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COLORADO'S DEPARTMENT OF LABOR AND EMPLOYMENT TAKES HARD LINE ON REMOTE JOBS THAT EXCLUDE COLORADO APPLICANTS TO ESCAPE CHALLENGING ASPECTS OF THE EQUAL PAY FOR EQUAL WORK ACT'S POSTING REQUIREMENTS

To Our Clients and Friends:

The Colorado Department of Labor and Employment (“CDLE”) has released new guidance on the Equal Pay for Equal Work Act (“EPEW”), taking a much harder line on Colorado employers whose remote job postings exclude Colorado applicants. Previously, some employers tried to avoid the most challenging aspects of the EPEW’s compensation-and-benefits posting requirements by stating that remote positions could be performed from anywhere but Colorado.

On July 21, 2021, the CDLE issued new guidance clarifying that all Colorado employers’ postings for remote jobs must comply with the EPEW’s compensation-and-benefits posting requirements, even if the postings state that the position cannot be performed in or from Colorado. *See CDLE Interpretive Notice & Formal Opinion #9 (“INFO #9”).* The CDLE also announced that it was sending “Compliance Assistance Letters” to all Colorado employers with remote job postings that exclude Colorado applicants and that do not include the compensation-and-benefits information required by the EPEW. *See CDLE Compliance Assistance Letter (the “Letter”).* The Letter gives such employers until August 10, 2021, to advise the CDLE by what date their covered job postings will include the compensation-and-benefits information the EPEW requires.

Finally, the CDLE also provided minor updates to its guidance about the compensation-and-benefits information the EPEW requires. The CDLE clarified that covered job postings need only provide a brief general description of the position’s benefits, but cannot use “open-ended” phrases such as “etc.” or “and more” to describe the position’s benefits. The CDLE also explained that, while employers can post a good-faith compensation range, the range’s bottom and top limits cannot be left unclear or open-ended. Additionally, the CDLE noted that the compensation posting requirements do not apply to “Help Wanted” signs or similar communications that do not refer to any specific positions for which the employer is hiring. Finally, the CDLE noted that job postings need not include the employer’s name to comply with the compensation posting requirements, if the employer wants to be discrete in its external job posting process.

This guidance indicates the CDLE’s “officially approved opinions and notices to employers ... as to how [the CDLE] applies and interprets various statutes and rules.” INFO #9. It is not binding, for example, on a court of law. Moreover, although the prior lawsuit challenging the EPEW’s posting requirements and other “transparency rules” was voluntarily dismissed after the Colorado federal district court denied the plaintiff’s motion for a preliminary injunction, it is possible that the CDLE’s tough new stance on postings for remote jobs will lead to new challenges to these requirements.

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This Client Alert expands on these issues, first addressing the CDLE’s new guidance regarding job posting requirements for remote jobs, then discussing the Compliance Assistance Letters the CDLE sent employers excluding Colorado applicants from remote jobs, and finally providing further detail on INFO #9’s updates regarding the compensation-and-benefits information the EPEW requires.

The EPEW’s Posting Requirements

The EPEW covers all public and private employers that employ at least one person in Colorado. Under the EPEW’s compensation-and-benefits posting requirements, employers are required to “disclose in each posting for each job 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(2). This requirement does not reach postings for “jobs to be performed entirely outside Colorado.” 7 CCR 1103-13 (4.3)(B).

Additionally, the EPEW also requires employers to “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.” C.R.S. § 8-5-201(1). This requirement applies broadly and includes only a few, very narrow exceptions.

The EPEW Posting Requirements Apply to Remote Jobs, Even If the Job Posting Excludes Colorado Applicants

The CDLE’s newly revised guidance states that the EPEW applies to “any posting by a covered employer for either (1) work tied to Colorado locations or (2) remote work performable anywhere, but not (3) work performable only at non-Colorado worksites.” INFO #9. The posting requirements’ “out-of-state exception ... applies to only jobs tied to non-Colorado worksites (e.g., waitstaff at restaurant locations in other states), but *not to remote work performable in Colorado or elsewhere.*” *Id.* (emphasis added). Thus, a “remote job posting, even if it states that the employer will not accept Colorado applicants, remains covered by the [EPEW’s] transparency requirements.” *Id.*

The CDLE Sent “Compliance Assistance Letters” to Employers Excluding Coloradans from Remote Jobs

Consistent with INFO #9’s guidance regarding remote jobs, the CDLE announced it was sending a “Compliance Assistance Letter” to “all covered employers with remote job postings lacking pay disclosure and excluding Coloradans.” Compliance Assistance Letter. The Letter explained that, for “any employer with any Colorado staff,” “[r]emote jobs are clearly covered by the [EPEW’s] pay disclosure requirement, regardless of an employer’s expressed intent not to hire Coloradans.” Thus, “when employers covered by the [EPEW] post remote jobs covered by the Act, declaring a preference not to hire Coloradans does not eliminate the Act’s pay disclosure duty.”

The Letter goes on to provide general, high-level guidance on how to comply with the EPEW’s compensation-and-benefits posting requirements, including the following:

1. “The required pay information can be brief,” such as just saying “\$50,000 - \$55,000, health insurance, and IRA.”
2. “No special form, or format” of posting “is required — as long as the posting includes the required pay and benefits information.”
3. “Pay information can be included or linked in a posting, if the employer prefers.”
4. A “flexible” compensation range “from the lowest to the highest the employer genuinely may offer for that particular position can be posted.”
5. An “out-of-range offer is allowed if the range was a good-faith expectation, but then unanticipated factors required higher or lower pay.”
6. “The employer’s name need not be included [in the posting], if it wants discretion and is posting in a third-party site or publication.”

This guidance largely conforms to the CDLE’s prior guidance on these issues.

The CDLE Has Not Imposed Any Penalties ... Yet

Consistent with its prior public stances, the CDLE indicated that it is currently focused on compliance through education, rather than fines. The Letter notes that, thus far, all of the employers that the CDLE has contacted about EPEW violations have agreed to fix their postings “promptly,” and the CDLE “happily exercised its discretion to waive all potential fines in each case, believing each employer to have acted in good faith.”

In addition, the CDLE stated that it is first sending the Compliance Assistance Letter to each employer excluding Colorado applicants from remote jobs, “rather than immediately launching investigations of each” employer. The Letter also offers these employers “individualized advice” from the CDLE by phone or email about how to comply with the EPEW posting requirements. Finally, the CDLE gives each employer who receives the Letter until “Tuesday, August 10, 2021, to indicate by what date all covered job postings will include the required pay and benefits disclosures.”

Additional CDLE Guidance Regarding the Required Contents of Job Postings

In addition to explaining the posting requirements for remote jobs, the CDLE provided a few other clarifications of its prior EPEW guidance:

1. In providing the required “general description of all of the benefits the employer is offering for the position,” employers “cannot use an open-ended phrase such as ‘etc.,’ or ‘and more.’” INFO #9. However, consistent with its prior guidance, employers can simply say something brief like “\$50,000 - \$55,000, health insurance, and IRA.” Compliance Assistance Letter.

2. Employers continue to be allowed to post a good-faith compensation range (which employers may ultimately depart from, in limited circumstances). INFO #9. But the compensation range’s “bottom and top cannot be left unclear with open-ended phrases such as ‘[\$]30,000 and up’ (with no top of the range), or ‘up to \$60,000’ (with no bottom of the range).”
3. The compensation posting requirements do not apply to “Help Wanted” signs or “similar communication indicating only generally, without reference to any particular positions, that an employer is accepting applications or hiring.” INFO #9. In contrast, a job posting that must comply with the compensation-and-benefits posting requirements is “any written or printed communication (whether electronic or hard copy) that the employer has a specific job or jobs available or is accepting job applications for a particular position or positions.”
4. Job postings need not include the employer’s name, if the employer “wants discretion and is posting in a third-party site or publication — as long as the posting includes the required pay and benefits information.” Compliance Assistance Letter. The Letter does not clarify whether a no-name posting would also comply with the EPEW’s promotion posting requirements, or just the compensation posting requirements.

Key Takeaways

This new guidance indicates that the CDLE is focused on foreclosing the methods that some employers were using to try to avoid the more challenging aspects of the EPEW’s **compensation-and-benefits** posting requirements. In contrast, little of the new CDLE guidance relates to the EPEW’s internal, **promotion** posting requirements (which in some ways may be even more challenging for Colorado employers).

Finally, the CDLE continues to indicate that it is focused on encouraging EPEW compliance through education, rather than fines, at least for now. Nonetheless, given the CDLE’s (and the public’s) continued scrutiny of compliance with this law, employers with any Colorado employees should ensure that their job postings are compliant as soon as possible. In particular, whether or not they have yet received a Compliance Assistance Letter from the CDLE, employers that had been relying on excluding Colorado applicants from remote jobs should revise their job postings to bring them into compliance with the EPEW, as interpreted by the CDLE.



Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm’s Labor and Employment practice group, or the following authors:

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