and

Attorneys' fees and costs.

*Publication of Job Opportunities and Wage Rates*

A little discussed part of the Act relates to new transparency requirements for employers. Employers must notify current employees of opportunities for promotion and include in job postings the amount or range of compensation and benefits. Few smaller employers post promotional opportunities internally, and it remains to be seen how many employers will even know to comply with this provision of the Act. Many employers do not publish compensation ranges to their own employees, let alone to applicants. The Division may enforce these provisions with fines ranging from \$500-\$10,000.

**Contact Us**

If you have questions about the implications of this new law, contact Barb Grandjean, Chris Ottele or your Husch Blackwell attorney.

*Tracey Oakes O'Brien was a contributing author of this content.*