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REMINDER: COLORADO NOW REQUIRES DISCLOSURE OF COMPENSATION AND BENEFITS WITH ALL JOB POSTINGS AND ADVANCE NOTICE OF PROMOTIONAL OPPORTUNITIES

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Employers with at least one employee in Colorado should remember that they are now required to comply with the pay transparency and promotion transparency requirements of the Colorado Equal Pay for Equal Work Act, which took effect January 1, 2021. The governing regulations can be found at 7 CCR 1103-13. In addition, the Colorado Department of Labor and Employment (“CDLE”) has issued Interpretive Notice & Formal Opinion #9 (“INFO #9”), a non-binding interpretation regarding these requirements (“INFO #9”).

PAY TRANSPARENCY

All job postings must now include the hourly or salary compensation, or compensation range, for the position and a general description of the benefits and other compensation that will be provided to the successful applicant. Employers may use electronic links to compensation and benefit information, rather than including that information in the posting itself.

If compensation is stated as a range, that range must represent the lowest and highest pay that the employer in good faith believes it might pay for that particular job. Relying on stale data regarding the filling of such positions in the past, or using the same blanket “range” for all positions, will not suffice.

CDLE has opined in INFO #9 that employers must disclose only significant benefits (such as health care, pension and vacation) and not “minor perks” (such as use of an on-site gym or employee discounts). INFO #9 also states that benefits may be described generally (e.g., “health insurance”) without specifying coverage levels or premiums.

To be clear, there is no requirement that employers post any jobs (except for notice of promotional opportunities as discussed below). But if they do, they must include this information.

Coverage: This requirement does not apply to postings for jobs to be performed entirely outside of Colorado, but it does apply to positions that will be performed by telework or other remote work. In

addition, this requirement does not apply to postings that are made entirely outside of Colorado, but it does apply to online postings that are accessible to Colorado residents (which may well mean all online postings).

PROMOTION TRANSPARENCY

Employers are now required to make “reasonable efforts” to provide notice of all opportunities for promotion to all Colorado employees on the same calendar day, before making the promotion decision. A position is considered a “promotional opportunity” if it could be considered a promotion for any employee in terms of compensation, benefits, status, duties or access to further advancement.

The notice must contain at least the job title, how to apply for it, and the compensation information now required in all job postings. This notice requirement can be satisfied by directing employees to a physical or electronic location where they can find job postings and announcements.

The purpose of this requirement is to ensure that female and minority employees have an opportunity to express interest in and be considered for promotional opportunities. Therefore, employers should expect that the requirements will be construed broadly.

Coverage: This requirement applies to all employees in Colorado but not to employees who work exclusively outside of Colorado. It applies to all promotional opportunities, including positions to be performed outside of Colorado, but CDLE has opined in INFO #9 that compensation information need not be included for out-of-state positions. However, a position that will be performed by telework or other remote work is not considered an out-of-state position. Notice of the opportunity must be provided to all Colorado employees for whom the position would be a promotion, even those employees who are not qualified for the position, but the employer may state that applications are limited to those with certain qualifications and may reject candidates who lack those qualifications.

Exceptions: The requirement to provide notice of promotional opportunities does not apply where:

- there is a compelling need to keep the opening confidential because the employee holding the position is not yet aware that he/she will be removed from the position;
- an employee was hired within the previous year with a written representation that he/she would be automatically considered for that position within one year; or
- the position is expected to be filled only on a temporary basis for six months or less.

Continuous Vacancies: One recurring issue is how to communicate promotional opportunities that occur continuously, such as where an employer with high turnover is continuously recruiting for

certain positions. CDLE has opined in INFO #9 that, where a position will be filled at least monthly, a monthly posting will be sufficient.

Line-of-Progression Advancement: Another recurring issue is whether “line-of-progression” advancements must be communicated to all employees, such as when a Mechanic I is automatically advanced to Mechanic II upon passing a skills test or serving a specified number of months as a Mechanic I. CDLE has opined in INFO #9 that such advancements are “opportunities for promotion” that must be communicated to all employees. But that interpretation is contrary to the Act and CDLE’s regulations. The Act speaks of “opportunities for promotion.” See C.R.S. 8-5-201. And CDLE’s regulations clarify that an “opportunity for promotion” means a “vacancy.” See 7 CCR 1103-13, Section 4.2.1 (“A ‘promotional opportunity’ exists when an employer has or anticipates a vacancy in an existing or new position . . .”). In a line-of-progression advancement, there is never a vacancy. If the Mechanic I does not pass the skills test or serve the requisite number of months, no one becomes a Mechanic II. Stated another way, the “opportunity for promotion” to Mechanic II exists only for a given Mechanic I and no one else. Therefore, this non-binding interpretation by CDLE appears to be erroneous. However, until such time as CDLE corrects it or a court rules it invalid, employers may wish to follow CDLE’s guidance.

PENALTIES

Violations of these requirements may result in fines of \$500 to \$10,000 per violation. CDLE has stated in INFO #9 that fines will be assessed on a per-position basis rather than a per-posting or per-employee basis. For example, multiple noncompliant postings for one position will be considered one violation. Similarly, failing to provide notice of a promotional opportunity will be considered one violation no matter how employees failed to receive the required notice.

RELATED CAPABILITIES

- Employment & Labor

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