



# Colorado issues pay equity rules to implement law in 2021

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Starting Jan. 1, 2021, Colorado's Equal Pay for Equal Work Act (SB 19-085) will prohibit all employers from discriminating because of sex (including gender identity) — alone or with another protected status — by paying less for substantially similar work in terms of skill, effort and responsibility. Every employer with any employees in the state will have to comply with the law. The Department of Labor and Employment, through its Division of Labor Standards and Statistics (the Division), adopted final administrative rules on Nov. 11, 2020, that were scaled back from their proposed rules and limit the scope of the job posting requirement.

## Highlights

The law aims to increase pay equity and transparency, imposes new notice and recordkeeping requirements, and encourages companies to regularly self-audit their compensation practices.

### Pay equity, transparency protections

Employees are protected against sex-based pay discrimination for work requiring similar skills, effort and responsibility. However, the law permits pay differences arising from:

- 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 reasonably related to the work.

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- Travel that is a regular and necessary condition of the job.

Employers can't prevent employees from discussing their own compensation information with other employees or require employees to sign a waiver preventing them from discussing their compensation.

The law also prohibits employers from asking about job candidates' wage history or relying on wage history to determine a wage rate. Employers can't discriminate or retaliate against a prospective employee for failing to disclose wage history.

### Job-posting notices and recordkeeping

New notice requirements will help current and prospective employees learn about job opportunities:

- Employers will have to make reasonable efforts to "announce, post, or make known all opportunities for promotion" to all current employees on the same calendar day. The rules clarify that the posting requirements do not apply to employees outside of Colorado. "Reasonable efforts" are satisfied by telling employees where to find postings or announcements, and allowing them to access posts at their regular workplace online or via a hard copy. A "promotional opportunity" is 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.
- Each job vacancy posting will have to 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. The rules specify that this requirement does not apply to jobs performed outside of Colorado and job postings entirely outside of Colorado.
- Permitted exceptions to the posting requirements include compelling confidentiality needs, automatic promotion after a specified initial trial period, and temporary, acting or interim hires.

Employees can report posting violations to the Division within one year of learning of the violation.

Employers must keep records of job descriptions and wage history for each employee while employed and for two years after termination. Employers could face civil fines of \$500 to \$10,000 per violation of either the job-posting or recordkeeping requirements.

### Enforcement

The Division will enforce the law, investigate complaints and establish a voluntary mediation service. Employees could also pursue private civil actions and recover up to three years of back pay and double damages. The Division will not accept complaints of violations that occurred before Jan. 1, 2021.

Employers can limit liability for damages by showing the act or omission causing the pay violation was made in good faith. In particular, employers that proactively self-evaluate their compensation practices for disparities could use those audits as a partial defense against a pay equity claim.

## **Related Resources**

### **Non-Mercer resources**

- [Press release: Labor Dept. adopts new rules around equal pay, paid sick](#) (Division, Nov. 11, 2020)
- [Statement of basis, purpose, specific statutory authority and findings](#) (Division, Nov. 10, 2020)
- [Equal pay rules](#) (Division, Nov. 10, 2020)
- [SB 19-085, Equal Pay for Equal Work Act](#) (Colorado Legislature, May 22, 2019)

### **Mercer Law & Policy resources**

- [Colorado's new pay equity law takes effect in 2021](#) (June 6, 2019)
- [Maine employer can't ask job seekers about salary history](#) (May 1, 2019)
- [Cincinnati adopts salary history ban](#) (April 8, 2019)

### **Other Mercer resources**

- [How to address pay equity during coronavirus](#) (May 4, 2020)
- [On pay equity, simple statistics can be deceiving](#) (March 7, 2019)

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