

## **Alert** | Labor & Employment



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### **Colorado’s Equal Pay Act: Amended Job Notification Requirements and Increased Enforcement Ahead**

Colorado Governor Polis recently signed into law **an amendment** to the Colorado Equal Pay for Equal Work Act (the Act), most of which will be effective Jan. 1, 2024 (the Amended Act). The Act remains one of the most comprehensive equal pay laws in the United States. The Amended Act reflects the Legislature’s intention to decrease pay disparities for Colorado workers by altering employer obligations with respect to job and promotional opportunity postings.

More specifically, the Act, which took effect Jan. 1, 2021, revised Colorado’s law regarding equal pay, including to: (1) prohibit discriminatory wage payments on the basis of sex (or sex combined with any other protected status); and (2) impose on employers a significant number of job posting and notification requirements, including disclosure of salary and benefits offered for a job. The Amended Act modifies primarily the latter issue concerning “transparency in pay and opportunities for promotion and advancement” by:

- Excluding certain lockstep career advancements from the job notification and posting requirement; and
- Adding two new notice requirements, requiring employers to notify:
  - All eligible employees of the “career progression” criteria for certain positions; and

- All employees who will “regularly” work with a selected candidate of specified information about the candidate and similar opportunities.

The Amended Act also increases the damages available to an individual “aggrieved by” the pay discrimination aspect of the Act by doubling the back pay liability from three years to six years.

### **Job Posting and Notification Requirements: Jan. 1, 2021 – Dec. 31, 2023**

*External Job Postings:* Since Jan. 1, 2021, the Act has required all employers, which either had employees working from Colorado or had remote-only roles that could be performed from anywhere, to disclose detailed compensation and benefits information in all job postings. Specifically, postings 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 variable compensation (e.g., bonuses, commissions, or other compensation); and (3) a general description of all benefits the employer is offering for the position. A “posting” is any electronic or hard copy communication that the employer has any specific job(s) available or is accepting job applications for any particular position(s), in addition to a required notification of a “promotional opportunity,” discussed below.

*Internal Promotional Opportunity Postings:* In addition, the Act also has required employers to make reasonable efforts to announce, post, or otherwise make known to their current Colorado employees (as opposed to employees working outside of Colorado) any “promotional opportunities” on the same calendar day and in advance of making the hiring or 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 one or more employee(s) in terms of compensation, benefits, status, duties, or access to further advancement.” Notices of “promotional opportunities” are considered “job postings” under the Act, and, therefore, must include the compensation and benefits information required for any job posting (detailed above). Notices must also include the job title or a description of the position, and how employees may apply for the position. The notice may also identify that the position is expected to be filled by a specific employee, as in the case of a planned promotion, so long as the employer has not made a final decision regarding who will fill the vacancy. Lockstep promotions and career progressions are not excluded from the Act’s definition of “promotional opportunities,” meaning that, currently, Colorado employers must provide notice of any meaningful change to an employee’s job responsibilities or title, even if the position is not actually vacant and available for other employees to apply.

The Colorado Department of Labor & Employment’s Division of Labor Standards and Statistics (the Division) has promulgated significant regulatory and sub-regulatory guidance, providing its enforcement position and interpretation on these requirements.

### **Amended Job Notification Requirements Effective Jan. 1, 2024**

The Amended Act alters this landscape. Specifically, beginning Jan. 1, 2024, with respect to internal promotional opportunity postings, employers do not need to notify current Colorado employees of personnel changes that currently would qualify as “promotional opportunities” *if* such changes are the result of “career development” and “career progression.” “Career development” means “a change to an [existing] employee’s terms of compensation, benefits, full-time or part-time status, duties, or access to further advancement in order to update the employee’s job title or compensate the employee to reflect work performed or contributions already made by the employee.” “Career progression” means an existing employee’s “regular or automatic movement from one position to another based on time in a specific role or other objective metrics.”

The differences between the Act and Amended Act's requirements are best illustrated by a hypothetical example at the theoretical employer, ABC Corp:

ABC Corp. employs a large accounting department with three lockstep positions based in Colorado: Accountant I, Accountant II, and Accountant III. To progress from Accountant I to Accountant II, an employee must work for an identified time period in the Accountant I role, complete specific benchmarks, and obtain certifications. Under the current Act, ABC Corp. is required to notify all of its existing Colorado employees of the promotional opportunity the Accountant II position presents, including by listing compensation and benefits information, *before* promoting an employee who successfully completed the Accountant I requirements to the Accountant II role. The Amended Act would not require this promotional opportunity notification as a prerequisite to moving this individual to Accountant II, although ABC Corp. would have had to make available to all eligible (Colorado) employees information (outlined above) about this "career progression" opportunity. On or after Jan. 1, 2024, ABC Corp. need not notify (Colorado) employees about the employee now filling the Accountant II role because the change was part of a "career progression."

Under the Amended Act, job opportunities – meaning current or anticipated vacancies for which an employer is considering or interviewing a candidate or posting externally, that are not "career development" or "career progression" – will need to be presented to current employees similarly to how "job postings" are presented under the current Act, except that – in addition to including compensation and benefits information – the notice must also include the date the application window is anticipated to close. Such notice must be in writing and be provided to all employees on the same date and prior to selection of the successful individual. Through July 1, 2029, employers that are physically located outside of Colorado and have fewer than 15 employees working in Colorado, all of whom work only remotely, need only provide this notice for remote job opportunities.

### **Required Disclosure for "Career Progression" Criteria**

For positions with "career progression," however, the Amended Act requires employers to disclose and make available to all "eligible employees" the requirements for career progression, in addition to each position's compensation, benefits, full-time or part-time status, duties, and access to further advancement. Future guidance from the Colorado Department of Labor and Employment may clarify the appropriate method and language of such a disclosure, and whether a standing notice available to employees is acceptable, as opposed to a separate written notice for each position experiencing a "career progression." Clarification as to which employees are "eligible" for such information may also be forthcoming, as the Act currently requires that promotional opportunities be presented to all current employees, regardless of their qualifications for the position.

### **New Notification About Selected Candidate**

Further, the Amended Act adds a new requirement that Colorado employers must notify employees who will "regularly" work with a candidate selected for a job opportunity (not as the result of "career development" or "career progression") of the following information within 30 calendar days after the successful candidate begins working in the position: (1) name, (2) job title, (3) former job title (if the candidate previously worked for the employer), and (4) information on how employees may demonstrate interest in similar job opportunities in the future, including identifying individuals or departments to whom employees can express interest in similar job opportunities. However, if such notification would

violate an individual's privacy rights under applicable law or would risk their health or safety, such notice need not be provided.

### Increased Enforcement and Back Pay Liability for Violations

Lastly, the Amended Act bolsters enforcement measures via increased funding to the Department of Labor and Employment (the Department), and a mandate for the Director of the Division of Labor Standards and Statistics in the Department to mediate and investigate reported violations beginning on July 1, 2024 (with rules to be promulgated for this purpose). The Amended Act also doubles the back pay damages available to persons aggrieved by the Act's prohibition against discriminatory pay from three to six years.

### Conclusion

These amendments underscore the Legislature's prioritization of this law, and the importance of Colorado employers understanding these changes and incorporating them into their personnel practices.

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