Colorado's Equal Pay for Equal Work Act

What Employment Counsel Need to Know

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This article summarizes Senate Bill 19-085, Colorado's Equal Pay for Equal Work Act.

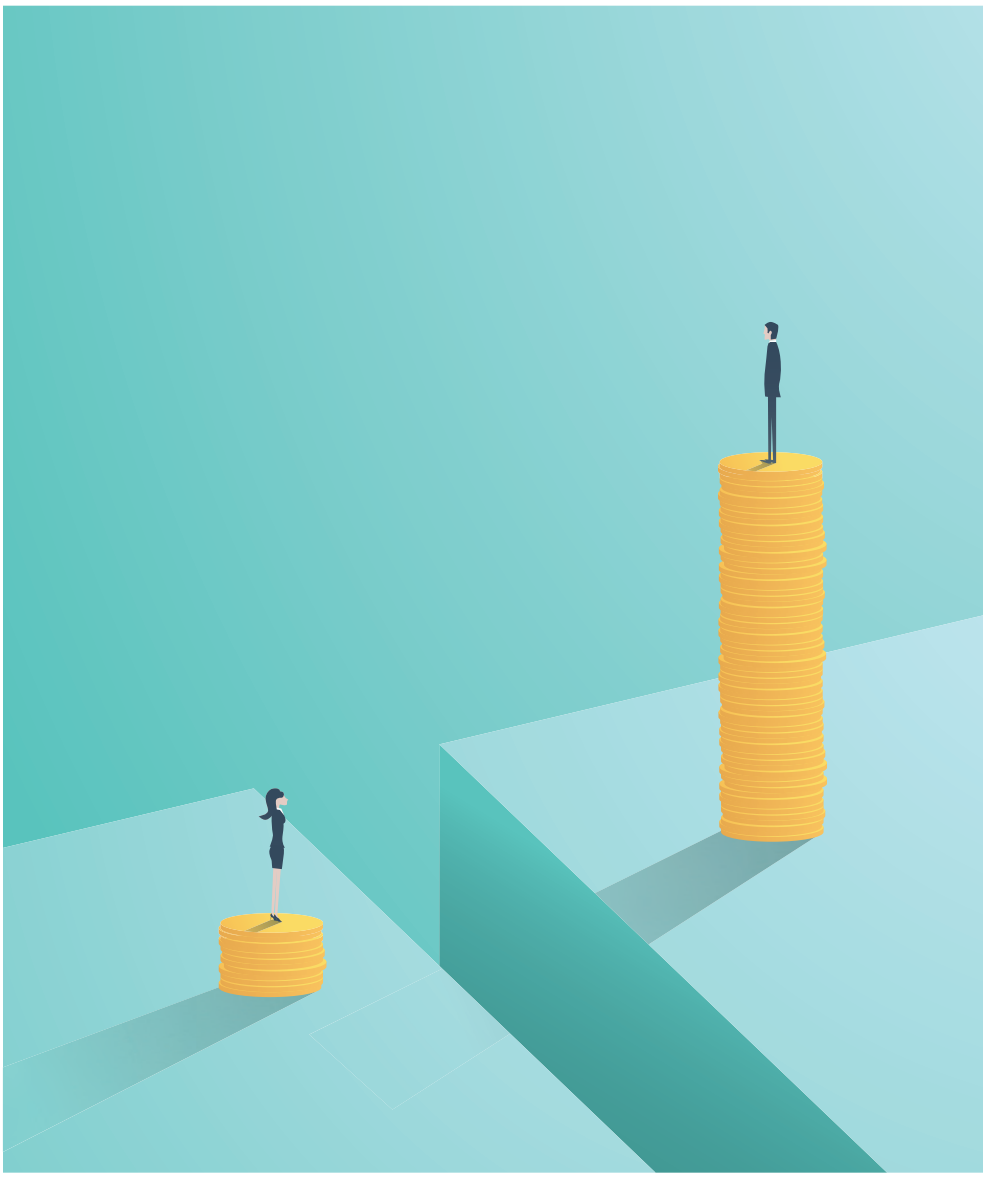
In 2019, the Colorado General Assembly passed SB 19-085, the Colorado Equal Pay for Equal Work Act (CEPEWA). CEPEWA becomes effective on January 1, 2021 and will apply only to violations that occur on or after its effective date.[1] CEPEWA amends and effectively replaces Colorado's equal pay statute, the Wage Equality Regardless of Sex Act, CRS §§ 8-5-101 et seq., which prohibited an employer from discriminating "in the amount or rate of wages or salary paid or to be paid his employees in any employment in this state solely on account of the sex thereof,"[2] and gave the Colorado Department of Labor and Employment (CDLE) permissive enforcement authority.[3] CEPEWA greatly expands the definition of wage discrimination and changes the process for handling wage discrimination claims.

CEPEWA has two parts. The first creates a private cause of action similar to, but broader than, the federal Equal Pay Act (EPA);[4] the second creates transparency measures, enforceable by CDLE, to provide employees more information about promotional opportunities, pay ranges, and the historical pay practices at a given place of employment.

This article provides an overview of CEPEWA and concludes with tips for both practitioners representing employees and those representing employers.

Why CEPEWA?

CEPEWA is Colorado's response to the persistent wage gap between men and women. While the EPA was designed to eliminate the gender pay gap, it has been woefully ineffective



in doing so.[5] CEPEWA is intended to meaningfully close Colorado's pervasive gender and "gender plus" wage gaps.[6]

In passing CEPEWA, the General Assembly declared that "[d]espite policies outlawing pay discrimination and creating avenues for women to bring a civil action for lost wages, women still earn significantly less than their male counterparts for the same work[.]"[7] The legislature noted that Colorado women "earn just 86 cents for every dollar men earn"[8] and "Latinas earn 53.5 cents and black women earn 63.1 cents for every dollar earned by white men."[9] It further noted that the gender wage gap deprives women of $400,000 to $1 million in employment income over a typical lifespan and stated that eliminating the pay gap would cut the poverty rate for working women in half.[10] Accordingly, the General Assembly declared its intent "to pass legislation that helps to close the pay gap in Colorado and ensure that employees with similar job duties are paid the same wage rate regardless of sex, or sex plus another protected status."[11]

CEPEWA differs from existing state and federal law in several key respects. Unlike the Colorado Anti-Discrimination Act (CADA),[12] CEPEWA prohibits pay differentials between male and female employees in the same job regardless of whether those pay differentials arise from an intent to discriminate. Unlike the EPA,[13] CEPEWA does not permit employers to justify a sex-based pay disparity by pointing to "any factor other than sex," and instead requires employers to justify pay disparities using one of six specific factors.[14] CEPEWA also bans the use of pay history to justify a pay disparity and imposes new recordkeeping requirements on employers.

Overview of CEPEWA

CEPEWA will apply to all employees working for all public and private employers in Colorado, irrespective of size. Unlike CADA, CEPEWA has no exemptions for religious entities or domestic employees.

CEPEWA's definitions of "employer" and "employee" align with those in CADA.[15] As defined in the statute, "'[e]mployer' means the state or any political subdivision, commission, department, institution, or school district thereof, and every other person employing a person in the state,"[16] and "'[e]mployee' means a person employed by an employer."[17] Accordingly, CEPEWA does not appear to alter current standards for determining whether someone is an employee or an independent contractor.

Note, however, that CEPEWA's retaliation provision is not limited to "employees," and instead prohibits retaliation by an employer against an employee or any "other person"[18] who "inquire[s] about, disclose[s], compare[s], or otherwise discusse[s]" the wage rate of an employee.[19]

CEPEWA's main provisions

- prohibit pay discrimination on the basis of sex or sex plus another protected status;
- ban employers from requesting pay history from prospective employees;
- ban employers' reliance on the pay history of a prospective employee;
- require employers to internally post job opportunities, including promotional opportunities;
- require employers to post salary ranges in job listings;
- protect from retaliation anyone who discusses employee pay; and
- require employer recordkeeping regarding job descriptions and wage rates.

Part 1 of CEPEWA provides a private right of action for pay disparities, retaliation, and related violations. Part 2 provides for administrative enforcement by CDLE of transparency-related measures.

Part 1: CEPEWA Provisions Enforceable in Court

CEPEWA's private right of action is modeled on that in the EPA but is intentionally more protective than the EPA in several respects.

Prohibition against Pay Discrimination Based on Sex

The core of CEPEWA is the CRS § 8-5-102(1) prohibition against discrimination "on the basis of sex, or on the basis of sex in combination with another protected status as described in section 24–34–402(1)(a) [CADA], 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. . . ."

Evaluating wage rates. SB 19-085, § 4, amends CRS § 8-5-102 to describe a fact-dependent analysis of what constitutes "substantially similar work." The statute directs factfinders to look past job titles and consider (1) the skill and effort required for a job, (2) shift work, and (3) job responsibilities.

The statute does not specify how much less is "less than" the rate paid to an employee of a different sex. Employers will likely argue that courts should read the statute to allow for a de minimis differential, while employees will argue that no differential is allowed. Recognizing that employees are paid in different ways (e.g., hourly versus salary), the statute defines "wage rate" as follows:

> (a) for an employee paid on an hourly basis, the hourly compensation paid to the employee plus the value per hour of all other compensation and benefits received by the employee from the employer; and
>
> (b) for an employee paid on a salary basis, the total of all compensation and benefits received by the employee from the employer.[20]

When considering whether a wage gap exists between hourly versus salaried employees who otherwise perform "substantially similar work," this definition of "wage rate" suggests that each worker's total compensation package must be compared. Thus, the hourly worker's total hourly pay plus the value of benefits is compared against the salaried worker's total salary plus the value of benefits.

Evaluating sex. CRS § 8-5-101(8) defines "sex" as "an employee's gender identity." Non-female plaintiffs will be able to assert claims under CEPEWA if they experience a sex-based pay differential. Additionally, the phrase "gender identity" means that a person's self-identified gender will control, not the gender assigned at birth. Nothing in the statute suggests a legislative intent to limit an employee's identity to a binary gender, meaning non-binary genders should be equally protected.

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CEPEWA prohibits not only discrimination based on "sex," but discrimination based on "sex plus" any other status protected by CADA: "disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry."[21] For example, if Latina women, older women, or lesbians experience a more severe wage gap in a given workplace than non-Latina women, younger women, or heterosexual women, the statute contemplates that these women will be able to recover the entirety of the wage gap based on their sex *plus* their race, age, or sexual orientation.

Finally, as courts interpreting the use of the word "sex" in Title VII of the Civil Rights Act of 1964[22] have recognized, prohibitions on sex discrimination should also be read to prohibit discrimination against sub-groups of women based on sex plus a non-protected trait like having children.[23] Thus, CEPEWA should be read to include these claims in addition to "sex plus" claims based on a combination of two protected statuses. So, for example, for the non-protected trait of having children, a woman with children can bring a claim if she experiences a wage rate disparity compared to a man with children.

Intent. As with the EPA, proof of intent to discriminate is not an element of a CEPEWA violation. This is based on the pervasive nature of the gender pay gap and the historical devaluation of the work of women, as described in extensive testimony by proponents and statements by bill sponsors.

Factors justifying disparate treatment. An employer may only rely upon one or more specifically enumerated factors other than sex to justify a pay disparity and therefore establish an affirmative defense to liability. CEPEWA provides that an employer is not liable if it demonstrates that a pay disparity is the product of

- 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 to the extent that they are reasonably related to the work in question; or
- travel, if the travel is a regular and necessary condition of the work performed.[24]

This list is exhaustive; there is no "catch-all" provision allowing employers to establish a defense by relying on some other factor that the employer asserts is non-sex-related. Indeed, one of the main goals of CEPEWA is to eliminate the EPA's catch-all affirmative defense, which

entitles an employer to a defense if it proves that it relied on "any other factor other than sex."[25]

Simply establishing the existence of a difference based on a permitted factor other than sex is not sufficient to meet the statutory defense, however. An employer must also prove that (1) it reasonably relied on the asserted factor, (2) the asserted factor "accounts for the entire wage differential," and (3) the "prior wage rate history was not relied on to justify a disparity in current wage rates."[26]

If an employer proves an enumerated factor other than sex, but the plaintiff proves that sex was *also* a factor, the employer loses the protection of the affirmative defense because it has failed to prove that the non-sex factor "account(ed) for the entire wage differential."[27] And an employer may not rely on any CADA-protected status to justify a wage differential.

No Red-Circling

CEPEWA does not grandfather current pay disparities. This echoes the Supreme Court's 1974 holding in *Corning Glass Works v. Brennan* that an employer, when equalizing pay disparities, cannot merely "red circle" existing higher-paid employees for grandfathered continuance of their higher pay because doing so would "perpetuate the effects of the company's prior illegal practice of paying women less than men for equal work."[28]

Pay History Ban

Employers are prohibited from seeking or relying on the wage rate history of employees and prospective employees.[29] This language appears to permit an employer to receive such information if an applicant volunteers it without solicitation, so long as the employer does not rely on it in setting pay.

Pay Discussions

Under new CRS § 8-5-102, an employer will not be permitted to "prohibit, as a condition of employment, an employee from disclosing the employee's wage rate."[30] Nor may an employer require an employee to sign a document that prohibits him or her from disclosing any employees' wage rates.[31]

Anti-Retaliation

Employers are prohibited from retaliating against employees and prospective employees who exercise their rights under CEPEWA.[32] An additional provision protects a prospective employee from retaliation "for failing to disclose" her wage rate history.[33] And a third provision prohibits retaliation when an employee or other person "disclosed, compared, or otherwise discussed" an employee's wage rate.[34]

Part 2: CEPEWA Provisions Enforceable by CDLE

Part 2 of CEPEWA requires employers to make "reasonable efforts" to "announce, post or otherwise make known all opportunities for promotion." The announcement must be made to all employees simultaneously (or at least within the same calendar day) and must occur "prior to making a promotion decision."[35] The statute does not define "opportunities for promotion," but CDLE is empowered to interpret Part 2 in regulations.[36]

CEPEWA also requires employers to post a pay range and a general description of benefits in all job listings. Finally, Part 2 requires that employers keep records of the job description and wage rate history for each employee, for the duration of the employee's employment, plus two years thereafter.

Court Actions

Although the CDLE will continue to have jurisdiction over wage claims in general, plaintiffs will be entitled to pursue such claims, and all Part 1 claims, directly in Colorado state district court.[37] CEPEWA also gives CDLE the power to create a process to accept and mediate complaints of wage discrimination under Part 1, a process that will be entirely voluntary for an aggrieved employee.[38] The CDLE is further authorized to provide legal resources in the form of referrals or educational materials to such employees.[39]

The statute of limitations requires plaintiffs to file in court within two years after the violation occurs, and a violation is defined as occurring

"on each occasion that a person is affected by wage discrimination, including each occasion that a discriminatory wage rate is paid."[40] However, so long as they file within two years of a violation (for example, within two years of a final discriminatory paycheck), workers can recover for "the entire time the violation continue[d]," up to three years.[41] Accordingly, CEPEWA claims are not subject to the EPA's "rolling" statute of limitations, which arguably has caused a "race to the courthouse" by allowing plaintiffs to recover only for paychecks that were paid within the statute of limitations. Under CEPEWA, so long as a plaintiff files within two years of her final discriminatory paycheck, she may recover up to three years of lost pay.

Trial by jury is available,[42] and remedies include

- back pay;
- liquidated damages;
- reinstatement, promotion, and pay increases;
- attorney fees and costs; and
- other "legal and equitable relief" as the court determines.[43]

Back pay is available "for the entire time the violation continues, not to exceed three years."[44] Back pay is defined as "economic damages in an amount equal to the difference between the amount that the employer paid to the complaining employee and the amount that the employee would have received had there been no violation."[45]

Liquidated damages are available in an amount equal to economic damages,[46] but no liquidated damages are available if the employer establishes its violation "was in good faith and that the employer has reasonable grounds for believing that the employer did not violate" CEPEWA.[47] The statute does not explain what constitutes "reasonable grounds" sufficient to meet this "good faith" defense, except to say that a fact finder may consider "evidence that within two years prior to" the lawsuit, "the employer completed a thorough and comprehensive pay audit of its workforce, with the specific goal of identifying and remedying unlawful pay disparities."[48] The statute does not explain what constitutes a "thorough and comprehensive pay audit."

While Part 2 claims are enforceable only by the CDLE, one aspect of Part 2 may prove relevant in court: a court may issue a jury instruction in a Part 1 case stating that a recordkeeping violation under Part 2 "can be considered evidence that the [Part 1] violation was not made in good faith." To obtain such an instruction, an employee has the burden of proving, and a court must find, that the Part 2 violation occurred.

> "Accordingly, CEPEWA claims are not subject to the EPA's 'rolling' statute of limitations, which arguably has caused a 'race to the courthouse' by allowing plaintiffs to recover only for paychecks that were paid within the statute of limitations."

Administrative Actions

The CDLE director has jurisdiction over Part 2 claims (job postings and recordkeeping). The deadline for administrative claims is one year after "the person learned of the violation."[49] Fines will range from $500 to $10,000 per violation.[50]

Tips for Advocating for Employees

Practitioners representing employees should contemplate the best avenue for relief. There are now four avenues available for claims of sex-based pay discrimination: court, the CDLE, the Colorado Civil Rights Division (under CADA), or the U.S. Equal Employment Opportunity Commission (under the EPA). Practitioners should also keep in mind that while Part 2 claims may only be asserted before the CDLE, a recordkeeping violation may be admissible in a state court action. Practitioners should advise employees to

- seek more, not less, information about pay from the employer if they suspect a pay inequity;
- discuss wage rates with coworkers, but be professional in such discussions (not every employee wants to share wage rate information);
- review the applicable job description and make sure it comports with actual job duties;
- verify whether the employer posted or announced all advancement opportunities before selecting the candidate;
- verify whether job postings contain a wage rate range; and
- ask to see the pay audit, if the employer has conducted one.

Tips for Defending Employers

CEPEWA has revised the legal landscape in Colorado for equal pay claims. Employers should expect pay-equity claims but must also realize their exposure goes far beyond pay-equity claims. To prepare for this new legal landscape, employers can take the following steps to eliminate inadvertent, previously unidentified pay-equity gaps in their wage structures:

- Develop a system to identify and post future job openings, including promotional opportunities.
- Develop the pay scales in advance of posting job openings, and don't vary from the pay scales except in circumstances that would give rise to the affirmative defense.

- Ensure that all job postings contain a wage rate range.
- Consider conducting pay audits at least every two years to compare employees by sex.
- Consider revising Equal Employment Opportunity policies to
  - ▷ specifically confirm the employer does not permit pay inequities, and
  - ▷ advise individuals to immediately report any concerns regarding pay inequities.
- Consider developing a policy to cover both CEPEWA and HB 19-1025, which will prohibit employers from inquiring into an applicant's criminal history (Colorado's new ban-the-box law), and include in it:
  - ▷ a prohibition against such inquiries, and
  - ▷ a procedure for what to do if such information is provided without being requested.
- Revise recordkeeping policies to include requirements for retention in compliance with CEPEWA.
  - ▷ Although not specifically required, consider keeping a record of the job postings.
- Train supervisors and human resources personnel accordingly.
- Compare the total compensation packages of workers who perform substantially similar work by sex and other protected classes. Consider doing this audit either as an attorney–client privileged analysis or to satisfy the statute's good faith provision. If the audit is to be used to establish good faith, consider using an outside resource skilled and experienced in pay gap auditing. Perform audits every two years to comply with the statute's good faith provision.

Conclusion

CEPEWA is a major overhaul of existing equal pay law and a powerful response to Colorado's pervasive gender and "gender plus" wage gaps. Whether it will succeed in closing those gaps remains to be seen. For now, one thing is clear: Colorado is a national leader with this effort to promote wage equality, and employment law practitioners should prepare for its coming. CL



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NOTES

1. SB 19-085, § 9.
2. SB 19-085, § 4, CRS § 8-5-102.
3. SB 19-085, § 4, CRS § 8-5-103.
4. Pub. L. 88-38 (June 10, 1963).
5. SB 19-085, § 2.
6. SB 19-085, § 2(2).
7. SB 19-085, § 2(1)(b).
8. SB 19-085, § 2(1)(c)(I).
9. SB 19-085, § 2(1)(c)(II).
10. SB 19-085, § 2(d) to (e).
11. SB 19-085, § 2(2).
12. CRS §§ 24-34-401 et seq.
13. 29 USC § 206(d).
14. SB 19-085, § 4, CRS § 8-5-102(1).
15. *Compare* CRS § 8-5-101(5) (eff. 1/1/2021) *with* § 24-34-401(3) (definitions of employer), *and compare* CRS § 8-5-101(4) (eff. 1/1/2021) *with* § 24-24-401(2).
16. CRS § 8-5-101(5).

17. CRS § 8-5-101(4).
18. SB 19-085, § 5, CRS § 8-5-103(3).
19. CRS § 8-5-102(2)(d).
20. SB 19-085, § 3, CRS § 8-5-101(9).
21. CRS § 24-34-402(1)(a). This concept has been recognized in federal anti-discrimination statutes that do not contain an explicit prohibition against "sex-plus" discrimination. *See, e.g.*, *Jeffries v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (recognizing sex-plus race discrimination as a form of sex discrimination); *Hall v. Missouri Highway and Transp. Comm'n*, 995 F.Supp. 1001 (E.D. Mo. 1998) (recognizing sex-plus age discrimination as a form of sex discrimination), *aff'd*, 235 F.3d 1065 (8th Cir. 2000).
22. 42 USC § 2000e et seq.
23. *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1203 (10th Cir. 1997) ("To be actionable, however, gender-plus discrimination must be premised on gender. As one scholar has artfully explained, Title VII contemplates gender-plus claims because 'when one proceeds to cancel out the common characteristics of the two classes being compared ([e.g.,] married men and married women), as one would do in solving an algebraic equation, the cancelled-out element proves to be that of married status, and sex remains the only operative factor in the equation.'").
24. SB 19-085, § 4, CRS § 8-5-102(1).
25. 29 USC § 206(d)(1).
26. SB 19-085, § 4, CRS § 8-5-102(1)(b) to (d).
27. SB 19-085, § 4, CRS § 8-5-102(1)(c).
28. *Corning Glass Works v. Brennan*, 417 U.S. 188, 209–10 (1974).
29. SB 19-085, § 4, CRS § 8-5-102(2)(a). The 2019 legislative session had a substantial impact on hiring practices. Colorado also passed HB 19-1025, a "ban-the-box" law, which will prohibit employers from inquiring into applicants' criminal history. This law will take effect on September 1, 2019 for employers of 11 or more employees, and for all employers on September 1, 2021.
30. SB 19-085, § 4, CRS § 8-5-102(2)(e).
31. SB 19-085, § 4, CRS § 8-5-102 (2)(f)(I).
32. SB 19-085, § 4, CRS § 8-5-102(2)(c).
33. SB 19-085, § 4, CRS § 8-5-102(2)(b).
34. SB 19-085, § 4, CRS § 8-5-102(2)(d).
35. SB 19-085, § 8, CRS § 8-5-201(1).
36. SB 19-085, § 8, CRS § 8-5-203.
37. SB 19-085, § 5, CRS § 8-5-103(1).
38. *Id.*
39. *See id.*
40. SB 19-085, § 5, CRS § 8-5-103(2).
41. SB 19-085, § 5, CRS § 8-5-103(3).
42. SB 19-085, § 5, CRS § 8-5-103(4).
43. SB 19-085, § 6, CRS § 8-5-104.
44. SB 19-085, § 5, CRS § 8-5-103(3).
45. SB 19-085, § 6, CRS § 8-5-104(1)(a).
46. *Id.*
47. SB 19-085, § 6, CRS § 8-5-104(1)(b).
48. SB 19-085, § 6, CRS § 8-5-104(1)(b)(II).
49. SB 19-085, § 8, CRS § 8-5-203(2)(a).
50. SB 19-085, § 8, CRS § 8-5-203(2)(b)(4).