



STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY, AND FINDINGS

Equal Pay Transparency (“EPT”) Rules, 7 CCR 1103-13, as proposed September 29, 2020; to be followed and replaced by a final Statement at the conclusion of the rulemaking process.

(1) **BASIS.** These Equal Pay Transparency Rules (“EPT Rules” or “Rules”) implement and enforce the Equal Pay for Equal Work Act (the “Act”), Colorado Revised Statutes (“C.R.S.”), Title 8, Article 5, Part 2 (C.R.S. §§ 8-5-201 to 8-5-203) (2021) (“Transparency in Pay and Opportunities for Promotion and Advancement”), and serve important public needs that the Director of the Division of Labor Standards and Statistics (hereinafter, “Director” and “Division,” respectively) finds are best served by these rule updates, amendments, and supplements.

(2) **SPECIFIC STATUTORY AUTHORITY.** The Director is authorized to adopt rules and regulations to enforce, execute, implement, apply, and interpret Articles 1 and 4-6 of C.R.S. Title 8, and all rules, regulations, investigations, and proceedings thereunder, by the Administrative Procedure Act, C.R.S. §§ 24-4-103 and 105, and provisions of the above-listed Articles, including but not limited to: C.R.S. §§ 8-1-101, -103, -107, -108, -111, -116, -117, -130; 8-4-111; 8-5-203; 8-6-102, -104, -105, -106, -108, -109, -111, -116, -117.

(3) **FINDINGS, JUSTIFICATIONS, AND REASONS FOR ADOPTION.** Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds: (A) demonstrated need exists for the rules (detailed in Part 4, which this finding incorporates); (B) proper statutory authority exists for the rules (detailed in Part 2, which this finding incorporates); (C) to the extent practicable, the rules are clearly stated so that their meaning will be understood by any party required to comply; (D) the rules do not conflict with other provisions of law; and (E) any duplicating or overlapping has been minimized and is explained by the Division.

(4) **SPECIFIC FINDINGS FOR ADOPTION.**

(A) **Broad Purpose of Rules**

Section 8 of the Act, C.R.S. §§ 8-5-201 to -203, a new “Part 2” of C.R.S. Title 8, Article 5, requires employers to notify all current employees of promotion opportunities (§ 201(1)), to disclose compensation and benefits in all job postings (§ 201(2)), and to keep certain job records (§ 202). The Act assigns the Division authority “to administer, carry out, and enforce all of the provisions of this part 2” § 8-5-202 to “investigate complaints of violations of this part 2,” and to “promulgate rules” for such purposes. (§ 8-5-203). These Rules pertain to those Part 2 provisions.

Section 5 of the Act, C.R.S. § 8-5-103, also assigns the Division authority that is limited in scope, and discretionary, “to create and administer a process to accept and mediate complaints and to provide legal resources concerning alleged violations of section 8-5-102,” the Act’s “wage discrimination” prohibition, and to promulgate rules for such purposes. These Rules do not exercise that authority now, due to limits on Division resources, but do not preclude any such future Division efforts.

(B) **Rules 1-2: Statutory Framework and Definitions**

Rule 1 details the relationship of these Rules to relevant statutes, and the Division’s intent for these Rules to remain in effect to the maximum extent possible if a portion is held invalid.¹ Rule 2

¹ *E.g., High Gear & Toke Shop v. Beacom*, 689 P.2d 624, 633 (Colo. 1984) (Colorado general severability statute “can be used not only to sever separate sections, subsections, or sentences, but may also be used to sever words and phrases” in even statutes

defines key terms. Rules 2.1-2.2 define terms consistently with other Division rules, but Rule 2.1 clarifies the use in these Rules of “Complainant” rather than “employee,” the Act allows a Part 2 Complaint not just by “employees,” but by any “person who claims to be aggrieved by a violation of section 8-5-201 or 8-5-202.” (C.R.S. § 8-5-203(2)(a).) Rules 2.3-2.5 incorporate definitions in the Act.

(C) Rule 3: Complaint, Investigation, and Appeal Procedures

Rule 3 draws from the wage complaint process of the Colorado Wage Act (C.R.S. Title 8, Article 4) and accompanying Wage Protection Rules (7 CCR 1103-7), with adjustments as needed to account for different statutory provisions in the Act, and different needs in the sorts of claims these Rules address.

Rule 3.4.4 requires employers to preserve relevant records upon filing or commencement of a claim, complaint, or investigation for violation of C.R.S. §§ 8-5-201 (notice to employees of promotion opportunities) or 202 (compensation information in job postings). Without a rule, employers *still* would have preservation duties, because failure to preserve relevant records may yield varied negative consequences and adverse inferences, some expressly provided by Part 2 of the Act,² and others simply within the discretion of the factfinder who must decide issues in the case in the absence of preserved documents.³ Employers have long been subject to analogous preservation duties under federal discrimination and retaliation law⁴ that has existed for almost 50 years,⁵ which obligations are incorporated into proposed Colorado WARNING Rule 3.3.5, 7 CCR 1103-11. The Division thus finds that (A) a preservation rule is needed to state the relevant preservation duties more clearly and predictably than they would exist, with more variance in application, without a rule, and (B) that such a rule imposes no new or undue burden on employers, given the limited range of documents that must be preserved -- only records relevant to: in a § 201(1) claim, whether employees were notified of promotion opportunities; in a § 201(2) claim, whether a job posting included compensation information; or in a § 202 claim, whether records of job descriptions and wage rate history for each employee were kept.

Rule 3.5, on determinations, reiterates and codifies the applicability to claims under these Rules of relevant provisions of statutes and other rules. Rule 3.5.3 mirrors other Division rules to provide

lacking severability provisions) (citing *Shroyer v. Sokol*, 550 P.2d 309 (1976)); *Shroyer*, 550 P.2d at 311 (after striking as unconstitutional a “40 per cent” statutory requirement” and “restrict[ing] the recall petition powers of the people to registered voters,” severing so “the statute can be given legal effect” by “incorporat[ing] by implication” a different numerical threshold and eligible elector rule: a “25 per cent limitation and the electors (not necessarily registered) requirement set forth” in another provision); *see generally Regan v. Time, Inc.*, 468 U.S. 641, 642 (1984) (“presumption is in favor of severability”).

² C.R.S. § 8-5-203(5) (“If an employee bringing suit for a violation of section 8-5-102 demonstrates a violation of this part 2, and the court finds a violation of this part 2, the court may order appropriate relief, including a rebuttable presumption that records not kept by the employer in violation of section 8-5-202 contained information favorable to the employee's claim and an instruction to the jury that failure to keep records can be considered evidence that the violation was not made in good faith.”).

³ *E.g., He v. Home on 8th Corp.*, No. 09 Civ. 5630, 2014 U.S. Dist. LEXIS 114605, at *17-18 (S.D.N.Y. Aug. 13, 2014) (holding employer was not entitled to tip credit due to failure to hang required poster: “Defendant was unable to produce any poster—or even a picture of such a poster hanging on the wall . Defendant’s failure to produce any poster that he claims he hung before this lawsuit was filed weighs in Plaintiffs’ favor, especially because someone being sued for failing to comply with federal and state minimum wage laws likely would have a strong incentive to preserve all documents relating to his compliance....”); *Garcia v. Saigon Mkt. LLC*, No. 15-CV-9433 (VSB), 2019 U.S. Dist. LEXIS 163259, at *25-29 (S.D.N.Y. Sep. 24, 2019) (holding same: “Defendants have failed to produce a copy or photograph of this poster, or any specific details regarding the time period during which the notice was posted or where precisely it was displayed.... [Defendant’s] statement, which ‘do[es] not provide any information as to what the poster[] said, apart from a verbatim recitation of [statutory] requirements,’ is thus insufficient.... Defendants are not entitled to claim a tip credit against Plaintiffs’ ... wages.”).

⁴ *See* 29 C.F.R. § 1602.14.

⁵ 37 FR 9219, May 6, 1972 (adopting federal rule).

clarity on remedies the Division may order. Rule 3.6 explains that an investigation may be split into discrete proceedings, a discretionary docket management decision that was already permissible, but that the Division sees value in codifying for clarification. Rules 3.7-3.8 cover appeals and filings in court of certified copies, with no substantive differences from other Division statutory and rule provisions.⁶

(D) Rule 4: Job Posting Requirements

Rule 4.1 clarifies the C.R.S. § 8-5-201(2) requirement to disclose “hourly or salary compensation, or a range of hourly or the salary compensation, and a general description of all of the benefits and other compensation to be offered to the hired applicant” in “each posting for each job opening.” Rule 4.1.1 clarifies that postings cannot omit particular forms of pay, such as “bonuses, commissions, or other forms of compensation,” and that the required “general description of . . . benefits” must include “health care benefits; retirement benefits; any benefits permitting paid days off . . . ; as well as any benefits that must be reported for federal tax purposes,” but not low-value “perks.” The Division finds that the intent of Section 201(2) is transparency as to compensation package that an applicant may expect or negotiate for, and accordingly, that (A) postings cannot omit particular types of compensation, and (B) including benefits that employers already must know to report for tax purposes eliminates ambiguity as to which benefits to include in a posting, but (C) low-value perks do not meaningfully improve applicants’ understanding of job compensation and may not be worth the burden of deciding which to include.

Rule 4.1.2 clarifies that under the C.R.S. § 8-5-201(2) requirement for a posting to include a job’s “compensation, or a range,” an employer may (A) post a range “from the lowest to the highest pay the employer in good faith believes it might pay for the particular job, depending on the circumstances,” and (B) “ultimately pay more or less than the posted range, if the posted range was the employer’s good-faith and reasonable estimate of the range of possible compensation at the time of the posting.” Point (A) reflects a balance the legislature struck between (1) allowing employers flexibility to post a range when they cannot specify exact compensation figures, (2) without undercutting the over-arching goal of transparency — informing potential applicants of what a job actually might pay. As to point (B), an initial draft of the Act required employers to re-post a job before making any offer outside the posted range,⁷ but a sponsor-introduced amendment eliminated that requirement.⁸ Thus, to respect the dual legislative intent of (1) allowing employers flexibility with job offers, (2) without undercutting the over-arching goal of transparency, an employer may depart from a range that was a “good-faith and reasonable estimate” and thus was departed from only “ultimately” as the hiring process unfolded.

Rule 4.2 details requirements for notifying employees of promotion opportunities under C.R.S. § 8-5-201(1). The Division finds that to provide employees genuine, actionable notice of a promotion opportunity, notice must (A) be in writing; and (B) include the name of the job, the compensation and benefits, and how the employee may apply for the job, as set forth in Rule 4.2.1.

Rules 4.2.2-2.3 clarify “reasonable efforts to announce, post, or otherwise make [a promotional opportunity] known” under C.R.S. § 8-5-201(1). An employer makes “reasonable efforts” when it provides notice directly to each employee via its “regular and customary method of communication,”

⁶ See, e.g., C.R.S. § 8-1-104 (“Any copy of an order, award, or record of the director under his seal shall be received in all courts as evidence as if such copy were the original thereof.”).

⁷ [Jan. 17, 2019, introduced draft of SB19-085](#), at 9:15-19: “the employer shall offer a prospective employee a wage rate within the posted range or, if necessary, repost each job opening with an adjusted range before offering a prospective employee a wage rate that is not within the originally posted wage rate range.”

⁸ [Senate Judiciary Committee’s February 20, 2019, hearing](#) at 3:18:17 (amendment L.015 introduced by Representative Serena Gonzales-Gutierrez); 3:18:54 (explanation of amendment by Senator Jessie Danielson).

and provides notice by other reliable means to employees not reachable by such methods. If an employer has no or multiple methods by which it regularly and customarily communicates with employees — e.g. if the employer regularly communicates with the employee via email *and* internal messaging system — employees must be informed in advance of where and how they will be notified of promotion opportunities. The Division finds that notifying employees directly through a means of communication the employer regularly and customarily uses is the best way to ensure actual notice of promotion opportunities, imposes minimal burden on employers because it requires only use of systems the employer already uses, and is not a novel duty because Colorado employers already must provide similar direct notice to employees, such as under the Healthy Families and Workplaces Act (“HFWA”) requirement that Colorado employers not only display a poster, but also “supply[] each employee with a written notice” of their HFWA rights, C.R.S. § 8-13.3-408(2)(a).

Employers with no regular and customary means of communicating directly with employees may use other effective means to notify employees of promotional opportunities. If the employer chooses to post promotion opportunities, Rule 4.2.3 requires the posting to “be displayed in each establishment where employees work, in a conspicuous location frequented by employees where it may be easily read during the workday — such as in break rooms, on employee bulletin boards, and/or adjacent to time clocks, department entrances, and facility entrances.” This requirement is analogous to those in HFWA,⁹ the COMPS Order,¹⁰ the Colorado WARNING Rules,¹¹ the Public Health Emergency Whistleblower law (“PHEW”),¹² and federal National Labor Relations Board (“NLRB”) worker rights posting rules.¹³

Rule 4.2.4 reflects the statutory text and legislative intent in requiring notice to “*all* current employees” of “*all* opportunities for promotion,” without limitation based on employer knowledge or perception of particular employees’ qualifications. C.R.S. § 8-5-201(1) (emphases added). A sponsor of the Act, Senator Jessie Danielson, expressly addressed this exact issue, as follows:

[O]ne of the core tenets of the bill is requiring public posting for all employees of any opportunity that may exist within the company. Requiring businesses to do this expands the pool of employees that may come forward, so if we did limit it to ... you only have to notify qualified employees, we’re kind of right back where we were where the hand-selected insiders are hand-picked for promotion without consideration of additional applicants who may or may not be qualified but who don’t have the opportunity.... What this bill says is the employee gets to decide if she is qualified for the position according to the job posting.¹⁴

Corroborating the legislature’s endorsement of this explanation, an amendment to strike C.R.S. § 8-5-201(1) failed,¹⁵ and the Act was enacted with no change to this section. Thus, the Division finds that

⁹ C.R.S. § 8-13.3-408(2)(A) (“in a conspicuous and accessible location in each establishment where the ... employees work.”)

¹⁰ 7 CCR 1103-1, R. 7.4.1 (“in an area frequented by employees where it may be easily read during the workday”).

¹¹ 7 CCR 1103-11, R. 4.1.3 (“in each establishment where employees or workers work, in a conspicuous location frequented by employees or workers where it may be easily read during the workday — such as in break rooms, on employee bulletin boards, and/or adjacent to time clocks, department entrances, and/or facility entrances”).

¹² C.R.S. § 8-14.4-103(1) (“in a conspicuous location on the principal’s premises.”).

¹³ NLRB Casehandling Manual § 10518.2 (“wherever employee ... notices are customarily posted,” including “employee bulletin boards, timeclocks, [or] department entrances”).

¹⁴ [Senate Judiciary Committee hearing, Feb. 20, 2019](#), at 3:30:30.

¹⁵ [Feb. 20, 2019 Senate Judiciary Committee hearing](#), 3:29:18 (describing amendment L.010), 3:32:18 (3-2 vote against amendment L.10); [SB19-085, introduced version, Jan. 17, 2019](#) (showing enacted version of 201(1) was unchanged)

text and legislative intent point in the same direction, and further finds that while an employer may deem some employees obviously unqualified for certain jobs too different or too far above their qualifications:

- employers may not know what is a plausible opportunity for an employee enhancing their own skills, such as a hair stylist in school part-time for an economics degree, or a clerical worker learning computer programming on her own (actual examples known to the Division);
- one added value of transparency is for postings to be shared with others lacking opportunity, so a janitor may not be qualified for an accounting posting, but may share it with a relative or acquaintance who completed an accounting degree but lacks professional connections; and
- Rules 4.2.1-4.2.3 allows employers flexibility as to posting content and method, so notifying “all current employees” should not be unduly burdensome.

Rule 4.3 details how the Part 2 promotion notice and job posting requirements apply to certain scenarios other than a Colorado employer posting jobs locally for Coloradans, since many employers have multi-state operations or remote employees. An “employer” is covered upon “employing a person in the state” (C.R.S. § 8-5-101(5)), and then has obligations not limited to the borders of Colorado, albeit with potential limitations, such as certain jobs outside Colorado limited to candidates already in that geographic area, and a new or non-Colorado employer that is engaged in hiring but not yet “employing a person in the state,” under Rules 4.3.3 and Rule 4.3.4, respectively.

(4) EFFECTIVE DATE. These rules take effect on January 1, 2021, or as soon thereafter as the rule-making process is completed.



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Date