



Robert Thomas

Of Counsel
303.295.8381
Denver
rmthomas@hollandhart.com

Colorado Department of Labor and Employment Issues Final Equal Pay Transparency Rules

Publication — 11/13/2020

On September 29, 2020, the Colorado Department of Labor and Employment ("CDLE") issued proposed rules, called the Equal Pay Transparency Rules (the "Rules"), that would potentially govern the enforcement and implementation of Colorado's Equal Pay for Equal Work Act (the "Act")--most specifically, the provisions of the Act governing employer obligations to disclose and announce promotional opportunities to all employees when such opportunities arise. After a public hearing and commentary period, the CDLE finalized the Rules on November 10, 2020, albeit with several notable changes and modifications. Both the Act and the Rules are set to go into effect as of January 1, 2021.

What is a "Promotional Opportunity?"

Generally speaking, the Transparency in Pay and Opportunities for Promotion and Advancement provisions of the Act require employers to 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 any promotion decisions. However, neither the Act itself nor the prior proposed Rules defines what constitutes a "promotional opportunity."

The adopted Rules provide some additional clarity on this issue, stating 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." The use of the term "vacancy" by the CDLE suggests that an employer's obligations to announce promotional opportunities would not necessarily apply to "in line" advancements, such as, for example, a "Caterer I" employee moving up to "Caterer II" due to the needs of the employer or the simple passage of time, rather than as a particular reward or recognition from the employer. Again, apart from certain limited exceptions described below, it is unknown whether the CDLE's definition is intended to apply to all advancement opportunities, or only those promotional opportunities in which there is a current or anticipated vacancy in a new or existing position.

Regarding employee qualifications for promotional opportunities, the adopted Rules still require employers to notify all employees of promotional opportunities, and employers may not limit notice to only those employees that it deems "qualified," but employers may state that applications are only open to employees with certain qualifications. Under the adopted Rules, however, employers may screen or reject candidates based on such qualifications. Of course, such stated "qualifications" and

any screening or rejections under the same must not run afoul of any federal or state anti-discrimination laws.

Exceptions to Promotional Opportunity Notification Requirements Based on Confidentiality and Other Issues.

Previously, the Rules generally required employers to notify employees, in writing, of promotional opportunities—including information regarding job titles, compensation (including bonuses and/or commissions), and benefits—without regard to the potential confidentiality of such information. However, the adopted Rules soften this requirement by permitting certain exceptions to promotional opportunity communications and postings based on confidentiality and other practical concerns.

Regarding confidentiality, the adopted Rules permit an employer to not post or publish 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 is unaware that he/she will be separated. Under such circumstances, if an employer still elects to notify any employees of the opportunity, then all employees must be notified who either meet the minimum qualifications of the position or have a job "substantially similar" to those employees being told of the opportunity. If the need for confidentiality ends before the deadline to apply for the position, then the employer must "promptly" comply with the Act and the Rules in full.

Other limited exceptions to the Act's and the Rules' notification requirements are based on more practical concerns that were not previously addressed by the prior version of the Rules. For example, when an employer hires an employee and makes a written representation (via an offer letter, policy document, or express agreement) to the employee that the employer will "automatically consider" the employee for a promotion to a specific position within one year based solely on performance and/or employer needs, then the employer has no obligation to post such a promotional opportunity to all other employees—at least during that first year.

Likewise, no promotion opportunity posting is required to fill temporary positions for up to six months when the position/hiring is not expected to be permanent. But, if the hire "may become permanent," then the required promotion posting under the Act and Rules must be made in time for employees to apply for the permanent position.

Simplification of Rules Governing Geographic Applicability to Employees and Job Positions

The prior version of the Rules contained several caveats as to their applicability depending on whether the job at issue was to be performed within or outside Colorado (or anywhere for that matter), and whether eligible employees were located within or outside Colorado. The adopted Rules dramatically simplify these provisions, and provide that the promotion posting requirements of Section 201(1) of the Act do not apply to employees entirely outside Colorado, and the compensation posting

requirements of Section 201(2) of the Act do not apply to either 1) jobs to be performed entirely outside of Colorado, or 2) postings entirely outside Colorado. Accordingly, the new Rules effectively eliminate the need to publish promotional opportunities to employees outside of Colorado, or provide compensation information when either the job itself is to be done outside of Colorado or the promotional posting itself takes place outside Colorado, which is a significant change from the more inclusive language contained in the prior Rules.

Timing of Complaints

Last, the adopted Rules provide that the CDLE will not accept complaints of violations of the Rules that occur prior to January 1, 2021. Previously, the Rules provided that the Division would not accept complaints for violations occurring before the later of January 1, 2021 or more than 12 months prior to the date of the complaint.

Takeaways for Employers

While the adopted Rules provide additional clarity, simplification, and flexibility, both the Act and the Rules as adopted nonetheless impose significant employer obligations to post and publish promotional activities among the workforce in a diligent and timely manner, and it is unknown how these obligations will affect employers in practice in the future. As state and local guidance frequently changes, it is prudent to consult with legal counsel to ensure your business policies and practices are compliant.

The adopted Rules are located at 7 C.C.R. 1103-13, and the CDLE has provided a redlined version of the adopted Rules here:

<https://cdle.colorado.gov/proposed/adopted-rules>.