

## Colorado Equal Pay for Equal Work Act Goes Into Effect on January 1, 2021

November 30, 2020

In 2019, Colorado enacted the [Equal Pay for Equal Work Act](#) to go into effect on January 1, 2021. The Equal Pay Act protects against pay discrimination on the basis of sex (or sex in combination with another protected status), prohibits employers from seeking salary history, and requires employers to disclose certain compensation and promotion information.

On November 10, 2020, Colorado Department of Labor and Employment adopted the [Equal Pay Transparency \(EPT\) Rules](#), which clarify employer obligations under the Equal Pay Act.

Effective January 1, 2021, any employer with at least one employee in Colorado must comply with the following:

### **Wage discrimination prohibitions**

The Equal Pay Act prohibits employers from discriminating on the basis of sex (or sex in combination with another protected status) by paying employees of different sexes different amounts for substantially similar work, regardless of job title, based on a composite of skill, effort (which may include consideration of shift work) and responsibility.

Wage differentials may be justified based on (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; (d) the geographic location where the work is performed; (e) education, training, or experience reasonably related to the work in question; or (f) travel, if the travel is a regular and necessary condition of the work performed. Employers cannot rely on prior salary history to justify a disparity in pay.

### **Salary history prohibitions**

The Equal Pay Act also prohibits employers from seeking salary history from prospective employees or retaliating against a prospective employee who fails to disclose his or her salary history. Employers cannot rely on an applicant's salary history to determine his or her current wage. Employers also cannot prohibit employees from disclosing, comparing or otherwise discussing their wage rate.

### **Compensation posting requirements**

For all postings for job openings that could be performed by a Colorado candidate or employee (including promotions), the Equal Pay Act requires employers to include:

- a. the hourly rate, salary compensation, or range of hourly or salary compensation the employer is offering for the position;
- b. a general description of any bonuses, commissions, or other forms of compensation offered for the job; and
- c. a general description of all employment benefits, including healthcare benefits, retirement benefits, any

benefits permitting paid days off, and any other benefits that must be reported for federal tax purposes (excluding minor perks).

The EPT Rules clarify that the posted compensation range may extend from the lowest to highest pay the employer in good faith believes it may pay for that job, depending on the circumstances. As long as the range was the employer's good faith and reasonable estimate at the time of posting, the employer may ultimately pay more or less than that range.

The EPT Rules also note that this posting requirement does not apply to jobs to be performed entirely outside Colorado or postings entirely outside Colorado.

## Promotion posting requirements

Subject to limited exceptions, an employer must also announce all promotional opportunities to current employees on the same calendar day and prior to making promotion decisions. The promotion posting requirements do not apply to employees entirely outside of Colorado.

The EPT Rules provide that, "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 employee(s) in terms of compensation, benefits, status, duties, or access to further advancement."

An announcement of promotional opportunity should include the job title, the application method, and the pay and benefits information required for all job postings. Employers must notify all employees of promotional opportunities in writing, although applications may be open only to employees with certain qualifications. Employers can provide promotional opportunity announcement online or in hard copy, so long as all covered employees can access and locate the announcement.

The EPT Rules provide three narrow exceptions to the promotion posting requirements:

1. **Confidentiality.** Employers need not announce a promotional opportunity to all employees if the employer has a compelling need to keep a particular opening confidential because the position is still held by an incumbent employee who has not yet been made aware of his or her upcoming separation. If any employees are told of the confidential opportunity, the employer must notify other employees who either meet the minimum qualifications or hold a job substantially similar to those employees who were told of the opportunity. If the need for confidentiality ends before any job application deadline, the employer must promptly comply with the above posting requirements.
2. **Automatic promotion after trial period.** If an employer has a written agreement with the employee that the employer will automatically consider the employee for promotion to a specific position within one year of the employee being hired, the employer does not need to announce the promotional opportunity to other employees.
3. **Temporary, acting or interim hires.** If an employer is only looking to fill a position on a temporary basis for up to six months and the hiring is not expected to be permanent, the employer need not immediately post the promotional opportunity. If the hire may become permanent, the employer should make the required promotion posting in time for employees to apply for the permanent position.

The EPT Rules are silent as to whether normal professional progression is covered by the promotion posting requirements. If an employee "levels up" to a new title or position for which there was previously no vacancy, this may not be deemed a promotional opportunity under the definition above. But the second exception above suggests that even such "leveling up" may require a promotion posting if it occurs more than a year after the employee starts work.

## Recordkeeping requirements

Employers must keep records of job descriptions and wage rate history for each employee during that employee's employment and for two years thereafter. This helps determine if there is a pattern of wage discrepancy.

## Liability

Those who claim to be aggrieved by violation of the wage discrimination and salary history prohibitions may file a civil lawsuit no later than two years after the violation occurs. They may also file a charge with the Colorado Civil Rights Division. Employers who violate these prohibitions may be liable for damages (including backpay), reinstatement, liquidated damages, and attorney fees. Employers may avoid an award of liquidated damages (i.e., a safe harbor) if they show that the violation was in good faith, including a showing that the employer had recently conducted a thorough and comprehensive pay audit.

Those who claim to be aggrieved by violation of the posting or recordkeeping requirements may file complaints with Colorado Department of Labor and Employment within one year after the date they learn of the violation. Employers may be fined between \$500 and \$10,000 per violation.

## Prepare for compliance in Colorado

Employers with one or more employees in Colorado should review their policies and procedures to ensure compliance with the Equal Pay Act starting January 1, 2021.

Employers should review hiring practices to avoid asking salary history questions and compensation practices to ensure the anti-discrimination prohibitions are met. Employers may consider conducting pay audits to take advantage of the "safe harbor" noted above. Employers should also prepare job postings to include compensation and benefits information as required. Finally, employers should have a procedure in place to ensure same-day announcement of promotional opportunities to all covered employees.

For questions or more information on how to comply with these new requirements, please contact a member of Cooley's employment group.

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