HOUSE BILL 18-1378

A BILL FOR AN ACT

CONCERNING THE CREATION OF THE "EQUAL PAY FOR EQUAL WORK ACT" IN ORDER TO IMPLEMENT MEASURES TO PREVENT PAY DISPARITIES, AND, IN CONNECTION THEREWITH, PROMOTING PAY TRANSPARENCY AND MAKING AN APPROPRIATION.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://leg.colorado.gov.)

The bill authorizes the director of the division of labor standards and statistics in the department of labor and employment (director) to administer and enforce the law that prohibits an employer from discriminating against an employee on the basis of sex and to issue...
awards to employees and impose penalties on employers for violations. The bill removes the director's enforcement authority and instead permits an aggrieved person to bring a civil action in district court to pursue remedies specified in the bill. The bill allows exceptions to the prohibition if the employer demonstrates that a wage differential is based upon one or more factors including a seniority system, a merit system, or a system that measures earnings by quantity or quality of production or a bona fide factor other than sex.

The bill prohibits an employer from discharging or retaliating against an employee for actions by an employee asserting the rights established by the bill against an employer.

An employer is required to announce to all employees employment advancement opportunities and the pay range for the opportunities. The director is authorized to enforce actions against an employer concerning transparency in pay and employment opportunities, including fines of between $500 and $10,000 per violation.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Short title. The short title of this act is the "Equal Pay for Equal Work Act".

SECTION 2. Legislative declaration. (1) The general assembly finds that:

(a) In 1944, the first equal pay bill was introduced in Congress, but it was not until the federal "Equal Pay Act of 1963", 29 U.S.C. sec. 206, became law that pay discrimination based on sex was outlawed;

(b) Despite 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;

(c) According to a report released in March 2018 by the Institute for Women's Policy Research and The Women's Foundation of Colorado:

(I) Women in this state earn just 86 cents for every dollar men earn; and

(II) Latinas earn 53.8 cents and black women earn 63.1 cents for
every dollar earned by white men;

(d) The effects of pay disparity compound over a woman's lifetime, with women losing between $400,000 and $1 million over the course of a lifetime due to the wage gap;

(e) If the wage gap were eliminated, a working woman in Colorado would earn, on average, $7,000 more per year, which would pay for 1.9 years of community college tuition or approximately six months of childcare costs;

(f) Equal pay would cut the poverty rate for working women in half and reduce the poverty rate for employed single mothers by more than 40 percent; and

(g) It is the intent of the general assembly 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 regardless of sex, or sex plus another protected status.

SECTION 3. In Colorado Revised Statutes, 8-5-101, amend the introductory portion; repeal (6); and add (1.5), (7), and (8) as follows:

8-5-101. Definitions. As used in this article 5, unless the context otherwise requires:

(1.5) "BUSINESS NECESSITY" MEANS AN OVERRIDING LEGITIMATE BUSINESS PURPOSE SUCH THAT THE FACTOR RELIED UPON EFFECTIVELY FULFILLS THE BUSINESS PURPOSE IT IS SUPPOSED TO SERVE.

(6) "Employment" means any trade, occupation, job, or position in which any person may be engaged in the service of another for wages or salary, except household and domestic servants and farm and ranch laborers.

(7) "Sex" means an employee's gender identity.
(8) "Wage rate" means:

(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.

SECTION 4. In Colorado Revised Statutes, amend 8-5-102 as follows:

8-5-102. Wage discrimination prohibited. (1) No employer shall make any discrimination 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. An employer shall not discriminate between employees on the basis of sex, or on the basis of sex in combination with another protected status as defined in section 24-34-402 (1)(a), 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, when viewed as a composite of skill, effort, and responsibility and regardless of job title, except where the employer demonstrates each of the following:

(a) that the wage differential is based on:

(I) a seniority system;

(II) a merit system;

(III) a system that measures earnings by quantity or quality of production; or

(IV) a bona fide factor other than sex that is job related
WITH RESPECT TO THE POSITION IN QUESTION AND IS CONSISTENT WITH A BUSINESS NECESSITY SUCH AS EDUCATION, TRAINING, OR EXPERIENCE. THIS DEFENSE DOES NOT APPLY IF THE EMPLOYEE DEMONSTRATES THAT AN ALTERNATIVE BUSINESS PRACTICE EXISTS THAT WOULD SERVE THE SAME BUSINESS PURPOSE WITHOUT PRODUCING THE WAGE DIFFERENTIAL.

(b) THAT EACH FACTOR RELIED UPON IS APPLIED REASONABLY; AND

(c) THAT THE FACTOR OR FACTORS RELIED UPON ACCOUNT FOR THE ENTIRE WAGE DIFFERENTIAL. PRIOR SALARY DOES NOT, BY ITSELF, JUSTIFY ANY DISPARITY IN COMPENSATION.

(2) AN EMPLOYER SHALL NOT DISCHARGE, OR IN ANY MANNER DISCRIMINATE OR RETALIATE AGAINST, AN EMPLOYEE BY REASON OF AN ACTION TAKEN BY THE EMPLOYEE TO INVOKE THIS SECTION ON BEHALF OF ANYONE, OR ANY ACTION TAKEN BY THE EMPLOYEE TO ASSIST IN ANY MANNER IN THE ENFORCEMENT OF THIS SECTION.

(3) AN EMPLOYER SHALL NOT:

(a) DISCHARGE, DISCIPLINE, DISCRIMINATE AGAINST, COerce, INTIMIDATE, THREATEN, OR INTERFERE WITH AN EMPLOYEE OR OTHER PERSON BECAUSE THE EMPLOYEE OR PERSON INQUIRED ABOUT, DISCLOSED, COMPARED, OR OTHERWISE DISCUSSED THE EMPLOYEE’S WAGES;

(b) PROHIBIT, AS A CONDITION OF EMPLOYMENT, AN EMPLOYEE FROM DISCLOSING HIS OR HER WAGES; OR

(c) REQUIRE AN EMPLOYEE TO SIGN A WAIVER OR OTHER DOCUMENT THAT PROHIBITS AN EMPLOYEE FROM DISCLOSING, OR PURPORTS TO DENY AN EMPLOYEE THE RIGHT TO DISCLOSE, HIS OR HER WAGE INFORMATION.

SECTION 5. In Colorado Revised Statutes, amend 8-5-103 as
follows:

8-5-103. Enforcement - complaints. (1) The director has the power to administer, carry out, and enforce all of the provisions of this article and may promulgate rules and regulations for that purpose. Copies of the rules and regulations shall be furnished by the division to all employees and employers upon written request. A person aggrieved by a violation of section 8-5-102 may commence a civil action in district court not later than two years after the cause of action accrues; except that a cause of action arising out of a willful violation of section 8-5-102 may be commenced not later than three years after the cause of action accrues.

(2) Upon written complaint, duly executed and verified, by any employee that any employer has, within one year from the date of such complaint, violated the provisions of section 8-5-102, the director or any referee of the division may proceed to hear and determine such complaint, and the director may make an award upon said complaint. Judicial review may be had of any award of the director under this article pursuant to section 24-4-106, C.R.S. A cause of action for a violation of section 8-5-102 accrues for all wages paid to an employee by an employer, regardless of the date the wages were paid, on the date the employee learns of the violation, regardless of whether the employee remains employed by the employer.

SECTION 6. In Colorado Revised Statutes, amend 8-5-104 as follows:

8-5-104. Employer liability - awards. (1) An employer who violates the provisions of section 8-5-102 (I) is liable for economic damages in an amount equal to the difference between the amount which
he THAT THE EMPLOYER paid to the complaining employee and the
amount which THAT the employee would have received had there been no
discrimination; and, if the director finds that such discrimination was
willful, the director may impose a penalty upon the employer in addition
thereto of not more than the amount of such difference. The amount of
such liability so determined by the director shall constitute the award of
the director. Such award shall be the property of the employee but may be
recovered for the employee in a suit brought by the director in his name
in any court in the county of the residence of the employer within this
state having jurisdiction of the amount of the demand in the suit. The
director may join in one suit all of his awards against any one employer
under this article VIOLATION PLUS LIQUIDATED DAMAGES IN AN AMOUNT
EQUAL TO THE ECONOMIC DAMAGES. HOWEVER, IF THE EMPLOYER
DEMONSTRATES THAT THE ACT OR OMISSION GIVING RISE TO THE
VIOLATION WAS IN GOOD FAITH AND THAT THE EMPLOYER HAD
REASONABLE GROUNDS FOR BELIEVING THAT THE EMPLOYER DID NOT
VIOLATE SECTION 8-5-102 (1), THE COURT NEED NOT AWARD LIQUIDATED
DAMAGES OR MAY AWARD AN AMOUNT LESS THAN AN AMOUNT EQUAL TO
THE EMPLOYEE’S LOSS OF PAY.

(2) AN EMPLOYER WHO VIOLATES SECTION 8-5-102 IS LIABLE FOR
LEGAL AND EQUITABLE RELIEF, WHICH MAY INCLUDE EMPLOYMENT,
REINSTATEMENT, PROMOTION, PAY INCREASE, THE PAYMENT OF LOST
WAGES, AND LIQUIDATED DAMAGES.

(3) AN EMPLOYER WHO VIOLATES SECTION 8-5-102 IS LIABLE FOR
THE PREVAILING PARTY’S REASONABLE COSTS AND ATTORNEY FEES.

(4) NOTHING IN THIS SECTION PRECLUDES AN EMPLOYEE FROM
ASSERTING ANY OTHER AVAILABLE STATUTORY OR COMMON LAW CLAIMS.
SECTION 7. In Colorado Revised Statutes, repeal 8-5-105 as follows:

8-5-105. Records open to inspection. When complaint is made to the division by any employee against any employer for a violation of this article, all books, records, and payrolls of such employer, material and pertinent to such complaint, shall be open for inspection by the division or any of its agents duly appointed for that purpose.

SECTION 8. In Colorado Revised Statutes, add part 2 to article 5 of title 8 as follows:

PART 2

TRANSPARENCY IN PAY AND OPPORTUNITIES FOR PROMOTION AND ADVANCEMENT

8-5-201. Employment opportunities - opportunities for promotion or advancement - pay rates in job listings. (1) An employer shall announce all opportunities for promotion simultaneously to all existing employees.

(2) An employer shall disclose an hourly pay rate or salary range in all job listings and shall select a salary within the posted range or, if necessary, republish each job listing with an adjusted range before selecting an hourly pay rate or salary for a prospective employee.

8-5-202. Record keeping. An employer shall keep records of job descriptions and wage rate history for all employees for the duration of the employment plus three years after the end of employment in order to determine if there is a pattern of wage discrepancy.

8-5-203. Enforcement - rules. (1) The director has the
POWER TO ADMINISTER, CARRY OUT, AND ENFORCE ALL OF THE
PROVISIONS OF THIS PART 2 AND MAY PROMULGATE RULES FOR THAT
PURPOSE. THE DIRECTOR SHALL PROVIDE WRITTEN COPIES OF RULES
PROMULGATED PURSUANT TO THIS SECTION TO ALL EMPLOYEES AND
EMPLOYERS UPON WRITTEN REQUEST.

(2) THE DIRECTOR SHALL INVESTIGATE COMPLAINTS OF
VIOLATIONS OF THIS PART 2 AND SHALL PROMULGATE RULES NECESSARY
TO GOVERN THE INVESTIGATIONS.

(3) UPON FINDING THAT AN EMPLOYER HAS VIOLATED THIS PART
2, THE DIRECTOR MAY ORDER THE EMPLOYER TO PAY A FINE OF NO LESS
THAN FIVE HUNDRED DOLLARS AND NO MORE THAN TEN THOUSAND
DOLLARS PER VIOLATION.

(4) IF AN EMPLOYEE BRINGING SUIT FOR A VIOLATION OF SECTION
8-5-102 DEMONSTRATES A VIOLATION OF THIS PART 2, AND THE COURT
FINDS A VIOLATION OF THIS PART 2, THE COURT MAY ORDER APPROPRIATE
RELIEF, INCLUDING A PRESUMPTION THAT RECORDS NOT KEPT BY THE
EMPLOYER IN VIOLATION OF SECTION 8-5-202 CONTAINED INFORMATION
FAVORABLE TO THE EMPLOYEE’S CLAIM AND AN INSTRUCTION TO THE JURY
THAT FAILURE TO KEEP RECORDS CAN BE CONSIDERED EVIDENCE THAT THE
VIOLATION WAS WILLFUL.

SECTION 9. Appropriation. For the 2018-19 state fiscal year,
$85,034 is appropriated to the department of labor and employment for
use by the division of labor standards and statistics. This appropriation is
from the employment support fund created in section 8-77-109 (1)(b)(I),
C.R.S., and is based on an assumption that the division will require an
additional 1.2 FTE. To implement this act, the division may use this
appropriation for program costs related to labor standards.
SECTION 10. Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 8, 2018, if adjournment sine die is on May 9, 2018); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2018 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.