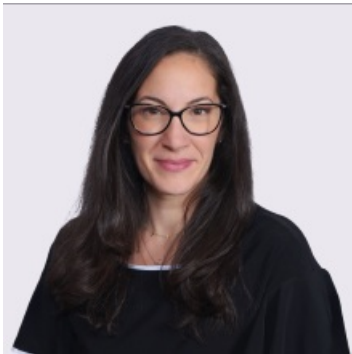


Colorado Equal Pay Transparency Law Update: Additional Guidance (INFO #9A) Released

By Laura A. Mitchell, Christopher T. Patrick, Scott M. Pechaitis &

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Meet the Authors



Laura A. Mitchell

(She/Her)
Principal
303-225-2382
Laura.Mitchell@jacksonlewis.com



Christopher T. Patrick

(He/Him)
Principal
303-876-2202
Christopher.Patrick@jacksonlewis.com



Colorado's revised Equal Pay Transparency Rules go into effect on January 1, 2024. The Colorado Department of Labor and Employment (CDLE) has released additional guidance following release of its [final rules for implementation](#). The CDLE's [Interpretive Notice & Formal Opinion \(INFO\) #9A](#) provides CDLE's official opinions, expectations, and examples for employer compliance with the Rules. Topics covered by INFO #9A include required disclosures and notices, among others.

Compensation and Benefits Disclosures

All job postings and notices must disclose the pay rate or range for the position and a general description of any other compensation (*e.g.*, bonuses and commissions), a general description of benefits, and when and how to apply. INFO #9A clarifies that, if compensation would vary by state, the salary range disclosed on the posting or notice must reflect the information for Colorado, including any local minimum wage requirements. Further, if the role can be performed anywhere in Colorado, then the salary range disclosed must be consistent with all local minimum wages (or state that pay will not be below any applicable local minimum wage).

Notice of Job Opportunities

Employers must make reasonable efforts to announce, post, or otherwise make known each "job opportunity" to all Colorado employees on the same calendar day and before a selection decision.

What is a Job Opportunity?

INFO #9A explains that a "job opportunity" exists any time an employer is at least "considering" filling any "current or anticipated vacancy." It instructs that employers need not use a formal application process; rather, if the employer is considering multiple candidates or just one person (*e.g.*, giving a promotion) for a role, then notice obligations attach. But "Career progression" and "career development" opportunities (discussed below) are not "job opportunities."

What is a Vacancy?

According to INFO #9A, any of these are a "vacancy":

1. A vacated position that an employer intends to fill a position that is open or is held by a departing employee; or
2. A newly created position, including when a new position is created or when an existing position is changed enough to make it a different position.

Who Must Receive Notice?

Scott M. Pechaitis

Principal
303-876-2201
Scott.Pechaitis@jacksonlewis.com

Related Services

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INFO #9A reiterates that employers must provide notices to all Colorado employees and cannot limit the notice to certain employees. Reinforcing this view, INFO #9A provides an example: If a job opportunity for a sales agent became available, all employees must receive notice even if most of the employees are in higher-paid positions and are not likely to be interested in the open role.

Career Progression Opportunities

A career progression is a non-competitive promotion exempted from the general “job opportunity” notice requirements of the Ensure Equal Pay for Equal Work Act (although a separate, career progression-specific notice is still needed). INFO #9A makes clear that, to be a career progression opportunity, there can be no discretion in the decision. Instead, the promotion must be based on an “objective metric,” like an automatic promotion every 12 months (*e.g.*, from associate II to associate III, and then from associate III to associate IV). However, if the manager reviews promotions every 12 months and has discretion whether to allow, reject, or postpone, then the career progression exception does not apply, and employers must provide notice of the opportunity. Similarly, if an employer uses a “promotion list” to determine which employees should be promoted next, such promotions would not qualify as career progression opportunities if the list is based even partly on subjective factors, such as performance reviews or sales rankings.

Career Progression Notices

INFO #9A does not supply an example of a career progression notice, but it provides that a written notice must be given to all eligible employees shortly after beginning any position within a career progression. Employers have discretion in choosing how to deliver these notices.

Career Development Opportunities

A career development opportunity also falls within an exemption to general “job opportunity” notice requirements as a non-competitive promotion. To be exempt from the notice requirements, a Career Development Opportunity must be “to reflect work performed or contributions already made by the employee.” This appears to be more limited than many had hoped. Under INFO #9A, the work the employee is being recognized for contributing (1) need not be a part of the employee’s current job duties and (2) cannot already be part of a different position. Examples include a cashier who gradually takes on more responsibility in the absence of a head cashier and eventually “grows enough” to change their position to be a head cashier. INFO #9A cautions that, if there previously was a head cashier who quit and the cashier from this example immediately overtook those duties, the employer must provide the job opportunity notice because the cashier is filling a vacancy.

Other Exceptions to Notice Requirements

[Acting, Interim or Temporary Positions](#) and Confidential replacements are also exempt from “job opportunity” notice requirements.

Timing of Notice

Generally, all employees must be notified of job opportunities on the same day. However, INFO #9A states that there is no prohibition against notifying certain employees in advance of the general notice (*e.g.*, if an employer is assessing a specific

individual's interest in a promotion before notifying other employees of the job opportunity).

Post-Selection Notice

While the CDLE has not announced a specific, required form for post-selection notices, INFO #9A offers the following example of a compliant post-selection notice:

Ali C. has been promoted to Analyst IV from Analyst III. Any employee interested in similar opportunities in the future should email Human Resources at HR@company.com.

The Rules provide a limited right to non-disclosure for employees who may wish to remove their name and former job title from the post-selection notice in certain, specific, circumstances.

Geographic Limits on Notice Requirements

Employers must provide these notices to Colorado employees:

1. Job opportunity notices for all opportunities, regardless of whether the job is in Colorado.
2. Post-selection notices to all Colorado employees whom the employer intends the selected candidate will work with regularly, regardless of where the selected candidate will work.
3. Career progression notices to all eligible employees in Colorado.

Delayed Application

Employers with no physical presence in Colorado and fewer than 15 remote employees in Colorado are exempt from the job opportunity notice requirements, but they still must disclose compensation and benefits, as well as when and how to apply, in covered job postings.

Recordkeeping

The Act also has recordkeeping obligations. Records of each employee's job description and compensation, including any changes to the job description or compensation over time, must be retained for the duration of the employee's employment and two years thereafter.

As CDLE has done before, INFO #9A is likely to be updated to reflect developments in CDLE's interpretation and enforcement priorities.

Please contact a Jackson Lewis attorney if you have any questions about these developments or need assistance.

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