

NEW COMPLIANCE AND JOB POSTING REQUIREMENTS FOR CO EMPLOYERS UNDER THE EQUAL PAY FOR EQUAL WORK ACT

To address and eliminate gender pay disparities, the Colorado legislature enacted the Equal Pay for Equal Work Act (the Act), which will take effect on Jan. 1, 2021. The Act aims to close gender wage disparities by requiring that employees, regardless of their sex, be paid the same wage rates for performing substantially similar work. “Substantially similar work” will be based upon the skill and effort necessary to perform the job, and the job responsibilities. Differing job titles and minor differences in the required skill, effort and duties will not render jobs dissimilar. The only permissible exception to this rule is when pay differentials are based solely upon:

- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production;
- the geographic location where the work is performed;
- education, training or experience to the extent that they are reasonably related to the work in question; or
- travel, if the travel is a regular and necessary condition of the work performed.

PROHIBITIONS

In addition to impermissible wage differentials, employers may not:

- seek or require disclosure of a prospective employee’s prior wage rates as a condition of employment or rely on a prior wage rate of a prospective employee to determine a wage rate;
- discriminate or retaliate against a prospective employee for failing to disclose the prospective employee's wage rate history;
- discharge, discipline, discriminate against, coerce, intimidate, threaten or interfere with an employee or other person because the employee

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or other person inquired about, disclosed, compared or otherwise discussed the employee's wage rate;

- prohibit an employee from disclosing the employee's wage rate; or
- require an employee to sign a waiver that prohibits the employee from disclosing wage rate information.

EMPLOYER JOB POSTING REQUIREMENTS FOR JOB APPLICANTS AND PROMOTIONAL OPPORTUNITIES¹

The Act requires employers to provide all job applicants notice of the hourly rate or salary rate range, and general description of all the benefits and other compensation offered to the hired job applicant. A posted compensation range from the lowest to the highest pay the employer would pay for the job opening or promotion is sufficient.

Employers are also required to make "reasonable efforts" to announce or post a promotional job opportunity that complies with the salary and benefit notice requirements for job applicants to all Colorado employees, and may not limit notice to those employees it deems qualified for the position, but may state that applications are only open to those employees with certain qualifications. "Reasonable efforts" can include the employer's regular and customary methods of communicating with employees, e.g., posting in breakrooms, email communication.

Specific cases that require notice:

- Colorado employer with a Colorado job, wherever advertised. If an employer has one or more Colorado-based employees and has a job to be performed in Colorado, the employer must notify all of its employees in any state for whom the job would be a promotion.
- Colorado employer with remote job. If an employer with one or more employees in Colorado has a job that can be performed anywhere, because the job has no requirement or preference for the employee to reside in a particular area, the employer must notify all of its Colorado employees for whom the job would be a promotion. If the job is either posted in Colorado or accessible through the internet, it must comply with the compensation and benefits notice requirements.
- Colorado employer with job outside of Colorado. The proposed rule provides "if an employer with one or more employees in Colorado has a job that it requires or prefers to be performed outside Colorado, and if the employer accepts applicants from locales at least as distant as Colorado . . . the employer must notify all of its Colorado employees for whom the job would be a promotion."
- Non-Colorado employer. An employer with no current employees in Colorado does not have to comply with the Act until it employs an

individual who works in Colorado.

RECORD-KEEPING REQUIREMENTS

- Employers must keep records of job descriptions and wage rate history for each employee for the duration of the employee's employment, and for two years after the employee's employment ends.

LEGAL RAMIFICATIONS

If an employer violates the Act's prohibitions on wage discrimination, a job applicant or an employee can file a charge of discrimination with the Colorado Civil Rights Division, seek mediation or directly file a civil complaint in state district court. Available damages and remedies include economic damages in an amount equal to the difference between the amount the employer actually paid the employee and the amount that the employee would have received had there been no violation of the Act; plus liquidated damages in an amount equal to the employee's economic damages; reinstatement; promotion; and reasonable attorneys' fees and costs. If an employer can show that the act or omission giving rise to the violation was in good faith, then the court cannot award liquidated damages.

NEXT STEPS FOR EMPLOYERS

Employers should:

- Establish a record-keeping system that accurately tracks job positions and wage rate history for each employee that works in Colorado.
- Review current employees' wages and job descriptions to ensure jobs that they do not violate the Act's prohibitions against wage discrimination. Importantly, this should be done to minimize the risk of disparate impact/disparate treatment claims that could be asserted.
- Revise employee handbooks, policies and procedures regarding employee wages and recordkeeping.

Our attorneys will continue to monitor for any developments on this topic and others. Should you have any further compliance questions, please contact one of the authors or your regular Armstrong Teasdale attorney.

¹The Colorado Department of Labor and Employment (CDLE) has proposed Equal Pay Transparency Rules, 7 CCR 1103-13, concerning job posting requirements to comply with the Act. If adopted, these proposed will also become effective on Jan. 1, 2021.