

Colorado Enacts Comprehensive Equal Pay Law

By Laura A. Mitchell and Scott M. Pechaitis

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Enacting one of the toughest enhanced state pay equity laws to date, Colorado has become the tenth state in the country to pass an equal pay law that is more demanding than federal law. The new law, signed by Governor Jared Polis on May 22, 2019, goes into effect on January 1, 2021.

The “[Equal Pay for Equal Work Act](#)” ([SB 19-085](#)), which applies to all employers in the state, shares similarities with other enhanced state equal pay laws, including provisions on *pay equity*, *pay history*, and *pay transparency*. Unlike other states, however, the Colorado Act creates new notice requirements around promotional opportunities and position wage rates. Importantly, the Colorado Act provides an incentive to companies that conduct proactive self-audits of their compensation practices.

New Notice Requirements Unique to Colorado

The Equal Pay for Equal Work Act creates two new notice requirements for Colorado employers, which are not found in any other state equal pay law:

- Employers must make reasonable efforts to *announce, post, or make known all opportunities for promotion* to all current employees on the same calendar day.
- Employers must disclose in each posting for each job opening the hourly or salary compensation, or a range of the hourly or salary compensation, and a general description of all benefits and other compensation offered.

Key Provisions for Establishing Pay Discrimination

The new law protects against discrimination because of sex (including gender identity) or *sex in combination with another protected status*. Employers may not pay an employee of one sex less than an employee of another sex for substantially similar work (measured as a composite of skill, effort, and responsibility).

However, an employer can avoid legal liability under the new law if it demonstrates that the entire difference in compensation is based on at least one of the following:

1. A seniority system;
2. A merit system;
3. A system that measures earning by quantity or quality of production;
4. The geographic location where the work is performed;
5. Education, training, or experience to the extent that they are reasonably related to the work in question; or
6. Travel, if a regular and necessary condition of the work performed.

The new law creates a *menu* of options for employees to pursue claims, including a private right of action.

Employees may still avail themselves of administrative relief for pay discrimination claims through the Colorado Civil Rights Commission or a mediation process *yet to be developed* by the Director of the Colorado Department of Labor and Employment.

A successful plaintiff may recover up to three years of back pay and *liquidated* (double) damages, unless the employer can show the “act or omission giving rise” to the pay violations was made in good faith.

“Mini-Safe Harbor” for Conducting Proactive Pay Audits

Similar to equal pay laws in [Massachusetts](#) and [Oregon](#), the Colorado Act provides an incentive for employers to conduct proactive self-evaluations of their compensation practices. While not a complete defense against lawsuits, employers may use evidence of a “thorough and comprehensive pay audit” with the “specific goal of identifying and remedying unlawful pay disparities” to avoid an award for liquidated (double) damages.

Prohibitions on Pay History Information

Meet the Authors



[Laura A. Mitchell](#)

Principal
Denver 303-225-2382
Email



[Scott M. Pechaitis](#)

Principal
Denver 303-876-2201
Email

Practices

[Wage and Hour](#)

[Services](#)

[Pay Equity](#)

Colorado joins nine other states (California, Connecticut, Delaware, Hawaii, Maine, Massachusetts, Oregon, Vermont, and Washington) with statewide salary history bans applicable to both public and private employers.

Under the new Colorado law, employers may not:

- Seek the wage history of a prospective employee;
- Rely on the wage history of a prospective employee to determine a wage rate; or
- Discriminate or retaliate against a prospective employee for failing to disclose wage history.

Pay Transparency Requirements

Finally, the new Act prohibits employers from: (1) preventing their employees from discussing their own compensation information with others; and (2) requiring employees to sign a waiver that prohibits his or her ability to do the same.

Employers Have Time to Prepare

Colorado's new law creates significant new risks and responsibilities for employers. While the new requirements do not take effect until January 1, 2021, Colorado employers should consider reviewing their pay policies and practices with employment counsel.

Policies and practices to review should include:

1. Practices regarding posting new job openings. The new law requires including a wage rate or wage range with each new job opening, along with a general description of other benefits and compensation offered.
2. Practices for disseminating promotional opportunities. The new law requires reasonable efforts to inform all current employees of promotional opportunities on the same calendar day.
3. Policies and practices surrounding compensation. Employers should review hiring practices and avoid asking questions about compensation history of an applicant. Employers may no longer require employees to sign a waiver that forbids the employee from discussing compensation information. The Colorado law does not forbid employers from asking applicants their salary expectations.

Proactive Pay Audit

Finally, employers should consider conducting a proactive pay audit, preferably before the new law's effective date, to take maximum advantage of the *two-year* "mini-safe harbor." Conducting an analysis will allow employers to identify and begin remedying any unexplained pay differences. Best of all, the audit may be used as evidence of "good faith" to minimize damages in litigation under the Act.

Please contact a Jackson Lewis attorney with any questions related to this and other workplace developments and stay tuned for further compliance updates.

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