



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

### **Equal Pay Transparency (“EPT”) Rules, 7 CCR 1103-13 (2021), as adopted on November 10, 2020.**

(1) **BASIS.** These Equal Pay Transparency Rules (“EPT Rules” or “Rules”) implement and enforce Part 2 (“Transparency in Pay and Opportunities for Promotion and Advancement”) of 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), 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, a new “Part 2” of C.R.S. Title 8, Article 5 (§ 8-5-201 to 203), 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,” to “investigate complaints of violations of this part 2,” and to “promulgate rules” for such purposes. (§ 203). These Rules pertain to those Part 2 provisions. Because Division enforcement and implementation of Part 2 is mandatory, statutorily taking effect on January 1, 2021, the Division initiated Part 2 rulemaking in late summer 2020, to assure implementation of rules by that statutory effective date. Part 1 of the Act, on pay discrimination and disparities, provides 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. (C.R.S. § 8-5-103.) The Division is not exercising that Part 1 Authority in *these* Rules, which were needed imminently to implement the Division’s mandatory authority by the statutory effective date. The promulgation of these Rules does not preclude any possible later implementation and/or rulemaking as to the Division’s Part 1 authority.

#### **(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.<sup>1</sup> Rule 2

<sup>1</sup> *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 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

defines key terms. Rules 2.1-2.2 define terms consistently with other Division rules. The Act allows a Part 2 Complaint by not just “employees,” but 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 of a violation of C.R.S. § 8-5-201(1) (promotion opportunity notice to employees) or § 201(2) (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,<sup>2</sup> others within the discretion of the factfinder who must decide issues in the case in the absence of preserved documents.<sup>3</sup>

Employers have long been subject to analogous preservation duties under federal discrimination and retaliation law<sup>4</sup> that has existed for almost 50 years,<sup>5</sup> 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 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 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<sup>6</sup> and rule provisions.

### **(D) Rule 4: Job Posting Requirements**

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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”).

<sup>2</sup> 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.”).

<sup>3</sup> *E.g., He v. Home on 8th Corp.*, No. 09 CV 5630, 2014 U.S. Dist. LEXIS 114605, at \*17-18 (S.D.N.Y. Aug. 13, 2014) (employer not entitled to tip credit for not posting a required poster: “Defendant was unable to produce any poster—or even a picture of such a poster hanging.... Defendant’s failure to produce any poster that he claims he hung before this lawsuit ... weighs in Plaintiffs’ favor, especially because someone being sued for failing to comply with ... 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. Sept. 24, 2019) (same: “Defendants have failed to produce a copy or photograph of this poster, or any specific details regarding the time period ... 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 [statute] requirements,’ is thus insufficient.... Defendants are not entitled to ... a tip credit against ... wages.”).

<sup>4</sup> *See* 29 C.F.R. § 1602.14.

<sup>5</sup> 37 FR 9219, May 6, 1972 (adopting federal rule).

<sup>6</sup> *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.”).

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 the C.R.S. § 8-5-201(2) requirement for a posting to include a job’s “compensation, or a range” lets an employer (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,<sup>7</sup> but a sponsor-introduced amendment eliminated that requirement.<sup>8</sup>

Rule 4.2 details requirements for notifying employees of promotional opportunities under C.R.S. § 8-5-201(1). Rules 4.2.2-2.3 clarify “reasonable efforts to announce, post, or otherwise make [an opportunity] known” under C.R.S. § 8-5-201(1). An employer makes “reasonable efforts” by providing notice by any method(s) accessible to all employees within their workplace “online or hard-copy,” and notifies employees in advance where notices can be found. An employer may need to use multiple methods if “a particular method reaches some but not all employees.” This accommodates employer advocates’ suggestion that employers make “reasonable efforts” by posting promotions to a company intranet or job board rather than providing notice directly to each employee.<sup>9</sup> An employer may provide notice in any number of ways, depending on existing communication systems and the nature of the workplace, e.g. by emails directly to employees, through a secured website or company intranet, through a single workstation in the workplace, or in a single hard-copy in an on-site human resources office. This flexibility minimizes burden on employers while still ensuring employees have adequate access notices of promotion. When making such notice, the Division finds that genuine, actionable notice of a promotion opportunity must at minimum (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 4.2.1 and 4.2.4-2.5 define the scope and limits of “promotional opportunity” under C.R.S. § 8-5-201(1). The Division received comments during rulemaking to define “promotional opportunity”<sup>10</sup> and the scope of required notice, including whether notice is required for in-line career progression by

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<sup>7</sup> [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”).

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

<sup>9</sup> *E.g.*, Comments by Littler Mendelson, P.C. Workplace Policy Institute, Oct. 30, 2020, at 2 n.1; Colorado Chamber of Commerce, Oct. 28, 2020, at 3 (intranet); Colorado Bankers Association, Oct. 30, 2020 (job board).

<sup>10</sup> *E.g.*, public hearing testimony by Dean Harris and Scott Pachitas, Nov. 2, 2020; comment by Joan Nelson, Rooted Resolve, Oct. 28, 2020.

individual employees,<sup>11</sup> for non-competitive promotions,<sup>12</sup> for temporary promotions,<sup>13</sup> for confidential job searches,<sup>14</sup> to those the employer deems unqualified,<sup>15</sup> and outside of operational units.<sup>16</sup> The Division finds that clarifying the definition of a “promotional opportunity” for compliance with C.R.S. § 8-5-201(1) is beneficial to both employers, who must comply with the Act, and employees, who benefit from receiving the notice required by the letter and spirit of the Act. The Division provides this clarification in Rule 4.2.1 (“When required”), 4.2.4 (“Qualifications”), and 4.2.5 (“Exceptions”).

Rule 4.2.1 defines “promotional opportunity” as a current or anticipated “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.” Rule 4.2.4 notes that, based on the plain text and legislative intent of the Act, notice must be made 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). Together, Rules 4.2.1 and 4.2.4 reflect the breadth of the Act text and the legislative intent animating the promotion notice requirement. Act sponsor 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.<sup>17</sup>

Corroborating the legislature’s endorsement of this explanation, an amendment to strike C.R.S. § 8-5-201(1) failed,<sup>18</sup> and the Act was enacted with no change to section 201(1). Thus, the Division finds that text and legislative intent point in the same direction. So while an employer may deem some employees obviously unqualified for certain jobs too different or too far above their qualifications, that is a policy argument against Act text and legislative intent that point in the opposite direction from that policy argument. The Division also notes that the Act text and legislative intent requiring notice to “all” is supported by reasonable policy arguments as well. For example, 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). Also, Rules 4.2.1-4.2.5 allows employers flexibility as to posting content and method, so notifying “all current employees” should not be unduly burdensome. But ultimately, the balance of policy arguments for and against posting to “all” employees is immaterial in light of the clear direction laid out by the text and legislative intent, which this Division cannot ignore.

Rule 4.2.5 lists exceptions to the § 201(1) notice requirement based on the Act’s “promotional opportunity” and “reasonable efforts” definitions. Rule 4.2.5(A) allows non-posting in a search to

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<sup>11</sup> *E.g., id.*; comment by Colorado Chamber of Commerce, Oct. 28, 2020, at 5.

<sup>12</sup> *E.g.*, public hearing testimony by Dean Harris and Scott Pachitas, Nov. 2, 2020.

<sup>13</sup> *E.g.*, comments by Colorado Chamber of Commerce, Oct. 28, 2020, at 5; Colorado Ass’n of School Boards, Oct. 29, 2020.

<sup>14</sup> *E.g.*, comments by Great Western Operating Company, LLC, Oct. 16, 2020; Littler Mendelson, P.C. Workplace Policy Institute, Oct. 30, 2020, at 5.

<sup>15</sup> *E.g.*, comments by Littler Mendelson, P.C. Workplace Policy Institute, Oct. 30, 2020, at 7; Colorado Chamber of Commerce, Oct. 28, 2020, at 4; Stacy Campbell, Aug. 21, 2020, at 2.

<sup>16</sup> *E.g.*, public hearing testimony by Dean Harris, Nov. 2, 2020; comment by Littler Mendelson, P.C. Workplace Policy Institute, Oct. 30, 2020, at 6.

<sup>17</sup> [Senate Judiciary Committee hearing, Feb. 20, 2019](#), at 3:30:30.

<sup>18</sup> [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).

replace a departing employee who (for business reasons other than avoiding the Act) does not know of their termination, as employer advocates requested. The Division finds that in such circumstances, the required reasonable efforts do not require publicizing the opening, at least until the search becomes less confidential (*e.g.*, once some employees are told, other similar employees must be as well), or non-confidential (*e.g.*, confidentiality ends once the departing employee learns of the termination).

Rule 4.2.5(B) provides that an employer need not provide notice of an employee’s consideration for promotion to a specific position that by writing must occur automatically within a year, and is based solely on their own performance and/or employer needs. Some employer advocates requested a blanket exception for “in-line” or “elevator” promotions advancing specific employees on career trajectories.<sup>19</sup> The Division finds that a blanket exception for such promotions is inconsistent with the Act text and legislative intent. Even where a promotion is specific to an individual employee’s career trajectory (*e.g.*, from junior to senior positions, or from training to full positions), notice of such advancement lets others similarly qualified, who may not know the employer is open to promotion requests, seek the same advancement. A research finding supporting the sort of redress for pay disparity that the Act implements is that women are less likely to self-promote;<sup>20</sup> notice of in-line promotions ameliorates this problem. The Division does, however, find that the Rule 4.2.5(B) limited exception addresses the type of early career advancement that may be deemed not to be a “promotional opportunity.”

Rule 4.2.5(C) provides that no promotion notice is required for temporary or interim hires, as such positions are generally not considered “promotions.” But if a temporary hire is expected to turn into a permanent hire — *e.g.*, when an assistant manager initially becomes an interim manager due to an unexpected vacancy, but then employer wishes to fill the position permanently with that employee — other employees must be given notice and opportunity to apply for that promotional opportunity.

Rule 4.3 details how the § 201 promotion and job posting requirements apply to certain scenarios for employers with multi-state operations and/or recruiting. An “employer” is covered upon “employing a person in the state” (C.R.S. § 8-5-101(5)), and then has obligations not necessarily limited by the Act to the borders of Colorado. However, Rule 4.3 interprets the Act as not stretching to the limits of possible extraterritoriality in certain specific scenarios. Firstly, under Rule 4.3(A): § 201(1) *promotion* postings need not be made to employers’ *outside-Colorado employees*. Secondly, under Rule 4.3(B): § 201(2) *job postings* with compensation need not be made (1) for jobs *to be performed* entirely outside Colorado (an exemption that does not include remote jobs because they *could* be performed in Colorado, it cannot be determined until after a hiring decision whether the employee *will* be in Colorado, and even non-Coloradans hired for remote work may move to Colorado after being hired by Colorado employers), nor (2) for *postings entirely outside* Colorado (*e.g.*, a printed posting or advertisement entirely outside Colorado would not need to comply with the Act, but an internet posting accessible in Colorado would).

(4) **EFFECTIVE DATE.** These rules take effect on January 1, 2021.



Scott Moss  
Director  
Division of Labor Standards and Statistics  
Colorado Department of Labor and Employment

November 10, 2020

Date

<sup>19</sup> Public hearing testimony by Dean Harris and Scott Pachitas, Nov. 2, 2020; written comment by Joan Nelson, Rooted Resolve, Oct. 28, 2020. comment by Colorado Chamber of Commerce, Oct. 28, 2020, at 5.

<sup>20</sup> See Christine L. Exley & Judd B. Kessler, *The Gender Gap in Self-Promotion*, *Nat’l Bur. of Econ. Research* (Oct. 2019).