

# Gender Pay Equity in the #MeToo Era

BY KATIE PRATT

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*This article examines the law governing pay equity and offers suggestions for Colorado businesses to maintain compliance with these laws.*

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Much has been written and said about the #MeToo Movement and its implications for employers around the nation and in Colorado. Questions abound regarding how to handle sexual harassment allegations in the workplace in light of new emphasis on rooting out gender bias and abuse at work. Another long-simmering and related issue also merits attention by Colorado employers in light of existing laws and new state law trends: It has been widely reported that women earn less money than men for the same work. According to the U.S. Bureau of Labor Statistics, in 2016 full-time working women earned just 82 cents of every dollar earned by their male colleagues, across all professions.<sup>1</sup>

Several factors impact this disparity, and discussion of all of them is beyond the scope of this article. However, examples from the legal profession are illustrative of the problem. Across all positions in the legal field as of 2014, women earned 57% of every dollar earned by a man.<sup>2</sup> For full-time female lawyers, the median pay in 2014 was 77.4% of the pay earned by their male counterparts.<sup>3</sup> The gender pay gap between male and female lawyers persists regardless of whether the female takes time for family responsibilities or has no children.<sup>4</sup>

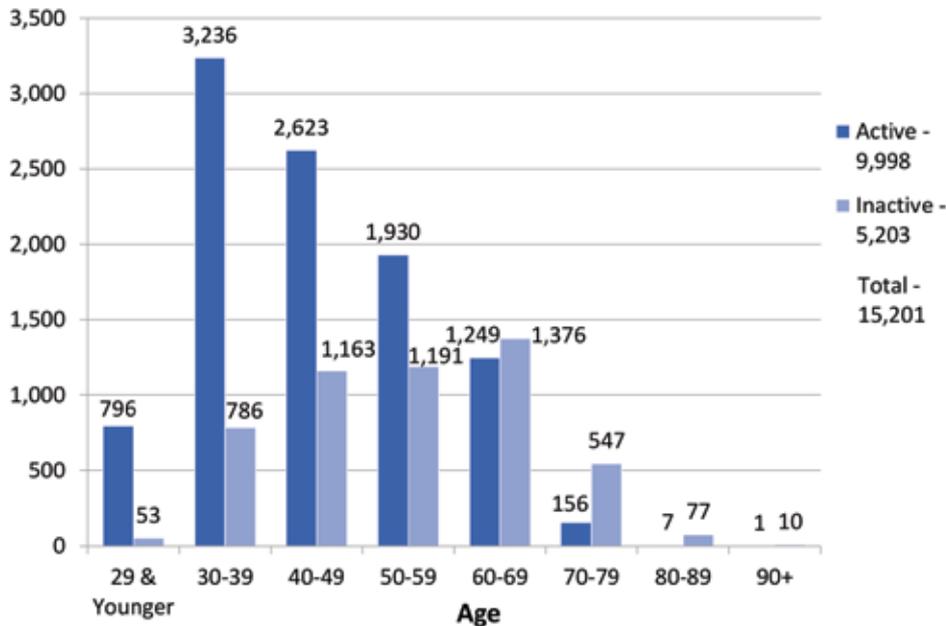
Female attorneys are also significantly more likely to take inactive status than their male counterparts over time.<sup>5</sup> The accompanying charts demonstrate the precipitous decline of female lawyers actively engaged in the practice

of law over time as compared to their male counterparts.<sup>6</sup> The evidence shows that female lawyers consistently earn less than male lawyers and tend to leave the legal field earlier in their careers.

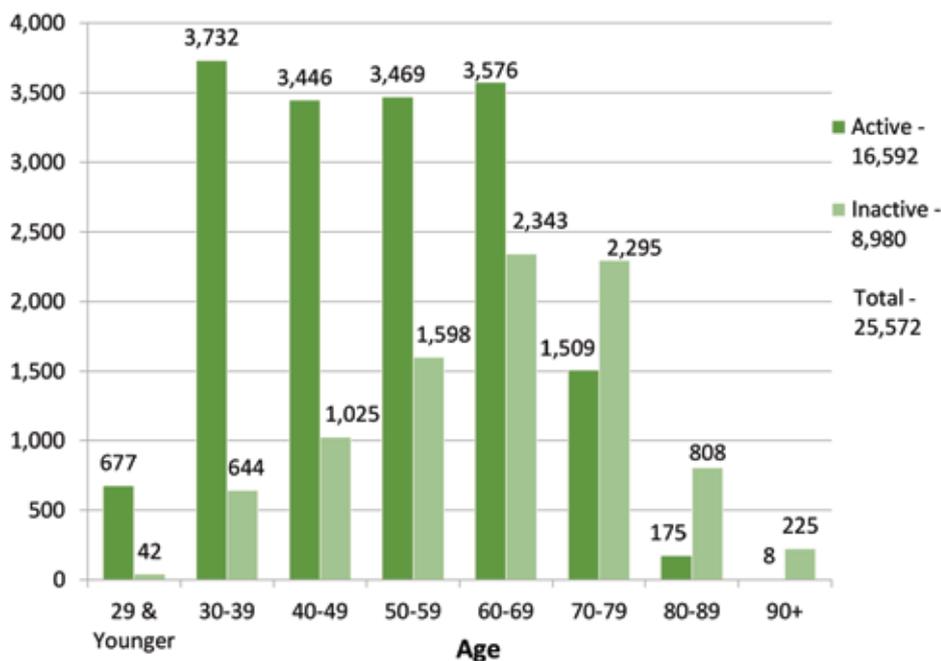
It is timely for businesses across Colorado—including in the legal profession—to evaluate their compliance with existing equal pay laws, examine laws that may be enacted in the future, and implement changes to their compensation structures if they discover pay disparities that cannot be explained by a legitimate factor. Increased focus on issues that systemically impact women in the workplace—including pay equality—is unlikely to recede anytime soon.

This article examines existing law, evaluates legal trends for legislation in Colorado

## COLORADO FEMALE ATTORNEYS, ACTIVE AND INACTIVE BY AGE



## COLORADO MALE ATTORNEYS, ACTIVE AND INACTIVE BY AGE



and around the country, and makes practical suggestions for Colorado businesses to increase their awareness of and compliance with equal pay laws.

### Federal Laws Addressing Equal Pay

In 1963, Congress passed the Equal Pay Act (EPA), which requires equal pay for equal work by men and women.<sup>7</sup> The EPA amended the Fair Labor Standards Act, which now applies broadly to the majority of employers in the United States.<sup>8</sup> The EPA makes it illegal for employers to discriminate “between employees on the basis of sex by paying wages to employees in such establishment[s] at a rate less than the rate at which he pays wages to employees of the opposite sex. . . .”<sup>9</sup> The EPA provides four affirmative defenses that allow an employer to argue that the differential is based on a legitimate factor other than gender.<sup>10</sup> Unlike Title VII cases, a plaintiff suing under the EPA is not required to show intentional discrimination and is not required to file a charge of discrimination before proceeding with such a claim.<sup>11</sup>

Title VII also makes it unlawful to discriminate in the terms of compensation based on a worker’s gender.<sup>12</sup> However, the requirement of filing a charge of discrimination applies to such claims as does the familiar Title VII disparate treatment analysis. In 2007, the U.S. Supreme Court decided *Ledbetter v. Goodyear Tire & Rubber Co.*, in which the plaintiff had asserted both EPA and Title VII theories.<sup>13</sup> By the time the case came before the Supreme Court, only the Title VII claim remained and the plaintiff had not timely filed a charge of discrimination.<sup>14</sup> The Court’s decision effectively limited the time period within which an aggrieved person was permitted to bring a claim alleging unfair pay practices under Title VII.<sup>15</sup>

Congress responded by passing the Lilly Ledbetter Fair Pay Act of 2009, which allows an aggrieved person to sue for back pay “for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.”<sup>16</sup> With respect to discrimination in

compensation claims, a cause of action accrues for limitations purposes when the discriminatory compensation decision or other practice is adopted, when the worker “becomes subject to a discriminatory compensation decision or other practice,” or when the worker “is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.”<sup>17</sup> In practice, this means “each paycheck issued pursuant to a discriminatory pay structure creates an independent, actionable employment practice.”<sup>18</sup>

Courts are also issuing decisions aimed at gender equality in pay practices. For instance, in April 2018, in *Rizo v. Yovino* the U.S. Court of Appeals for the Ninth Circuit concluded that a worker’s prior salary could not be considered “a factor other than sex” for purposes of evaluating whether a pay differential is lawful under the EPA.<sup>19</sup> In that case, the plaintiff was hired as a math consultant by the Fresno County Office of Education.<sup>20</sup> Roughly three years after she was hired, she learned that her male colleagues—some of whom were hired after her—were compensated at higher salary steps.<sup>21</sup> The County acknowledged that the plaintiff was paid less than her male colleagues, but contended that the discrepancy was based on each employee’s prior salary history and argued that basis was a “factor other than sex.”<sup>22</sup> The Ninth Circuit disagreed.<sup>23</sup>

In reaching its conclusion, the Ninth Circuit relied on two related Supreme Court cases. In *Corning Glass Works v. Brennan*, the Supreme Court rejected the notion that employers can justifiably pay women less than men because women are less expensive to employ.<sup>24</sup> In that case, the defendant argued that women would be willing to accept lower salaries because they would not be able to find higher salaries elsewhere.<sup>25</sup> The Supreme Court emphasized that “Congress declared it to be the policy of the [EPA] to correct” the “unfair employer exploitation of this source of cheap labor.”<sup>26</sup>

In *City of Los Angeles Department of Water and Power v. Manhart*, the Supreme Court considered whether an alleged cost differential between employing women and men could be

a permissible factor other than sex.<sup>27</sup> In that case, the employer contended that women were more expensive to employ than men, which it claimed was a legitimate reason to pay them less.<sup>28</sup> The Supreme Court rejected that reasoning.<sup>29</sup> As the Ninth Circuit noted, the catchall exception may legitimately apply to a wide variety of job-related factors, such as the time of day an employee works or the amount of heavy lifting involved in a given job.<sup>30</sup> But it does not encompass every reason that may simply be good for a business’s bottom line. Accordingly, the Ninth Circuit concluded that relying on salary history—either alone or in combination with other factors—was not a legitimate factor other than sex for purposes of justifying paying women less than their male colleagues.<sup>31</sup>

The Ninth Circuit’s decision in *Rizo* is in tension with decisions from several other circuits. For example, the Seventh Circuit has repeatedly emphasized that an employee’s prior salary is a permissible factor other than sex for purposes of setting one’s rate of compensation.<sup>32</sup> Courts in the Second, Sixth, and Eleventh Circuits have found that past wages are a factor other than sex if the employer has an “acceptable business reason” for using past wages to set current wages.<sup>33</sup>

The Tenth Circuit, however, found that genuine issues of material fact precluded the entry of summary judgment in an EPA and Title VII case, *Mickelson v. New York Life Insurance Co.*<sup>34</sup> In *Mickelson*, the plaintiff presented sufficient evidence to call into question the employer’s proffered reasons for the pay disparity between male and female life insurance professionals.<sup>35</sup> The Tenth Circuit emphasized the different burdens of proof applicable to Title VII claims as opposed to EPA claims;<sup>36</sup> EPA claims require a plaintiff to show a prima facie case of discrimination “by demonstrating that employees of the opposite sex were paid differently for performing substantially equal work.”<sup>37</sup> If the plaintiff meets this burden, the burden of persuasion shifts to the employer to prove that the wage difference was justified by one of four permissible reasons, including:

1. a seniority system;
2. a merit system;

3. a pay system based on quantity or quality of output; or
4. a disparity based on any factor other than sex.<sup>38</sup>

In addition, the employer’s explanation for the wage disparity *must in fact* explain the difference, which is unlike Title VII claims, where the employer’s reasoning need only hypothetically explain the different treatment.<sup>39</sup> In other words, an employer must “submit evidence from which a reasonable factfinder could conclude not merely that the employer’s proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity.”<sup>40</sup> Thus, the EPA essentially provides a type of strict liability for pay disparities between men and women.<sup>41</sup>

Given the range of decisions by the intermediate federal appellate courts, employers in Colorado and around the country should pay close attention to the potential for further developments. Although it is never easy to predict which cases will end up in the Supreme Court, an equal pay case will probably be filed there if the intermediate courts cannot settle on the factors deemed to be factors other than sex for EPA purposes.

### Can Employees Discuss Their Pay with Other Employees?

The corollary issue of whether employers can prevent employees from discussing their respective rates of pay has also reemerged with the renewed emphasis on equal pay issues. Many employers in Colorado and around the country have promulgated rules or policies either discouraging or outright banning employees from discussing their respective rates of pay. In addition to societal taboos attendant with asking coworkers how much money they make, such rules have presented a further hurdle to employees seeking to gather information necessary to bring a discriminatory pay claim. California, New York, and Maryland recently passed laws designed specifically to protect employees who discuss their wages with fellow co-workers to confirm whether they are being paid fairly.<sup>42</sup> Other states, including Colorado, recently considered similar legislation.<sup>43</sup>

Even in states without specific legislation, employers should bear in mind that the National Labor Relations Act (NLRA) applies broadly to most private sector employees.<sup>44</sup> Section 7 of the NLRA provides employees with the right to “self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .”<sup>45</sup> Section 8(a)(1) makes it an unfair labor practice to interfere with section 7 rights.<sup>46</sup> Courts have defined concerted activities broadly to include matters of common concern, including the right to discuss wages.<sup>47</sup> Employees need not be union members to be considered to have engaged in protected activity. As the Fourth Circuit put it, “[t]wo or more employees engaged in a common effort to achieve better working conditions do so in concert, and are entitled to Section 7 protection.”<sup>48</sup> Even unwritten rules and more generalized confidentiality rules have been found to run afoul of the NLRA.<sup>49</sup> Employers should carefully review their policies to ensure they do not violate the NLRA’s prohibition on retaliation against employees who exercise their rights to engage in concerted activities, specifically as those activities relate to their respective rates of pay.

### Colorado’s Approach to Equal Pay

Colorado state law also prohibits paying men and women differently for the same work.<sup>50</sup> Both the Colorado Equal Pay Act and the Colorado Anti-Discrimination Act (CADA) have provisions prohibiting employers in Colorado from paying different wages or salary to workers performing the same job based on the employee’s gender.<sup>51</sup> As most employers are already aware, in 2013 the legislature amended CADA and provided new remedies for employees against employers who are found liable for discrimination in the workplace.<sup>52</sup> For example, employees are now able to bring lawsuits to directly enforce CADA’s proscriptions against discrimination and can seek compensatory and punitive damages under state law.<sup>53</sup> This was a significant development given that the federal law protections under

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Title VII apply only to employers with 15 or more employees. The CADA revisions made damages available against even small employers in Colorado with fewer than 15 employees, up to certain statutory caps.<sup>54</sup>

Colorado also has its own version of the EPA, which prohibits discriminatory pay practices based on gender.<sup>55</sup> However, that law presently does not authorize a private right of action by an aggrieved employee.<sup>56</sup> Rather, the director of the Division of Labor Standards and Statistics is empowered to enforce the EPA.<sup>57</sup> The Colorado legislature recently considered revisions to the EPA that would have provided a private right of action, penalties, and attorney fees to a prevailing plaintiff, similar to the CADA revisions five years ago.<sup>58</sup> The proposed legislation would also have clarified that prior salary history alone does not justify pay disparity.<sup>59</sup> Although both bills were postponed in the Senate committee during the current legislative session, Colorado employers should continue to monitor this evolving area of

the law. It seems very likely that the legislature will take up similar legislation in the future.

Since 2008, Colorado has also outlawed taking adverse employment actions against employees who inquire about, disclose, compare, or otherwise discuss their wages.<sup>60</sup> In 2017, the Colorado legislature removed the CRS § 24-34-402(1)(i) exemption for employers who are otherwise exempt from the provisions of the NLRA.<sup>61</sup> This means that all employees in Colorado are protected from adverse action and retaliation if they choose to discuss their wages. In light of the bills recently considered by the state legislature, Colorado appears to be joining the recent trend in state legislatures to pass additional laws aimed at closing the gender-based wage gap. This area of law is changing rapidly and employers should take practical steps to ensure compliance.

### Practical Tips for Colorado Employers

In addition to legal considerations, pay inequality can also damage morale and lead to higher turnover and training costs if employees do not believe they are being fairly compensated. Employers in all fields across Colorado can take several steps aimed at eliminating this problem. First, employers should conduct an internal audit and investigation into their pay practices to determine whether they are paying employees fairly. Working with qualified counsel to conduct the investigation may protect the results via the attorney-client privilege or the work product doctrine. Businesses should engage counsel early in this process to ensure the maximum protection. State and local laws in this arena are swiftly developing, and legal compliance in each place where the employer conducts business is essential.

The investigation should consider as much relevant information as possible for each employee. Factors to consider include but may not be limited to

1. where in the state or country the employee works;
2. the employee’s job title and actual job duties;
3. ranges of compensation across the business for the same type of job, even if the specific jobs are in different departments;

4. performance information about the specific employee;
5. how the employee's wages were initially set; and
6. demographic information about the employee, including date of hire, training, education, experience, seniority, gender, and any other relevant information.

Employers should analyze the available information and take proactive steps to determine whether there is a legitimate basis for any pay disparities that are found. If no legitimate factor can be identified for a particular employee or group of employees, employers must increase the pay for those employees who are being underpaid. It is not permissible to lower the higher paid person's wages. It may also be necessary to reclassify any employees who are not in the correct job category.

It is also critical (and of course good business practice) for employers to document any changes that were made. Documenting the ultimate decisions may also have the salutary effect of providing a better defense if a dispute arises. Employers should work with qualified counsel to maximize protections for sensitive

information while also documenting support for the rationale for any changes that were made.

Employers should also evaluate whether managers need additional training on making pay-related decisions. Employers should be wary of asking candidates about their prior salary history, as that question tends to perpetuate unequal pay practices. In some areas of the country such questions are banned, and Colorado employers who operate in multiple states and cities must be aware of such local laws.

These tips are not exclusive, and additional factors should be considered depending on the specific situation. One thing is clear: this as an ongoing issue, and employers are well-advised to revisit these issues regularly to ensure that pay inequity does not silently creep back into their pay practices.

### Conclusion

Employers in Colorado and around the country are facing increased scrutiny of their pay practices in the #MeToo era. In addition to federal protections, several states have passed laws offering employees greater protections against unequal pay. While Colorado did not pass

legislation during the 2018 session, employers should monitor this developing area to assess the impact of proposed and new laws. Further, employers are advised to conduct internal audits to ensure pay practices are equitable.

In this new era, savvy employers will approach these issues proactively rather than reactively. In the long run, equal pay for equal work is the not only the law—it is good for business. CL



**Katie Pratt** is special counsel with Wells, Anderson & Race, LLC in Denver. Pratt handles trial-level litigation and civil appeals in employment law, civil rights, professional liability, and other commercial litigation. Her practice focuses on the defense of both private and public entities and their employees in a wide variety of areas, including employment discrimination disputes, civil rights violations under 42 USC § 1983, FLSA claims, retaliation lawsuits, unemployment benefits matters, contract-based employment disputes, and trade secrets matters—kpratt@warllc.com.

**Coordinating Editor:** John Husband, [jhusband@hollandhart.com](mailto:jhusband@hollandhart.com)

### NOTES

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3. Sterling and Reichman, "Overlooked and Undervalued: Women in Private Law Practice," 12 *Annu. Rev. Law Soc. Sci.* 373, 379 (Oct. 2016).
4. *Id.* at 377 (citing Dau-Schmidt et al. 2009, Noonan et al. 2008, Sommerlad 2015, and Williams 2010).
5. Colorado Office of Attorney Regulation Counsel, 2017 Annual Report at 60, [www.coloradosupremecourt.com/PDF/AboutUs/Annual%20Reports/2017%20Annual%20Report.pdf](http://www.coloradosupremecourt.com/PDF/AboutUs/Annual%20Reports/2017%20Annual%20Report.pdf).
6. *Id.* at 60–61.
7. 29 USC § 206(d).
8. 29 USC § 203(d). See also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (the

- term employ is defined expansively to mean "suffer or permit to work").
9. 29 USC § 206(d)(1).
10. *Id.*
11. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 641 (2007).
12. 42 USC § 2000e-2(a)(1).
13. *Ledbetter*, 550 U.S. at 622.
14. *Id.*
15. *Id.* at 642–43.
16. 42 USC § 2000e-5(e)(3)(B).
17. 42 USC § 2000e-5(e)(3)(A).
18. *Estes v. Vilsak*, Case No. 11-cv-03109-PAB-MJW, 2013 WL 5215103 at \*7 (D.Colo. Sept. 17, 2013).
19. *Rizo v. Yovino*, 887 F.3d 453, 455 (9th Cir. 2018).
20. *Id.* at 457.
21. *Id.* at 458.
22. *Id.*
23. *Id.* at 455.
24. *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974).
25. *Id.*

26. *Id.* at 206 (quoting *Hodgson v. Corning Glass Works*, 474 F.2d 226, 234 (2d Cir. 1973)).
27. *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 704–05 (1978).
28. *Id.*
29. *Id.* at 711.
30. *Rizo*, 887 F.3d at 464.
31. *Id.* at 468 (noting that allowing prior salary to justify a wage differential only perpetuates the message to women that they are worth less than men).
32. *Wernsing v. Dep't of Human Servs., State of Ill.*, 427 F.3d 466, 468 (7th Cir. 2005) (citing *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446 (7th Cir. 1994); *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987); and *Covington v. S. Ill. Univ.*, 816 F.2d 317 (7th Cir. 1987)).
33. *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526–27 (2d Cir. 1992), *cert. den.* 506 U.S. 965; *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988).
34. *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1307 (10th Cir. 2006).
35. *Id.* at 1315.
36. *Id.* at 1312.

37. *Id.* at 1311.

38. *Id.*

39. *Id.* at 1312 (quoting *Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000)).

40. *Id.* (emphasis in original). *But see Casalina v. Perry*, 708 Fed. Appx. 938, 942-43 (10th Cir. 2017) (unpublished disposition) (affirming summary judgment in favor of employer when the pay disparity was explained by the male employee's higher level of experience and education).

41. *Id.* at 1310-11 (citing *Ryduchowski v. Port Auth. of N.Y. & N.J.*, 203 F.3d 135, 142 (2d Cir. 2000); *Sinclair v. Auto. Club of Okla., Inc.*, 733 F.2d 726, 729 (10th Cir. 1984); and *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992)).

42. *See, e.g.*, West's Ann. Cal. Labor Code § 1197.5(k)(1) (West 2018); McKinney's Consolidated Laws of New York Annotated § 194(4)(a); Md. Labor and Employment Article Title 3, Subtitle 3 § 3-304.1(a)(1) to (3).

43. *See* HB 18-1378, <https://leg.colorado.gov/bills/hb18-1378>. *See also* HB 18-1377, <https://leg.colorado.gov/bills/hb18-1377>.

44. 29 USC § 152(2) and (3).

45. 29 USC § 157.

46. 29 USC § 158(a)(1).

47. *N.L.R.B. v. Brookshire Grocery Co.*, 919 F.2d 359, 362 (5th Cir. 1990) (citing *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962), and *D & D Distrib. Co. v. N.L.R.B.*, 801 F.2d 636, 639-40 (3d Cir. 1986) (granting enforcement of order when employee was discharged for discussing wages and suggesting he and his colleagues contact a union)). *See also N.L.R.B. v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537-38 (6th Cir. 2000) (unwritten rule barring discussion of wages is an unfair labor practice); *Wilson Trophy Co. v. N.L.R.B.*, 989 F.2d 1502, 1510 (8th Cir. 1993); *Cintas Corp. v. N.L.R.B.*, 482 F.3d 463, 469-70 (D.C. Cir. 2007); *N.L.R.B. v. American Spring Bed Mfg. Co.*, 670 F.2d 1236, 1242-43 (1st Cir. 1982); *Flex Frac Logistics, L.L.C. v. N.L.R.B.*, 746 F.3d 205, 208-09 (5th Cir. 2014) (confidentiality clause violated NLRA); *Arthur Young & Co. v. N.L.R.B.*, 884 F.2d 1387, 1989 WL 100674 at \*3-4 (4th Cir. 1989).

48. *Arthur Young & Co.*, 884 F.2d 1387, 1989 WL 100674 at \*3-4.

49. *See, e.g.*, *Main St. Terrace Care Ctr.*, 218 F.3d at 537-38; *Flex Frac Logistics, L.L.C.*, 746 F.3d

at 208-09.

50. CRS § 8-5-102; CRS § 24-34-402(1)(a).

51. *Id.*

52. CRS § 24-34-405.

53. *Id.*

54. *Id.*

55. CRS §§ 8-5-101 et seq.

56. CRS § 8-5-103.

57. *Id.*

58. HB 18-1378, <https://leg.colorado.gov/bills/hb18-1378>; HB 18-1377, <https://leg.colorado.gov/bills/hb18-1377>.

59. *Id.*

60. CRS § 24-34-402(1)(i).

61. *Id.* *See also* [http://leg.colorado.gov/sites/default/files/documents/2017A/bills/2017a\\_1269\\_signed.pdf](http://leg.colorado.gov/sites/default/files/documents/2017A/bills/2017a_1269_signed.pdf).



BERG HILL  
GREENLEAF RUSCITTI<sup>LLP</sup>

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