



Interpretive Notice & Formal Opinion (“INFO”) #8

Equal Pay by Sex: The Colorado Equal Pay for Equal Work Act, Part 1

Overview. The Colorado [Equal Pay for Equal Work Act \(the “Act,” S.B. 19-085\)](#) aims to **close gender pay gaps** and make sure employees with “**similar job duties are paid the same wage rate regardless of sex.**” The Act requires that **all employers**, public or private, with at least one employee in Colorado:

- 1) can’t **pay an employee less** than another of a **different sex** for **substantially similar work** — unless the difference is for fair reasons (explained below);
 - 2) can’t **set pay based on, or even ask about, prior pay rates** of potential hires;
 - 3) can’t **restrict** employees from **discussing pay**;
 - 4) can’t **fire or otherwise act against** anyone for **exercising rights** under the Act (ex: discussing pay, refusing to disclose prior pay, complaining of unequal pay, supporting others’ rights); and
 - 5) must **disclose pay** in job postings, and disclose **job opportunities** to all employees.
- Points (1)-(4) are in Part 1 of the Act (the topic of this INFO), enforced by this Division or lawsuits in court.
 - Point (5) (transparency of pay and job opportunities) is in Part 2 of the Act, and covered in [INFO #9A](#).

1) Ban on unequal pay. The Act bans unequal pay (often called “pay gaps” or “pay disparities”), **intentional or not**, between employees of a **different sex** with **substantially similar work**. (C.R.S. § 8-5-102(1).)

- What is “**substantially similar work**” is based on skill, effort, and responsibility — not just job *title* — and doesn’t require that the work be identical or equal.¹

Example 1: Bill, a Customer Service Manager, and Lisa, a Customer Service Representative, both have the **same job duties**. Both serve different but similarly important clients, and both had **similar performance evaluations**. Bill has an accounting degree, but his job duties don’t rely on those skills. Bill and Lisa have **substantially similar work**, despite different job titles and some differences in their work, because their positions require substantially similar skills, efforts, and responsibilities.

Example 2: Similar to Example 1, except Bill supervises Customer Service Representatives while Lisa does not. Bill has responsibilities that make his work **not substantially similar** to Lisa’s work.

- Under the Act, “**sex**” means “**gender identity**,” which is the gender someone identifies as, even if it is different from their sex assigned at birth. This Act covers people of **all genders**.
- The Act applies to unequal pay based on sex or “**sex plus**” **other characteristics** — for example, paying women with children less, even if women without children aren’t paid less.

¹ Federal law requires equal pay for “*equal work on jobs the performance of which requires equal skill, effort, and responsibility*,” 29 U.S.C. § 206(d)(1) — though that standard “does not require that compared jobs be *identical*, only . . . *substantially equal*,” 29 C.F.R. § 1620.13(a) (emphases added). Colorado’s Act goes further, requiring equal pay for not just “equal” work, but any “*substantially similar work*, regardless of job title, based on a composite of skill; effort, . . . and responsibility.” C.R.S. § 8-5-102(1) (emphasis added). Colorado’s adoption of a textually broader equal pay mandate comports with its explicit legislative purpose: giving Coloradans a broader right to pay equity than under existing federal law. See Colo. S. Judiciary Comm., [Bill Summary](#), Feb. 20, 2019 (“Senators Danielson and Pettersen, co-prime sponsors, presented SB19-085, concerning the equal pay for equal work act. Senator Danielson explained how women earn less than men for the same work and emphasized that pay gaps are real and tangible. Senator Pettersen noted that federal law does not go far enough for equal pay and stressed the need for this measure on a state-wide level.”).

- Unequal pay by sex is allowed **only** if an employer **proves all four** of these points:
 - I) That the unequal pay is based on one or more of the following:
 - a) a **seniority** system,
 - b) a **merit** system,
 - c) a system that measures earnings by **quantity or quality** of production,
 - d) the **geographic location** of the work,
 - e) **education, training, or experience**, to the extent **reasonably related to the work, or**
 - f) **travel that is regular and necessary** for the work; *and*
 - II) That the above factors were **applied reasonably**; *and*
 - III) That the above factors account for the **entire pay gap**; *and*
 - IV) That prior **wage history was not relied on** to justify the unequal pay.

2) Ban on asking about, or setting pay based on, prior pay rates — employers:

- **can't seek to learn prior pay rates** of a prospective employee, at their last job or an earlier one — whether in application materials, interviews, or their own research (like contacting a prior employer); or
- **can't set pay based on prior pay rates** of prospective employees.

3) Employee rights to disclose or discuss pay are protected by the Act, and employers:

- **can't prohibit employees** from disclosing or discussing pay, whether through policies or practices that chill employees from discussing their wages, or that explicitly ban employees from doing so; or
- **can't require employees to waive** those rights (which would be invalid anyway).

4) No Retaliation — Current and prospective employees are protected from retaliation. **Employers cannot:**

- Fire, discriminate, retaliate against, discipline, or otherwise interfere with an employee's rights because
 - The employee **used their rights** under this law, **including filing a complaint**; or
 - The employee asked about, shared, compared, or otherwise **discussed pay**.
- Discriminate or retaliate against a prospective employee for **declining to disclose their pay history**.

Complaints, Investigations, and Remedies

- **Complaints.** The Division accepts Unequal Pay Complaints from any person who suffered from or witnessed a violation under Part 1 of the Act, including violations of points (1) - (4) listed above.²
 - A complaint must be filed **within two years** of a violation — but an unequal pay violation occurs **each time** that an employee is paid an unequal pay rate.
 - Submit an Unequal Pay Complaint or anonymous tip on the [Division's Equal Pay webpage](#).
- Unequal pay complaints should identify at least one **comparator**, who may work before, at the same time as, or after the employee paid less. Comparators **must:**
 - Be a **different gender** than the employee paid less;
 - Earn **more in total compensation** than the employee paid less; and
 - Perform **substantially similar work** as the employee paid less.

² C.R.S. § 8-5-103(1)(a)(III). Complaints of violations of Part 2 of the Act (pay and job opportunity transparency) are accepted on the [Division's Equal Pay webpage](#).

- The Division does not have authority to investigate complaints if the employer is **the state of Colorado**. State employees may still file private lawsuits under the Act.
- The Act does **not** require the Division to investigate all Unequal Pay Complaints. The Division determines which complaints to investigate based on its workload and other considerations, and it may prioritize complaints with more complete and accurate information, including supporting documents.
- Filing an Unequal Pay Complaint with the Division doesn't prevent filing the same or a similar complaint in a court, another agency, or any other forum. However:
 - another forum may have rules about filing the same or a similar claim in multiple places; and
 - a complainant must notify the Division if they have filed, or later file, the same or a similar claim in any other forum, and the Division may, in its discretion, dismiss the complaint at the Division.
- **Investigations.** If the Division chooses to begin an investigation, it will notify the employer of any complaint or allegations, the scope of the investigation, and any Division demands for information.
 - While complainants and/or employees impacted by the unequal pay may receive relief and may be contacted for evidence, they will not be a "party" with an automatic right to participate in all stages of the investigation or appeal its outcome.
 - The investigation process is lengthy and may take many months to over a year to complete.
 - The Division may launch investigations based on information received without a formal complaint (a "direct investigation") — including from **anonymous** complaints or tips.
 - Throughout investigations, all parties **must promptly notify** the Division of any new contact information (mail or email address, phone number, etc.).
- **Remedies.** If a violation of Part 1 is found, orders of "**compliance and relief** as authorized by" Part 1 of the Act may be issued.³
 - **Compliance** orders may require employer action to:
 - Bring itself into **compliance**;
 - **Remedy** violations of unequal pay;
 - Provide **information** to the Division or to others; and/or
 - Pay **non-compliance fines**, usually daily as long as compliance orders remain not fully executed.⁴
 - **Relief** for employees who experienced unequal pay may include:
 - **back pay** — the amount the employee was underpaid by — for up to **six years**;⁵
 - **double the back pay** ("liquidated damages") if the employer fails to demonstrate they acted in good faith, with reasonable grounds to believe they weren't in violation;⁶
 - **other money relief or orders** to make the employee whole — for example, (re)instatement or promotion, when appropriate to remedy a violation;⁷ and
 - the employee's **reasonable costs** of pressing their complaint, including **attorney fees**.⁸

³ C.R.S. § 8-5-103(1)(a)(IV) (emphasis added).

⁴ C.R.S. § 8-1-117 (fine for non-compliance with information demands); C.R.S. § 8-1-140(2) (same, for other orders).

⁵ C.R.S. § 8-5-103(3).

⁶ C.R.S. § 8-5-104(1).

⁷ C.R.S. § 8-5-104(2)(a).

⁸ C.R.S. § 8-5-104(2)(b).

- **Mediation.** The Division offers mediation to help resolve complaints of unequal pay.
 - Mediation is a **voluntary option** that **doesn't give a decision or ruling** on a complaint. Instead, a mediator, as the neutral, impartial party, facilitates a discussion between the complainant and the employer to help them resolve their disputes, and **reach an agreed-upon settlement**, to avoid the time, burden, cost, and uncertainty of formal investigation or in-court litigation.
 - All unequal pay complaints received are evaluated as potential candidates for mediation before any formal investigation. A complainant may request mediation on their complaint form, but as described above, the Division prioritizes which complaints it can mediate or investigate based on Division resources and the accuracy and completeness of the complaint.
 - The Division offers two possible mediation types: 1) paper mediation or 2) a scheduled virtual mediation session.
 - Paper mediation is mediator-led facilitation between the complainant and the employer through various methods (email, phone, letters, etc).
 - Virtual mediation takes place live via Zoom on an agreed-upon date and time, with the complainant, the employer, the mediator, and any agreed-upon representatives present.
 - If the Division offers to mediate a complaint, the Division's mediator contacts the complainant to ask for their agreement to mediate and their preferred type of mediation (paper or virtual). If the complainant agrees, the employer is then notified of the received complaint(s), and the mediator asks for their agreement to mediate. If both parties agree to mediation, the complaint is scheduled for mediation. If either party does not agree, the complaint is sent back to the investigative team for next steps.
 - Mediation allows the complainant and the employer to make their own choices about the complaint. If the parties decline mediation, the Division may still investigate the complaint, and if the Division investigates, it may increase the scope to include other potential labor law violations and additional impacted employees.

For More Information: Visit the Division [website](#), call 303-318-8441, or email cdle_labor_standards@state.co.us.