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# Implementing the Equal Pay for Equal Work Act and Employee Paid Sick Leave

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# Equal Pay for Equal Work 2021

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“Equal Pay for Equal Work Act” signed into law May 22, 2019, effective **January 1, 2021**. Found at C.R.S. §§ 8-5-101 et seq.

**Applies to ALL employers in Colorado**

## THE LAW

An employer **shall not discriminate** between employees **on the basis of sex** [sex includes “gender identity”], or on the basis of sex in combination with another protected status under Colorado law, by paying an employee of one sex a wage rate less than the rate paid to an employee of a different sex **for substantially similar work**, regardless of job title, based on a *composite of skill, effort*, which may include consideration of shift work; and *responsibility*.



# Equal Pay for Equal Work 2021

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Permits wage differential based on:

- 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

**Factors above must account for “entire” differential in wages.  
No “any factor other than sex” loophole like federal Equal Pay Act.**



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# Equal Pay for Equal Work 2021

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## Employers SHALL NOT:

- [**Salary history ban**] Seek the wage rate history of a prospective employee or rely on a prior wage rate to determine a wage rate;
- Discriminate/retaliate against a prospective employee for failing to disclose the employee's wage rate history;
- [**Pay transparency**] Discharge/discriminate/retaliate against an employee for asserting rights, assisting in enforcement, or discussing or disclosing own wage rate;
- Require an employee to sign a waiver or other document that prohibits the employee from disclosing wage rate information or deny the employee the right to disclose the employee's wage rate information.



# Equal Pay for Equal Work 2021

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Two notice requirements not found in any other state's law:

- **Promotions/advancement.** Shall make *reasonable efforts* to announce, post or make known *ALL opportunities for promotion* to *ALL* current employees on the *same calendar day* and prior to making promotion decision
- **Job openings.** Shall disclose in each posting for each job opening the hourly/salary compensation, or a *range of the hourly/salary compensation*, and a general description of *ALL* of the *benefits and other compensation* offered to the hired applicant



# Considerations for employers

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Administratively burdensome/high litigation risk

Employer must keep records of job descriptions/wage history for all employees for employment period plus two years

Many enforcement options for wage discrimination

- Complaint and mediation through CO Department of Labor and Employment
- Charge with CO Civil Rights Division
- Private civil action in state court no later than two years after violation; may be awarded back pay up to three years plus liquidated (double) damages, equitable relief, attorney fees; jury trial available

## **Mini safe harbor**

Employer may show good faith, avoid liquidated damages, by completing a thorough and comprehensive **pay audit** of its workforce—with goal of identifying pay disparities—within two years prior to civil action



# Considerations for employers

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Address job openings. Adopt a policy regarding job openings, wage rate/range, general description of benefits and other compensation offered

Address promotions. What constitutes a promotion? What “reasonable efforts” will be used to inform all employees of promotional opportunities on the same calendar day?

Review compensation practices. No questions about compensation history of an applicant. Cannot require an employee to sign a waiver that forbids the employee from discussing compensation information. Can still ask an applicant his or her salary expectations.

Consider conducting a proactive pay audit.



# Arvada's Approach



- ❖ Have a plan and gain buy-in (and funding) from leadership.
- ❖ Partner with Legal, review policies and update them to comply with the Act.
- ❖ Update policy to post all vacancies for a minimum number of days. Clearly explain any exceptions (i.e. reclassification and career level advancement models.)
- ❖ Post a pay rate, hiring range or salary range and benefits on all job postings.
- ❖ Remove all salary history questions from job applications, interview processes and job offer process.
- ❖ Train managers to work with HR on all job offers and not to ask applicant's for salary history. Asking for salary expectations is a good alternative.



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\*Disclaimer: This is not legal advice. Consult with your legal team or a consultant on what's best for your organization



# Arvada's Approach



- ❖ Update job descriptions; make sure there is one for every job; include a copy in the employee's personnel file.
- ❖ Identify jobs that perform "substantially similar work" based on a composite of skill, responsibility and work effort required. Consider if any jobs need to be regraded or reclassified based on this comparison.
- ❖ Conduct a pay equity analysis to identify any gaps in pay between women and men performing "substantially similar work." Document everything and involve Legal on options for protecting this information.
- ❖ Develop a plan to address and correct any gaps in pay that cannot be explained due to individual seniority, merit, or relevant education, training or experience (or any other factors permitted by the Act.)
- ❖ Make pay equity analysis a regular part of your annual pay plan update.
- ❖ Be transparent and communicate!



# Colorado's New Paid Sick Leaves

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Healthy Families and Workplaces Act ("HFWA")(SB20-205), passed June 16, 2020, signed July 14, 2020, effective **January 1, 2021**

Requires **three types of paid sick leave:**

1. COVID-19 Emergency Paid Sick Leave
2. Paid Sick Leave
3. Public Health Emergency Leave



# Colorado's New Paid Sick Leave: *COVID-19 E-Paid Sick Leave*

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## **Emergency Paid Sick Leave, C.R.S. §8-13.3-406**

Applies only through December 31, 2020

**ALL employers** (including private employers with 500+ employees)

Shall provide paid sick leave in the amount and for purposes provided in federal "Emergency Paid Sick Leave Act" in FFCRA [normally, 10 days or 80 hours FT; 2-week average amount for PT) up to \$511 per day (\$5,110 total) where leave is taken for employee's own illness or quarantine and \$200 per day (\$2,000 total) where leave is taken for care for others or school closures]

**No small employer exemption/no tax credits**



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# Colorado's New Paid Sick Leave: *Paid Sick Leave*

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**Paid Sick Leave**, C.R.S. §§8-13.3-401 et seq

Beginning **January 1, 2021**, all employers with 16+ employees (in Colorado?) must provide paid sick leave to all employees, accrued at one hour of paid sick leave for every 30 hours worked, up to a maximum of **48 hours/year** (can be more generous/accrue at more generous rate). Effective **January 1, 2022**, covers ALL employers.

An employee begins accruing paid sick leave when employment begins (or employer can frontload the amount); may use paid sick leave as it is accrued; and may carry forward and use up to 48 hours unused leave in subsequent calendar years



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# Colorado's New Paid Sick Leave:

## *Paid Sick Leave*

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Employees may use accrued paid sick leave to be absent from work for the following purposes:

- Employee has a mental or physical illness, injury, or health condition; needs a medical diagnosis, care, or treatment related to such illness, injury, or condition; or needs to obtain preventive medical care;
- Employee needs to care for a family member who has a mental or physical illness, injury, or health condition; needs a medical diagnosis, care, or treatment related to such illness, injury, or condition; or needs to obtain preventive medical care;
- Employee or family member has been the victim of domestic abuse, sexual assault, or harassment and needs to be absent from work for purposes related to such crime (e.g., care, legal, relocation); or
- A public official has ordered the closure of employee's business or school/place of care of the employee's child due to a public health emergency necessitating absence from work



# Colorado's New Paid Sick Leave:

## *Paid Sick Leave*

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### Key considerations regarding paid sick leave

- Exempt employees presumed to work 40 hours/week
- May use leave in hourly or greater increments
- “Family member” is an immediate family member, in loco parentis or for whom responsible for health-related care
- Employee must make good faith effort to provide advance notice of foreseeable leave
- Employer may require reasonable documentation for leaves lasting four or more consecutive work days
- Need not pay unused leave on termination, unless retaliatory personnel action prevented the individual from using leave; must reinstate leave if rehired in six months
- Can't make employee find a replacement/coverage



# Colorado's New Paid Sick Leave: *Public Health Emergency Leave*

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In the event of a “public health emergency,” employers **must supplement an employee's paid sick leave** to ensure the employee may take up to **80 hours** (proportional for PT employees) **one-time** emergency leave

Can **offset** accrued, unused paid sick leave against emergency leave requirement

Employees must notify employer of need for emergency leave as soon as practicable when the need for leave is foreseeable and the employer's place of business has not been closed.



# Colorado's New Paid Sick Leave: *Public Health Emergency Leave*

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Employees can use emergency leave for any of the following reasons:

- Self-isolating due to a positive diagnosis, are experiencing symptoms, or are seeking medical treatment or preventive care with respect to the disease causing the public health emergency, or are caring for a family member in such circumstances;
- Public health official or employer determines it is unsafe for the employee to come to work due to the public health emergency;
- Must care for a child whose child care facility is closed due to the public health emergency; or
- Employee suffers from a preexisting condition that would make him or her more susceptible to serious harm if they were infected with the disease causing the public health emergency





# Colorado's New Paid Sick Leave: *For all leaves*

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## **Broad anti-retaliation provision**

Must provide written notice of rights and a poster (TBD); must maintain record of paid leave accrued/used for two years

Must complain to CDLE before private lawsuit

Employers, including public employers, that provide comparable paid leave to their employees and allow employees to use that leave as permitted under the act are **not required to provide additional paid sick leave** to their employees

Potential exceptions for unionized workforce under a CBA



# Public Health Emergency Whistleblower Law ("PHEW")

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New C.R.S. §§8-14.4-101 et seq

A principal [any "employer" under FLSA, State of Colorado, local government, contractor of 5+ independent contracts in CO/year]

Shall not discriminate, or retaliate, against any worker who in good faith raises any reasonable concern about workplace violations of government health or safety rules, or a significant workplace threat, related to a public health emergency [public health order or disaster emergency declaration] to the principal, agent, other workers, government agency or the public if principal controls the workplace conditions giving rise to the threat or violation

Shall not require a worker to sign a nondisclosure agreement that would limit disclosing public health/safety practices or hazards; any such contract is void

Shall not discriminate, or retaliate, against any worker for voluntarily wearing own PPE if provides a higher level of protection than principal's equipment and is recommended by federal, state, local health agency and doesn't render worker incapable of doing job

Shall not discriminate, or retaliate, against any worker for opposing practices believed to be unlawful, making a charge or participating in an investigation/hearing

Notice required. Extensive enforcement/relief provisions: Administrative/ private lawsuit/qui tam actions



# Arvada's Approach



- ❖ Develop a plan, gain buy-in (and funding) from leadership.
- ❖ Partner with Legal to review policies and update them to comply with the Act
- ❖ Include expanded definitions of family members, expanded reasons for which leave can be taken, and practices on how and when documentation is requested (only after 4 days.)
- ❖ Make sure policies cover all employees, including part-time, temporary, seasonal and variable hour employees; and that accrual rates meet or exceed the requirements of the act.
- ❖ Post notices and train managers on the new requirements and responsibilities under both the Healthy Families and Workplaces Act and the Public Health Emergency Whistleblower law.
- ❖ Update and communicate complaint resolution or grievance policies and provide a safe environment for employees to bring forth concerns about working conditions and safety.



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