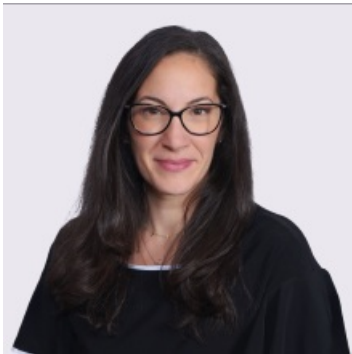


Colorado Pay Transparency: More Guidance on Job, Promotional Posting Requirements Issued

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Colorado's [Equal Pay for Equal Work Act](#) goes into effect on January 1, 2021, and applies to all entities with at least one employee in Colorado, including public bodies, schools, and private individuals. Beginning January, employers in Colorado must (1) provide formal notice to Colorado employees of “promotional opportunities,” which includes virtually every job movement, and (2) disclose pay rates or ranges in job postings for jobs that will be (or could be) worked in Colorado (including remote or “work anywhere” openings). For many companies, this means creating or revamping practices and procedures for making promotional decisions and processing internal position changes.

The Colorado Department of Labor and Employment's (CDLE) [Interpretive Notice & Formal Opinion #9 \(INFO #9\)](#), issued on December 18, clarifies CDLE's interpretation of the [Equal Pay Transparency Rules \(EPT Rules\)](#). The EPT Rules, along with a [Statement of Basis, Purpose, Specific Statutory Authority, and Findings](#) were issued on November 10, 2020. Some of these new requirements have been vague, while others have been potentially contradictory. The latest INFO may cement Colorado as the most aggressive state in the nation on pay transparency.

The EPT Rules, the Statement of Basis, and INFO #9 mandates the following for employers:

1. *Requirement to Post Promotional Opportunities.* An employer must 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.

a. *When required:* 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. EPT Rule 4.2.1.

i. *What is a “vacancy”?* With some nuances, a vacancy exists when an employer (1) backfills an existing position, (2) adds a new position, or (3) gives an existing employee a new position, including by changing their title or materially changing their authority, duties, or opportunities. Accordingly, non-competitive, in-line career advancements qualify as “promotional opportunities,” because the company creates new positions, or vacancies, for the employees who are advancing, and thus Colorado employees must be provided notice of the opportunity. INFO #9, p. 2.

ii. *What is a “promotional opportunity”?* A vacancy is a promotional opportunity so long as the job is superior to another job held by at least one employee of the

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same employer in terms of compensation, benefits, status, duties, opportunities, or access to further career advancement. INFO #9, p. 3.

b. *Procedural requirements of notice:* Notice of a promotional opportunity must:

- i. Be in writing. EPT Rule 4.2.2.
- ii. Be delivered in a method that reaches all employees. EPT Rule 4.2.3.
- iii. Go to all employees for whom it may be a promotion on the same calendar day — not only employees the employer believes to be qualified. EPT Rule 4.2.4.
- iv. Be made sufficiently in advance of the selection decision may apply — and for a reasonable duration so that those employees may be considered. INFO #9, p. 4.

c. *Substantive requirements of notice:* Notice of a promotional opportunity must:

- i. Include the job title. EPT Rule 4.2.2.
- ii. Meet the job posting requirements (see below). EPT Rule 4.2.2.
- iii. Provide the means by which employees must apply for the position. EPT Rule 4.2.2.

d. *Exceptions.*

i. *Confidentiality.* A promotional opportunity need not be posted 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, for reasons other than avoiding job posting requirements, the employer has not yet made aware they will be separated. But additional obligations exist if any employee is told of the opportunity. EPT Rule 4.2.5(A).

ii. *Automatic promotion after trial period.* No promotion posting to other employees is required for a promotion within one year of an employee being hired with a written representation (whether in an offer letter, an agreement, or a policy the employer publishes to employees) that the employer will automatically consider the employee for promotion to a specific position within one year based solely on their own performance or employer needs. EPT Rule 4.2.5(B).

iii. *Temporary, acting, or interim hires.* No immediate promotion posting is required to fill a position on a temporary basis for up to six months where the hiring is not expected to be permanent, *e.g.*, an acting or interim position. But a transition to a more permanent role would qualify as a promotional opportunity and notice of that opportunity must be provided. EPT Rule 4.2.5(C).

iv. *Continuous promotional opportunities.* “Where an employer continuously — at least once per month — either (1) hires for a specific position that would qualify as a promotional opportunity for any current employees, or (2) automatically promotes employees in an in-line job progression upon completing set requirements (*e.g.*, a certification or number of service hours): Such an employer may provide a single notice of such promotional

opportunities, rather than a notice for each individual promotion. Such notice may be provided: (1) directly to employees (e.g., by email) in a periodic notice of the promotional opportunity that is frequent enough to give employees time to apply, but at least monthly; or (2) in a static notice, such as a physical or intranet posting, or an employee handbook, (a) that is continuously accessible to employees, (b) that employees are told contains notice of promotional opportunities, and (c) that is updated promptly whenever any aspect of the promotional opportunity changes (e.g., compensation, benefits, qualifications, job description, or application process).” INFO #9, p. 4.

2. Required Contents of Job Postings. An employer must disclose 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. C.R.S. § 8-5-202.

a. *When required:* Required for all “promotional opportunities.” Colorado does not require that an employer post all jobs externally.

i. Job postings for roles to be performed entirely outside of Colorado – or with only modest travel to Colorado – *need not comply* with this requirement. EPT Rule 4.3.(B); INFO #9, p. 2.

ii. Postings for roles that are remote and are as likely to be performed in Colorado as anywhere else *must comply* with this requirement. INFO #9, p. 2.

iii. Job postings from 2020 only meet these requirements if they continue into February 2021. INFO #9, p. 1.

b. *Must include:* Employers must include the following compensation and benefits information in each posting:

i. The rate of compensation (or a range thereof), including salary and hourly, piece, or day rate compensation. EPT Rule 4.1.1(A).

1. If an employer elects to post a wage range, it 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. EPT Rule 4.1.2.

2. An employer 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. EPT Rule 4.1.2.

ii. A general description of any bonuses, commissions, or other forms of compensation that are being offered for the job. EPT Rule 4.1.1(B).

iii. 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), and any other benefits that must be reported for federal tax purposes, but not benefits in the form of minor perks. EPT Rule 4.1.1(C).

iv. This compensation and benefits information may be included through a

hyperlink in a job posting. INFO #9, p. 2. But, with the potential for broken links and risks of links not being carried through to third party posting sites, using hyperlinks may create more problems than it solves.

For additional information or to discuss how Colorado's EPT Rules might affect your promotional and job posting processes, please contact a Jackson Lewis attorney.

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