

# Preparing for the Colorado "Equal Pay for Equal Work Act"

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ALVAREZ & MARSAL  
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## Is Your Company Ready for 2021?



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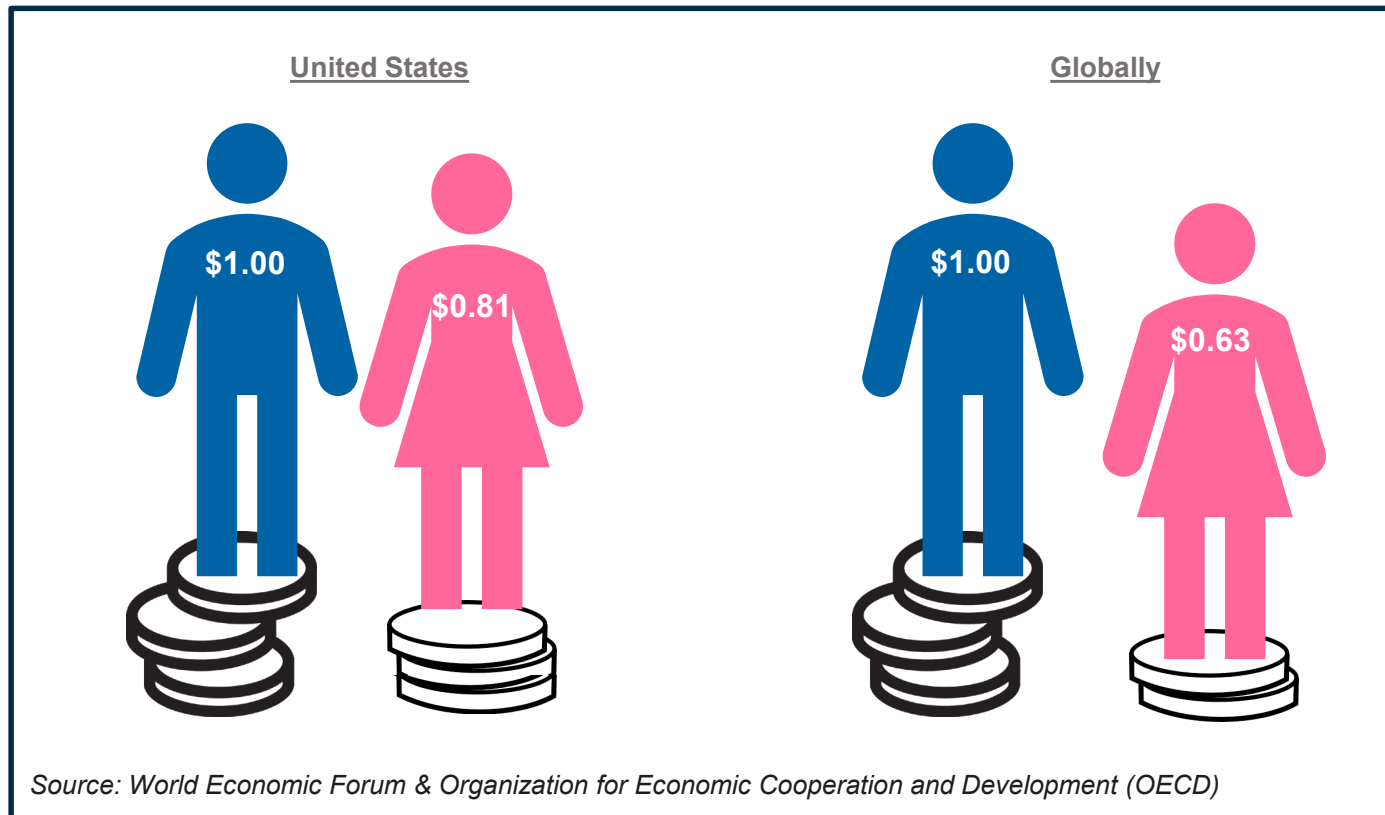
# Background

# Pay Equity Legislation

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- **There is limited relevant federal legislation in the United States**
  - The Equal Pay Act of 1963 requires that men and women be paid equally for equal work in the same establishment
  - Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sex with regard to compensation (among other types of workplace discrimination)
- **Over a dozen states have also passed pay equity laws**
  - The lack of comprehensive federal legislation has led states to take matters into their own hands
  - Provisions are inconsistent, making it difficult for employers to comply

# Gender Pay Gap



- Driven by factors such as:
  - Number of men v. women in an industry
  - Smaller number of women holding senior management positions
  - More men in higher paying positions and more women in lower paying positions

# Focus on Pay Equity

- **Pay equity is on the minds of employees and employers alike**
  - Public disputes over equal pay at organizations such as U.S. Women's Soccer have raised the profile of this issue
  - The team will appeal after parts of the claim were dismissed on the basis of the team's CBA
- **High-profile lawsuits have received significant attention in the news**
  - Disney, Twitter, Nike, and other companies have been involved in pay equity disputes
  - Disney and Nike have both lost initial appeals against class-action status
- **Pay equity has become a business issue**



# Pay Equity Legislation Across the United States

# Pay Equity Legislation Across the United States

- **Other states have enacted pay equity legislation, to mixed results**

- In some states, such as California and Maryland, pay equity legislation that has been effective for a few years has reduced the pay gap
  - Other states’ legislation may have been enacted too recently to see full effects
- Employers in these states have begun navigating provisions that are not well defined and have sought clarification
- In many cases, small business owners or employers operating in different states may have been uninformed about changes

Change in Wage Gap Ranking – 2015 to 2019						
State	Year Legislation Effective	2015 Gap Ranking	2015 Gap	2019 Gap Ranking	2019 Gap	Change
California	2015	7th	14%	1st	11%	▲ 6
Maryland	2016	12th	16%	7th	14%	▲ 5
Massachusetts	2018	14th	17%	13th	17%	▲ 1
Oregon	2017 and 2019	21st	19%	20th	18%	▲ 1
New York	2019	1st	11%	3rd	12%	▼ 2
Delaware	2017	2nd	11%	5th	14%	▼ 3
New Jersey	2018	17th	18%	25th	20%	▼ 8

Source: National Women’s Law Center (NWLC)



# California Fair Pay Act

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- **California's Fair Pay Act, effective 1/1/2016, expanded existing law to make it more difficult for employers to justify pay disparities**
  - The law was amended again to include a salary history ban and to require employers to provide pay scale information to job applicants
- **California's legislation has improved pay equity in the state**
  - Statistics from the U.S. Census Bureau show decreases in California's pay gap since the new laws were passed in 2016
  - California frequently rates within the top 5 states for pay equity
- **These improvements have not come without challenges**
  - The law has been amended multiple times to provide clarification and expand provisions
  - Employers are facing a significant increase in lawsuits and additional scrutiny under the new legislation

# New York Pay Equity Legislation

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- **In 2019, New York passed two bills aimed at improving pay equity**
  - The “Pay Equity Bill” limits the acceptable justifications for pay discrepancies, similar to many other state laws
  - The “Salary History Bill” bans employers from asking candidates for salary history information
  
- **It may be too soon to see the effects of the legislation**
  - The bills were effective in late 2019 and early 2020, respectively
  - New York already had a much lower-than-average pay gap
  - As questions arise, amendments and clarifications may change some aspects of the law

# Key Takeaways

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- **Equal pay legislation is becoming widespread but is inconsistent**
  - Employers with employees in more than one state may find themselves facing a variety of different recordkeeping and compliance standards
  - As additional states consider legislation, employers may take a holistic approach rather than targeting specific segments of the population
- **Pay equity is a process**
  - Amendments or additional provisions are frequently implemented as issues arise through litigation or employers raise compliance questions
  - Employers should stay up-to-date on changes and developments
- **To stay compliant, implement best practices**
  - Employers should implement best practices whether or not their state has enacted legislation to stay ahead of compliance risks

# Pay Gap Progress

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Number of years it will take to close the gender pay gap at the current pace – that's year 2221.

*Source: World Economic Forum & Organization for Economic Cooperation and Development (OECD)*

# Colorado Equal Pay for Equal Work Act

# Colorado Equal Pay for Equal Work Act

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- **Colorado enacted the Equal Pay for Equal Work Act on May 22, 2019**
  - The Act is one of the most comprehensive in the nation
  - Imposes notice requirements, limits acceptable reasons for pay discrepancies, and includes a salary history ban, among other provisions
  - Also provides for steep penalties in civil claims
- **Private and public employers with any employees in the state are subject to the Act**
  - Includes government and religious entities
  - No carveout for small businesses or domestic employers
- **The Act is effective January 1<sup>st</sup>, 2021**
  - Employers will be responsible for understanding and complying with the Act
  - There is still time to prepare and take advantage of a provision that could protect employers from paying double damages in a claim

# Comparison to Federal Laws

- **The Colorado Act includes many provisions not present in federal law**
  - Title VII and the federal Equal Pay Act provide some of the same protections but allow for more flexibility in explaining discrepancies
  - The Colorado Act also includes a number of additional provisions (e.g., salary history ban)

Comparison - Federal Laws and Colorado Equal Pay for Equal Work Act			
	Title VII	Federal Equal Pay Act	Colorado Equal Pay for Equal Work Act
Who is Covered?	-Employers with 15 or more employees -Exceptions for religious groups, federal government, and some other organizations	Nearly all employers	Any employer with employees in Colorado
Statute of Limitations	Complaint must be filed with EEOC within 180 days	2 years; 3 in case of "willful" violation	-2 years for pay disparity claims -1 year for administrative (recordkeeping or notice-related) claims
Damages	-Dependent on motive of employer -Back pay (up to 2 years from time of claim) -Punitive or compensatory damages may be awarded	Back pay and liquidated damages for up to 2 years (3 in case of "willful" violation)	-Back pay & potential liquidated damages for up to 3 years -Fines between \$500 and \$10,000 for administrative violations
Other Provisions	Title VII broadly protects against workplace discrimination on the basis of race, color, religion, or national origin.	-Limited to employees working in same establishment -Includes a "catch-all" provision allowing discrepancies based on "any other factor other than sex"	-Salary history ban -Job postings must include salary range -Recordkeeping requirements -Relief from liquidated damages for violations resulting from "good faith" error

# Pay Disparity

- **The Act prohibits wage-based discrimination and details factors that may be used to explain discrepancies:**
  - Seniority system
  - Merit system
  - System which measures earnings by quantity/quality of production
  - Location
  - Relevant education, training, or experience
  - Travel, if it is required by the work performed
- **Recent legislation from New York, California, and others includes similar provisions**
  - Designed to clarify acceptable explanations for pay discrepancies
  - Closes loopholes previously allowed under ambiguous regulations





# Salary History

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- **The Act prohibits employers from requesting salary history information from applicants**
  - Intent is to avoid inadvertently tainting current wage rate decisions with bias by considering salary history that may not have been set fairly
  - Employers may not retaliate against applicants who refuse to provide such information
  - Such provisions are not uncommon in recent pay equity legislation
- **The Act also protects the right of employees to discuss compensation**
  - Employers may not prevent employees from disclosing/discussing salary as a condition of employment
  - Employers may not require employees to sign a waiver for the same purpose

# Notice/Recordkeeping Requirements

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- **The Act imposes new requirements around job postings**
  - Employers will be required to disclose compensation amount/range for each posting
  - Posting must also include description of benefits/other compensation
  - Employer must make a reasonable effort to announce internal promotion opportunities to all employees on the same day as well as prior to making a decision
- **Employers must maintain employee records for two years**
  - Includes job descriptions and wage history
  - Corresponds to timeframe for employees to file a lawsuit after a violation
- **These provisions are more stringent than those in other state laws**

# Employee Claims

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- **Employees will have two years to pursue a claim after a violation**
  - Each instance in which an employee is paid a discriminatory rate is a violation
  - Alternative relief process being developed by Department of Labor and Employment
- **Employer may be liable for double damages**
  - Damages may be up to three years of back pay
  - Employer may also be liable for liquidated damages in the same amount unless they can prove the violation was made “in good faith”
- **Pay equity study may be seen as evidence of “good faith”**
  - Pay equity study must have been completed within two years of civil action
  - This provides a significant incentive for employers to complete pay equity studies and proactively remedy pay disparities
- **No “red circling” – Act does not grandfather existing pay disparities**

# Preparing for 2021

# Potential Risk Factors

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- **Changes create potential risks for even most diligent employers**

- Changes span multiple organizational functions/departments
- Significant coordination across functions required to prepare

- **Potential risk factors to address prior to 2021**

- Inconsistent/outdated pay policies (especially those based on salary history)
- Lack of recent pay equity analysis
- Vague/undefined salary ranges for job openings
- Handbooks/policies preventing employees from discussing compensation
- Outdated job descriptions
- Inconsistent or decentralized record retention



- **Risk factors indicate work to be done, but there is still time to prepare**

# How to Prepare – Pay Equity Audit

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- **The Act incentivizes proactive identification/prevention of issues**
  - Steep penalties (potentially twice the amount of three years of back pay)
  - Employers can potentially avoid double damages by conducting a pay equity study
- **At minimum, employers should consider conducting a pay audit prior to 1/1/2021**
  - Pay audits conducted within two years prior to a violation can be used as evidence of “good faith”
  - Pay audit must be “thorough and comprehensive” and conducted “with the specific goal of identifying and remedying unlawful pay disparities”
  - These audits can be conducted in-house or with the assistance of a consultant or compensation attorney

# Conducting a Pay Equity Audit



## INITIAL DIAGNOSTIC

Start with a diagnostic of the company's payroll data to determine any irregularities between gender and/or race. Involve legal counsel to protect any attorney/client privilege.



## DEEPER DIVE INTO IDENTIFIED ISSUES

If potential issues are identified, take a deeper look at those data points to determine whether there is a reasonable explanation for the differences.



## CORRECTIVE ACTION

If discrepancies still exist, evaluate the various ways to correct the issue while mitigating their potential legal and financial exposure.

# How to Prepare – Market Compensation Analysis

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- **Consider conducting a market compensation analysis**
  - As of 2021, salary history may no longer be considered when setting wages
  - Market compensation analyses compare salaries for similar positions in similar locations for peers of the company
  - Reviewing compensation against the market is a best practice
- **Compensation in job postings is another factor to consider**
  - Recall that compensation amounts or ranges must be posted in all job postings starting in 2021
  - Employers should assume that competitors, prospective employees, and existing employees will see this information
  - Compensation ranges that more closely align to the market are more likely to be viewed favorably by employees



# How to Prepare – Update Relevant Materials

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- **Review and update job postings**
  - Confirm that all job postings include all required information and that existing information is accurate
  - Implement a process for keeping compensation information updated on job postings
- **Consider updating employee application forms**
  - Remove requests for salary history on applications/interview materials
  - Employers may want to request and retain detailed information related to the allowable factors for discrepancies
- **Train relevant employees about changes to the new law**
  - Create guidelines and processes to ensure that records are properly retained
  - Ensure that staff are aware of policy changes around salary discussion (interviewers may not ask, and employees may not be prohibited)

# Summary

# Key Takeaways

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- **Become familiar with new requirements**
- **Identify potential risk factors**
- **Start preparing early to ensure compliance in 2021**
- **Not knowing an issue exists does not protect an employer from liability**

# Bios

## Brennan Rittenhouse – Managing Director

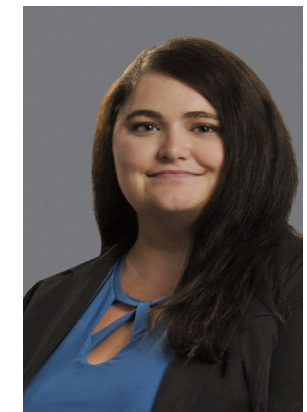
- Brennan Rittenhouse is a Managing Director with A&M Taxand Denver, Colorado, specializing in compensation and benefits planning and consulting.
- He brings an expertise in all areas of executive, independent director, and broad-based compensation consulting. Some of the areas in which he has significant experience include compensation benchmarking, conducting pay equity analyses, designing and implementing both short- and long-term incentive plans, and creating salary structures.
- Previously, Brennan served as the Head of Compensation for Vista Outdoor, a public company outside of Salt Lake City, UT, where he oversaw the compensation structures for 50 consumer brands.
- Brennan earned his bachelor's degree from the University of Central Florida, law degree from Florida State University, and LL.M. (Tax) from the University of Denver.



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## Emily Milligan – Senior Associate

- Emily Milligan is a Senior Associate with the Compensation & Benefits practice at Alvarez & Marsal Taxand in Denver, Colorado.
- Emily consults on compensation-related issues such as gender pay analyses and complicated tax related calculations. She applies her background in statistics to a number of data analysis projects such as plan design models and pay equity analyses. She has also assisted with a wide range of qualified retirement plan issues such as compliance reviews, financial statement audits, and calculating corrections.
- Emily earned a bachelor's degree in mathematical and computer sciences, concentrated in statistics, and her master's degree in applied mathematics and statistics from Colorado School of Mines in Golden, Colorado.



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