

Colorado Joins Wave of States to Offer Heightened Employee Protections

Article By:

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Colorado has joined a growing movement of states in passing laws that provide greater protections to employees and job applicants. Among these are the Equal Pay for Equal Work Act and a ban the box law, which limits criminal history inquiries for job applicants. The following is a breakdown of Colorado's newest employment laws and how their implementation may impact employers and employees alike.

Equal Pay

Effective January 1, 2021, the [Equal Pay for Equal Work Act](#) (the "Act") will expressly prohibit employers from paying employees of different genders different wages for "substantially similar work." The law also prohibits pay discrimination on the basis of sex in combination with another protected category under Colorado law. Determining whether work is "substantially similar" depends on the nature of the job itself, as well as the skill set and level of responsibility of the employees involved.

Employers are permitted to have pay differentials if the employer can prove differences in compensation are based on one or more of the following factors:

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

Additionally, employers that can demonstrate a good faith effort through proactive measures to comply with the Act may be able to mitigate liability should a claim arise. Similar to “safe harbor” provisions in equal pay laws in [Massachusetts](#) and Oregon, such proactive measures should include regular audits of compensation practices. While these measures do not create a complete defense, employers that successfully present evidence of a “thorough and comprehensive pay audit” with the “specific goal of identifying and remedying unlawful pay disparities” may avoid liquidated damages. The key word here is “remedying”; employers that conduct pay audits, but then fail to take steps to correct unlawful pay discrepancies revealed by the audit, will not reap the benefits of the “safe harbor” defense and could instead find themselves without the proverbial port in a storm.

Notably, the Act goes further than most other comparable state wage discrimination laws by mandating notification to employees of employment opportunities. Employers must make reasonable efforts to provide notice of internal opportunities for promotion on the same calendar day the opening occurs. These announcements must disclose the hourly or salary compensation, or at the very least a pay range, as well as a description of benefits and other compensation being offered. Failure to comply with these provisions could result in fines of between \$500 and \$10,000 per violation.

Salary History

Following the lead of nine other states (and a number of localities), the Act also includes a provision barring employers from asking applicants about their wage or salary history. Specifically, employers may not:

- Seek the wage rate history of a prospective employee;
- Rely on a prior wage rate to determine the wages or salary to be offered;
- Discriminate or retaliate against a prospective employee for failing to disclose his or her wage history; or
- Discharge or retaliate against an employee for asserting rights protected by the Act on behalf of a prospective employee.

Unlike many other bans on salary history inquiries, the Colorado law contains no exceptions that would allow an applicant to voluntarily disclose salary history information or an employer to confirm an applicant’s prior salary after a conditional job offer is made and where the prospective employee wants to negotiate a higher salary.

Pay Transparency

Another portion of the Act provides that once an employee is hired, an employer may not:

- Prevent employees from discussing their own compensation information with others; or
- Require employees to sign a waiver that prohibits their ability to do the same.

Employers that violate this provision may be subject to fines and other legal and/or equitable relief, including reinstatement, promotion, pay increase, payment of lost wage rates, liquidated damages

and reasonable attorneys' fees.

Ban the Box

Colorado has also enacted a ban the box law ([HB19-1025](#)) that prohibits employers from inquiring into a job applicant's criminal history on an application form.

Additionally, employers may not:

- Advertise that a person with a criminal history may not apply for a position;
- Place a statement in an employment application that a person with a criminal history may not apply for a position; or
- Inquire about an applicant's criminal history on an initial application.

Employers may perform criminal background checks later in the hiring process. There also is no prohibition against an employer obtaining publicly available criminal background reports. Several additional exceptions to the ban on advertisements and application inquiries apply if:

- Federal, state, or local law or regulation prohibits a person who has a particular criminal history from being employed in a particular job;
- The employer is participating in a program to encourage employment of people with criminal histories; or
- The employer is required by law to conduct a criminal history record check for the particular position.

The Colorado Department of Labor and Employment is charged with issuing warnings and orders of compliance for violations and has the authority to issue civil penalties for subsequent violations. Private causes of action are not authorized by the law.

The law goes into effect on September 1, 2019 for businesses with eleven or more employees; for smaller businesses, the law becomes effective on September 1, 2021.

This post was written with assistance from Jenna D. Russell, a 2019 Summer Associate at Epstein Becker Green.

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