



Top 12 Things Employers Need to Know About the Colorado Equal Pay for Equal Work Act

Insights

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Colorado's Equal Pay for Equal Work Act became effective at the beginning of 2021, but employers across the state continue to have questions about the scope of the new law. While the Colorado Department of Labor and Employment has attempted to provide clarity around the job posting and pay transparency provisions in the Act – adopting Equal Pay Transparency Rules, issuing its Statement of Basis, Purpose, Specific Statutory Authority, and Findings, and providing its Interpretive Notice and Formal Opinion #9 – there remain some common compliance questions that are not easily uncovered in these documents. We have reviewed all of the detailed legal rules and guidance to develop a list of the top 12 things employers need to know about the Act.

Top 12 Employer Takeaways

1. The Act applies to any entity employing at least one employee working in Colorado.
2. The Act requires employers to keep records of job descriptions and wage rate history for each employee for the duration of the employment – plus two years after the end of employment.
3. The Act prohibits employers from:
 - Paying one employee a wage rate less than the rate paid to an employee of a different sex (or sex plus another protected status) for substantially similar work absent legally justified reasons;
 - Asking about or relying on an applicant's salary history;
 - Restricting employees from discussing their compensation with other employees; and
 - Retaliating against an applicant who fails to disclose their wage history.
4. Employers must post the compensation range and a general description of all employment benefits in their job postings. An employer may include a hyperlink to compensation and benefits information.
 - An employer ultimately may pay more or less than the posted range. Only the Colorado range is required for multi-state or remote postings; postings may specify a different range for different parts of Colorado.
 - The compensation range must be for the particular job advertised (*g.*, an employer cannot post a \$70,000-\$100,000 range for a junior accountant position just because it pays senior

accountants at the high end of that range, but it can post a \$70,000-\$100,000 range for an accountant if it does not limit the posting to a junior or senior accountant).

5. Including compensation and benefits in job postings is required for all jobs tied to a location in Colorado or a remote job. **NOTE:** The Department has recently taken the position that a company that omits compensation by posting that a remote job is available for anyone in any location except for Coloradoans is not compliant with the Act.
6. Employers must make reasonable efforts to announce promotional opportunities to all Colorado employees prior to making a promotion decision. 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 at least one employee in terms of compensation, benefits, status, duties, or access to further advancement. The Department has stated that companies may not limit the announcements to only “qualified” employees.
7. Announcements for promotional opportunities must include the job title, means by which employees may apply, and compensation and benefits for the position. Promotional opportunities may also include required qualifications and intended hire (g., “Jo Doe is recommended for promotion to senior accountant. Salary \$50-70,000; health insurance & 401k. Interested applicants contact S. Poe in HR.”). Employers may post the announcements by any method so long as all covered employees can access them within their regular workplace (either online or in hard copy) and are told where to find required postings or announcements.
8. If an employer regularly (at least monthly) hires or automatically promotes employees, including in-line lateral promotions, into a specific position upon the completion of set requirements, an employer may issue a one-time static notice of the promotional opportunity (g., in an employee handbook).
9. The exceptions to the job postings requirements are (1) confidentiality from an incumbent employee being replaced, (2) automatic promotion after a trial period of up to a year, and (3) temporary/acting/interim hire for up to six months (employer must post if the position becomes permanent).
10. The Act does not place any restrictions on the hiring process or who is hired. Employers may already know who the position is intended for, may state that applications are open only to those with certain qualifications, and may screen or reject candidates based on qualifications. There is not a set number of days a promotional opportunity must be posted before the hiring decision. There is no requirement that an employer must receive or consider applications.
11. A promotional opportunity must be provided for any job tied to a location in Colorado, a remote job, or a job tied to a location outside of Colorado. With respect to jobs tied to a location outside of Colorado, the employer is not required to include the compensation for the position.
12. Employers that violate the job posting requirements may be required to pay a fine of between \$500 and \$10,000 for each violation. The Department will waive all fines if an employer brings its postings into compliance after the first violation.

What's Next?

A lawsuit challenging the constitutionality of the law's compensation and promotional postings requirements was filed against the Department in Colorado federal court soon after it was enacted. However, the court rejected the plaintiff's request to issue a preliminary injunction to halt application or enforcement of the Act in May, and all parties agreed to a dismissal of the lawsuit in early July. In other words, you now need to adjust your practices and policies to ensure compliance with the Act as it will be the law of the land for the foreseeable future.

We will monitor the developments in Colorado and provide updates as warranted, so you should ensure you are subscribed to Fisher Phillips' Insight system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the author of this Insight, any attorney in our Denver office or any member of our Pay Equity Practice Group.

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