

Colorado Expands Employer Job Posting Obligations: Promotional Opportunity Evolution

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Employers across the country have grappled with the requirements of Colorado's Equal Pay for Equal Work Act (EPEWA), since it [went into effect on January 1, 2021](#). The act was the only one of its kind at the time, and has spawned similar legislative efforts around the country, including in [California](#), New York, and [Washington](#). Yet the Centennial State has stood alone in its requirement that employers notify their Colorado employees of "promotional opportunities" available to them, no matter where those opportunities exist in the organization or whether those employees might be qualified for or interested in such jobs. The current act defines "promotional opportunities" broadly to include any vacancies in existing or new positions that could be considered promotions for any employee in terms of compensation, benefits, status, duties, or access to further advancement. Compliance with this obligation has been a challenge for businesses, and many have made costly and significant changes to their job posting infrastructures and promotional policies as a result.

Now, only two and a half years later, Colorado has announced it is changing the game with [Senate Bill \(SB\) 23-105](#), signed by Governor Polis on June 5, 2023. Effective January 1, 2024, SB 23-105 will:

- Expand notification requirements beyond "promotional opportunities" to "job opportunities," eliminating any arguments that a posting is not required because an opportunity is not "promotional";
- Impose new post-selection notification obligations on employers;
- Provide some potential relief for employers struggling with posting obligations for "in-line" promotions and material changes in job responsibilities; and
- Require the Colorado Department of Labor & Employment (CDLE) to create and administer a process for investigating and mediating wage discrimination complaints.

Notice Requirements and Exceptions

As a brief refresher, the EPEWA is comprised of two parts. Part One prohibits wage discrimination on the basis of sex, bans employers from asking job applicants for their salary histories, and prohibits retaliation against employees for engaging in protected activity under the statute. Part Two and its implementing Equal Pay Transparency Rules (EPT Rules) address pay transparency and require job postings and postings for promotional opportunities to contain salary and wage information and a general description of any other compensation and benefits applicable to the position.

SB 23-105 expands Part Two of the EPEWA's posting and notice requirements for current employees to apply to any "job opportunity." The bill defines a "job opportunity" as "a current or anticipated vacancy for which the employer is considering a candidate or candidates or interviewing a candidate or candidates or that the employer externally posts." This means that certain entry-level jobs that previously may have been excluded from the "promotional opportunity" notice requirements for current employees will be covered by the EPEWA.

The notification must include not only the wage and salary range and general description of benefits and other compensation currently required by the EPEWA, but also the date the application window for the opportunity is anticipated to close. SB 23-105 does include a very narrow exception for employers not physically located in the state and with fewer than fifteen employees working remotely in Colorado, requiring such employers to notify their employees only of "remote" job opportunities through July 1, 2029. While limited, this exception could prove useful for out-of-state employers that in recent years have permitted a few employees to work remotely from Colorado.

Notably, for more than two years, the EPT Rules have provided certain important qualifications to the EPEWA's requirements, including (1) clarifying that employers are required to provide opportunity notifications only to Colorado employees; (2) confirming that notifications of opportunities entirely outside the state do not have to include details regarding compensation; and (3) establishing exceptions to the notification requirements in cases of confidential searches to replace incumbent employees, automatic promotions after trial periods, and temporary or interim hires. It remains to be seen if the rules implementing SB 23-105 will contain similar provisions, although the bill does specifically instruct the CDLE to promulgate rules for temporary, interim, or acting job opportunities that necessitate immediate hire.

Career Progression and Career Development

Critically, SB 23-105's definition of "job opportunity" excludes (1) any regular advancement consisting of a "career progression" and (2) any change qualifying as a "career development"—both of which are **excluded** from the posting and preselection notice obligations for current employees.

SB 23-105 defines a "career progression" as "a regular or automatic movement from one position to another based on time in a specific role or other objective metrics." This carveout will provide relief for employers currently required to announce regular in-line promotions that are noncompetitive in nature and that typically occur upon completion of years of service, passage of examinations, or acquisition of certifications (e.g., junior accountant to senior accountant; engineer I to engineer II, etc.). Employers may nevertheless want to note that if employees advance in this fashion according to *subjective* criteria, that may disqualify them from "career progression" status and may entitle them to receive notifications.

SB 23-105 also requires employers to disclose and make available the requirements for career progression to all eligible employees, in addition to each position's compensation, benefits, full- or part-time status, duties, and access to further advancement. SB 23-105's does not define the term "eligible," and CDLE guidance to date has stressed that employers should not limit notifications to only those employees deemed to be eligible for opportunities. Thus, the bill's use of "eligible" may strike employers as confusing. The CDLE is likely to issue rules or guidance on this point.

The “career development” exception to the “job opportunity” posting requirement is more complex, as the bill defines it as

a change to an 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.

This exception is one that certainly will require regulatory clarification from the CDLE but, as written, could allow employers to make considerable modifications to an employee’s responsibilities, advancement opportunities, or title without having to issue notifications to other employees regarding such changes. This would represent a significant departure from current CDLE guidance, which requires promotional opportunity notifications for *any* material changes in an employee’s authority, duties, or opportunities.

New Post-Selection Obligation: Disclosure of the Candidate Selected

SB 23-105 also will place a new *post-selection* notice obligation on employers. Within thirty days of selecting a candidate for a job opportunity, employers must make “reasonable efforts” to notify, at a minimum, the employees with whom the selected candidate is expected to work regularly of: (1) the name of the selected candidate; (2) the selected candidate’s former job title if hired from within the company; (3) the selected candidate’s new job title; and (4) information on how employees may express interest in similar future opportunities, including identification of contacts to reach out to for more information. SB 23-105 does clarify that this requirement should not be applied in a way that violates a candidate’s privacy rights or would place the candidate’s health or safety at risk.

Enhancement of the CDLE’s Investigatory Powers

Lastly, while the EPT Rules already have established a mechanism for an aggrieved individual to file a complaint and the CDLE to investigate violations of Part Two of the EPEWA, there was previously no administrative process in place specifically for complaints related to violations of Part One’s wage discrimination prohibitions.

SB 23-105 plants the seed for a formal investigatory and remedial process for complaints of wage discrimination under Part One. Specifically, SB 23-105 requires the CDLE’s director to create and administer a process for accepting, investigating, and mediating complaints for violations of Part One. This will give individuals an additional outlet for asserting a claim, and will have no impact on an aggrieved individual’s ability to file suit in court for a violation of the EPEWA.

In addition, SB 23-105 doubles the look-back period for aggrieved individuals seeking relief for a violation. An employee who files suit under the EPEWA may now receive back pay for every year the violation occurred up to a maximum of **six** years.

Takeaways

With these amendments, employers may want to conduct a comprehensive review of their job postings, processes for notifying current employees of job opportunities, potential methods for post-selection notifications, selection criteria for in-line promotions, and hiring procedures as the January 1, 2024, effective date nears. For

employers hoping to develop a uniform and comprehensive process for multistate job posting compliance, SB 23-105 represents a new obstacle to those efforts as the nationwide patchwork of pay transparency laws continues to expand.

Ogletree Deakins' [Denver office](#) will continue to report on developments with respect to SB 23-105 and any related regulations or guidance on the [Colorado Pay Equity](#), and [Wage and Hour](#) blogs as additional information becomes available. Important information for employers is also available via the firm's [webinar](#) and [podcast](#) programs.