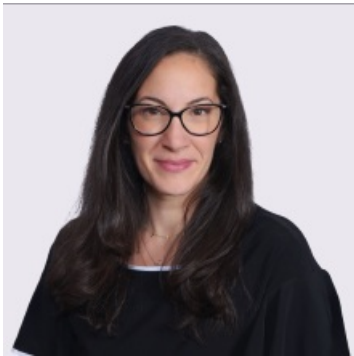


Colorado Issues Final Rules Requiring Pay Transparency in Job and Promotional Postings

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The Colorado Department of Labor and Employment (CDLE) issued its [final Equal Pay Transparency Rules](#) (EPT Rules) on November 10, 2020, with additional information on job and promotional postings. The EPT Rules go into effect on January 1, 2021.

The EPT Rules provide clarity on the requirements in the state's new "Equal Pay for Equal Work Act" that Colorado employers (*i.e.*, anyone with at least one employee in Colorado, including public employers, political subdivisions, schools, and individuals) announce promotional opportunities and include compensation and benefit information on certain job postings. It is clear CDLE listened to comments on its proposed rule.

Colorado's Pay Transparency Requirements

Colorado's Equal Pay for Equal Work Act requires employers:

[D]isclose in each posting for each job opening the hourly or salary compensation, or a range of the hourly or salary compensation, and a general description of all of the benefits and other compensation to be offered to the hired applicant.

And:

[M]ake 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.

The EPT Rules detail how employers must implement these obligations. One significant revision from the proposed rules is a dramatic reduction in geographic scope. The EPT Rules provide:

(A) the promotion posting requirements do not apply to employees entirely outside Colorado; and

(B) the compensation posting requirements do not apply to either (1) jobs to be performed entirely outside Colorado, or (2) postings entirely outside Colorado.

Compensation, Benefits Information Included in Job Postings

Employers must include the following compensation and benefits information in each posting:

1. The hourly rate or salary compensation (or a range thereof) that the employer in good faith believes it may pay for the particular job,
2. A general description of any bonuses, commission, or other forms of

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compensation that are being offered for the role, and

3. A general description of the other benefits that are being offered for the role.

For employers that elect to post a compensation range, the range may extend from the lowest to the highest pay “the employer in good faith believes it might pay for the particular job, depending on the circumstances.” Accordingly, the range can be tailored to the expectations for that particular opening and need not reflect the full potential range for that role in general. In addition, employers may “ultimately pay more or less than the posted range, if the posted range was the employer’s good-faith and reasonable estimate of the range of possible compensation at the time of the posting.”

Promotional Opportunities “Announced”

With respect to the requirement to announce promotional opportunities, the EPT Rules define “promotional opportunities” as those situations “when an employer has or anticipates a vacancy in an existing or new position that could be considered a promotion for one or more employee(s) in terms of compensation, benefits, status, duties, or access to further advancement.”

Exceptions

The EPT Rules provide the following exceptions to the requirement to provide notice of promotional opportunities to current Colorado employees:

1. *Confidential Job Search.* When there is “a compelling need to keep a particular opening confidential because the position is still held by an incumbent employee who, for reasons other than avoiding job posting requirements, the employer has not yet made aware they will be separated,” employers need not provide notice of the promotional opportunity. If the employer tells any employees of the opportunity, all employees must be told who (1) meet the minimum qualifications or (2) have a job “substantially similar” to any employees being told of the opportunity. In addition, the employee notice obligation springs back if the need for confidentiality ends before the deadline to apply for the job;
2. *Probationary Periods.* The notice requirement also does not apply to promotions “within one year of an employee being hired with a written representation that the employer will automatically consider the employee for promotion to a specific position within one year based solely on their own performance and/or employer needs”; and
3. *Temporary Positions.* Employers need not provide notice to all employees of the promotional opportunity if the position being filled is “on a temporary basis for up to six months” and “the hiring is not expected to be permanent.”

Content of the Notice

The notice must be in writing and must include:

1. The job title of the role;
2. The compensation and benefits information required of all job postings; and
3. Information on how to apply to the role.

Employees Who Must Receive Notice

The EPT Rules make clear that employers must notify all Colorado employees of all promotional opportunities (even if the employer does not believe the employee is

qualified for the role). The announcement may state that applications are open only to those with certain qualifications, and employers “may screen or reject candidates based on such qualifications.”

Rules in Practice

The EPT Rules impose obligations dictated by the location of the job and the accessibility of the job posting as follows:

1. *Job to be performed in part in Colorado.* If an employer with at least one employee in Colorado has a job to be performed at least in part in Colorado and the job posting *is accessible* from Colorado:

(A) C.R.S. § 8-5-201(1) requires it to notify all its employees in Colorado for whom the job would be a promotion.

(B) C.R.S. § 8-5-201(2) requires it to include compensation and benefits in such job postings.

2. *Job to be performed in part in Colorado.* If an employer with one or more employees in Colorado has a job to be performed at least in part in Colorado, and the job posting *is not accessible* from Colorado (*e.g.*, a Cheyenne, Wyoming-based local trucking company that delivers product to Denver and uses only Wyoming-based hard copy postings to recruit through a Wyoming commercial driving school):

(A) C.R.S. § 8-5-201(1) requires it to notify all its employees in Colorado for whom the job would be a promotion.

(B) C.R.S. § 8-5-201(2) *does not* require it to include compensation and benefits in such job postings.

3. *Remote job.* If an employer with at least one employee in Colorado has a job that can be performed anywhere (*e.g.*, a remote position that could be performed by a Coloradan because the job has no requirement or preference for the employee to reside in a particular area):

(A) C.R.S. § 8-5-201(1) requires it to notify all its employees in Colorado for whom the job would be a promotion.

(B) C.R.S. § 8-5-201(2) requires it to include compensation and benefits in such job postings.

4. *Job outside of Colorado.* If an employer with at least one employee in Colorado has a job to be performed entirely outside of Colorado:

(A) C.R.S. § 8-5-201(1) requires it to notify all its employees in Colorado for whom the job would be a promotion.

(B) C.R.S. § 8-5-201(2) *does not* require it to include compensation and benefits in such job posting.

5. *Non-Colorado employer.* An employer with no current employees in Colorado has no obligations under C.R.S. § 8-5-201(1)-(2) until it employs an employee in the state of Colorado.

Of course, the specifics of what is required and whether actions are “reasonable” in each unique circumstance may vary. Should you have any questions about how these new rules apply to your workforce and job openings, please reach out to your Jackson Lewis attorney. Jackson Lewis attorneys are available to assist employers with this and other workplace requirements.

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