

ALLIANCE SUMMIT



LEGAL, LEGISLATIVE & BEST- PRACTICES UPDATE

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2019 State Legislation





**Concerning the Creation of the “Equal Pay
for Equal Work Act” in Order to Implement
Measures to Prevent Pay Disparities
(Senate Bill 19-085)**

Equal Pay Act

Senate Bill 19-085

- ▶ Equal Pay Act contains the following:
 - ▶ “Employer” means the state or any political subdivision, commission, department institution, or school district thereof, and every other person employing a person in the state.
 - ▶ “Wage Rate” means all compensation received and benefits received by the employee, including benefits.

Equal Pay Act

Senate Bill 19-085

- ▶ Requirements: “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 composite of skill and effort...”

Equal Pay Act

Senate Bill 19-085

- ▶ “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 composite of skill and effort...;
- ▶ And responsibility.”

Equal Pay Act

Senate Bill 19-085

- ▶ 1. That the wage differential is based on:
 - a) A seniority system
 - b) A merit system
 - c) A system that measures earnings by quantity or quality of production
 - d) Geographic location

Equal Pay Act

Senate Bill 19-085

- e) Education, training, or experience to the extent reasonably related to the work in question.
- f) Travel, if the travel is a regular and necessary condition of work performed.

Equal Pay Act

Senate Bill 19-085

- ▶ 2. That each factor is applied reasonably
- ▶ 3. That each factor, to the extent relied upon, accounts for the entire wage differential
- ▶ 4. That prior wage rate history was not relied on to justify disparity in current wage rate

Equal Pay Act

Senate Bill 19-085

- ▶ So employers need to consider establishing:
 - ▶ A seniority system;
 - ▶ A merit system;
 - ▶ A system that measures earnings by quantity or quality of production;
 - ▶ Geographic distinctions;
 - ▶ Education, training, or experience if they are related to the work; or
 - ▶ Travel, if travel is a regular and necessary condition of the work performed.

Equal Pay Act

Senate Bill 19-085

▶ **These terms and requirements are defined in the Bill as follows:**



Equal Pay Act

Senate Bill 19-085

- ▶ **A seniority system:**
 - ▶ **Generally, some employee rights and/or benefits are tied to the employee's length of service for an organization.**
 - ▶ **A simple example: vacation accrual increases based on the length of time an employee has been employed.**

Equal Pay Act

Senate Bill 19-085

► A seniority system:

Length of service	Position	Amount of compensation
1-3 years	Administrative Assistant	\$20,000-\$23,000
3-5 years	Administrative Assistant	\$23,000-\$25,000
5-7 years	Administrative Assistant	\$30,000-\$35,000
7-10 years	Administrative Assistant	\$40,000-\$45,000
10-15 years	Administrative Assistant	\$50,000-\$55,000
15-20 years	Administrative Assistant	\$60,000-\$65,000
20-25 years	Administrative Assistant	\$70,000-\$75,000
25+ years	Administrative Assistant	\$80,000-\$85,000

Equal Pay Act

Senate Bill 19-085

- ▶ **A seniority system:**
 - ▶ **A table like that would need to be created for each position.**
 - ▶ **Analyze within the pay range whether men and women are paid equally, or whether one gender or the other is paid more or less than the other.**
 - ▶ **As a pure seniority system, it limits consideration of other factors like productivity or merit.**

Equal Pay Act

Senate Bill 19-085

- ▶ **A merit system:**
 - ▶ **A system in which ability is prioritized.**
 - ▶ **To implement a system, employers must have measurable goals for each position.**
 - ▶ **Those measurable goals must be able to be evaluated in a neutral way.**
 - ▶ **Based on the evaluations, employees' compensation then must be tied to a range of compensation, like the one we saw with respect to seniority.**

Equal Pay Act

Senate Bill 19-085

- ▶ **A merit system:**
 - ▶ **Any testing or other neutral evaluation must not have an inherent bias toward one gender or another.**
 - ▶ **Consider hiring a professional to develop targeted measuring techniques or processes for your organization.**
 - ▶ **Analyze within the pay range whether men and women are paid equally, or whether one gender or the other is paid more or less than the other.**

Equal Pay Act

Senate Bill 19-085

- ▶ **Measuring quantity or quality:**
 - ▶ This option depends upon having an end product that can be measured in a neutral way.
 - ▶ For example, it is possible to measure the number of widgets. And if the widgets must all be 1" x 1" and be smooth on all sides, it is possible to evaluate the quality of each widget.

Equal Pay Act

Senate Bill 19-085

- ▶ **Geographic location:**
 - ▶ **How far geographically is far enough?**
 - ▶ **Denver versus Los Angeles?**
 - ▶ **Denver versus Colorado Springs?**
 - ▶ **Consider obtaining cost of living and other economic data if geographic differences contribute to differences in pay.**

Equal Pay Act

Senate Bill 19-085

- ▶ **Education, training, or experience:**
 - ▶ **Must be reasonably related to the work at issue.**
 - ▶ **Keep resumes.**
 - ▶ **Likely will need to inquire during interviews and keep those notes.**
 - ▶ **If education, training, or experience can be verified, verification may be necessary.**

Equal Pay Act

Senate Bill 19-085

- ▶ Travel, if travel is a regular and necessary condition of the work.
 - ▶ Document why travel is regular and necessary for one position and not another.
 - ▶ Keep records of such travel.

Equal Pay Act

Senate Bill 19-085

- ▶ Whatever basis/bases accounts for a pay differentiation, it/they must be the reason for the entire difference in pay.

Equal Pay Act

Senate Bill 19-085

- ▶ The bill also prohibits an employer from:
 - ▶ Seeking the wage rate history of a prospective employee;
 - ▶ Relying on a prior wage rate to determine a wage rate;
 - ▶ Discriminating or retaliating against a prospective employee for failing to disclose the employee's wage rate history;

Equal Pay Act

Senate Bill 19-085

- ▶ Discharge, discipline, discriminate against, coerce, intimidate, threaten, or interfere with an employee or other person because the employee or person inquired about, disclosed, compared, or otherwise discussed the employee's wage rate.
- ▶ Prohibit as a condition of employment, an employee from disclosing the employee's wage rate.

Equal Pay Act

Senate Bill 19-085

- ▶ Other requirements:
 - ▶ Employer 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 the decision.**
 - ▶ Employer shall disclose in each posting the compensation rate (or range) and general description of all the benefits and other compensation to be offered to the **hired applicant.**

Equal Pay Act

Senate Bill 19-085

- ▶ Other requirements:
 - ▶ Employer shall keep records of job descriptions and wage-rate history for each employee for the duration of employment plus two years in order to determine if there is a pattern of wage discrepancy.

Equal Pay Act

Senate Bill 19-085

- ▶ The bill removes the requirement of the CDOL's Division Director to enforce wage discrimination complaints based on an employee's sex and instead permits an aggrieved person to bring a civil action in district court to pursue remedies specified in the bill.
- ▶ The bill still permits an employee to file a claim with the Civil Rights Division.

Equal Pay Act

Senate Bill 19-085

- ▶ In fact, the Bill authorized the Director of the CDOL to create and administer a process to accept and mediate complaints and to provide legal resources regarding alleged violations of the Equal Pay Act and to promulgate rules for this purpose.
- ▶ The process created does not affect or prevent the right of an aggrieved person from commencing a civil action.

Equal Pay Act

Senate Bill 19-085

- ▶ Two year statute of limitations, but damages can go back three years.
- ▶ Damages: Lost pay plus liquidated damages unless employer demonstrates that the act or omission giving rise to the violation was in good faith and employer had reasonable grounds for believing employer did not violate the statute.
- ▶ Employee can also recover reasonable attorney fees.

Liquidated Damages

- ▶ If the **employer demonstrates (i.e., it is the employer's burden)** that the act or omission giving rise to the violation was in “good faith and the employer had a reasonable grounds for believing that the employer did not violate the law,” the Court shall not award liquidated damages.

Liquidated Damages

- ▶ “In determining whether the employer’s violation was in good faith, the fact finder may consider evidence that within two years prior to the date of the commencement of the civil action, **the employer completed a thorough and comprehensive pay audit of its workforce,** with the specific goal of identifying and remedying unlawful pay disparities.

Equal Pay Act

Senate Bill 19-085

- ▶ **Hiring:**
 - ▶ Employers must “make reasonable efforts” to tell employees on the same day a job opens, and prior to making a decision, about job openings (“opportunities for promotion”).
 - ▶ Do all employees have email?
 - ▶ Do all employees access email?
 - ▶ Can notices be posted close to a timeclock?

Equal Pay Act

Senate Bill 19-085

- ▶ **Hiring:**
 - ▶ Develop a standard system to provide notices to employees, likely in multiple ways or formats.
 - ▶ The notice must state: (1) the position; (2) the hourly rate of pay or wage rate; (3) any benefits that are not provided to all employees.

Equal Pay Act

Senate Bill 19-085

- ▶ **Job descriptions:**
 - ▶ This Bill expressly states that employers must keep records of job descriptions and wage rate history for each employee and for two years after the employee's employment ends.
 - ▶ There is no qualifying language.
 - ▶ If your organization does not have job descriptions at all, or if job descriptions have not been updated in a while, create or revise those job descriptions now.

Equal Pay Act

Senate Bill 19-085

- ▶ If Division determines employer failed to comply, it may order employer to pay a fine of no less than \$500.00 and no more than \$10,000.00.
- ▶ In litigation, if an employer does not have the identified records, the court will tell jury to presume the records would have contained information favorable to the employee and instruct the jury that failure to keep records can be considered evidence that the violation was not made in good faith.
- ▶ The Bill becomes effective on January 1, 2021.



**A Bill for an Act Concerning the
Creation of a Family and Medical
Leave Insurance Program
Senate Bill 19-188**

FAMLI Bill

Senate Bill 19-188

- ▶ The bill accommodates up to 12 weeks leave, with up to \$1,000 a week in benefits, depending on income. Premium payments would begin in 2021 with the first benefits available in 2022; though there also appears to be concessions offered that may delay those.
- ▶ Provides 12 weeks of paid leave, which can be taken as intermittent leave like the Federal FMLA; though there's a reference to such leave being an hour or less.

FAMILY Bill

Senate Bill 19-188

- ▶ Tasks forces must have all appointments completed by July 1, 2019.
- ▶ Deadlines then set to occur over the following months after the collection of certain information.
 - ▶ November 1, 2019: Initial recommendation by the task force.
 - ▶ December 1, 2019: Independent actuarial analysis must be completed.
 - ▶ January 8, 2020: Final recommendations from task force.

FAMILY Bill

Senate Bill 19-188

- ▶ Recommendations must review, evaluate and assess, at least the following elements without limitation:
 - ▶ The purposes of the leave, including serious illness, caring for a loved one with a serious illness, bonding with a new child, and needs arising from military deployment and the effects of domestic violence, stalking, and sexual assault;
 - ▶ Self-employed workers' access to paid Family and Medical Leave and a mechanism to allow self-employed workers to participate;
 - ▶ Eligibility to take leave;

FAMLI Bill

Senate Bill 19-188

- ▶ The definition of “family” or “family member” for whom an individual may take leave for purposes of providing care;
- ▶ Job protections and other employment protections, including their effect on individual’s ability to take leave;
- ▶ The duration of leave;
- ▶ The amount of the wage replacement;
- ▶ The maximum weekly wage replacement amount;
- ▶ The program funding structure;

FAMLI Bill

Senate Bill 19-188

- ▶ Program Implementation;
- ▶ The role of third-party vendors on program sustainability;
- ▶ The solvency of a paid Family and Medical Leave fund under various models;
- ▶ The portability of paid Family and Medical Leave benefits;
- ▶ The sustainability of a paid Family and Medical Leave program; and
- ▶ How a paid Family and Medical Leave program would interact with other benefits.

FAMLI Bill

Senate Bill 19-188

- ▶ Additional deadlines “assumed” in the Bill:
 - ▶ July 1, 2020: The Family and Medical Leave Program will be established.
 - ▶ January 1, 2022: The public education and outreach campaign begins.
 - ▶ January 1, 2023: The funding for the program will begin.
 - ▶ January 1, 2024: The program will start paying benefits.



**Concerning the Timing of an
Inquiry into a Job Applicant's
Criminal History**

House Bill 19-1025

Conviction Information Bill

House Bill 19-1025

- ▶ The bill prohibits employers from:
 - ▶ Advertising that a person with a criminal history may not apply for a position;
 - ▶ Placing a statement in an employment application that a person with a criminal history may not apply for a position;
 - ▶ Inquiring into, or requiring disclosure of, an applicant's criminal history on an initial written or electronic application form.
- ▶ An employer may obtain a job applicant's criminal history at any time.

Conviction Information Bill

House Bill 19-1025

- ▶ An employer is exempt when:
 - ▶ The law 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.

Conviction Information Bill

House Bill 19-1025

- ▶ When would the law become effective?
 - ▶ On or after September 1, 2019, for employers with 11 or more employees
 - ▶ On or after September 1, 2021 for all employers.

Conviction Information Bill

House Bill 19-1025

- ▶ The DOL is charged with enforcing the requirements of the bill and may issue warnings and orders of compliance for violations and, for second or subsequent violations, impose civil penalties.
- ▶ A violation of the restrictions does not create a private cause of action, and the bill does not create a protected class under employment anti discrimination laws. The department is directed to adopt rules regarding procedures for handling complaints against employers.

Conviction Information Bill

House Bill 19-1025

- ▶ A person who is aggrieved by a violation of this section may file a complaint with the Department of Labor. An employer that violates this section is liable for one of the following:
 - ▶ 1st Violation – a warning and an order requiring compliance within 30 days.
 - ▶ 2nd Violation – same as the first violation plus a civil penalty not to exceed \$1,000.
 - ▶ 3rd Violation – same as the first violation plus a civil penalty not to exceed \$2,500.

Conviction Information

- ▶ In 2012, the EEOC published its own guidance on the conviction question. In it, the EEOC emphasized that employers should consider the following:
 - (1) the nature of the crime;
 - (2) the time elapsed since the conviction; and
 - (3) the nature of the job duties that the applicant is applying for.

Conviction Information

- ▶ After review, the employer should conduct an assessment to determine if the conviction is job related.
- ▶ According to the EEOC, as part of this individualized assessment, employers should also consider the following factors:
 - (1) the facts or circumstances surrounding the offense or conduct;
 - (2) the number of offenses for which the individual was convicted;
 - (3) the individual's age at the time of conviction;

Conviction Information



- (3) evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- (4) the length and consistency of employment history before and after the offense or conduct;
- (5) rehabilitation efforts undertaken by the individual;
- (6) Employment or character references regarding fitness for a particular position; and
- (7) Whether the individual is bonded under a federal, state or local bonding program.

Name-based Criminal History Record Checks (HB19-1166)

- ▶ Current law requires certain people, including applicants for certain licenses, employment, or volunteer activities, to undergo a fingerprint-based criminal history record check.
- ▶ This bill adds the requirement that the person submit to a name-based criminal history record check when the fingerprint-based check reveals a record of arrest but does not show a disposition in the case.



**Local Government Minimum Wage.
Concerning the repeal of the prohibitions
on a local government establishing
minimum wage laws within its
jurisdiction.
HB 19-1210**

The bill allows a unit of local government to enact laws establishing a minimum wage within its jurisdiction.



**Concerning Criminal Offenses for
failure to pay wages, and , in
connection therewith, implementing
recommendations from the
Colorado Human Trafficking Council
(House Bill 19-2167)**

Penalties For Failure To Pay Wages (HB19-1267)

- ▶ 8-4-114. Criminal penalties. (2) In addition to any other penalty imposed by this Article 4, any employer or agent of an employer who willfully refuses to pay wages or compensation as provided in this Article 4, or falsely denies the amount of a wage claim, or the validity thereof, or that the same is due, with intent to secure for himself, herself, or another person any discount upon such indebtedness or any underpayment of such indebtedness or with intent to annoy, harass, oppress, hinder, coerce, delay, or defraud the person to whom such indebtedness is due commits theft.

Penalties For Failure To Pay Wages (HB19-1267)

- ▶ The bill defines “employee” as any person who performs labor or services for the benefit of an employer, provides factors that are relevant for determining whether a person is an employee, and maintains the exclusions from the definition in existing law.
- ▶ The bill defines “employer” as having the same meaning as set forth in the federal “Fair Labor Standards Act”, specifically includes foreign labor contractors and migratory field labor contractors or crew leaders in the definition, and maintains the exclusions from the definition in existing law.

Penalties For Failure To Pay Wages (HB19-1267)

- ▶ Under existing law, an employer who pays an employee a wage less than the minimum wage is guilty of a misdemeanor. Under the bill, a person who intentionally pays a wage less than the minimum commits theft, which is a felony when the theft is of an amount greater than \$2,000.
- ▶ The bill defines wage theft as theft, which is a felony when the theft is of an amount greater than \$2,000.

School Immunization Requirements

HB19-1312

- ▶ This bill concerned “modernizing immunization requirements for school entry to improve vaccination rates.”
- ▶ In short, the bill required the department of public health and environment (department) to:
 - ▶ Develop a standardized form and submission process to claim a medical exemption to an immunization; and
 - ▶ Develop a standardized form and submission process to claim a religious or personal belief exemption to an immunization.
- ▶ It passed the House, but stalled in the Senate.



EMPLOYMENT LAW FOR BUSINESSES

ATTORNEYS

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- Employee Handbooks and Policies
- Day-to-Day Employment-Law Questions
- Wage and Hour Issues
- Contracts/Agreements
- HR and Manager Training
- Recruiting and Hiring Procedures
- Termination Letters/Separation Agreements
- Department of Labor Audits
- Compliance with FMLA, ADA, FLSA, etc.
- Defending Your Organization Against Employee Claims, Charges, and Litigations
- And Much More!

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