

Navigating Updates to Employment/ Human Resources Law For Nonprofit Organizations

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Agenda/Topics

- ▶ 1. New employment laws or updates for 2024/25
- ▶ 2. Colorado COMPS
- ▶ 3. Department of Labor Overtime Rules
- ▶ 4. Exempt v. Nonexempt
- ▶ 5. Equal Pay for Equal Work
- ▶ 6. Job Application Fairness Act
- ▶ 7. Utilizing interns at non-profits
- ▶ 8. Wage, Labor, Recruitment
- ▶ 9. Case law changes
- ▶ 10. Harassment Laws
- ▶ 11. POWR Act and preventing discrimination
- ▶ 12. Internal Harassment Investigations
- ▶ 13. American with Disabilities Act law - Leave and Marijuana Use
- ▶ 14. Affirmative Defenses
- ▶ 15. FAMLl updates and Changes
- ▶ 16. Workers' Compensation interplay
- ▶ 17. Case law changes
- ▶ 18. And.....

Updates Regarding 2024 State Legislation



Creating a Respectful and Open World for Natural Hair act of 2020 ("CROWN")

- This 2020 Bill identified that the protected classification of "race" includes hair texture, hair type, or a protective hairstyle that is commonly or historically associated with race.
- HB24-1451 adds "hair length" to that definition: "the term "race" includes hair texture, hair type, HAIR LENGTH, or a protective hairstyle that is commonly or historically associated with race."

Bills, Rules, Etc. That Did Not “Pass”

- ▶ Prohibition against employee discipline (HB24-1260)
- ▶ Wage Claims Construction Industry Contractors (HB24-1008)
- ▶ Prevent Workplace Violence in Health-Care Settings (HB24-1066)
- ▶ FTC Bans noncompete agreements

Wage-and-Hour Update

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Wage-and-Hour Background

Colorado Wage-and-Hour Laws

1. **Fair Labor Standards Act (“FLSA”)**: covers almost every employer.
2. **Colorado Overtime & Minimum Pay Standards Order (“COMPS”)**: covers every employer except certain public entities.
3. **Colorado Wage Act**: covers all employers in Colorado, except state public organizations.

COMPS Definitions

- ▶ **“Employer”** has the same meaning as in the Federal Fair Labor Standards Act, except that the provisions of the COMPS do not apply to:
 - ▶ State or its agencies or entities
 - ▶ Counties and cities
 - ▶ Municipal corporations
 - ▶ Quasi-municipal corporations
 - ▶ School districts
 - ▶ Irrigation, reservoir, or drainage conservation companies or districts

Types of Workers

- ▶ Interns.
- ▶ Volunteers.
- ▶ Independent Contractors.
- ▶ Employees; and.....
- ▶ Actually, that's all.

Interns

- ▶ Courts use the “primary beneficiary test” to determine whether an intern or a student is, in fact, an employee.
- ▶ In short, this test allows courts to examine the “economic reality” of the intern-employer relationship to determine which party is the “primary beneficiary.” Courts generally identify the following seven factors as part of the test:

Interns

- ▶ The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
- ▶ The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- ▶ The extent to which the internship is tied to the intern's formal education program or the receipt of academic credit.

Interns

- ▶ The extent to which the internship accommodates the intern's academic commitments.
- ▶ The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- ▶ The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- ▶ The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Volunteers

- ▶ According to the Department of Labor, a volunteer is: an “individual who performs hours of service for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered.
- ▶ To determine whether an individual is a true volunteer, the Department of Labor considers the following factors:
 - ▶ Is the entity that will benefit/receive services from the volunteer a nonprofit organization?
 - ▶ Is the activity less than a full-time occupation?

Volunteers

- ▶ To determine whether an individual is a true volunteer, the Department of Labor considers the following factors:
 - ▶ Are the services offered freely and without pressure or coercion?
 - ▶ Are the services typically associated with volunteer work?
 - ▶ Have regular employees been displaced?
 - ▶ Does the worker receive (or expect) any benefit from the entity to which it is providing services to?

Volunteers

- ▶ Can an employer have an employee volunteer?
 - ▶ Is the volunteering optional?
 - ▶ Will volunteering or not volunteering have any impact on the employee's working conditions or employment prospects? And
 - ▶ Is the employee "guaranteed" a bonus for not volunteering?

Independent Contractor – Colorado Statute

C.R.S. § 8-70-115(1)(b):

- 1) No Control Allowed; and
 - 2) Separate Business Required; and
 - 3) The degree to which the person performs work that is the primary work of the employer.
- ▶ Employer is liable for paying back taxes and interest. Willful violators may also be fined \$5,000 per misclassified employee for the first misclassification, and up to \$25,000 per misclassified employee for a second or subsequent violation.

U.S. Department of Labor's new independent contractor rules

The U.S. DOL explained that the new “economic reality test in our new regulations is nimble enough to continue to provide a useful analysis for the broad range of work arrangements that exist today. We recognize that independent contractors play an important role in our economy – and this rule won’t change that.”

U.S. Department of Labor's new independent contractor rules

New Factors:

- Opportunity for profit or loss depending on managerial skill;
- Investments by the worker and the potential employer;
- Degree of permanence of the work relationship;
- Nature and degree of control;

U.S. Department of Labor's new independent contractor rules

New Factors:

- Extent to which the work is integral to employer's business; and
- Skill and initiative.
- Additional factors may be relevant if they bear on whether the worker is economically dependent on the employer for work.

State/Federal Requirements

- ▶ 1. Pay at least minimum wage for all work hours
- ▶ 2. Pay overtime at 1 ½ regular rate
 - ▶ Federal – Overtime = more than 40 in a workweek
 - ▶ State – More than 40 in a workweek; more than 12 in a day; more than 12 consecutive hours
- ▶ 3. Keep track of time.

Exemptions Background

- ▶ To be exempt, the employer must meet two tests with respect to the employee:
 - ▶ Salary-Basis Test
 - ▶ Duty-Basis Test
- ▶ *Meeting one of the tests is insufficient.*

Salary v. Day Rate

Recently, the United States Supreme Court issued its opinion in *Helix Energy Solutions Group, Inc. v. Hewitt*, wherein it held that paying an employee a “day rate” does not satisfy the salary basis test under the white-collar exemptions to the FLSA.

Because of this ruling, even highly compensated employees may be eligible to receive overtime if they are paid solely on a day-rate basis.

U.S. Department of Labor Tries Again

- ▶ Early this year, the DOL identified that on July 1, 2024, it would increase the annual salary-level threshold to \$844 per week (\$43,888 per year), and, on January 1, 2025, the standard level will increase again to \$1,128 per week (\$58,656 per year).
- ▶ Thereafter, the Department will update the salary threshold every three years, starting July 1, 2027.

COMPS v. FLSA

- ▶ Under COMPS, the current salary threshold for covered employers is \$55,000.00.
- ▶ Starting in 2025, the new threshold “shall be indexed every January 1 by the same Consumer Price Index (“CPI”) as the Colorado minimum wage, which went up about 6% last year, but only went up 2.7% this time, which would make the amount (\$56,485.00).

DOL Highly Compensated Employees

- ▶ The employee earns total annual compensation at the required threshold, which will move to \$132,964 per year and \$151,164 on July 1, 2025.
- ▶ The employee's primary duty includes performing office or non-manual work; and
- ▶ The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

U.S. DOL Labor Tries Again

- ▶ As of January 1, 2025, the Rule will also change the methodology used to calculate the minimum salary levels for exemption to be equal to the 35th percentile of earnings of full-time salaried workers in the lowest-wage Census region (currently, the South). The salary threshold for highly compensated employees will be set to equal to the 85th percentile of earnings of full-time salaried workers nationally.

Federal Administrative Exemption

- 1) The employee must make the federally-required weekly salary;
- 2) The employee must have the primary duty of performing office or non-manual work that is directly related to the management or general business operations of the employer or its customers; and
- 3) The employee's primary duty must include the exercise of discretion and independent judgment on significant matters.

COMPS Administrative Exemption

1. Meets the then-current salary-basis test.
2. Directly serves an executive, and regularly performs duties important to the decision-making process of that executive.
3. The employee must regularly exercise independent judgment and discretion in matters of significance, with a primary duty that is nonmanual in nature and directly related to management policies or general business operations.

Federal Executive Exemption

- 1) The employee must make the required rate on a salary basis, exclusive of board or lodging;
- 2) The employee must have the primary duty of management of the enterprise in which he or she is employed, or manage a customarily recognized department;
- 3) The employee must customarily and regularly direct the work of at least two other employees or their equivalent; and
- 4) The employee must have the authority to hire or fire employees, or their recommendations about hiring, firing, advancement, promotion, etc. must be given particular weight.

COMPS Executive Exemption

1. Meets the then-current federal salary-basis test.
2. Supervises the work of at least two full-time employees.
3. Has the authority to hire and fire, or to effectively recommend such action.
4. The employee must spend a minimum of 50% of the workweek in duties directly related to supervision.

COMPS Executive Exemption

- ▶ Generally, “management” includes, but is not limited to, activities such as:
 - ▶ Interviewing, selecting, and training of employees;
 - ▶ Setting and adjusting rates of pay and hours of work;
 - ▶ Directing the work of employees;
 - ▶ Maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status;
 - ▶ Handling employee complaints and grievances; disciplining employees;

COMPS Executive Exemption

- ▶ Planning the work; determining the techniques to be used; apportioning the work among the employees;
- ▶ Determining the type of materials, supplies, machinery, equipment or tools to be used, or merchandise to be bought, stocked and sold;
- ▶ Controlling the flow and distribution of materials or merchandise and supplies;
- ▶ Providing for the safety and security of the employees or the property;
- ▶ Planning and controlling the budget; and
- ▶ Monitoring or implementing legal compliance measures.

Federal Professional Exemption

- 1) The employee must be compensated on a salary at a rate not less than the required weekly salary;
- 2) The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

Federal Professional Exemption

- 3) The advanced knowledge must be in a field of science or learning; and
- 4) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

COMPS Professional Exemption

1. Meets the then-current salary-basis test.
2. Employed in a field or endeavor who has knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.
3. A professional employee must be employed in the field in which s/he was trained.

Federal Outside Sales Exemption

- ▶ The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- ▶ The employee must be customarily and regularly engaged away from the employer's place or places of business.
- ▶ The salary requirements of the regulation do not apply to the outside sales exemption.

COMPS Outside Salesperson Exemption

1. This exemption covers an employee working primarily away from the employer's place of business or enterprise for the purpose of making sales or obtaining orders or contracts for any commodities, articles, goods, real estate, wares, merchandise, or services.
2. The employee must spend a minimum of 80% of the workweek in activities directly related to his or her own outside sales.
3. No reference in COMPS to any pay requirements for this exemption.

COMPS Overtime

- ▶ Employees shall be paid time and one-half of the regular rate of pay for any work in excess of any of the following, except as provided below:
 - (A) 40 hours per workweek;
 - (B) 12 hours per workday; or
 - (C) 12 consecutive hours without regard to the start and end time of the workday.

FLSA “Regular Rate”

- ▶ The regular rate includes “all remuneration for employment paid to, or on behalf of, the employee.”
- ▶ What is excluded from “regular rate:”
 - ▶ Gifts and payments in the nature of gifts on special occasions;
 - ▶ Payments for occasional periods when no work is performed due to vacation, holidays, or illness; reimbursable business expenses; and other similar payments;
 - ▶ Reimbursement for business expenses;
 - ▶ “Show up” or “call-back” pay;
 - ▶ Discretionary bonuses;
 - ▶ Profit-sharing plans;
 - ▶ Employer contributions to Benefit Plans;

FLSA “Regular Rate” Exclusions

- ▶ Premium Payments for Non-FLSA Overtime
 - ▶ Extra compensation paid at a “premium rate” for certain hours worked by the employee because such hours are hours worked in excess of eight in a day, in excess of 40 hours in the workweek, or in excess of the employee’s normal working hours or regular working hours can be excluded from the regular rate of pay.
 - ▶ Extra compensation paid at a “premium rate” for work on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek may be excluded if the premium rate is at least equal to one and one-half times the rate.

FLSA “Regular Rate” Exclusions

- ▶ Extra compensation provided by a “premium rate” under an applicable employment contract or collective bargaining agreement for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding 40 hours) if the premium rate is at least equal to one and one-half times the rate established in good faith by the contract or agreement.

FLSA “Regular Rate”

- ▶ General Principles:
 - ▶ All compensation for hours worked, services rendered, or performance must be included in the regular rate.
 - ▶ When a payment is a wage supplement, even if not directly related to employee performance or hours worked, it is still compensation for “hours of employment” and must be included in the regular rate.
 - ▶ The determination of whether a particular payment, perk, or benefit may be excluded from the regular rate is made on a case-by-case basis applying the requirements set out in the statute to the specific circumstances.

COMPS Regular Rate

- ▶ “Regular rate of pay” means the hourly rate actually paid to employees for a standard, nonovertime workweek. Employers need not pay employees on an hourly basis. If pay is on a piece rate, salary, commission, or other non-hourly basis, any overtime compensation is based on an hourly regular rate calculated from the employee’s pay.

COMPS Regular Rate

- ▶ Pay included in regular rate. The regular rate includes all compensation paid to an employee, including set hourly rates, shift differentials, minimum wage tip credits, nondiscretionary bonuses, production bonuses, and commissions used for calculating hourly overtime rates for non-exempt employees. Business expenses, bona fide gifts, discretionary bonuses, tips, employer investment contributions, vacation pay, holiday pay, sick leave, jury duty, or other pay for non-work hours may be excluded from regular rates.

COMPS “Time Worked”

- ▶ **“Time worked”** means time during which an employee is performing labor or services for the benefit of an employer, including all time s/he is suffered or permitted to work, whether or not required to do so.
- ▶ Examples of time worked:
 - ▶ Requiring or permitting employees to be on the employer's premises, on duty, or at a prescribed workplace (but not merely permitting an employee completely relieved from duty to arrive or remain on-premises), over one minute.

COMPS “Time Worked”

- ▶ Putting on or removing required work clothes or gear (but not a uniform worn outside work as well).
- ▶ Receiving or sharing work-related information, security or safety screening.
- ▶ Remaining at the place of employment awaiting a decision on job assignment or when to begin work, or to perform clean-up or other duties "off the clock."
- ▶ Clocking or checking in or out or waiting for any of the preceding.

“Time Worked”

- ▶ In a recent case, a court ruled that the time detention officers spent going through security screening before their shifts was “time worked,” and therefore compensable, because the security screening was “integral and indispensable” to employees’ duties.
 - ▶ The screenings were to prevent weapons and other contraband from entering facility, and keeping weapons and other contraband out of the facility was tied to the officers’ work.
 - ▶ The employer could not have eliminated the screenings without impairing the employees’ ability to complete their work.

Time Worked Hypothetical

- ▶ A group of Los Angeles County public-safety employees filed a lawsuit for unpaid overtime. The hourly workers claimed that they weren't paid for the extra time that they worked before and after their shifts when they checked email, had briefings, and completed reports. The County claimed that it had no idea about the work. But the employee's evaluations showed that the employees received regular praise for their extra, albeit unpaid, work. Was the pre-work time compensable? And, if so, what was the statute of limitations? *Vallerand v. County of Los Angeles*.

Time Worked Hypothetical

- ▶ Employee checked his work emails at home and then drove into work. Employee claimed that under the Portal-to-Portal Act his drive time was work time (i.e., compensable) because the Act provides that travel time after the commencement of work is compensable. Who won? *Kuebel v. Black & Decker*.

Time Worked Hypothetical

- ▶ On occasion, Incor scheduled training for its employees during regular work hours. Employees received a notice for training in the envelope containing their paycheck. If an employee missed a session, a \$25.00 “no show” fee was charged. If there was a repeated failure to attend a required training, the employee might be removed from the schedule. At least some of the training was directly related to an employee’s job. And while the State of Oklahoma required training for Incor employees to perform under the contract between the State and Incor, Incor required no training beyond that required by the State. Was the training compensable as “work time?”

Federal Travel Time Rules

General FLSA rules regarding travel

- ▶ Travel to and from home
- ▶ Travel “all in a day’s work”
- ▶ Special one-day trips (driver vs. passenger)
- ▶ Overnight travel (driver vs. passenger)
- ▶ Travel to work when work keeps moving
- ▶ Using employer’s vehicle for travel

COMPS Travel Definitions

- ▶ **“Travel time”** means “time spent on travel for the benefit of an employer, excluding normal home to work travel, and shall be considered time worked.”

Travel Time Rules

- ▶ Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the workplace is part of the day's work and must be counted as work time.
- ▶ Examples of compensable home-to-work travel:
 - ▶ Performing authorized work-related errands while commuting from home-to-work or from work-to-home.
 - ▶ Transporting or delivering materials or equipment to a job site prior to the start of the workday and/or returning materials or equipment at the end of the workday.
 - ▶ Transporting other employees to work sites, to the office, or to their homes either before the workday or after the workday at management's request.

COMPS Meal and Rest Periods

- ▶ **Meal Periods.** Employees shall be entitled to an uninterrupted and duty-free meal period of at least a 30-minute duration when the shift exceeds 5 consecutive hours.
- ▶ Such meal periods, to the extent practical, shall be at least one hour after the start, and one hour before the end, of the shift.
- ▶ Employees must be completely relieved of all duties and permitted to pursue personal activities for a period to qualify as non-work, uncompensated time.

COMPS Meal and Rest Periods

- ▶ When the nature of the business activity or other circumstances make an uninterrupted meal period impractical, the employee shall be permitted to consume an on-duty meal while performing duties.
- ▶ Employees shall be permitted to fully consume a meal of choice on the job and be fully compensated for the on-duty meal period without any loss of time or compensation.

COMPS Meal and Rest Periods

- ▶ Every employer shall authorize and permit a compensated 10-minute rest period for each 4 hours of work, or major fractions thereof, for all employees, as follows:

<u>Work Hours</u>	<u>Rest Periods Required</u>
2 or fewer	0
Over 2, and up to 6	1
Over 6, and up to 10	2
Over 10, and up to 14	3
Over 14, and up to 18	4
Over 18, and up to 22	5
Over 22	6

COMPS Meal and Rest Periods

- ▶ Rest periods shall be 10 minutes unless, on a given workday, or in writing covering up to a one-year period that is signed by both parties, the employee and the employer agree, voluntarily and without coercion, to have two 5-minute breaks, as long as 5 minutes is sufficient, in the work setting, to allow the employee to go back and forth to a bathroom or other location where a bona fide break would be taken.

COMPS Meal and Rest Periods

- ▶ If the below conditions are met, rest periods need not be 10 minutes every 4 hours for any employees:
 - ▶ (i) governed by a collective bargaining agreement at any employer, or
 - ▶ (ii) during time they are providing Medicaid-funded residential in-home services for an employer receiving at least 75% of its annual total gross revenue from federal and/or state Medicaid funds for providing such services.

COMPS Meal and Rest Periods

- ▶ iii) rest periods that average, over the workday, at least 10 minutes per 4 hours worked; and
- ▶ iv) at least 5 minutes of rest in every 4 hours worked.
- ▶ Such an agreement does not change an employee's right to pay for rest periods.
- ▶ Rest periods, to the extent practical, shall be in the middle of each 4-hour work period. It is not necessary that the employee leave the premises for a rest period.

COMPS Meal and Rest Periods

- ▶ According to COMPS, “**when an employee is not authorized and permitted does not have a required 10-minute rest period**, his or her shift is effectively extended by 10 minutes without compensation. Because a rest period requires 10 minutes of pay without work being performed, work during a rest period is additional work for which additional pay is not provided. Therefore, a failure by an employer to authorize and permit a 10-minute compensated rest period is a failure to pay 10 minutes of wages at the employee’s agreed-upon or legally required (whichever is higher) rate of pay.”

CDLE: How long is a “long enough” break?

Hypothetical:

- ▶ In addition to a 30-minute meal break, an employee has another 20-minute break, when completely relieved of duty, in their eight-hour shift.
- ▶ Is that 20 minutes compensable time?

What Counts As “Vacation Pay” That Must Be Paid When An Employee Separates from Their Job ?

- ▶ “Vacation pay” is any paid leave usable for any purpose the employee chooses, at their discretion — unlike paid leave usable only for qualifying events like health needs, caretaking, bereavement, or public holidays.
- ▶ Because vacation pay is usable without a qualifying event, it is a form of guaranteed pay that an employee can use, or save for eventual payout, at their discretion.

What Counts As “Vacation Pay” That Must Be Paid When An Employee Separates from Their Job ?

- ▶ Some paid leave meets this “vacation pay” definition, but has a different name — “personal days,” “paid time off” (“PTO”), “annual leave,” “floating holiday,” etc. Labor rights depend on how employment works in reality, not just how it’s labeled.
- ▶ If paid leave by any name meets the “vacation pay” definition, then it counts as “vacation pay” that the Wage Act requires to be paid when an employee separates from their job.

Employer Record-Keeping and Posting Requirements

- ▶ Employee Records. Every employer shall keep a record for each employee that contains the following information:
 - ▶ Name, address, occupation, and date of hire of the employee.
 - ▶ Date of birth, if the employee is under 18 years of age;
 - ▶ Daily record of all hours worked
 - ▶ Record of credits claimed and of tips; and
 - ▶ Regular rates of pay, gross wages earned, withholdings made, and net amounts paid each pay period.

Employer Record-Keeping and Posting Requirements

- ▶ The employer must provide an itemized earnings statement each pay period.
- ▶ Such itemized earning statements must be maintained in the employer's records for at least 3 years after the wages or compensation were due, and for the duration of any pending wage claim pertaining to the employee.

Employer Record-Keeping and Posting Requirements

▶ Posting and Distribution Requirements:

- ▶ **Posting.** Every employer subject to the COMPS Order must display a COMPS Order poster published by the Division in an area frequented by employees where it may be easily read during the work day.
- ▶ If the work site or other conditions make a physical posting impractical (including private residences employing only one worker, and certain entirely outdoor worksites lacking an indoor area), the employer shall provide a copy of the COMPS Order or poster to each employee within his or her first month of employment, and shall make it available to employees upon request.

Employer Record-Keeping and Posting Requirements

- ▶ **Distribution.** Every employer publishing or distributing to employees any handbook, manual, or written or posted policies shall include a copy of the COMPS Order, or a COMPS Order poster published by the Division, with any such handbook, manual, or policies.
- ▶ Every employer that requires employees to sign any handbook, manual, or policy shall, at the same time or promptly thereafter, include a copy of the COMPS Order, or a COMPS Order poster published by the Division, and have the employee sign an acknowledgement of being provided the COMPS Order or the COMPS Order poster.

Job Application Fairness Act / Equal Pay for Equal Work Act

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Job Application Fairness Act (SB 23-058)

- ▶ Starting July 1, 2024, the bill prohibits employers from inquiring about a prospective employee's age, date of birth, and dates of attendance at or date of graduation from an educational institution on an employment application.
- ▶ For example, asking which election an applicant first voted in would, like asking when they graduated high school, give information on when they likely turned 18.

Job Application Fairness Act (SB 23-058)

- ▶ An employer may request/require an individual to provide additional application materials, including copies of certifications, transcripts, and other materials, at the time of an initial employment application, if the employer notifies the individual that the individual may redact information that identifies their age, date of birth, or dates of attendance at or graduation from an educational institution.

Job Application Fairness Act (SB 23-058)

- ▶ An employer may request an individual to verify compliance with age requirements imposed pursuant to or required by:
 - ▶ A bona fide occupational qualification pertaining to public or occupational safety;
 - ▶ A federal law or regulation; or
 - ▶ A state or local law or regulation based on a bona fide occupational qualification.

Job Application Fairness Act (SB 23-058)

- ▶ The Bill does not create a private cause of action. Instead, all claims are handled by the CDLE, which may impose the following penalties:
 - ▶ 1st Violation – a warning and an order requiring compliance within 15 days
 - ▶ 2nd Violation – a warning and an order requiring compliance within 15 days and a civil penalty not to exceed \$1,000
 - ▶ Subsequent Violations – a warning and an order requiring compliance within 15 days and a civil penalty not to exceed \$2,000.

Job Application Fairness Act (SB 23-058)

- ▶ What Employers May Do:
 - ▶ Employers may request additional application materials — certifications, school transcripts, etc. But if employers do so, they must notify applicants that applicants may redact age-related information — dates of school attendance or graduation, etc.

Job Application Fairness Act (SB 23-058)

- ▶ Example: Federal and state law disallow minors from performing certain work — including that no minor can sell or serve alcoholic beverages. A restaurant hiring someone to serve alcoholic beverages, may
 - ▶ ask in an application whether the applicant will be at least 18 when they would start work; and
 - ▶ ask, after extending a job offer, the applicant to provide evidence of their specific age, like a driver's license, without redacting age information like date of birth; but may not ask an applicant to disclose their specific age, or to produce evidence of their age like an unredacted driver's license, in or with their application.

Equal Pay for Equal Work Act

- ▶ 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 for Equal Work Act

- ▶ 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.

Equal Pay for Equal Work Act

- ▶ 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 reasonable grounds for believing that the employer did not violate the law,” the Court shall not award liquidated damages.

Equal Pay for Equal Work Act

- ▶ “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 for Equal Work Act

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 for Equal Work Act

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 for Equal Work Act

- ▶ Employers should create wage grids for each role to explain any pay differentials between employees and taking into account the EPA factors. For example:

Employee	Gender	Seniority	Merit	Quantity or Quality of Production	Geographic Distinction	Education, training, experience	Pay Rate
Executive Assistant A	Male	1 year with Company	Received 9/10 on annual performance evaluation	Received a warning for tardiness during first month	Works in Denver office	College degree in English	\$18/hour
Executive Assistant B	Female	10 years with Company	Received 7/10 on annual performance evaluation	Received a write-up 2 years ago for insubordination	Works in Grand Junction office	Master's in Business Administration	\$21/hour
Executive Assistant C	Male	4 years with Company	Received 8/10 on annual performance evaluation	No formal disciplinary action	Works in Grand Junction office	High school degree	\$19/hour

Equal Pay for Equal Work Act

- ▶ Posting requirements:
 - ▶ All job postings must disclose:
 - ▶ A range of possible pay
 - ▶ A general description of the benefits, to be offered,
 - ▶ A deadline to apply.
 - ▶ All Colorado companies must conduct an Equal Pay audit every two years (last one was due by December 31, 2023).

Equal Pay for Equal Work Act

- ▶ Employers must disclose all job opportunities to all employees — then disclose who was hired, and how to express interest in similar opportunities, to everyone the “hiree” will regularly work with, within 30 days.
- ▶ Employers must not ask an applicant, or require them to disclose, their wage history — and also must not act against anyone for disclosing or discussing their own wage rate.

Equal Pay for Equal Work Act

- ▶ Employers must disclose:
 - ▶ The rate of pay or a range of possible offered rates and whether hourly, salary, etc. and
 - ▶ A general description of any other compensation — such as bonuses, commissions, or tips.
 - ▶ Ranges of pay are compliant if they span the lowest to highest the employer actually believes it may offer for the specific job.
 - ▶ “\$18 per hour plus tips” is compliant
 - ▶ “\$18 per hour plus \$5-\$10 hourly tips” is compliant
 - ▶ “\$23-\$28 per hour with expected tips” is non-compliant

Equal Pay for Equal Work Act

- ▶ Specific Examples from CDLE regarding Application Deadline requirement
 - ▶ If the employer discloses that it accepts ongoing applications, no deadline is required.

Example:

- ▶ An employer is always accepting applications for waitstaff because it has so many identical positions.
- ▶ A compliant posting can say applications are “accepted on an ongoing basis.”

Equal Pay for Equal Work Act

- ▶ An application deadline may be extended if the original deadline was a good-faith expectation of what the deadline would be, and the posting is promptly updated with any deadline extension.

Equal Pay for Equal Work Act

- ▶ If a specific person is expected to be selected, the employer may (but isn't required to) identify whom — as long as it still notifies all employees in time for them to apply before a decision is finalized.

Jo Doe is recommended for promotion to senior accountant. Salary \$50-70,000; health ins.; PTO; 401k. To apply by January 1, or to express interest in similar jobs, email interest@CompanyHr.com.

Equal Pay for Equal Work Act

- ▶ Timing of Notice. “Reasonable efforts” to notify employees of job opportunities require providing notice sufficiently in advance of the decision for employees to apply.
- ▶ If notice is posted rather than provided to employees, it must be posted for long enough that employees can reasonably access it.

Equal Pay for Equal Work Act

- ▶ CDLE Example: The requirement to notify all employees on the same calendar day doesn't prohibit employers from notifying certain employees in advance of a general notice — for example, if an employer assesses a particular employee's interest in a promotion before notifying other employees of the opportunity.

Equal Pay for Equal Work Act

- ▶ Required disclosures must be “in the notification of each job opportunity.” An employer has a “job opportunity” that must be disclosed whenever it is at least considering filling any current or anticipated vacancy

Equal Pay for Equal Work Act

- ▶ “Vacancy” can be either of the following:
 - ▶ A “Vacated Position” an employer intends to fill that is open or held by a departing employee.
 - ▶ A “Newly Created Position,” which can be either
 - a) when an entirely new position is created, or
 - b) when an existing position is changed enough to make it a different position:

Equal Pay for Equal Work Act

- ▶ Changes creating a different position:
 - ▶ Changing authority, duties, or opportunities materially, with or without title or pay changes
 - ▶ Changing both title and pay
- ▶ Changes not creating a different position:
 - ▶ Changing title alone, without changing authority, duties, or opportunities materially
 - ▶ Changing pay alone, without changing authority, duties, or opportunities materially

Equal Pay for Equal Work Act

- ▶ What's not a "job opportunity"?
 - ▶ Career Progression
 - ▶ Career Development
 - ▶ Acting, interim, or temporary ("AINT")
 - ▶ Confidential replacements of current employees unaware of their separation.

Equal Pay for Equal Work Act

- ▶ “Career progression” promotions — “regular or automatic” promotions “based on time in a specific role or other objective metrics” that employees can satisfy without competition.

Example: An offer letter states that Bill is being hired as an Associate II and, if not subject to any disciplinary actions, will be promoted to Associate III in 12 months, then Associate IV in another 12 months. Each promotion is a career progression not requiring job opportunity notice to others: it is based on “time in a specific role or other objective metrics” (i.e., zero disciplinary actions, and 12 months).

Equal Pay for Equal Work Act

Who must have access to career progression information?

Career progression notices must be provided to eligible employees, meaning those in the position that, when the requirements in the notice are satisfied, would move from their position to another position listed in the notice. Employers may comply by providing this information to a broader range of, or all, employees.

Equal Pay for Equal Work Act

When must career progression notices be provided?

Career progression notices should be available to eligible employees shortly after beginning any position within a career progression.

Equal Pay for Equal Work Act

What must be in the career progression notices?

Career progression notices must disclose “the requirements for career progression, in addition to each position’s terms of compensation, benefits, full-time or part-time status, duties, and access to further advancement.”?

Equal Pay for Equal Work Act

How must career progression information be provided?

So long as the required information is disclosed and available to eligible employees, either online or in hard copy, employers may choose to decide how to provide these notices. Hardcopies of the required information in an employee's new hire packet would suffice, or a company intranet page accessible by all eligible employees.

Equal Pay for Equal Work Act

- ▶ “Career development” promotions “to update the employee’s job title or compensate the employee to reflect work performed or contributions already made by the employee.” This exception recognizes that there’s no competitive “job opportunity” to post if an employee’s own duties simply grew enough to change their own position.
- ▶ For “career development” to apply, the existing work or contributions need not be the employee’s official duties

Equal Pay for Equal Work Act

- ▶ Acting, Interim, or Temporary (“AINT”) Positions
 - ▶ Notice is not required for AINT positions of up to nine months — unless the same position was held by an AINT hire for seven months of the previous year.
 - ▶ Other employees must be notified if an AINT hire is for a position not scheduled to end in nine months.

Equal Pay for Equal Work Act

- ▶ Post-Selection Notice Criteria:
 - ▶ Notice is also required after a candidate is hired for a job opportunity and must go to:
 - ▶ At least employees whom the employer intends a selected candidate to work with regularly.
 - ▶ “Work with regularly” means those who, as part of their job responsibilities, either: (1) communicate or collaborate about work at least monthly; or (2) have a reporting relationship, i.e., supervisor/supervisee.

Equal Pay for Equal Work Act

When must post-selection notices be provided? Within 30 days of the hire, the post-selection notices must be provided. Employers may comply by sending post-selection notices individually for each hire or grouping all hires within the past days together into one post-selection notice.

Equal Pay for Equal Work Act

- ▶ What must post-selection notices contain?
 - ▶ The name of the candidate.
 - ▶ The selected candidate's former job title with the company (if applicable).
 - ▶ The selected candidate's new job title; and
 - ▶ Information on how employees may demonstrate interest in similar future opportunities.

Equal Pay for Equal Work Act

- ▶ Can an employee opt out of having their information shared in post-selection notices?
 - ▶ If an employee informs their employer in writing, on their own initiative, and voluntarily that they believe disclosing their name and/or former job title would put their health or safety at risk, the employer must not disclose those items.
 - ▶ If this opt-out is exercised, an employer must still provide a post-selection notice to notify employees that the position is filled and to inform employees how to express interest in future job opportunities.



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