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Under the Act, Colorado employers have an obligation to announce, post, or otherwise make known all job opportunities.

The rules attempt to clarify ambiguous provisions of the Act, as summarized below. The CDLE will be releasing further guidance in [Interpretive Notice and Formal Opinion \(INFO\) #9A](#), which the CDLE website says is “coming soon.”

Highlights

The new rules create definitions for “career developments” and “career progressions,” which are explicitly excluded from the notice obligation.

Career Development: The Act defines “career development” 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.” The EPT rules clarify that such existing work or contributions must be part of the employee’s existing job and are not within a position with a current or anticipated vacancy. Employers are not required to send notices of career development position changes.

Career Progression: Similarly, job changes due to “career progressions,” defined as “regular or automatic movement from one position to another based on time in a specific role or other objective metrics,” are carved out from the definition of “job opportunity.” However, for these positions, employers must disclose and make available to all “eligible employees” the requirements for career progression, along with each position’s terms of compensation, benefits, full-time or part-time status, duties, and access to further advancement. “Eligible employees” are “those in the position that, when the requirements in the notice are satisfied, would move from their position to another position listed in the notice as a ‘career progression.’”

Application Deadlines: The Act requires that job postings include the date the application is anticipated to close. This created confusion about “evergreen” job postings (*i.e.*, roles for which the employer accepts applications on an extended, ongoing basis), as well as how to comply when an application deadline is extended. To answer these questions, the EPT rules provide two exceptions to the deadline requirement:

1. If there is no deadline because the employer accepts applications on an ongoing basis, the posting must say so, and a deadline is not required.
2. A deadline may be extended so long as (1) the original deadline was a good-faith expectation or estimate of what the deadline would be and (2) the posting is promptly updated when the deadline is extended.

Acting, Interim, or Temporary (AINT) Hires: The EPT rules make clear that employers need not provide notice of AINT positions lasting for up to nine months where:

1. The AINT hiring is not expected to be permanent and, if the hire may become permanent, the required job opportunity posting must be made in time for employees to apply for the permanent position; and
2. The same or substantially similar position was not held any time in at least seven of the preceding 12 months by another AINT hire for which there was no job opportunity posting (unless the new AINT hire is to serve out the initial nine-month term of a prior AINT hire).

Post-Selection Notice to Employees: After a candidate is selected for a job opportunity, the Act requires employers to distribute a post-selection notice to “employees with whom the employer intends the selected candidate to regularly work.” The proposed rules were unclear as to the required method of notice and scope of the required distribution. The final EPT rules address both points.

Under the EPT rules, the term “work with regularly” means “employees who, as part of their job responsibilities, either (1) collaborate or communicate about their work at least monthly, or (2) have a reporting relationship (i.e., supervisor or supervisee).” In addition, employees entirely outside of Colorado are not entitled to this post-selection notice. Employers may comply, however, by providing notice “to a broader range of, or all, employees.”

In addition, employers may comply by providing the post-selection notice of either (1) each individual selection or (2) multiple selections, as long as the notice is provided no later than 30 days after any selection in the notice.

Opt-Out Procedure for Post-Selection Notices: In response to concerns raised by victims’ advocate groups in the public hearing that was held in October, the EPT rules provide a limited right to non-disclosure for employees. In particular, employers are prohibited from disclosing a selected candidate’s name or prior job title if:

1. Any applicable law (such as a restraining order) requires not disclosing either (or both) of those items; or
2. A selected candidate informs the employer (a) in writing, (b) on their own initiative (but employers may still inform candidates of non-disclosure rights), and (c) voluntarily (*i.e.*, without pressure or coercion) that they believe disclosure of either (or both) of those items would put their health or safety at risk (but need not detail the health or safety risk).

Notwithstanding, employers are still required to provide all other required post-selection information, even if it does not disclose the candidate’s name or prior job title pursuant to applicable law or the opt-out procedure.

Geographic Limits: The EPT rules establish that the notice requirements for pre-selection, post-selection, and career progression do not apply to employees entirely outside Colorado. Additionally, the compensation and benefits disclosure requirements do not apply to postings (1) for jobs to be performed entirely outside Colorado, or (2) physically located entirely outside Colorado.

Next

CDLE is expected to release its INFO #9A in the coming weeks. Historically, this sub-regulatory guidance has filled in the gaps and provided more details and examples of how the state expects employers to comply.

Please contact a Jackson Lewis attorney if you have any questions about these developments or need assistance.

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