

Colorado Enacts Sweeping Equal Pay Legislation After Decades of Failed Attempts

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On May 22, 2019, Colorado governor Jared Polis signed sweeping equal pay legislation into law after nearly 40 years of failed attempts by the Colorado government to pass a pay equity law. The recently signed Colorado Equal Pay for Equal Work Act is one of many transformative legislative changes the state government has put in place since the November 2018 election, which resulted in Democrats holding trifecta control in the Colorado state government for the first time in years.

The Act, which is codified in Colorado Revised Statutes Section 8-5-101, *et seq.*, removes the enforcement authority of the director of the Colorado Division of Labor Standards and Statistics in the department of labor and allows employees who believe they are being paid less because of their gender to file a lawsuit against their employer.

Effective Date

The Act will not take effect for another 19 months, leaving Colorado employers with plenty of time to determine any potential exposure and/or to come into compliance before the law officially goes into effect on January 1, 2021.

Key Components

The Act will ban private employers from asking job applicants for their salary histories. The Act not only bans employers from collecting prior salary history information altogether, but it also specifically prohibits employers from justifying differences in pay by pointing to differences in prior salary. Of course, this does not mean every employee with the same title needs to be paid the same. Employers can still justify pay discrepancies if they prove salaries are based on merit, quality of work, training or experience, work history, seniority, geographic location, or even travel requirements.

The Act also contains robust anti-retaliation provisions. It prohibits retaliation against an employee for engaging in protected activity under the law, whether on behalf of themselves or someone else. It also provides protection from retaliation against an employee for discussing his or her pay with other employees or refusing to disclose wage information to his or her employer.

The Act looks to address the gender wage gap by adding requirements for employers to include the pay range for positions in job postings. Additionally, when promotion opportunities become available within a company, those opportunities must be posted or otherwise made known to all employees.

The Act also imposes new affirmative recordkeeping obligations on employers, requiring that records of job descriptions and wage rate history for an employee be maintained for the duration of the employee's employment, plus two years.

The Act is not entirely employee friendly, as there are some business-friendly amendments that will help safeguard some companies from liability. For example, the Act contains a good-faith exception stating courts should not award damages to employees if an employer has reasonable grounds for believing that it was not in violation of the law. The law even provides companies with guidelines on how to prove good faith, such as by completing a thorough pay audit in the years before being sued. The existence of the good faith exception, in particular, indicates the Act encourages proactive rectification of gender pay disparities by employers, rather than simply punishing companies for those disparities.

Remedies

A plaintiff that succeeds in bringing a claim under the Act will be entitled to recover actual economic damages, which may include up to three years of back pay and any other compensation or benefits he or she should have received. Additionally, a successful plaintiff can recover liquidated damages equal to the economic damages, as well as equitable relief and attorneys' fees. According to the statute, the equitable relief sought may include employment, reinstatement, promotion, or pay increases, in addition to lost wages and liquidated damages.

What Employers Can Do

Colorado is not alone in its efforts to beef up equal pay regulations. Salary history bans and other statewide equal pay initiatives are a hot legislative trend. Employers may want to conduct a thorough and comprehensive pay audit to ensure any unintentional or unlawful pay disparities are isolated and remedied. Given the Act's "safe harbor" clause for employers that conduct this audit in good faith, this is really a case where an ounce of prevention is worth a pound of cure.

Employers may also want to review their job applications and other hiring procedures and discontinue practices that might violate the applicable salary history law. This may include an analysis of whether the current methods for communicating job opportunities to employees permit the required notifications to all employees in the same calendar day. Employers can make any necessary changes and train hiring managers and human resources well in advance of the January 1, 2021, implementation date.

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National Law Review, Volume IX, Number 150

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