

LEGAL UPDATES

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Services

Labor & Employment
Pay Equity

Professionals

BARBARA A. GRANDJEAN
DENVER:
303.892.4458
BARBARA.GRANDJEAN@
HUSCHBLACKWELL.COM

ASHLEY W. JORDAAN
DENVER:
303.749.7297
ASHLEY.JORDAAN@
HUSCHBLACKWELL.COM

FAQs: Colorado's New Equal Pay Rules for Job Posting and Pay Transparency

Colorado's Equal Pay for Equal Work Act (EPEWA) goes into effect January 1, 2021, and the Division of Labor Standards and Statistics within the Colorado Department of Labor and Employment issued proposed regulations on September 29, 2020, regarding equal pay transparency. The Division had been conducting stakeholder meetings throughout the year, and these proposed regulations will be formally adopted after a notice and comment period with some chance of revision, likely to be finalized in November 2020.

EPEWA is a far-reaching law that prohibits employment discrimination regarding gender-based pay disparities. It provides a private right of action, administrative enforcement, limited defenses, and liquidated damages and attorneys' fees for employees who prevail in their claims against employers. Husch Blackwell's has provided previous Thought Leadership on this issue. The proposed regulations detail the claims filing and handling process within the Division.

More significantly for employers, the proposed regulations also attempt to provide clarity on Section 2 of the law, which mandates unique and strict requirements on job postings and equal pay transparency. EPEWA Section 2 identified these requirements in two short paragraphs that raise more questions than answers:

1. An employer shall 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.

2. An employer shall 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. § 8-5-201. The equal pay transparency rules are **not** final. You can also read the full text of the proposed regulations.

12 FAQs regarding EPEWA equal pay transparency and posting

1. What job postings and job announcements do the equal pay transparency rules cover?

It requires written job postings or announcements for opportunities for promotion. It does not appear to require job postings for positions that are not considered opportunities for promotion.

2. What constitutes an opportunity for promotion?

It is unclear from the equal pay transparency rules, but we suspect it includes any position potentially open to current employees that might fairly be considered a job advancement for current employees. It does not appear to apply to a job advancement opportunity that is not an open position or available to others—*e.g.*, a promotion where an Accountant Level 1 progresses to Accountant Level 2. Hopefully the regulations will be clarified to include a definition of “promotion.”

3. What does it mean to “announce, post or otherwise make known” all opportunities for promotion to all current employees?

Under 4.2.1 of the equal pay transparency rules, the communication must be in writing and must include: (A) job title, (B) compensation and benefits, and (C) means by which employees may apply for the position.

4. What are the reasonable efforts employers must take to announce a job posting?

Under 4.2.2, the communication must use the employer’s regular and customary method of communication on the same calendar day and prior to making the promotion decision. For any employees not reachable by that method, employers must use an effective alternative method to notify those employees. If employers have no or multiple regular and customary method(s) of communicating with any employee, “reasonable efforts” require advance written notice to such employee of the location or means by which promotional opportunities will be announced, posted or made known.

If an employer elects to post promotional opportunities rather than providing notice to each employee, the posting must be displayed in each establishment where employees work, in a

conspicuous location frequented by employees where it may be easily read during the workday—such as in break rooms, on employee bulletin boards, or adjacent to time clocks, department entrances and facility entrances.

5. Do the rules regarding job postings apply to internal and external job postings?

Yes. While the requirements for posting opportunities for promotion are focused on internal announcements, the equal pay transparency rules make no distinction between internal and external job postings.

6. Do the requirements apply to staffing firms and headhunters?

The equal pay transparency rules do not address third parties engaged to assist in the hiring process. Arguably, employers may be responsible for the job postings and announcements made by third parties to the same extent as if they had made the posting or announcement themselves.

7. Which employees must receive notice of the job posting?

Employers must notify all employees of all promotional opportunities, regardless of the employee's qualifications for the open position. However, employers may state that applications are open only to those with certain qualifications.

8. What compensation and benefits information must the job posting include?

A posted compensation range may extend from the lowest to the highest pay the employer in good faith believes it might pay for the particular job. 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.

Compensation includes bonus, commissions and all other forms of compensation. Presumably, the good-faith estimate requirement will permit employers to identify broad ranges for discretionary bonuses and variable commissions.

9. Does this apply to all employers in Colorado?

Yes, the equal pay transparency rules apply to all Colorado employers. The only exempt employers are those that are non-Colorado employers. 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. Out-of-state employers with employees in Colorado are subject to the law's requirements.

10. Does the law apply to positions outside of Colorado?

Potentially. Under 4.3.3, the equal pay transparency rules may apply to Colorado employers with jobs outside of Colorado if two conditions are met: (1) an employer with one or more employees in Colorado has a job that it requires or prefers to be performed outside Colorado, and (2) the employer accepts applicants from locales at least as distant as Colorado. This controversial, and potentially unenforceable, provision would seem to mandate that multi-state employers with a Colorado workforce of one or more are required to meet the posting and equal pay transparency requirements for every position that a Colorado employee might apply for.

11. Does this apply to employers of all sizes?

Yes. The law does not exclude small employers.

12. How will the law be enforced?

The equal pay transparency rules provide no guidance beyond what is in the text of the EPEWA regarding how the Division will enforce the law. EPEWA provides for fines between \$500 and \$10,000 per violation of the posting and equal pay transparency provisions.

Contact us

Husch Blackwell will provide updated FAQs as soon as the equal pay transparency rules are finalized. If you have questions about your obligations regarding the EPEWA, contact Barbara Grandjean, Chris Ottele, Ashley Jordaan, Sonia Ramirez Anderson or your Husch Blackwell attorney.