

CLIENT ALERT

Colorado's New Pay Equity Law Takes Effect January 1, 2021

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Colorado's Equal Pay for Equal Work Act (EPEWA), which prohibits gender-based pay discrimination and mandates strict requirements on job postings and equal pay transparency, goes into effect on January 1, 2021. The EPEWA affects every employer with one or more employees in Colorado. On November 10, 2020, the Colorado Department of Labor and Employment (CDLE), Division of Labor Standards and Statistics (DLSS) adopted final Equal Pay Transparency Rules (EPT Rules) and issued a Statement of Basis, Purpose, Specific Statutory Authority, and Findings, providing long-awaited guidance on the requirements for job postings and equal pay transparency.

In the summary below, we first address the expanded guidance on pay equity requirements, followed by the new requirement that employers announce to all Colorado employees "promotional opportunities" and job openings, which raises a number of questions for employers with employees located in Colorado.

Pay Equity Requirements

The first part of the EPEWA allows exceptions to the prohibition against a wage differential based on sex, meaning gender identity. An employer must be able to demonstrate that a wage differential is not based on wage rate history, but is based upon one or more of the following facts, so long as the employer has applied the factors reasonably:

- A seniority system
- A merit system
- A system that measures earnings by quantity or quality of production
- The geographic location where the work is performed
- Travel, if the travel is a regular and necessary condition of the work performed

The Act prohibits employers from seeking wage rate history of a prospective employee or relying on prior wage rates to determine a current wage rate, and employers may not discriminate or retaliate against prospective employees for failing to disclose wage history. Employers also may not prevent current employees from discussing their own compensation information with other employees. The EPEWA provides a private right of action, administrative enforcement, and liquidated damages and attorneys' fees for employees or prospective employees who prevail on claims of wage discrimination based on sex.

Employers are also required to maintain records of job descriptions and wage rate history for each employee for two years after the employment ends. Failure to maintain these records creates a rebuttable presumption that the records not maintained contained information favorable to an employee's claim. One way for an employer to show that any such violation was in "good faith," and therefore not subject to liquidated damages, is for the employer to demonstrate that it completed a comprehensive pay audit of its workforce within the last two years. This "safe harbor" raises important privilege issues, as most employers perform such analyses pursuant to the attorney-client privilege for the purpose of providing legal advice.

Job Posting and Equal Pay Transparency Requirements

Part Two of the EPEWA requires employers to announce to all employees “promotional opportunities” and job openings, and the pay range for such opportunities and openings.

Specifically, employers must:

- Make reasonable efforts to announce, post, or otherwise make known, all opportunities for promotion to all current Colorado employees on the same day and prior to making a promotion decision; and
- For all job postings for jobs to be performed in Colorado or jobs that can be performed remotely from anywhere, including but not limited to promotions, employers must include the compensation range for the position and a general description of all benefits and other incentive compensation.

Geographic Limits: Employers are not required to give notice of job opportunities to employees entirely outside of Colorado. But, all Colorado employees must be notified of job opportunities – including promotional opportunities – anywhere in the world.

Content of Job Postings: Job postings, including promotional opportunities, must include hourly rate or salary compensation (or a range), a general description of any bonuses, commissions, or other forms of compensation, and a general description of all employment benefits, including health care, retirement, paid time off, and other benefits that must be reported for federal tax purposes. A compensation range may extend for the lowest to the highest pay the employer in good faith believes it might pay for the particular job.

Postings regarding Promotional Opportunities: A “promotional opportunity” exists when an employer “has or anticipates a vacancy in an existing or new position that could be considered a promotion for one or more employees in terms of compensation, benefits, status, duties, or access to further advancement.” Unless an exception applies, whether employees are actually qualified for a job or promotional opportunity does not matter; the law provides that employers “may not limit notice to those employees deemed qualified for the position.” Employers are not required to post promotional opportunities where (1) the employer has yet to inform incumbent employees that they are being separated, (2) promotions are automatic after a trial period that occur within one year of employees being hired with a written representation to that effect, and (3) positions are temporary for up to six months and not expected to be permanent.

Reasonable Efforts to Announce Promotional Opportunities: Employers must post promotional opportunities where Colorado employees can access the information within their regular workplace, either online or in hard copy, and notify Colorado employees where they can find the postings.

Enforcement: A person who claims a violation of Part Two of the EPEWA may file a written complaint with the DLSS within one year after the date the person learned of the alleged violation. The DLSS is authorized to investigate and enforce actions against an employer concerning transparency in pay and employment opportunities, including fines of between \$500 and \$10,000 per violation.

These new job posting requirements pose a host of key practical issues for employers with employees located in Colorado, including:

- **How should employers address non-competitive, automatic promotions that are specific to individual employees, but fall outside of the post-“trial period” exception noted above?** Although the EPT Rules suggest that employers must list “promotional opportunities” only where there is a “vacancy in a new position that could be considered a promotion for one or more employee(s),” the Statement of Basis and Purpose makes it clear that the rule is intended to require job postings even for promotions that are “specific to an individual employee’s career trajectory (*e.g.*, from junior to senior positions, or from training to full positions)” so that other employees understand what kind of advancement is available.
- **Should employers provide comprehensive job postings to their entire workforce, or should they limit those postings to employees located in Colorado?** Because the EPEWA mandates that employers advertise promotional opportunities and job openings – including compensation information – to Colorado employees, employers should consider whether they want to create a separate intranet page accessible to Colorado employees or another means to communicate exclusively with Colorado employees.
- **How should employers handle confidential searches for personnel?** The EPT Rules provide an exception to posting requirements for job openings created by personnel who are unaware that they will be separated. But, the Rules do not provide for other exceptions for confidentiality, such as when an employer is expanding its business in a way it does not yet wish to advertise.
- **How should employers reconcile the promotional posting requirements with detailed succession plans or developmental plans that identify specific roles for specific incumbents when those roles become vacant?** The EPT Rules do not carve out such promotions from the posting requirements.

We will continue to update our clients on any new significant guidance from DLSS. These new rules pose significant challenges for employers with employees in Colorado, and we are available to assist employers in ensuring compliance with these new requirements while minimizing disruption to their business.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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