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Colorado Enacts Laws Regarding Pay Equity, Salary History and Criminal Background Inquiries

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The Colorado legislature has been quite active in recent weeks, passing several new employment laws, many of which reflect nationwide trends. Among other things, the new laws address discriminatory pay disparities, salary history inquiries and criminal background checks.

Pay Disparity

Effective January 1, 2021, the Equal Pay for Equal Work Act (the "Act") will prohibit employers from paying members of the opposite sex different wages for "substantially similar work" based on sex (including gender identity) or sex plus another characteristic protected by applicable law. The presence of "substantially similar work" is determined by the nature of the job itself, taking into account employee skill, effort and responsibility.

An employer may, however, avoid liability under the Act if it can demonstrate that the difference in compensation is based on at least one of the following factors: (i) a seniority system; (ii) a merit system; (iii) a system that measures earning by quantity or quality of production; (iv) the geographic location where the work is performed; (v) education, training, or other relevant experience to the extent they are reasonably related to the work in question; and (vi) travel, if travel is a regular and necessary condition of the work performed.

Colorado's Act contains two unique notice provisions not required in other states' laws. First, it requires employers to make reasonable efforts to announce, post, or otherwise make known all internal opportunities for promotion to all employees on the same calendar day. Additionally, employers must disclose in each posting for each job opening the hourly or salary compensation, or a range of the hourly or salary compensation, and a general description of all benefits and other compensation offered.

Similar to laws in Massachusetts and Oregon, the Act incentivizes employers to be proactive and conduct audits of their compensation practices. While not a complete defense to liability, employers may use evidence of a "thorough and comprehensive pay audit" with the "specific goal of identifying and remedying unlawful pay disparities" to avoid liquidated damages.

The Act further obligates employers to keep records of all job descriptions and wage rate history for the duration of employees' employment plus two years after the end of employment in order to determine if there is a pattern of wage discrepancy.

Salary History

The Act also prohibits employers from seeking the wage rate history of job applicants, bringing Colorado in line with nine other states that have enacted similar prohibitions on salary history inquiries. Specifically, employers may not:

- Seek the wage history of a prospective employee;
- Rely on the wage history of a prospective employee to determine wage rate; or
- Discriminate or retaliate against a prospective employee for failing to disclose wage history.

For employees who are paid on an hourly basis, the Act defines "wage rate" to include the hourly compensation paid to the employee plus the value per hour of all other compensation and benefits received by the employee. For employees who are paid on a salary basis, "wage rate" includes the total of all compensation and benefits received by the employee.

The Act also prohibits employers from (1) preventing employees from discussing their own compensation information with others, or (2) requiring employees to sign a waiver that prohibits their ability to do the same.

Employers who violate the Act (as it relates to salary history or pay disparity, as discussed above) may be subject to fines and other legal and equitable relief, including reinstatement, promotion, pay increase, payment of lost wage rates, liquidated damages and reasonable attorneys' fees.

Ban the Box

Colorado also recently enacted a law (HB19-1025) that will prohibit employers from requiring the disclosure of or inquiring about a job applicant's criminal history on their application form. For employers with more than ten employees, the law takes effect on September 1, 2019; for employers of all other sizes, the law becomes effective on September 1, 2021.

Specifically, the law will prohibit 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; or
- Inquiring about an applicant's criminal history on an initial application.

Employers are, however, permitted to inquire about criminal history later in the hiring process. There are also exceptions to the law for (i) individuals with certain criminal histories who are prohibited by law from performing a particular job, (ii) criminal history inquiries that are implemented to promote employment of individuals with criminal histories, and (iii) employers that are otherwise required by law to conduct a criminal history check for a particular job.

While employees may not bring a private right of action for violations of the law, the state's department of labor and employment may issue warnings and orders of compliance for violations, as well as impose civil penalties for subsequent violations.

Next Steps

Employers in Colorado should start taking steps now to ensure all onboarding documents and other policies are compliant with these new requirements. In particular, employers should train HR and other relevant personnel and may also want to consider conducting an audit of their existing pay practices to determine what, if any, changes need to be made with respect to employee compensation.

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