

L&E Live

Pay Audits

How They Work & Why Colorado's New EPEW Act Encourages Employers to Conduct One

October 8, 2020

Carissa Davis

 303.299.8327

 cdavis@shermanhoward.com

Beth Ann Lennon

 303.299.8102

 blennon@shermanhoward.com

Nicholas Starkman (Trusaic)

 213.355.5116

 nstarkman@trusaic.com

Questions?



Colorado's Equal Pay for Equal Work Act ("EPEW")

Coming soon. . .

- Effective
January 1, 2021

Coverage

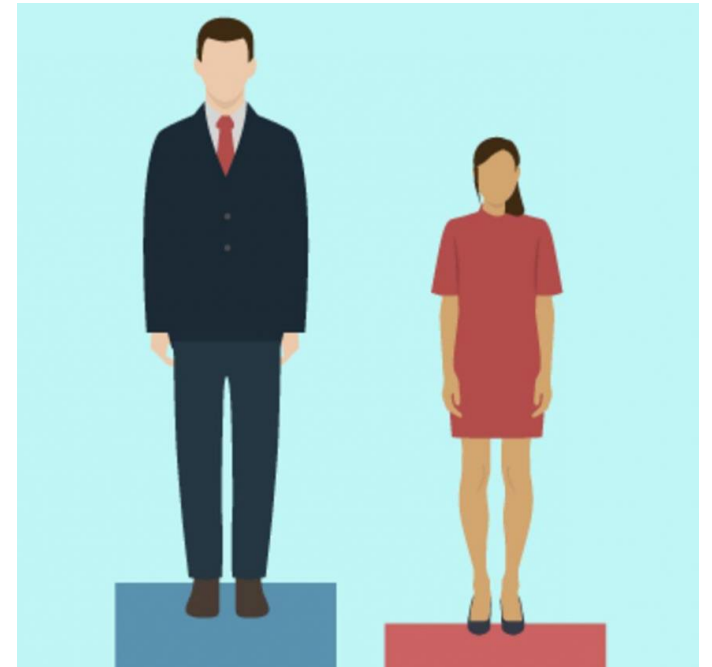
- **All** employers
and any person
employed by an
employer in the
state of
Colorado

Concept

- Employers must
ensure
employees with
similar job duties
are paid the
same wage rate

EPEW in a Nutshell

- Prohibits wage discrimination based on sex
 - Sex includes employee's gender identity
 - Includes non-binary individuals
 - “Sex plus” another protected status also unlawful
- Analyzes “substantially similar work”
 - “Regardless of job titles”
 - Skill
 - Effort
 - Responsibility



“Wage Rates” Under EPEW

- May not pay “an employee of one sex a **wage rate** less than the rate paid to an employee of a different sex for substantially similar work”
 - Hourly employees
 - Hourly compensation **plus** the value per hour of all other compensation and benefits received by the employee from the employer
 - Salaried employees
 - The total of **all** compensation and benefits received by the employee from the employer

EPEW Mandates at 30,000 Feet

May not:

- seek or rely on wage rate history for prospective employees;
- retaliate or discriminate against prospective employee for refusing to disclose prior wage rate history;
- retaliate or discriminate against employee for invoking the EPEW Act on behalf of anyone; or
- “discharge, discipline, discriminate against, coerce, intimidate, threaten, or interfere” with **anyone** for inquiring about, disclosing, comparing, or otherwise discussing an employee’s wage rate.

EPEW Mandates at 30,000 Feet

- Posting and notice requirements
 - All known opportunities for promotion must be posted prior to making a promotion decision and on the same calendar day
 - Postings for job openings must include compensation and benefits information
- Recordkeeping requirements
 - Employment plus two years
 - Job descriptions and wage rate histories for each employee

The Cost of Getting it Wrong

- Available relief
 - Economic damages
 - Liquidated damages
 - ★ Not available with good faith defense★
 - Equitable relief
 - Employee's reasonable costs, **including attorney fees**
- Director may fine \$500-\$10,000 **per** posting or recordkeeping violation



Why Double Your Damages?

LIQUIDATED
DAMAGES

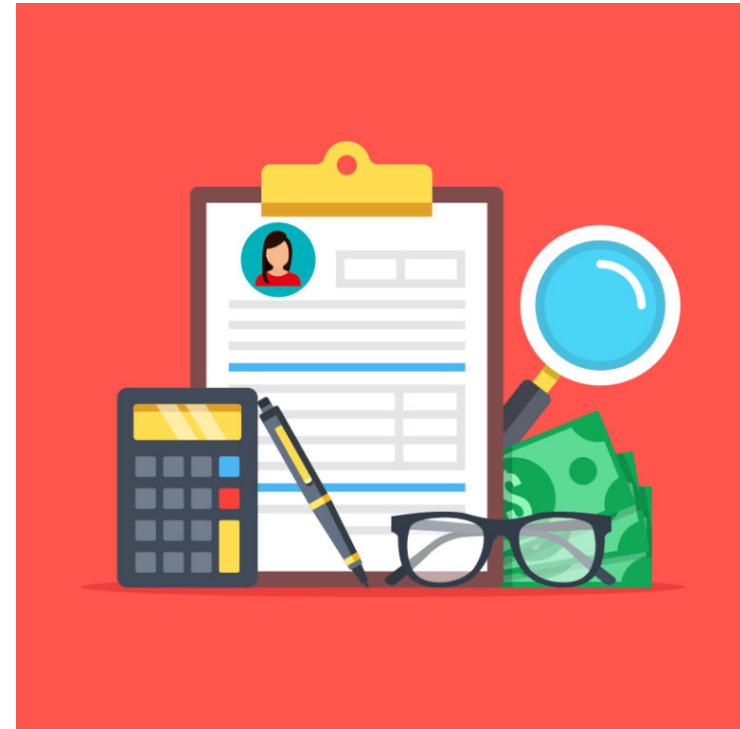


The good faith defense

- No liquidated damages if employer can show the act or omission giving rise to the violation was in good faith, and the employer had reasonable grounds for believing no violation occurred

Why EPEW “Encourages” Pay Audits

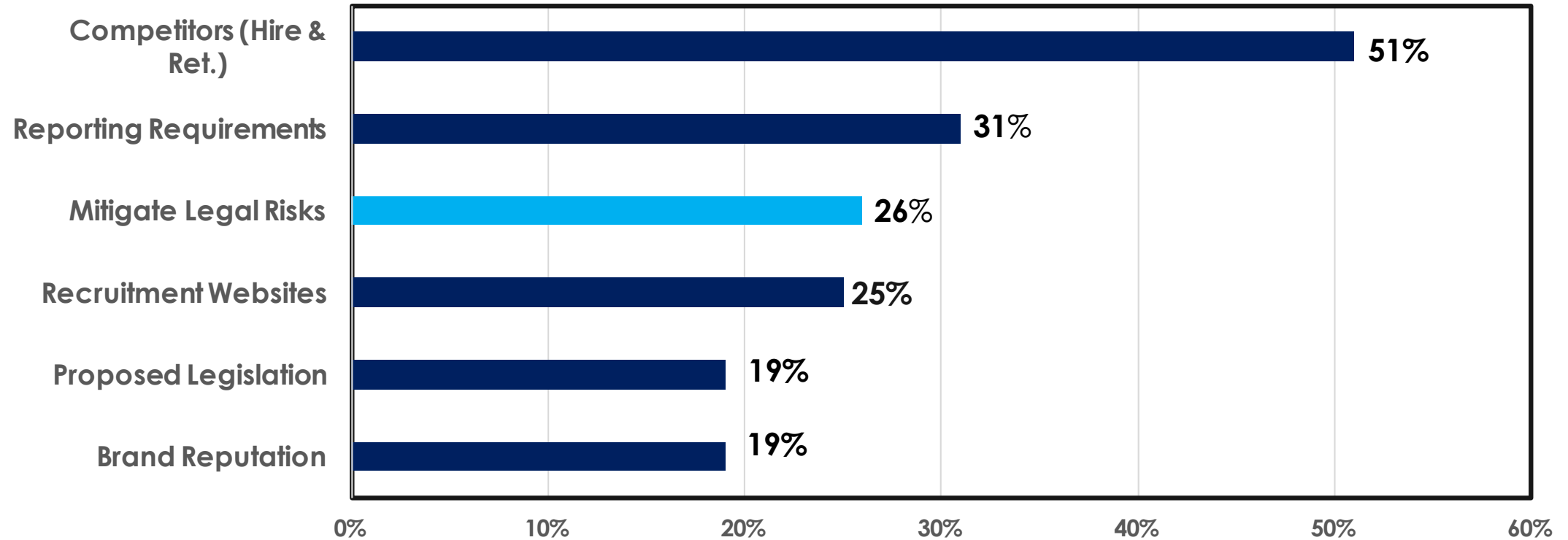
- How to show good faith?
 - Within 2 years of a violation, the fact finder may consider if the employer completed a *thorough and comprehensive* pay audit of its workforce with the specific goal of identifying and remedying unlawful pay disparities



What is a Pay Audit (When Done Right)?

- An analysis of your workforce that identifies pay disparities (liabilities)
- Places statistical weights on business factors that contribute to the pay differences
- Helps you identify the root cause for pay disparities and why they exist
- Encompasses base pay and total pay
- Quantifies risk, helps devise the right remediation strategy, and can be used to track progress
- Should be conducted under the attorney-client privilege

Top Pay Audit Drivers



Considerations Before You Begin

- Budget and Time-Frame
 - What resources can be devoted to conducting a pay audit and how much time will it take?
- Who will be involved?
 - Internal: you may need personnel from compensation/total rewards, human resources, information technology
 - External: counsel, consultant/vendor
- Vendor/Consultant Market Segmentation
 - DIY vs. “Do it for Me”
- Transparency of Process/Results?



Key Consideration: Clean Data



- Data that contain errors, that are incomplete, or are outdated can result in significant costs
- IBM estimates a yearly cost of \$3.1 Trillion to U.S. firms based on poor quality data
- “The reason bad data costs so much is that decision makers, managers, knowledge workers, data scientists, and others must accommodate it in their everyday work. And doing so is both time-consuming and expensive.”

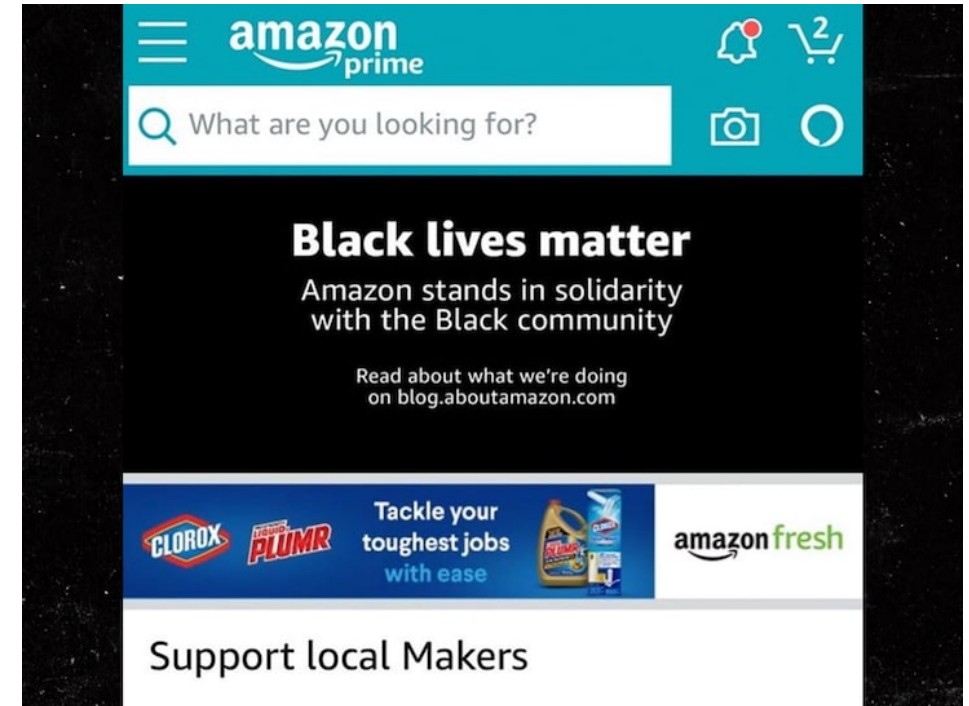
- Harvard Business Review

Pay Audit Process Steps Overview

1. Establish confidentiality, privacy, and privilege protocols
2. Establish scope of the analysis
3. Identify the applicable legitimate business factors
4. Prepare data sets (aggregate, consolidate, validate)
5. Determine the Pay Analysis Groups (PAGs)
6. Perform statistical modeling - Multiple Linear Regression Analysis and Non-Regression Analysis
7. Review employee outliers to determine whether there are legitimate reasons for the disparities identified
8. Select remediation strategy and implement
9. Monitor and track progress

Pay Audits are Part of a Growing Trend

- Public Disclosure of Workforce Data
 - NYC comptroller & public disclosure of EEO-1 reports
 - California SB 973 (passed 9/30/2020)
 - VP Nominee Harris & Equal Pay Certifications
- Salary History Bans Find Footing
 - Adopted in 19 states and 21 localities
- Pay Audit Safe Harbors in 3 States and Counting
 - MA, CO, OR
- Industry Leaders Promote Change



Questions?

Carissa Davis

 303.299.8327

 cdavis@shermanhoward.com

Beth Ann Lennon

 303.299.8102

 blennon@shermanhoward.com

Nicholas Starkman (Trusaic)

 213.355.5116

 nstarkman@trusaic.com

SHERMAN & HOWARD
