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Mile-High Expectations for Employers As Colorado Governor Signs Into Law One of Nation's Toughest Pay Equity Laws to Date

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Seyfarth Synopsis: *Yesterday, May 22, 2019, Colorado Governor Polis signed the "Equal Pay for Equal Work Act" which is the latest—and one of the most demanding—pay equity laws in the nation. As states race to enact their own pay equity laws, Colorado stands out with its requirement that employers provide all employees simultaneous notification of job opportunities, inclusion of pay scale on all job postings, the addition of a salary history ban, application based on gender identity, liquidated damages for successful claims, and a partial safe harbor provision for employers who conduct pay analyses. The law applies to all employers employing any employees in Colorado and it goes into effect January 1, 2021.*

Stronger Equal Pay Protections

Across the country, states, counties, and even cities have enacted stronger protections for employees in an attempt to ensure equal pay for equal work. (Click here for Seyfarth's 50-State Pay Equity Desktop Reference.) With Governor Polis's signature, Colorado has just enacted one of the toughest pay equity laws to date. See Colo. Rev. Stat. § 8-5-101 *et seq.*

Colorado's Equal Pay for Equal Work Act borrows strong equal pay protection provisions from other jurisdictions across the country and adds a few new twists that will likely require all employers with employees in Colorado to revisit their recruiting and pay practices.

The new law prohibits employers from paying an employee of one sex (or gender identity) a "wage rate" less than the rate paid to an employee of a different sex (or gender identity) for "substantially similar work", when viewed as a composite of skill, effort, and responsibility and regardless of job title, except where the employer demonstrates ***each*** of the following:

- That the wage differential is based *solely* on a list of enumerated factors (a seniority system; a merit system; a production-based system; reasonably-related education, training or experience; geography, or travel);
- That the factors are applied "reasonably"; and
- That prior wage rate history was not relied upon to justify the pay disparity

Like the pay equity laws in states like Maryland, and New Jersey, the Colorado Equal Pay for Equal Work Act applies to disparities in pay based on the employee's gender identity, applying a more expansive definition of sex. The statute, however, does not define what constitutes "substantially similar work" or how factors like skill, effort, and responsibility may be weighed in evaluating whether work is substantially similar.

The compensation subject to the Colorado statute is not limited to the employee's hourly compensation or salary. The Colorado statute defines the "wage rate" broadly to encompass all compensation and benefits received by an employee.

The statute's reach is broad too. *Any* employer who employs a *single person* in Colorado must comply. Being a small business or company with just a handful of employees in Colorado will not excuse compliance. Conversely, on its face, the statute does not limit "employee" to only those individuals living and/or working in Colorado.

Pay Scale Must be Posted on All Jobs Listings

The biggest change with the Colorado law is that Colorado will become the fourth jurisdiction (following California, Cincinnati, and Washington State) to require employers to provide pay scale information during the recruiting process, but the very first state to require that pay scale be posted in *all* job listings. In other words, employers will now need to widely disseminate pay rates for jobs, which, in turn, will likely lead to public dissemination of pay information.

Colorado will also require that promotion opportunities be provided to *all current employees* on the same calendar day.

Per section 8-5-201 of the statute:

- An employer shall make reasonable efforts to announce, post, or otherwise make known all opportunities for promotion to all current employees on the *same calendar day* and prior to making a promotion decision
- An employer shall 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 of the benefits and other compensation to be offered to the hired applicant

Language in the first section appears to apply specifically to current employees and opportunities for their promotion only, while the language in the second section, referring to the compensation and other benefits available to the "hired applicant" seems to imply application to external job openings (not just internal promotions). The statute gives rule-making authority to the Colorado Department of Labor and Employment (CDLE) to administer and enforce this rule. Further guidance on the application of the posting requirements will hopefully clarify some of the ambiguity in the statute before the requirements become effective in January 2021. However, in the age of online applicant tracking systems and electronic posting of jobs, this difference, if it exists, is largely practically irrelevant because if the compensation ranges are listed in electronic job listings, this information would be publically available to both internal and external job seekers (and competitors).

The statute further requires that an employer keep records of the job descriptions and wage rate history for each employee for the duration of their employment plus two years after the end of employment.

Employees may report violations of the posting requirements to the CDLE within one year of learning of the violation. Failure to comply with the posting requirements may result in civil fines of $500 to $10,000 *per violation.*

Salary History Ban

Colorado will also become the tenth state and the eighteenth jurisdiction[1] with a salary history ban that applies to applicants for employment with private employers.

The Colorado pay equity law specifically prohibits employers from justifying differences in pay by pointing to differences in prior salary and bans employers from collecting that information all together.

An employer also may not restrict an employee from disclosing wage rate information.[2] In short, employers may not ask about salaries, but employees are free to discuss that information as they see fit.

Retaliation Prohibition

The Colorado law also specifically prohibits retaliation against an employee for invoking the law on behalf of themselves or *any person*. An employer may not discharge, discipline, discriminate against, or "interfere with" any person for discussing an employee's wage rate. The statute also protects prospective employees from retaliation for failing to disclose wage history.

Remedies

To the courthouse! The new Colorado law allows aggrieved employees to take their pay disparity claims straight to court—up to two years after a violation of the statute. For purposes of the statute of limitations, a violation of pay discrimination includes each date an employee received disparate pay.

Plaintiffs may recover actual economic damages, which may include up to three years[3] of back pay, and any other compensation or benefits they would have received. Plus, plaintiffs can recover liquidated damages equal to the economic damages, as well as equitable relief and attorneys' fees. By statute, the equitable relief sought may include employment, reinstatement, promotion, or pay increases, in addition to lost wages and liquidated damages.

Limited Safe Harbor

Earlier versions of the bill provided for liquidated damages for any violation of the Act. However, subsequent amendments added an exception for "good faith." As enacted, a court may not award liquidated damages if the employer "demonstrates that the act or omission giving rise to the violation was in good faith" and the employer had "reasonable grounds" for believing that the employer did not violate the Act. While this good faith defense may save an employer from paying liquidated damages, it will not justify pay disparities, nor will it prevent recovery of economic damages or attorneys' fees.

Colorado also joins Massachusetts and, to a limited extent, Oregon, with a safe harbor for employers that have conducted a pay equity audit in the two years prior to the alleged violation: "In determining whether the employer's violation was in good faith, the fact finder may consider evidence that within two years prior [to the complaint] . . . the employer completed a thorough and comprehensive pay audit of its workforce, with the specific goal of identifying and remedying unlawful pay disparities."

This "safe harbor" however may not completely shelter employers from the storm: as with the Massachusetts self-evaluation defense, an audit used as a defense to a Colorado state law claim could be used against the employer under federal law, where there is no such defense. Employers must consider these risks carefully when determining whether and how to conduct such audits and disclose their results.

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1 Ten states (California, Connecticut, Delaware, Hawaii, Maine, Massachusetts, Oregon, Vermont, Washington and now Colorado), seven cities or counties (San Francisco, CA, New York City, NY, Albany County, NY, Suffolk County, NY, Westchester County, NY, Cincinnati, OH, and Philadelphia, PA) and one Territory (Puerto Rico) have passed salary history bans.
2 § 8-5-102.
3 § 8-5-103(3).

What Should Employers Do?

Barring a referendum petition, the law will become effective on January 1, 2021. Employers should review their job applications and other policies and procedures, make any necessary changes, and consider training hiring managers and human resources employees about the amendments. Because of the complex risks associated with implementing changes to comply with the Act, we recommend working closely with legal counsel before making these changes. Employers should also consider whether the current methods for communicating job opportunities to employees permit notifications to all employees in the same calendar day as required by the new provisions of the statute, and adjust those procedures if necessary. In addition, employers should consider whether to conduct a comprehensive pay audit in line with the statute's safe harbor provision to ensure that it has identified, and remedied, any unintentional or unlawful pay disparities.

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