

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

OWEN DAVIS  
DENVER:  
303.749.7268  
OWEN.DAVIS@  
HUSCHBLACKWELL.COM

SHAWNA RUETZ  
DENVER:  
303.749.7245  
SHAWNA.RUETZ@  
HUSCHBLACKWELL.COM

# UPDATED | FAQs: Colorado's Equal Pay Rules for Job Posting and Pay Transparency

Members of Husch Blackwell's Labor & Employment team in Denver shared Colorado's New Employments Laws: What to Know (2023) on June 7, 2023.

Colorado's Equal Pay for Equal Work Act (EPEWA) went into effect January 1, 2021. The Division of Labor Standards and Statistics within the Colorado Department of Labor and Employment adopted final regulations on November 10, 2020, regarding equal pay transparency. On July 21, 2021, the Division revised its Interpretive Notice and Formal Opinion #9 (INFO #9) to provide clarity around the job posting and pay transparency provisions of EPEWA and under the Equal Pay Transparency Rules (EPT Rules) that also went into effect on January 1, 2021. These provisions have generated the most questions from human resource and internal legal teams. Below we have revised and updated our earlier FAQs to provide the most up-to-date guidance in a single resource.

EPEWA is a far-reaching law that, subject to six narrow exceptions, prohibits employment discrimination by paying an employee of one sex a wage rate less than the rate paid to employees of a different sex performing substantially similar work. Part 1 of the EPEWA 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. Read Husch Blackwell's previous thought leadership on Part 1.

The Division's EPT Rules and INFO #9 have focused less on Part 1 of the EPEWA and instead attempt to provide clarity on Part 2 of the law, which mandates unique and strict requirements on job postings and equal pay transparency. You can read the full text of the EPT Rules [here](#). You can read the full text of INFO #9 [here](#).

EPEWA Part 2 identified these posting and transparency requirements in two short paragraphs that raised 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.

Even with the EPT Rules in place and the additional guidance from INFO #9, Employers still face some unanswered questions.

## **15 FAQs regarding EPEWA equal pay transparency and posting requirements**

### **1. What job postings and job announcements do the Equal Pay Transparency Rules cover?**

The EPT Rules require written job postings to announce promotional opportunities. The Rules do not require job postings for positions that are not considered opportunities for promotion. INFO #9 makes clear that employers are not required to post jobs unless needed to announce promotional opportunities. The EPT Rules also do not cover general communications that an employer is hiring or accepting applications for non-specified positions (such as “Help Wanted” signs). However, if an employer chooses to advertise for external candidates with a job posting, which is a standard practice for most employers, the employer must comply with the regulations. See Question #13 below for 2020 postings that continue into 2021.

Additionally, INFO #9 clarifies that the EPT Rules only cover job postings for either (1) work tied to Colorado locations or (2) remote work performable anywhere, but not (3) work performable only at non-Colorado worksites.

### **2. What is a promotional opportunity?**

This simple question has created the most uncertainty for employers. Under EPT Rule 4.2.1, a “promotional opportunity” is defined as a “vacancy” in an existing or new position that could be considered a promotion for any current employee in terms of compensation, benefits, status, duties or access to further advancement.

The Rules identify a number of exceptions to the requirement to announce promotional opportunities: (1) when the employer has a compelling need to keep an opening confidential because the position is still held by the incumbent employee; (2) when the promotion is automatic after a trial period according to a written agreement; or (3) where someone is hired into a temporary, acting or interim role. If the hire may become permanent, the promotional opportunity must be made in time for other employees to apply for the permanent position. EPT Rule 4.2.5.

“In-line” or “elevator” promotions are promotional opportunities that generally require job posting, subject to the exceptions identified above. These are promotions where a current employee is promoted to a new position on a standard career progression without an incumbent in the role, such as when an Accountant Level 1 is promoted to Accountant Level 2. The Division explained its reason for not creating a blanket exception for “in-line” or “elevator” promotions by stating that providing notice of these types of career advancement opportunities to all current employees lets others know that they too can seek the same advancement. Since these types of promotions are not always into a “vacant” position, the Division’s explanation is difficult to square with the language of the rule. You can read the full text of the Division’s Statement of Basis, Purpose, Specific Statutory Authority, and Findings [here](#).

INFO #9 attempts to provide further clarity around what constitutes a “vacancy.” A vacancy in an “existing position” occurs when an existing position that the employer intends to fill is open or is held by a departing employee.

A vacancy in a “new position” occurs when an employer: (1) adds a position; or (2) gives an existing employee a new position, including by changing their title, and/or materially changing their authorities, duties or opportunities. A vacancy does not occur if the employer is merely changing pay or adding a title to reflect an externally obtained degree or certification (*e.g.*, “CPA” or “LCSW”). According to the Division, a vacancy in a new position **does** include a lateral job change, or a promotion along a fixed, in-line career trajectory, for which a current employee is eligible.

The Division provides several examples in INFO #9 of circumstances in which it would consider a vacancy to be a promotional opportunity. In one example, restructuring a team to give an employee a supervisory role without any compensation increase, but with a higher title and authority, would be considered to be a promotional opportunity. In another example, even an entry-level position could be considered a promotional opportunity if it is an entry-level position into a department with more growth opportunities than other entry-level positions in the company.

Although the Division states that hiring can occur without a job posting, such instances appear rare given the Division’s expansive interpretations of the statutory language “opportunities for promotion” and the regulation’s term “vacancy.” The Division’s interpretation of those terms to include in-line advancement and restructured roles are vulnerable to challenge and appear

inconsistent with the common, everyday use of those terms. The Division will defend its broad interpretation as being consistent with the pay transparency principles underlying Part 2. It remains unclear what level of vigor the Division will attempt to enforce its broad understanding of Part 2. Part 2's enforcement mechanism is limited to the fines described in FAQ #12 below.

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

Under 4.2.2 of the EPT 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. INFO #9 states that a description of the position can be used in lieu of a job title.

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

Under Rule 4.2.3 an employer makes “reasonable efforts” using any method by which all covered employees can access the posting information at work either online or in hard copy and after they have been told where to find the required postings or announcements. If a particular method does not reach all employees, then an alternative method must be used for those employees.

INFO #9 clarifies that “reasonable efforts” to notify employees of promotional opportunities means providing notice sufficiently in advance of the promotion/hiring decision for employees to apply. If the information is posted, it must be posted for long enough that employees can reasonably access it. In certain circumstances, such as an automatic promotion of employees in an in-line job progression upon completing set requirements (*e.g.*, a move from a junior to a senior role), the notice can be included in a fixed location such as an employee handbook, so long as that notice includes the requisite compensation and benefits information and information about how to apply for the promotion to the senior role (*e.g.*, completion of a sufficient number of in-service hours).

### **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 EPT Rules make no distinction between internal and external job postings.

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

The EPT 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.

INFO #9 does not specifically address this question either, but it does clarify that entities that are merely sharing or re-posting the jobs of other employers (*e.g.*, a business operating a website that posts jobs from employers) are not liable for non-compliant postings under the EPT Rules.

## **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. Employers may be surprised or reluctant to disclose pay and benefits for open positions to their entire workforce, including those who are not eligible for the position. The rules and the statutory language emphasize the goal of transparency. These requirements, particularly if adopted elsewhere in the country, may result in a cultural shift regarding expectations of privacy surrounding compensation and benefits.

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

Each job posting must include (1) the rate of compensation (or a range thereof), including salary and hourly, piece, or day rate compensation; (2) a general description of any bonuses, commissions, or other compensation; and (3) a general description of all benefits the employer is offering for the position

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. INFO #9 further explains that the posted range must represent what the employer "genuinely believes" it would be willing to pay and that the range may depend on circumstances including employee qualifications, employer finances and other operational considerations.

Employers reluctant to disclose compensation ranges should proceed with caution as the Division has provided clear direction to post a range reflecting the lowest and highest amounts that the employer "actually" or "genuinely believes" will be paid. A range's bottom and top cannot be stated with open-ended phrases such as "30,000 and up" or "up to \$60,000."

Regarding benefits, INFO #9 clarifies that employers must describe only the general nature of the benefits and what they provide, not specific details or dollar values (*e.g.*, posting the position comes with health insurance without needing to detail premium costs or coverage specifics). Employers cannot use open-ended phrases such as "etc." or "and more" instead of generally describing all of the benefits provided. Benefits that must be generally described include health care, retirement benefits, paid days off, and any tax-reportable benefits. This excludes "minor perks" like use of an on-site gym or employee discounts.

See Question #14 below for more guidance about the logistics of publishing this compensation and benefits information.

## **9. Does this apply to all Colorado employers?**

Yes, the EPT 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?**

Under EPT Rule 4.3 (A), the promotion posting requirements do not apply to employees who are entirely outside of Colorado. However, if a Colorado employer has a promotion opportunity available anywhere in the company, even outside of Colorado, its Colorado employees must be notified. Under EPT Rule 4.3(B), job postings and promotional opportunities do not need to include compensation information if the job will be performed entirely outside of Colorado or if the job is posted entirely outside Colorado (*i.e.*, not on the internet).

INFO #9 instructs that the out-of-state exception applies "narrowly," only where the job is tied to non-Colorado worksites (*e.g.*, waitstaff at restaurants outside Colorado). Therefore, postings for remote positions that can be performed anywhere are subject to the EPEWA's requirements, even if the posting states that Colorado applicants won't be accepted. However, a non-Colorado job that may include "modest" travel to Colorado is still considered an out-of-state job not subject to the transparency requirements.

## **11. Does this apply to employers of all sizes?**

Yes. The EPEWA and EPT Rules do not exclude small employers.

## **12. How will the law be enforced?**

The EPT 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.

INFO #9 outlines the Division's procedures for investigating complaints and remedying violations. The failure to provide compensation and benefit information is one violation regardless of the number of postings listing the job. Similarly, a failure to notify employees of one promotional opportunity is one violation regardless of how many employees were not notified. Failure to maintain records of an employee's job description and wage rate history, as required by the EPEWA's recordkeeping provision (see Question #15), is one violation per employee. The Division has the authority to waive fines for the as yet undefined "good cause shown."

On July 21, 2021, the CDLE issued a Notice Regarding Labor Law Compliance, which can be found here. In it, the CDLE states that it has received “numerous complaints that remote job postings lack required pay disclosure and exclude Coloradans from consideration.” Acknowledging that “it takes time to fully understand and implement new labor laws,” the Notice serves to remind Colorado employers that, whether or not Colorado applicants are excluded, postings for remote positions must still comply with the pay transparency rules. The Notice further offers employers the opportunity to seek advice from the CDLE on particular postings.

Given the recent adoption of the EPWA and EPT Rules, the CDLE may send letters, like this Notice, in the future instead of immediately launching investigations. Employers may check the CDLE’s website here for similar communications under “Other Published Guidance.”

Under EPT Rule 3.2.4, the Division will not accept complaints of violations that occurred before January 1, 2021.

### **13. What happens to 2020 postings that are still up after January 1, 2021?**

According to the prior version of INFO #9, a 2020 job posting that extended past January 1, 2021, should have been taken down or made compliant if it remained posted on or after February 1, 2021.

### **14. Can employers include the required compensation and benefits information in a link accessible from the job posting rather than including the information in the job posting itself?**

INFO #9 provides limited relief to employers who may be concerned about making their compensation information “public.” In electronic postings (*e.g.*, webpages or e-mails), employers do not need to include all of the required compensation and/or benefits information in the posting itself provided that the information is hyperlinked or accessible via a URL within the electronic posting. There must be a clear indication in the posting to the reader that the hyperlink or URL provides access to the required information for that position. Employers have the responsibility of ensuring continuous compliance with the functionality of links and keeping the information up to date.

### **15. What are the recordkeeping requirements?**

Under C.R.S. § 8-5-202, employers are required to maintain records of job descriptions and wage rate history for each employee. According to INFO #9, such records must be kept for the duration of the employee’s employment history plus two years. This includes records of salary or hourly wages, benefits, bonuses, commissions, other compensation received, and any changes to the employee’s job description or compensation over time.

## **Contact us**

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If you have questions about your obligations regarding the EPEWA, contact Barbara Grandjean, Ashley Jordaan, Chris Ottele, Sonia Ramirez Anderson, Owen Davis, Shawna Ruetz or your Husch Blackwell attorney.