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Colorado Department of Labor and Employment Clarifies Job and Promotion Posting Requirements

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Colorado's Equal Pay for Equal Work Act (EPEWA) and the accompanying Colorado Equal Pay Transparency (EPT) Rules took effect on January 1, 2021. As discussed in a previous Cooley alert, the EPT Rules impose various job and promotion posting requirements on any employer with at least one employee in Colorado.

On July 21, 2021, the Division of Labor Standards and Statistics of the Colorado Department of Labor and Employment issued an Interpretive Notice & Formal Opinion #9 (INFO) addressing the EPT Rules. On the same day, the CDLE issued a Notice Regarding Labor Law Compliance to employers with remote jobs postings that lack pay and benefit disclosure.

The INFO and the Notice provided several important clarifications regarding employer obligations under the EPEWA and the EPT Rules.

Compensation posting requirements

A significant clarification from the Division is that employers can't avoid compensation and benefit disclosures for remote job postings by excluding Colorado candidates.

Since the EPEWA and the EPT Rules took effect earlier this year, some employers have expressly excluded Coloradans from consideration for remote positions, on the theory that such exclusion exempts those positions from the pay and benefit disclosure requirements.

The Division noted this trend and rejected this interpretation. According to the Division, the EPEWA "expressly covers all jobs, so a Colorado-covered employer's posting of work performable anywhere is not within the narrow implied exception for out-of-state worksites to which Colorado law is arguably inapplicable." Therefore, declaring a preference not to hire Coloradans does not eliminate the EPEWA's pay disclosure duty.

The Division further stated that job postings can't use open-ended phrases when disclosing compensation and benefits. Compensation ranges can't be left unclear with phrases such as "$30,000 and up" or "up to $60,000." Similarly, employers must include the required general description of all benefits and can't use terms such as "etc." or "and more."

Additionally, the Division explained that employers can include links to compensation and benefits information in electronic job postings, with a clear indication in each posting that the link provides access to the required disclosure.

Promotion posting requirements

The Division also confirmed that natural career progression is a promotion under the EPEWA. Therefore, employers must notify Colorado employees of career progression-type promotions, unless such promotion is promised in writing upon hiring and occurs within one year of hire.

Another important clarification from the Division affects employers that operate in multiple states. While multistate employers must still notify Colorado employees of all promotional opportunities regardless of location, employers need not include compensation or benefits for promotional opportunities outside of Colorado (except for remote positions).

According to the Division, employers may combine multiple promotions into one notice, as long as employees have sufficient time to apply for all positions in that notice. Similarly, where employers continuously hire for a position that would qualify as a promotional opportunity or automatically promote employees in an in-line job progression, employers may give a single notice of all such promotional opportunities. The notice may be provided directly to employees or in a static notice, such as an intranet posting or an employee handbook, that is continuously accessible to employees and updated promptly.

Division enforcement

The Division may initiate an investigation based on information it receives from a formal or anonymous complaint. If the Division finds a violation, it may order the employer to remedy the violation and/or issue fines of $500 to $10,000 for each violation. Failure to include compensation and benefit information in one or more postings for a single job is one violation, regardless of the number of postings listing the job. Failure to notify employees of a single promotional opportunity is one violation, regardless of how many employees weren't notified.

In the Notice, the Division shared its own research that an overwhelming majority of Colorado's largest employers brought their job postings into compliance shortly after the EPEWA took effect this year. In the initial months of enforcement, all employers informed of violations agreed to fix their postings, and the Division waived all potential fines in each case.

For employers with noncompliant job postings, the Division offered flexibility on a timeframe to modify postings. Employers may inform the Division by August 10, 2021, to indicate the date by which all covered job postings will include the required pay and benefits disclosures.

Compliance considerations

While the INFO and the Notice are not binding law, they do represent the Division's official position and reflect how the Division will interpret and enforce the law. Employers with one or more employees in Colorado should review their policies and procedures in light of the Division's new guidance.

If you have questions or would like more information on how to comply with the EPEWA and the EPT Rules, please contact a member of Cooley's employment group.

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