

Colorado's Proposed 'Equal Pay Transparency Rules' May Affect Employers Nationwide

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The Colorado Department of Labor and Employment (DLE) has published proposed “[Equal Pay Transparency Rules](#)” (EPT Rules), providing details on new affirmative obligations under the state’s [Equal Pay for Equal Work Act](#) going into effect on January 1, 2021.

The EPT Rules detail how to comply with the Act’s ambiguous requirements to (1) “disclose in each job posting” wage rate and benefit information and (2) “announce, post or otherwise make known all opportunities for promotion to all current employees.”

The EPT Rules apply to any employer (including public employers, political subdivisions, schools, and individuals) with at least one employee in Colorado. They also make clear that in some situations, the obligations will extend to job openings outside of the state. Consequently, many national employers may need to change their current posting and promotion practices to comply.

The DLE will hold a public hearing on the proposed rules on November 2, 2020. Public comments will be accepted until November 5. The final rules are expected to be adopted by November 10.

Proposed EPT Rules

The proposed EPT Rules address two general areas of the Act:

1. Complaint, Investigation, and Appeal Procedures

The first three sections of the EPT Rules propose a process for investigations, complaint filings, service and deadlines, determinations, and appeals. These sections draw heavily from the Wage Protection Act Rules that govern the wage complaint process in Colorado.

2. Job Posting Requirements

Rule 4 of the EPT Rules contains the much-awaited detail on the Act’s ambiguous job posting requirements. The Act requires employers to:

- “[D]isclose in each posting for each job the hourly or salary compensation, or a range of hourly or the salary compensation, and a general description of all of the benefits and other compensation to be offered to the hired applicant” (C.R.S. § 8-5-201(2)); and
- Make “reasonable efforts” to “announce, post or otherwise make known all opportunities for promotion to all current employees on the same calendar day and prior to making a promotion decision.” C.R.S. § 8-5-201(1).

Rule 4 clarifies that the disclosure requirement applies to all postings for all applicable job openings (see Scenarios below), including postings for promotional opportunities. Employers must include the following compensation and benefits information in each

such posting:

(1) The hourly rate or salary compensation (or a range thereof) that the employer is offering for the position, including any bonuses, commissions, or other forms of compensation that are being offered for the job; and

(2) A general description of all employment benefits the employer is offering for the position, including health care benefits; retirement benefits; any benefits permitting paid days off, including sick leave, parental leave, and paid time off or vacation benefits; as well as any other benefits that must be reported for federal tax purposes; but not benefits in the form of minor perks.

The good news for employers is that posted ranges may be based on what the employer “in good faith believes it might pay for the particular job, depending on the circumstances.” Therefore, employers likely can tailor a wage range on a job posting to what the company expects to pay the person who will be hired – rather than the entire range available for all incumbents in the position. Moreover, paying more or less than the posted range may not be a violation if the posted range was a “good-faith and reasonable estimate of the range of possible compensation at the time of the posting.”

On posting promotional opportunities, Rule 4 provides that the posting must:

1. Be in writing;
2. Include the compensation and benefits information; and
3. Indicate how to apply.

Further, “[e]mployers must notify all employees of all promotional opportunities, and may not limit notice to those employees it deems qualified for the position, but may state that applications are open to only those with certain qualifications.” Employers cannot choose which employees can access to the notices. For administrative convenience, a best practice may include post all external and internal openings at the same place, such as an external-facing Careers Page.

Unfortunately, a “promotional opportunity” is undefined. One question is whether non-competitive or “in line” promotions (*e.g.*, a promotion to “Senior” after hitting experience thresholds) will need to be posted. Many commentators have pointed out that such progressions are not “opportunities” open to anyone else. The DLE may address this during its hearing and final rulemaking.

Scenarios in Which EPT Rules Apply

In Rule 4, the DLE attempted to clarify when the new job posting requirements apply by providing three sample scenarios:

Scenario 1: Colorado employer with job to be performed in Colorado– “if the employer accepts applicants from outside Colorado, it must notify all of its employees in any state for whom the job would be a promotion” as well as include compensation and benefits on the posting.

Scenario 2: Colorado employer with job to be performed anywhere (e.g., remote)– “the employer must notify all of its Colorado employees for whom the job would be a promotion” as well as include compensation and benefits on the posting.

Scenario 3: Colorado employer with job outside of Colorado– “if the employer accepts applicants from locales at least as distant as Colorado ... it must notify all of its Colorado employees for whom the job would be a promotion” as well as include compensation and benefits on the posting.

Next

The proposed EPT Rules make clear that the State of Colorado wants nationwide employers to think about how their job opening and promotional posting practices affect Colorado workers. Failing to comply can get expensive, with penalties ranging from \$500 for first offenses, up to \$10,000 per violation.

When posting, employers should be mindful of the new EPT Rules, consider how competitors, unions, and current employees may view the information, and whether current employees’ pay rates fall within the ranges posted on job openings.

We will continue to monitor the EPT Rules and provide updates. Jackson Lewis attorneys are available to assist employers in determining whether and how the EPT Rules may affect their particular business.

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