COLORADO
Department of
Labor and Employment

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

Equal Pay Transparency (EPT) Rules, 7 CCR 1103-13 (2024), as adopted November 9, 2023.

I. BASIS: These Equal Pay Transparency Rules implement and enforce Part 2 ("Transparency in Pay and Opportunities for Promotion and Advancement") of the Equal Pay for Equal Work Act, Colorado Revised Statutes ("C.R.S."), Title 8, Article 5 (as amended), 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.

II. 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; 8-5-103, -201, -203; 8-6-102, -104, -105, -106, -108, -109, -111, -116, -117.

III. FINDINGS, JUSTIFICATIONS, AND REASONS FOR ADOPTION. Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds as follows: **(A)** demonstrated need exists for these rules, as detailed in the findings in Part IV, which are incorporated into this finding as well; **(B)** proper statutory authority exists for the rules, as detailed in the list of statutory authority in Part II, which is incorporated into this finding as well; **(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.

IV. SPECIFIC FINDINGS FOR ADOPTION. Pursuant to C.R.S. § 24-4-103(6), the Director finds as follows.

The Equal Pay for Equal Work Act, S.B. 19-085 (the "2019 Act"), was enacted May 22, 2019, effective January 1, 2021. The Equal Pay Transparency Rules ("EPT Rules") were promulgated in 2020, with the same effective date as the 2019 Act, to implement, interpret, and enforce the 2019 Act. Then the Ensure Equal Pay for Equal Work Act, S.B. 23-105, enacted on June 5, 2023 (the "2023 Amendments"), amended the 2019 Act in various respects. These rule amendments serve mainly to implement, interpret, and enforce the 2023 Amendments, as well as to continue to do so for the 2019 Act.

The 2023 Amendments modified definition of what opportunities must be posted to employees. The 2019 Act used the term "opportunities for promotion"; the 2023 Amendments instead use "job opportunity," and codify three exceptions:

(1) "Career progression" promotions — "regular or automatic" promotion "based on time in ... role or other objective metrics" that an employee can satisfy, without competition —

  (a) need not be disclosed for each individual employee;

  (b) but employers must notify eligible employees of any position's career progression requirements, as well as the pay, benefits, full-/part-time status, duties, and access to advancement.

(2) "Career development" promotions — which "reflect work performed or contributions already made" by one specific employee, without competition — need not be disclosed.

(3) At employers with no Colorado site, and under 15 remote staff in Colorado:

  (a) in-person (non-remote) job opportunities need not be disclosed through July 1, 2029;

  (b) but postings for such jobs still must disclose pay.

The 2023 Amendments also add new *post*-selection notice duties: 30 days after filling a job opportunity (but not a career development or progression), employers must notify those the hiree will regularly work with of: hiree name, title, (if any) prior title at the employer, and how and where to express interest in similar job opportunities.

Rule 2, "Definitions," is amended to conform the definitions of terms to these changes in the 2023 Amendments, and in doing so, to clarify how various forms of notice under the updated Act relate to each other — for example, in Rule 2.8, noting that a "notification of … job opportunity" includes not only notices to current employees, but also postings an employer "externally posts" to others outside the employer.

Rule 3.7, "Appeals," is amended to note expressly that, to the extent applicable, appeals will be conducted in a manner consistent with the Colorado Administrative Procedure Act.

Rule 4, "Posting and Notice Requirements," is amended to conform the employer duties to these changes in the 2023 Amendments, and also includes several elaborations of details requested by stakeholders, including:

- flexibility for employers to post ongoing job opportunities without including a deadline, and for employers to extend already-posted deadlines;
- as to the employer duty to provide post-selection notice to all employees whom a new hire will "work with regularly," clarification of whom will be deemed to be those a new hire will "work with regularly";
- flexibility for post-selection notices to combine multiple new hires, and/or be posted to a broader range of employees than the Act mandates — *e.g.*, employers can choose to send notices of all hires in the past 30 days to all employees, rather than send each to only specific employees a new hire will work with; and
- clarification of who qualifies as an "eligible employee" who must be provided notice of "career progression" requirements and terms.

Additionally, Rule 4.1.4(A)(4), "Acting, interim, or temporary ("AINT") hires," is amended to execute the statutory duty to "promulgate rules for temporary, interim, or acting job opportunities that necessitate immediate hire." The rule aims to balance (a) the need to accommodate situations that (in the words of the statute) "necessitate immediate hire" without awaiting a posting first, with (b) the need to assure that this exception is limited to (in the words of the statute) "temporary, acting, or interim" roles that "necessitate" hiring without a posting, and is not applied so broadly as to undercut the statute's broad mandate that job opportunities otherwise must be posted.

During the comment period on the proposed rules, stakeholder input led the Division to add the following three additions and edits to three parts of the proposed version of Rule 4.

First, in Rule 4.1.4(A)(4), the Division deleted the new proposed requirement that for an AINT exception, a position must "necessitate[] immediate hire into an AINT role." That requirement would exclude many temporary positions that already were exempt under existing rules that had no such requirement, which the Division found to have caused no problems since the rules took effect almost three years ago. The Division also amended the proposed rule's requirement that an AINT exception applies only if "the position was not held anytime in the preceding twelve months." The purpose of that requirement is to prevent a relatively long (e.g., nine-month) temporary, acting, or interim hire from being hired every year with no job postings. But as written, the "not held anytime in the preceding twelve months" requirement would exclude from the AINT exception even a short-term hire, like a seasonally temporary three- to six-month hire, if the employer had another such short-term hire in the prior twelve months. The adopted version disallows an AINT hire that follows another AINT hire who was employed in *seven* of the prior twelve months — to let seasonally temporary hires qualify for the AINT exception, with the seven-month length drawn from the main "seasonal" definition in the Fair Labor Standards Act. The adopted rule allows no posting for an AINT employee of up to nine months — except an *annual* such hire is limited to the seven months that fairly characterizes "seasonal" work, and that prevents the AINT exception from being used to avoid posting annually recurring positions of longer duration (i.e., over 7 and up to 9 months). The adopted rule ends with a small exception: if an employer made an AINT hire for a period of over 7 and up to 9 months, then if the hired employee separates after 7 or more months, the employer can hire a replacement, just to finish out the rest of the up to nine-month term, without need to post that very short-term position to finish the planned term.

Second, Rule 4.2.3 is an addition, based on stakeholder input, to the post-selection notice requirement: employees can opt out of disclosing their name and/or prior job title to other employees if legally impermissible (*e.g.*, a restraining order precludes disclosure) or if they believe disclosure would put their health or safety at risk. To prevent employers from *inducing* employees to opt out (either inadvertently, or based on disliking such disclosures), the adopted rule provides that (1) an employee request must be voluntary, in writing,[1] and on their own initiative,[2] and (2) the employer still must disclose the filling of the position with all required information other than the item(s) the employee asks not to disclose (*i.e.*, name and/or prior job). As to what makes a decision "voluntary": Under well-established labor law principles, if a law requires that an employee decision must be "voluntary," then it does not qualify as voluntary if, in reality, it was coerced or pressured. There cannot be a complete list of all situations that are and aren't voluntary; employer/employee relationships are human interactions that vary too much with the facts and nuances of each unique situation. But the well-established labor law principles of voluntariness provide meaningful guidance, including the following.

1) An employee decision to take on work is *not voluntary* if refusing would subject them to an *adverse action*.[3]

2) A writing's *language* saying it is a "Voluntary" employee decision or agreement does not defeat evidence that it is *non-voluntary in reality*, which includes:

    a) *implied threats or pressure* — for example, if the employee "was told that he 'had to sign it or, you know, they will take other actions," even though the the "other actions" were left unspecified; and

    b) requests sufficiently *repeated or strongly worded* that they are *more like demands than offers* — for example, if the employer "came back to me a third time and told me that I had to sign."[4]

3) An employee's decision to take on work *is voluntary* if, for example:

    a) the employer merely *offered*, as "two *options,*" *either* full or partial time off with some paid work;[5] *or*

    b) the employee *initiated* the idea of taking on the work — as long as there is no evidence the employee's decision "was anything but voluntary."[6]

Third, Rule 4.3, on geographic limits, is amended for clarity, based on stakeholder input that more detail is needed about various permutations of in- and out-of-state employees and notices.

The adopted rules also include various other technical or otherwise non-substantive changes where stakeholders suggested, and/or Division review found a need for, clarifications or corrections.

V. EFFECTIVE DATE. These rules take effect January 1, 2024.

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

November 9, 2023
Date

[1] Especially for employees with limited English literacy, the required "writing" can be through translators or interpreters, or with any other assistance — a point the Division will reiterate in updates to published guidance based on these adopted rules.

[2] The rule notes that although a request must be at an employee's initiative, employers may notify employees of non-disclosure rights.

[3] *Evans v. Books-A-Million*, 762 F.3d 1288 (11th Cir. 2014).

[4] *Wilson v. Decibels of Oregon, Inc.*, No. 1:16-cv-00855-CL, 2017 U.S. Dist. LEXIS 176983 (D. Or. Sep. 11, 2017).

[5] *D'Onofrio v. Vacation Publications, Inc.*, 888 F.3d 197 (5t\h Cir. 2018) ("[The employer] offered Karen two options: she could go on unpaid FMLA leave or she could log in remotely a few times per week and continue to service her existing accounts so that she could keep the commissions from those accounts while on leave. Karen chose the latter option, and agreed to continue servicing existing clients but not take new leads.").

[6] *Massey-Diez v. University of Iowa Community Medical Services*, 826 F.3d 1149 (8th Cir. 2016) (early return from leave was voluntary, although the employer proposed a specific plan for her early return, because the employer's proposal was a response to the employee *first* saying that to avoid further depleting her paid time off, she was "open for suggestions" on ways to let her return early).