



Colorado's Equal Pay for Equal Work Act Starts January 1, 2021

No Pay Discrimination for Substantially Similar Work, and New Job Posting Rules

On January 1, 2021, the Equal Pay for Equal Work Act ("EPEWA" or "the Act") becomes effective in Colorado. C.R.S. § 8-5-101 *et seq.* The Act applies to virtually all employers in the state, regardless of size, and is intended to "close the pay gap" between men and women and "ensure that employees with similar job duties are paid the same wage rate regardless of sex," which it defines broadly as "gender identity." The Act has two major parts: (1) Part 1 amends Colorado's previous equal pay statute by broadening the prohibition against wage discrimination to include paying employees of different sexes less for "substantially similar work"; and (2) Part 2 provides for "transparency in pay and opportunities for promotion and advancement" by requiring employers to announce opportunities for promotion and to disclose wage and benefit information in all job postings.

Part 1: Sex Discrimination in Wages for Substantially Similar Work

Both state and federal law have long prohibited sex discrimination in wages for "equal work." The Act goes farther and bans sex discrimination in wages for "substantially similar work, regardless of job title, based on a composite of skill, effort . . . and responsibility."

A wage differential based on one or more of the following factors is justifiable:

- a seniority system
- a merit system

- a system that defines earnings by quantity or quality of production
- geographic location where the work is performed
- education, training, or experience to the extent they are reasonably related to the work in question, or
- travel if it is a regular condition of the job.

If the wage differential is challenged in litigation, the employer must also show that to the extent it relies on one or more of the above factors, each factor is applied reasonably, such factors account for the entire wage differential, and prior wage history was not relied upon to justify a disparity in current wage rates.

Notably, the Act also specifically prohibits an employer from asking about or relying upon the wage rate history of prospective employees, a practice that has also been banned in several other states because of the concern that it perpetuates wage disparities. The Act further provides that an employer cannot prohibit employees from discussing or disclosing their wage rates.

The primary remedy for violations of the discrimination provisions will be civil lawsuits, which must be filed within two years after the alleged violation. Each occasion of wage discrimination will be considered a violation, meaning that each paycheck that the employee receives is treated separately. This precludes a defense that the discriminatory practice started many years ago and was merely continued into the past two years. The remedies for violations are economic damages equal to the difference between the employee's actual wages and the wages he or she would have been paid absent the discrimination, liquidated damages in an amount equal to economic damages, and attorney fees. As a defense to liquidated damages, the employer may show that it acted in "good faith" and had "reasonable grounds" for believing it did not discriminate. To support its good-faith defense, the employer may rely upon a pay audit of its workforce within two years before the lawsuit.

Part 2: Job Posting and Promotional Opportunities

The job posting or "transparency" rules may be even more significant for everyday activities of employers than the anti-discrimination provisions. The job posting requirements require the employer to "disclose in each posting for each job the

hourly or salary compensation, or a range of hourly or salary compensation, and a general description of all the benefits and other compensation offered to the hired applicant." The 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."

The Colorado Department of Labor and Employment (CDLE) has issued rules about the posting of jobs and opportunities for promotion, which can be accessed from this [link](#). Employers must include the following compensation and benefits information in each posting:

- the hourly rate or salary compensation (or a range) that the employer is offering for the position;
- a general description of any bonuses, commissions, or other forms of compensation offered for the job; and
- a general description of all employment benefits, including health care, retirement, paid days off, and other benefits, excluding minor perks of the job.

Regarding opportunities for promotion, the CDLE rules require:

- The communication must be in writing and include at least the job title, compensation and benefits as described above, and means by which employees may apply for the position.
- Any methods are permitted by which all covered employees can access within their regular workplace, online or in hard copy, and are told where to find required postings or announcements.
- The employer must notify all employees of all promotional opportunities, and may not limit notice to those employees it deems qualified for the position. However, the employer may state that applications are open only to those with certain qualifications, and may screen or reject candidates based on such qualifications.

The job posting rules provide exceptions when there is a need for confidentiality because the current incumbent in the position could be separated; the position is an automatic promotion after a trial period; and for temporary or interim hires. For employers who operate in other states besides Colorado, the rules clarify that (1) the promotion posting requirements do not apply to employees entirely outside

Colorado; and (2) the compensation posting requirements do not apply either to (a) jobs to be performed entirely outside Colorado, or (b) postings entirely outside Colorado.

Unlike the anti-discrimination provisions, the transparency requirements in Part 2 are administered only by the CDLE under its administrative complaint procedure. There is no private right to file a lawsuit.

Key Takeaways

- EPEWA will probably lead to extensive litigation about whether particular jobs are substantially similar to jobs with different titles held by employees of the opposite sex.
- Employers should carefully review their pay practices to ensure that wage differentials are justifiable based on the factors in the Act, and consider conducting a pay equity audit at least every two years.
- Employers should review their job posting procedures and comply with the requirements to post all jobs in Colorado, provide the compensation and benefits information, and notify employees of promotional opportunities.

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