



HUSCH BLACKWELL

# Colorado Equal Pay for Equal Work Act



Chris Ottele

## Legislative Declaration

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Despite decades of law prohibiting pay discrimination, disparities between men and women still exist

*Assumption:* pay disparities, even in the aggregate, are the result of discrimination

# Colorado's Solution

**EQUAL PAY  
FOR [REDACTED]  
EQUAL WORK  
ACT [REDACTED]**

Passed in 2019

January 1, 2021 –  
Equal Pay  
Transparency Rules

Objectives

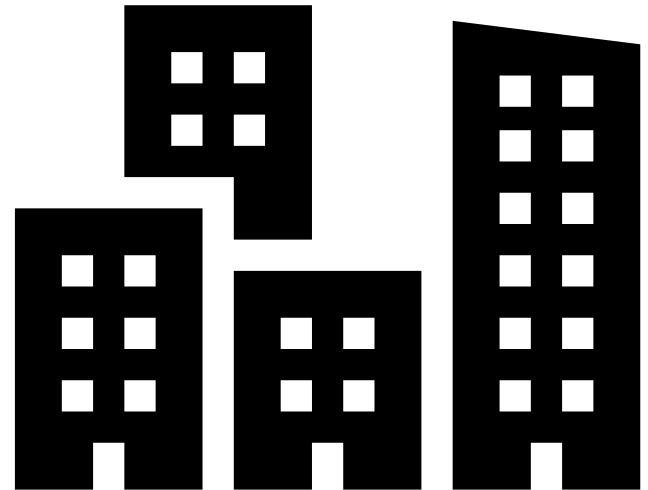
- Mandate pay equity
- Limited exceptions
- Transparency



## Employer

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“The state or any political subdivision, commission, department, institution, or school district thereof, and every other person employing a person in the state.” C.R.S. § 8-5-101(4).





# Multiple Intersecting Requirements

Pay Equity

Record Keeping

Prohibited Questions

Posting

Pay Transparency

Audits



## **Pay Equity: C.R.S. § 8-5-102(1)**

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An employer shall not discriminate between employees on the basis of sex . . . 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 . . . and responsibility....**

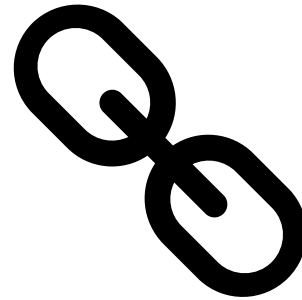


# Hybrid



Wage and Hour

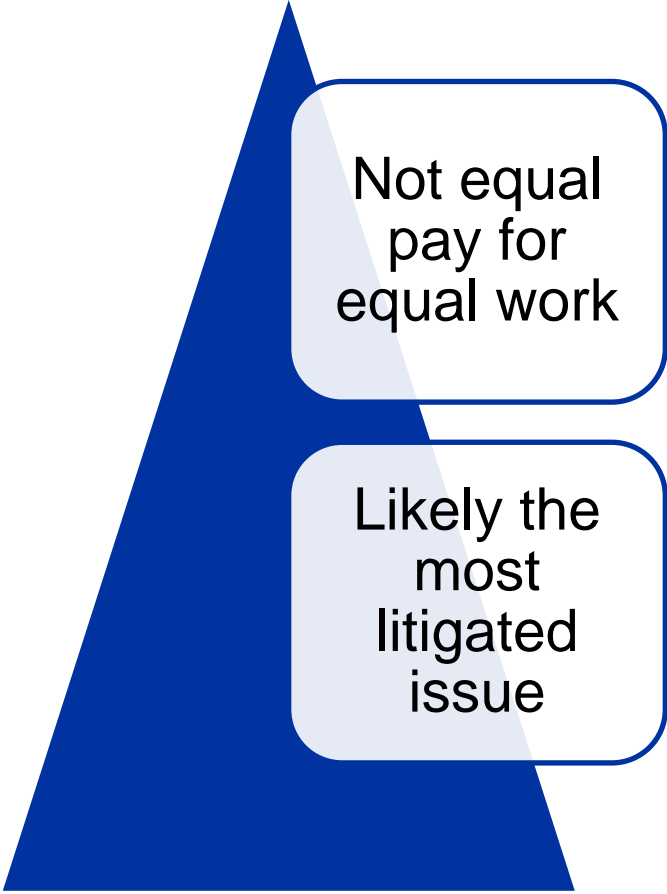
Discrimination





# Substantially Similar Work

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Not equal  
pay for  
equal work

Likely the  
most  
litigated  
issue

Skill

Effort

Responsibility



# 6 Defenses (C.R.S. § 102(1)(a)): No violation where the wage rate differential is based on ...

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Seniority System

Merit System

System Measuring Quantity / Quality

Location

Education

Travel

# Not a Defense in Colorado, but a defense everywhere else

“a differential based on any other factor other than sex” 29 U.S.C. § 206(d)(iv)





## Biggest Questions

- Strict liability
- Statistical significance
- Different roles, similar level of responsibility
- Effort
- Job Market Necessity (e.g. Retention or Hiring Bonuses)





## Prohibitions

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Ask or Rely on Wage Rate History

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Require Employee from Disclosing Wage Rate

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Requirements to Sign a Waiver

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Discriminate or Retaliate



# Transparency

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## Promotion Opportunities

- “Announce, post, or make known all opportunities for promotion” to all current employees on the same calendar day

## Job-vacancy posting

- must disclose the hourly wage or salary, or the hourly wage or salary range, along with a general description of all benefits and other compensation offered

# That got ugly fast

DEPARTMENT OF LABOR AND EMPLOYMENT  
Division of Labor Standards and Statistics  
Equal Pay Transparency Rules (“EPT Rules”)  
7 CCR 1103-13

Adopted on November 10, 2020, effective Jan. 1, 2021.



Division of Labor Standards and Statistics  
633 17th Street  
Denver, CO 80202-2107 | (303) 318-8441 | [www.coloradolaborlaw.gov](http://www.coloradolaborlaw.gov)

## STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY, AND FINDINGS



Division of Labor Standards and Statistics  
633 17th Street, Denver, CO 80202-2107  
(303) 318-8441 | [www.coloradolaborlaw.gov](http://www.coloradolaborlaw.gov)

### **Interpretive Notice & Formal Opinion (“INFO”) # 9: Equal Pay for Equal Work Act, Part 2: Transparency in Pay and Opportunities for Promotion and Advancement**



Division of Labor Standards and Statistics  
633 17th Street, Denver, CO 80202-2107  
303-318-8441 / [cdle\\_labor\\_standards@state.co.us](mailto:cdle_labor_standards@state.co.us) / [www.coloradolaborlaw.gov](http://www.coloradolaborlaw.gov)

Date: July 21, 2021

To: Employers with postings for remote jobs that lack pay disclosure as required by Colorado law

Re: Notice Regarding Labor Law Compliance — Route Promptly to Human Resources and/or Counsel

Subj: The legal requirement, for all employers with any Colorado employees, to disclose the compensation to be offered in postings for all jobs, including remote jobs, under Colorado’s Equal Pay for Equal Work Act



# What is a “promotional opportunity”?

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“A ‘promotional opportunity’ exists when an employer has or anticipates a *vacancy in an existing or new position* that could be considered a promotion for one or more employees in terms of compensation, benefits, status, duties, or access to further advancement.” EPT Rule 4.2.1.

- “existing position” occurs when an existing position that the employer intends to fill is open or is held by a departing employee. INFO #9.
- “new position” occurs when an employer: (1) adds a position; or (2) gives an existing employee a new position, including by changing their title, materially changing duties. INFO #9.



## Cont'd

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### Exceptions (EPT Rule 4.2.5):

- 1) When the employer has a compelling need to keep an opening confidential because the position is still held by the incumbent employee;
- 2) When the promotion is automatic after a trial period according to a written agreement; or
- 3) Where someone is hired into a temporary, acting or interim role.

NOT automatic promotions (e.g., Manager to Sr. Manager)





# Compensation and Benefits

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The hourly rate or salary (range)

General description of any bonuses, commissions, or other forms of compensation

General description of all employment benefits



## Good Faith Range

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- EPT Rule 4.1.2. A posted compensation **range** may extend from the lowest to the highest pay the employer in **good faith** believes it might pay for the particular job, **depending on the circumstances.**



## Manner of Posting (INFO #9)

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Notice of a promotional opportunity must be made:

- (1) in writing;
- (2) by any method reaching all employees;
- (3) to all employees for whom it may be a promotion, on the same calendar day; and
- (4) sufficiently in advance of the hiring or promotion decision that employees receiving notice may apply.



# Litigation - Rocky Mountain Association of Recruiters v. Moss (U.S.D.C. Colo.)

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- Plaintiff (trade organization) sought preliminary injunction of posting requirements, claiming they violated the Dormant Commerce Clause and First Amendment protections of commercial speech.
- Judge Martinez denied the preliminary injunction
  - No Interstate Burdens
  - No First Amendment claim



## No Private Right of Action

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- Fines between \$500 and \$10,000 per violation of the posting and equal pay transparency provisions.
- Lawsuits and CDLE investigations for pay discrimination

# Recordkeeping Obligations

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## C.R.S. § 8-5-202

- Duration of employment
- + 2 years
- Wage History
- Job Description

## Good Faith and Audits

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Good Faith = Nixes  
Liquidated Damages

Audits: Every 2 Years

Deliberate Effort

Attorney Client Privilege

Cohort Analysis vs. Multi-  
Factor Regression Analysis

