

# LAW WEEK COLORADO

## HR Compliance a Running Theme in Passed Bills

*Pay equity and other passed bills give employers much to review in pay and screening practices*

BY DOUG CHARTIER  
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From a compliance perspective, the busy legislative session at the Colorado General Assembly might make human resources and legal departments even busier as well.

In the 2019 session, Democratic control of the state legislature has ushered in a slate of employment law-related reforms in Colorado, from pay equity measures to a new “ban-the-box” law and wage theft amendments. The bills’ proponents have said employers that are already implementing good practices in pay equity and other areas won’t have much to worry about, compliance-wise.

But management-side employment attorneys say that even well-intentioned employers will need to pay attention to the nuances in the Equal Pay for Equal Work Act, among other new bills.

Senate Bill 85, the “Equal Pay for Equal Work Act,” is currently awaiting Gov. Jared Polis’ signature. It outlaws any wage differential among employees based on sex, except when the employer can justify the differential using certain criteria, like a seniority system or the employee’s experience. It also bans employers from asking job candidates about their salary history or basing wages on that history.

Elizabeth Wylie, a partner at Messner Reeves in Denver who practices in employment litigation and workplace issues, said SB 85 “is a very big deal for workers in Colorado.” Wylie said the bill has components that even employers that are mindful of pay equity issues will need to pay attention to, like the prohibition on salary history questions. “It is a very common practice to ask for wage history and this bill does change that law,” she added.

SB 85 changes the types of questions that employers can ask on job interviews and job applications, “so

many employers will need to revise applications to comply with this law and they need to train employees to ask the right questions,” Wylie said. One common adjustment HR professionals have made is asking candidates what their salary expectations are, rather than what they’re currently making.

One of SB 85’s most concerning aspects to employers was that it let employees go straight to court with sex-based pay discrimination claims. Employers realized that “even in cases where an employee’s claims lack merit, the time and litigation costs involved can be very high, particularly for smaller employers,” said Laura Mitchell, an employment attorney and principal at Jackson Lewis in Denver.

But the final version of the bill will give employers more ways to resolve these claims. The Colorado Department of Labor and Employment will create a special mediation process for sex-based discrimination claims, and employees will still be able to go to the Colorado Civil Rights Division with their complaints.

“The advantages of the CCRD or CDLE mediation processes will be that they tend to minimize costs and will generally move more quickly to resolution,” Mitchell said.

Lawmakers also amended SB 85 to give employers leeway in pay equity disputes if they’ve shown a history of good faith prevention measures.

The employer won’t be subject to liquidated damages in a case if it “demonstrates that the act or omission giving rise to the [wage discrimination] violation was in good faith,” or if it had reason to believe it wasn’t committing that violation. To determine whether the employer was acting in good faith, courts and agencies may consider whether “the employer completed a thorough and comprehensive pay audit of its workforce” to identify pay disparities.”

“This was another important improvement in the bill,” Mitchell said, adding that employers “are generally

trying to do the right thing by paying employees fairly.” When the employer makes a good faith showing, SB 85 can shield them from double damages, she added.

“This is still a tougher bill than other states that consider a pay audit as a complete defense to pay claims, like Massachusetts, but it does provide for this limited relief,” Mitchell said.

Also impactful, but perhaps less so than the pay equity bill, is Colorado’s new ban-the-box bill that passed this session. House Bill 1025, which also awaits the governor’s signature by press time, bars most employers from asking applicants about their criminal history on the initial job application.

It also prohibits employers from telling candidates not to apply for a position if they have a criminal history.

Wylie noted that the bill allows employers to seek a background check on a candidate at any point in the screening process. But it’s important for HR professionals to understand how to read those background check reports and interpret them fairly, she added, such as considering when a criminal charge against a candidate might be old or have been dismissed.

The ban-the-box issue also dovetails with the salary history question issue from SB 85, Wylie said; employers may be reviewing their initial application forms to make sure neither inquiry shows up.

HB 1025 should be less of a compliance concern for most multi-state employers, Mitchell said, seeing that they may be used to ban-the-box laws in many other jurisdictions already.

“This is generally where the law is going across the country, and the position the [Equal Employment Opportunity Commission] takes, even though it may take longer to filter down to smaller employers,” she said. “As a result, the impact of this law may not sting as much as others, but I think it is really going to depend on the employer and could result in a change of practice for those that have

not been affected previously.”

Wylie said another bill that might have implications for her employer clients is House Bill 1210, which enables local governments to set a minimum wage higher than the state’s. Colorado’s statewide minimum wage is set to rise to \$12.00 next year and increase each year thereafter.

It remains to be seen how many local jurisdictions will opt to set a higher minimum wage, and thus how varied Colorado’s minimum wage landscape will be in the years to come. Wylie said employers will want to “pay attention to the nuances of that law,” such as when a worker commutes across jurisdictions to work on a site with a higher wage rate.

A quieter change in employment law will impose heavier consequences for employers that engage in intentional wage theft.

House Bill 1267 defines wage theft in Colorado as theft, meaning that if the wage theft amounts to more than \$2,000, the employer would be committing a felony. But its impact should be limited to bad actors.

“The bill imposes greater consequences if an employer is found guilty of wage theft, but notably the intent requirement remains intact,” said Katy Bonesio, an associate at Hogan Lovells whose practice include employment litigation. To be subject to penalties under the new bill, the employer would have to annoy, harass, oppress, hinder, coerce, delay, or defraud the worker claiming unpaid wages.

Notably, HB 1267’s legislative declaration argues that labor is a “thing of value” that can be stolen from a worker. As described in the declaration, the bill is essentially a tool the state can use to combat human trafficking.

“This bill likely did not get much attention [from employers] because it likely will not affect your typical corporate employer as it appears to really be targeted towards stopping human trafficking,” Bonesio said. •

— Doug Chartier, [DChartier@circuitmedia.com](mailto:DChartier@circuitmedia.com)