



## Interpretive Notice & Formal Opinion (“INFO”) # 9:

### Equal Pay for Equal Work Act, Part 2: Transparency in Pay and Opportunities for Promotion and Advancement

#### **Overview**

This INFO #9 addresses employee rights and employer obligations under Part 2, “Transparency in Pay and Opportunities for Promotion and Advancement,” of the [Equal Pay for Equal Work Act \(“the Act”\) \(C.R.S. § 8-5-101 et seq.\)](#), as well as under the [Equal Pay Transparency Rules \(“EPT Rules”\) \(7 CCR 1103-13\)](#) promulgated under Part 2. The Act and the EPT Rules, both effective January 1, 2021, detail employer requirements to include compensation in job postings, notify employees of promotional opportunities, and keep job description and wage rate records. Both also detail employee rights and remedies for non-compliance.

#### **Coverage**

The Act covers individual and entity “employers,” public or private, that employ at least one person in Colorado, and all employees of such employers.<sup>1</sup> Entities merely sharing or re-posting the jobs of other employers — a business operating a website that posts jobs from employers, or a government or non-profit agency that connects job-seekers with jobs, etc. — are not liable for non-compliant postings under Part 2 or the EPT Rules.

#### **Disclosing Compensation in Job Postings: § 201(2) of the Act**

**Covered Postings.** The Act requires disclosing compensation and benefits “in each posting for each job.”<sup>2</sup> A “posting” is any written or printed communication (whether electronic or hard copy) that the employer has a job available or is accepting job applications. If a 2020 job posting extends past January 1, 2021, the Division will deem it *not* a 2021 posting covered by Part 2, unless it remains posted on or after February 1, 2021.

**Compensation and Benefits to Disclose.** Employers must include in each job posting (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.<sup>3</sup> Benefits that must be generally described include health care, retirement benefits, paid days off, and any tax-reportable benefits, but not minor “perks” like use of an on-site gym or employee discounts.<sup>4</sup> At a minimum, employers must describe the nature of these benefits and what they provide, not specific details or dollar values — such as listing that the job comes with “health insurance,” without needing to detail premium costs or coverage specifics.

**Posting a “Range.”** Where an employer posts a range of possible compensation, the range may extend from the lowest to the highest pay the employer actually believes it might pay for the particular job, depending on circumstances including employee qualifications, employer finances, and other operational considerations.<sup>5</sup> An employer may ultimately pay more or less than the posted range, as long as the posted range, at the time of the posting, was what the employer genuinely believed it would be willing to pay for the job.<sup>6</sup>

<sup>1</sup> [C.R.S. § 8-5-101\(4\),\(5\)](#).

<sup>2</sup> [C.R.S. § 8-5-201\(2\)](#); [EPT Rule 4.1](#).

<sup>3</sup> [C.R.S. § 8-5-201\(2\)](#); [EPT Rule 4.1.1](#).

<sup>4</sup> [EPT Rule 4.1.1\(C\)](#).

<sup>5</sup> [EPT Rule 4.1.2](#).

<sup>6</sup> [EPT Rule 4.1.2](#).

**Examples:**

- An employer cannot post the same \$30,000-\$100,000 range for janitor and accountant jobs alike, if it does not genuinely anticipate offering an accountant the low end, or a janitor the high end.
- An employer cannot post a \$70,000-\$100,000 range for a *junior* accountant position just because it pays *senior* accountants at the high end of that range. But it can post \$70,000-\$100,000 for an accountant if it does not limit the posting to junior or senior accountants, and genuinely might offer as low as \$70,000 for a junior accountant, or as much as \$100,000 for a senior one.

**Exceptions and Limitations as to Employer Duties to Post Compensation and Benefits.**

*Hiring Can Occur Without a Job Posting.* Employers are *not* required to “post” jobs, or have job postings, except as needed to announce promotional opportunities to existing employees (covered below). Compensation and benefits must be disclosed only if an employer *chooses* to have a job posting.

*Electronic Postings May Link Compensation and Benefit Information.* In electronic postings (e.g., webpages or emails), employers need not include all required compensation and/or benefits if such information is hyperlinked or accessible via a URL provided within the electronic posting, with a clear indication in the posting that the hyperlink or URL provides access to compensation and/or benefits specific to that position. Similarly, where an electronic posting is accessible only via another posting with compensation information — e.g., a webpage listing multiple jobs (with compensation and benefits) that links to an application page for each job (without compensation and benefits) — compensation and benefits need not be included on the second or subsequent posting. It is the employer’s responsibility to assure continuous compliance with functionality of links, up-to-date information, and information that applies to the specific job posting (e.g., not a single pay “range,” or identical benefits, for multiple jobs for which the actual pay ranges or benefits would be different).

*Out-of-State Jobs Are Excluded.* Employers need not disclose compensation for jobs *to be performed* entirely outside Colorado (which includes non-Colorado jobs that may include modest travel to Colorado), even if the job posting is in, or reaches, Colorado.<sup>7</sup> Remote jobs for a covered employer (i.e., an employer with any Colorado employees), as of the posting, are not out-of-state jobs, and therefore are not excluded.

*Out-of-State Postings Are Excluded.* Employers need not disclose compensation in job postings made entirely outside Colorado.<sup>8</sup> For example, compensation and benefits need not be included in a printed advertisement or posting entirely in another state, but must be included in an online posting accessible by Colorado residents.

**Reasonable Effort to Notify All Current Employees of All Promotional Opportunities: § 201(1) of the Act**

Under the Act, employers must “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.”<sup>9</sup> [EPT Rule 4.2](#) addresses what “reasonable efforts” entail.

**When a “Promotional Opportunity” Exists.** 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.”<sup>10</sup>

*Vacancy in an Existing Position.* An employer “has or anticipates a vacancy” when an existing position that the employer intends to fill is open, or is held by a departing employee. For example, an employer “anticipates a vacancy” when an employee gives notice of resignation, and the employer intends to hire a replacement.

*Vacancy in a New Position.* A vacancy in a new position exists 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 authority, duties, or opportunities, but not merely by changing their pay or by adding to their title an externally obtained degree or certification such as “CPA” or “LCSW.” A vacancy in a new position thus includes a lateral job change, or a promotion along a fixed, in-line career trajectory, for which a current employee is eligible.

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<sup>7</sup> [EPT Rule 4.3\(B\)](#).

<sup>8</sup> [EPT Rule 4.3\(B\)](#).

<sup>9</sup> [C.R.S. § 8-5-201\(1\)](#).

<sup>10</sup> [EPT Rule 4.2.1](#).

**Example:** An employer automatically advances every Apprentice 1 to an Apprentice 2 when the employee passes a competency test. An Apprentice 2 has more advanced duties, higher pay, and access to future promotions unavailable to an Apprentice 1. This advancement is a promotion to a new position because the employer is creating an Apprentice 2 position each time it advances an Apprentice 1. However, if the promotion is promised in writing upon hiring in conformity with [EPT Rule 4.2.5\(B\)](#), it may be exempt from the duty to provide notice of the promotional opportunity to other employees.

*When a Vacancy Is a “Promotional Opportunity.”* A vacancy is a promotional opportunity so long as the job is superior to another job held by one or more employees of the same employer in terms of compensation, benefits, status, duties, opportunities, or access to further career advancement.

**Examples:**

- An employer has a vacancy for a Customer Service Representative (“CSR”). While not *all* CSR jobs pay more than Administrative Assistant jobs, *most* CSR jobs are paid more. The CSR job would be considered a promotional opportunity for Administrative Assistants.
- An employer plans to restructure a team to give an employee a supervisory role, without any pay increase. The higher title and authority create a new position that is a promotional opportunity.
- An employer has an entry-level vacancy in its accounting division, which, unlike other divisions at the employer, has a tiered promotion track that gives employees scheduled promotions based on seniority and satisfactory performance. Because the entry-level accounting job gives more access to advancement, it would be considered a promotional opportunity for employees in other divisions.

**Contents of Notice.** All notices of promotional opportunities are considered “job postings” and therefore must include the compensation and benefit information required for any job posting.<sup>11</sup> Notices must also include the job title of the position and the means by which employees may apply for the position.<sup>12</sup>

**Manner of Notice.** Notice of a promotional opportunity must be made: (1) in writing; (2) by any method(s) reaching all employees;<sup>13</sup> (3) to all employees for whom it may be a promotion, on the same calendar day;<sup>14</sup> and (4) sufficiently in advance of the hiring or promotion decision that employees receiving notice may apply. Employers must notify all employees for whom a vacant position would be a promotion, and may not limit notice to those it deems qualified for the position.<sup>15</sup> Employers may state that applications are open to only those with certain qualifications, and may screen or reject candidates based on such qualifications.<sup>16</sup>

An employer satisfies its obligation to notify employees of a promotional opportunity if it (1) chooses a method by which all covered employees can access the promotional opportunity notice within their regular workplace; and (2) tells employees where to find the notice.<sup>17</sup> If a particular method reaches some but not all employees, such as an online posting not accessible to those lacking internet access, alternative methods must be used when needed to assure that each employee is informed how to, and can, access the information.<sup>18</sup>

**Example:** If some of employees work remotely and some in an office, the employer may physically post promotional opportunities on an on-site bulletin board *and* provide notices by email to remote employees. The employer may also use email or an online job board to provide notices to both remote and in-office employees, as long as all employees have internet access.

Employers may combine multiple promotions into one notice, as long as the notice is provided to employees at a time when employees may apply for all positions in that notice.

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<sup>11</sup> [EPT Rules 4.1, 4.2.2.](#)

<sup>12</sup> [EPT Rule 4.2.2.](#)

<sup>13</sup> [EPT Rules 4.2.1-4.](#)

<sup>14</sup> [C.R.S. § 8-5-201\(1\).](#)

<sup>15</sup> [EPT Rule 4.2.4.](#)

<sup>16</sup> [EPT Rule 4.2.4.](#)

<sup>17</sup> [EPT Rule 4.2.3.](#)

<sup>18</sup> [EPT Rule 4.2.3.](#)

**Timing of Notice.** “Reasonable efforts” to notify employees of promotional opportunities require providing notice sufficiently in advance of the promotion decision for employees to apply. If notice is posted rather than provided to employees, it must be posted for long enough that employees can reasonably access it.

Where an employer continuously — at least once per month — either (1) hires for a specific position that would qualify as a promotional opportunity for any current employees, or (2) automatically promotes employees in an in-line job progression upon completing set requirements (e.g., a certification or number of service hours): Such an employer may provide a single notice of such promotional opportunities, rather than a notice for each individual promotion. Such notice may be provided: (1) directly to employees (e.g., by email) in a periodic notice of the promotional opportunity that is frequent enough to give employees time to apply, but at least monthly; or (2) in a static notice, such as a physical or intranet posting, or an employee handbook, (a) that is continuously accessible to employees, (b) that employees are told contains notice of promotional opportunities, and (c) that is updated promptly whenever any aspect of the promotional opportunity changes (e.g., compensation, benefits, qualifications, job description, or application process).

**Examples:**

- An employer promotes Junior Haberdashers to Senior Haberdashers upon completion of 500 hats. The employer include a notice of this promotional opportunity (including compensation and benefits, and how Junior Haberdashers apply for the promotion by indicating their completion of 500 hats) in its employee handbook, notifying current and new employees that a promotional opportunity notice is in their handbook, and updating the handbook promptly upon any change to the Senior Haberdasher pay, qualifications (e.g., a change to 510 hats), or application process (e.g., a change to how Junior Haberdashers report hat statistics that qualify or promotion).
- An employer is continuously accepting applications for (and hiring at least monthly) salespeople, a position that would be a promotion for some of its employees. The employer may send an monthly email to employees, on the last day of each month, with a notice of the promotional opportunity.
- An employer does not *continuously* accept salesperson applications, but is a large company that always hires multiple salespeople each month to fill vacancies; when a vacancy arises, it opens a 15-day application period. A monthly email, on the last day of each month, would not suffice, because it would not notify employees in time to apply openings arising in the first half of each month. The employer can (A) send a *weekly* email or (B) provide notice as *each* opening arises.

**Exceptions and Limitations as to Employer Duties to Notify Employees of Promotional Opportunities.**

*Promotions to Replace Incumbent Employees Unaware of Their Separation.* No notice is required where a promotional opportunity is to replace an incumbent employee who, for reasons other than avoiding job posting requirements, is not yet aware of their impending separation.<sup>19</sup> If the need for confidentiality ends before the application deadline (e.g., because the departing employee learns of the separation), the employer must then promptly comply with all notice and posting requirements. If any employees are told of the opportunity, all employees must be told who either (1) meet the minimum qualifications or (2) have a job “substantially similar” (within the meaning of [C.R.S. § 8-5-102](#)) to any employees being told of the opportunity.<sup>20</sup> However, because personnel decisions are often made collaboratively, an employer may disclose the planned termination to certain employees with a bona fide human resources, decision-making, or deliberative role in the termination, or in the hiring of the replacement employee, without triggering the obligation to inform other employees.

*Automatic Consideration for Promotion Within One Year.* No notice is required where consideration for the promotion automatically follows a trial period of one year or less, and the commitment to consider the employee for promotion is memorialized in some writing (e.g., offer letter, contract, or employer handbook) and based solely on the employee’s own performance and/or the employer’s needs.<sup>21</sup>

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<sup>19</sup> [EPT Rule 4.2.5\(A\)](#).

<sup>20</sup> [EPT Rule 4.2.5\(A\)](#).

<sup>21</sup> [EPT Rule 4.2.5\(B\)](#).

*Temporary, Acting, or Interim Positions.* Notice is not required for temporary, acting, or interim positions lasting up to six months.<sup>22</sup> Before hiring someone to hold the position for more than six months, the employer must provide notice of the promotional opportunity in time for employees to apply for the permanent position.<sup>23</sup>

*Employees Outside Colorado.* Multi-state employers are not required to notify non-Colorado employees of promotional opportunities in Colorado or elsewhere.<sup>24</sup>

*Jobs Performed Outside Colorado.* Multi-state employers need not include compensation or benefits in notices to Colorado employees for positions outside of Colorado, but must notify Colorado employees of such promotional opportunities.<sup>25</sup> As with job postings generally, remote jobs do not qualify for this exclusion; promotional opportunity notices for such jobs must include compensation and benefits.

### **Employer Recordkeeping Obligations**

For each employee, an employer must keep records of the employee's job description and compensation, including salary or hourly wage, benefits, and all bonuses, commissions, and other compensation received.<sup>26</sup> Records must include any changes to job description or compensation over time.<sup>27</sup> The employer must maintain these records for the duration of the employee's employment plus two years thereafter.<sup>28</sup>

### **Complaints, Investigations, and Remedies**

The Division's investigation typically includes the following stages and procedures.

(1) A complainant files a complaint with the Division,<sup>29</sup> or the Division receives information,<sup>30</sup> that an employer may have violated, or retaliated against an employee for exercising rights under, Part 2 of the Act and/or applicable EPT Rules.<sup>31</sup> Any person who is "aggrieved by" (*i.e.* witnessed, suffered, or was injured by) a perceived violation of Part 2, or who believes they were retaliated against, may file a complaint within one year after learning of the alleged violation.<sup>32</sup> The complaint must be on a Division form if one is available, and must include a short and plain statement of its grounds; it may also include or attach relevant documents or information.<sup>33</sup> The complainant must timely respond to Division informational or investigatory requests, or the complaint may be dismissed.<sup>34</sup> The Division may initiate an investigation based on information it receives without a formal complaint (a "direct investigation"), including from anonymous complaints<sup>35</sup> that the Division treats as tips it investigates discretionarily, without mandatory complainant notice or participation.<sup>36</sup>

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<sup>22</sup> [EPT Rule 4.2.5\(C\)](#).

<sup>23</sup> [EPT Rule 4.2.5\(C\)](#).

<sup>24</sup> [EPT Rule 4.3\(A\)](#).

<sup>25</sup> [EPT Rule 4.3\(A\)](#).

<sup>26</sup> See [C.R.S. § 8-5-202](#) (employers must keep records of employees' "job descriptions and wage rate history").

<sup>27</sup> See [C.R.S. § 8-5-202](#).

<sup>28</sup> [C.R.S. § 8-5-202](#).

<sup>29</sup> [EPT Rule 3.2](#) (Part 2 violations); [Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving Rules \("WARNING Rules"\) \(7 CCR 1103-11\)](#), [Rule 3.2](#) (retaliation for opposing Part 2 violations).

<sup>30</sup> [Direct Investigation Rules \("DI Rules"\) \(7 CCR 1103-8\)](#), [Rule 3.1](#) (non-complaint investigations).

<sup>31</sup> Complaint investigations under Part 2 are governed by the [EPT Rules](#); retaliation complaint investigations are governed by the [WARNING Rules](#). Direct (*i.e.*, non-complaint-based) investigations of both types are governed by the [DI Rules](#).

<sup>32</sup> [C.R.S. § 8-5-203\(2\)\(a\)](#); [EPT Rule 3.2.1](#) (Part 2); see [WARNING Rules 1.1](#) and [1.2](#) (retaliation).

<sup>33</sup> [EPT Rules 3.2.2](#) (Part 2); [WARNING Rule 3.2.1](#) (retaliation).

<sup>34</sup> [EPT Rule 3.2.3](#) (Part 2); [WARNING Rule 3.2.2](#) (retaliation).

<sup>35</sup> [DI Rule 3.1](#).

<sup>36</sup> [EPT Rule 3.2.5](#) (Part 2); [WARNING Rule 3.2.3](#) (retaliation).

(2) The Division begins an investigation by sending the employer a “Notice of Complaint” (in a complaint investigation) or “Notice of Investigation” (in a direct investigation) (both called a “Notice”).<sup>37</sup> After learning of an investigation (whether upon or before receiving the Notice), an employer must preserve all relevant evidence through the duration of the investigation and any appeal, until the expiration of the period when an aggrieved person may sue in court.<sup>38</sup> The employer’s response to a Notice of a potential Part 2 violation must be received by the Division (not just sent) within 14 days of the date the Notice was sent (unless an extension is granted),<sup>39</sup> or 28 days in a retaliation investigation.<sup>40</sup> The response must include all requested documents and information, and any other documents and information the employer believes to be relevant to the investigation. An employer’s failure to respond may result in a finding against the employer and/or fines.<sup>41</sup>

(3) Throughout the investigation, all parties must promptly notify the Division of any change in contact information, including mailing address, email address, and phone number.<sup>42</sup>

(4) After reviewing all relevant evidence, the Division issues a determination that, if it finds a violation, may order (1) the employer to undertake actions to bring itself into compliance and remedy the violation, and/or (2) fines of \$500 to \$10,000 for each violation of Part 2.<sup>43</sup> Failure to include compensation and benefit information in one or more postings for a job (under § 201(2)) is one violation regardless of the number of postings listing the job. Failure to notify employees of one promotional opportunity (under § 201(1)) is one violation regardless of how many employees were not notified. Failure to keep records of employee job descriptions and wage rate history (under § 202) is one violation per employee. Other fines may apply for non-compliance with Division orders<sup>44</sup> or information demands.<sup>45</sup> The Division may waive or reduce particular fines for good cause shown.

(5) Either party may appeal a Division determination in a complaint investigation;<sup>46</sup> the employer may appeal in a direct investigation.<sup>47</sup> An appealing party must explain the error(s) in the determination,<sup>48</sup> and must ensure that the Division receives the appeal within 35 calendar days of the date the determination was sent.<sup>49</sup>

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<sup>37</sup> [EPT Rule 3.4.3](#) (Part 2); [WARNING Rule 3.3.4](#) (retaliation); [DI Rule 3.6](#) (direct investigations).

<sup>38</sup> [EPT Rule 3.4.4](#) (Part 2); [WARNING Rule 3.3.5](#) (retaliation).

<sup>39</sup> [EPT Rule 3.4.3](#).

<sup>40</sup> [WARNING Rule 3.3.4](#).

<sup>41</sup> See [C.R.S. § 8-1-140\(2\)](#).

<sup>42</sup> [EPT Rule 3.1](#) (Part 2) and [WARNING Rule 3.1](#) (retaliation), both incorporating the requirement to ensure the Division has current contact information from [Wage Protection Rule 4.6](#); [DI Rule 3.12](#) (direct investigations).

<sup>43</sup> [C.R.S. §§ 8-5-203\(1\),\(4\)](#); [EPT Rule 3.5](#) (Part 2); [WARNING Rule 3.5](#) (retaliation); [DI Rule 5.1](#) (direct investigations).

<sup>44</sup> *E.g.*, [C.R.S. § 8-1-140\(2\)](#).

<sup>45</sup> *E.g.*, [C.R.S. § 8-1-117](#).

<sup>46</sup> [EPT Rule 3.7.1](#) (Part 2); [WARNING Rule 3.7.1](#) (retaliation).

<sup>47</sup> [DI Rule 6.1](#).

<sup>48</sup> [EPT Rule 3.7.1](#) (Part 2) and [WARNING Rule 3.7.1](#) (retaliation), both incorporating the requirement to describe a clear error from [Wage Protection Rule 6.1.1 \(11 CCR 1103-7\)](#); [DI Rule 6.1.1](#).

<sup>49</sup> [EPT Rule 3.7.1](#) (Part 2), incorporating 35-day appeal deadline from [C.R.S. § 8-4-111.5\(1\)](#) and [Wage Protection Rule 6.1.2](#); [WARNING Rule 3.7.1](#) (retaliation), incorporating 35-day appeal deadline from [Wage Protection Rule 6.1.2](#); [DI Rule 6.1.2](#) (direct investigations).