**DE WEBINAR QUESTIONS[[1]](#footnote-1)**

**Questions regarding Colorado Equal Pay for Equal Work Act**

**Q: How many days does the posting for promotions need to be posted?**

**A:** There is no minimal period of posting for promotions in the law. Rather, it is a factual question for you to resolve, posting by posting. The law requires that each employer ensure that it provide sufficient notice to its Colorado employees of promotional opportunities so they are aware of the opportunity and have sufficient time to apply and be considered before a promotion decision is made. So, during holiday or popular vacation periods when employees will not able to become aware of the posting as quickly as when they are working a regular schedule, you must increase the length of your posting to accomplish the requirement that you post sufficiently long to give employees “sufficient time” to apply and be considered. You also have to look at job context. If you have all employees working common days and hours, that may allow you to shorten the duration of the posting relative to employees working rotating shifts with numerous days off in between shifts (like firefighters or those working 4 x10 workweeks). Also, if you rely on paper postings, as opposed to electronic postings with instantaneous delivery, you might add more time to allow employees to discover the posting.

**Q: What are large companies doing to comply with the promotional opportunity requirement?**

**A:** Large employers are mostly ensuring that their satisfaction of the listing/posting requirement as to “job openings” is separate from their satisfaction of the “promotional opportunities” legal requirement. This is to address differences in requirements. You must inform Colorado employees of all “promotional opportunities,” whereas the law is silent as to whether employers can avoid posting “job openings” in Colorado to avoid disclosure of “pay data” information. For “promotional opportunities,” which were the subject of DE’s January 27th webinar (“job opening” requirements were discussed during DE’s December 15th webinar), large employers are using intranet sites or other forms of communique that ensure Colorado employees get the required notice within the standards set by law. Those standards (reiterated below in response to another question) are as follows:

* The requirement to provide notice (i.e., a “posting”) of all promotional opportunities applies to Colorado employees; the law does not require employers to post or notify non-Colorado employees of all promotional opportunities.
* Notice of a promotional opportunity has to be in writing, by any method reaching all employees, to all Colorado employees for whom it may be a promotion on the same calendar day, and “sufficiently in advance of the hiring or promotion decision” such that employees receiving notice may apply.
* The notice must include the job title of the position and the means by which an employee may apply for the position.
* For “promotional opportunities” that are to be performed in Colorado or may be performed remotely (i.e., a person could work in the position from Colorado), employers must include the “pay data” information in the notice of the promotional opportunity.

**Q: Do we have to keep a copy of the job description with the employee file/personnel file, or is it appropriate to simply keep it in the recruiting system/electronically?**

**A:** There is no explicit requirement that job descriptions must be kept with the employee file or personnel file of the specific individual hired. Thus, it is appropriate to simply keep documents related to job descriptions and pay information in the recruiting file system or electronically. Obviously, this does not relate to the specific pay records or wage rate decisions for individual employees, which would still be part of the individual employee’s personnel file.

**Q: Can you please address the Rocky Mountain Recruiters suit and Colorado’s recent response to the suit seeking injunctive relief? Do you think the law is overreaching?**

**A:** The Rocky Mountain Association of Recruiters (“Plaintiff”) filed a Complaint for declaratory judgment and injunctive relief on or about December 29, 2020 in the United States District Court for the District of Colorado. The Complaint seeks an order prohibiting enforcement of the equal pay transparency sections of the [Colorado Equal Pay for Equal Work Act](https://leg.colorado.gov/sites/default/files/2019a_085_signed.pdf) (“EPEWA”). Plaintiff argues that the equal pay transparency section of the EPEWA, and regulations promulgated the Colorado Division of Labor Standards & Statistics (“DLSS”) published related to the EPT sections of the bill, are unconstitutional because violative of the Commerce Clause and the First Amendment. Plaintiff’s commerce clause argument alleges the listing/posting requirement conflicts with other state laws and imposes unique requirements that burden interstate commerce, and as such the authority to establish a law like the EPEWA rests solely with the United States Congress. Plaintiff’s First Amendment argument contends that requiring what information an employer must include in a job listing/posting amounts to “compelled speech,” and Colorado has failed to establish how the restriction is reasonably related to a substantial government interest that justifies governmental intrusion.

On December 31st, Plaintiff filed a Motion for Preliminary Injunction seeking to prohibit enforcement of the job listing/posting requirements during the pendency of the lawsuit. Colorado’s DLSS’ response to the Motion for Preliminary Injunction is not due until February 3rd.

Because the Court has not yet issued an Order granting the Preliminary Injunction sought by Plaintiff, the EPEWA and operative regulations are currently in force and active. Plaintiff has two swings at prohibiting enforcement: (1) before final judgment through the granting of its Motion for Preliminary Injunction (which can occur within the next few months); and (2) should it lose its Motion, upon the Court entering judgment in favor of Plaintiff on its Complaint (probably at least a year down the road). It is speculative to opine as to how the Court will most likely rule. However, constitutional arguments are difficult to win. Moreover, the Colorado DLSS has at least a colorable argument as to the existence of a substantial government interest related to eliminating pay disparity in the workplace sufficient to justify the law the Colorado legislature passed and which Colorado Governor Polis signed into law.

**Q: How does an employer meet obligations for all U.S. virtual postings?**

**A:** To the extent this question relates to listings/postings for “job openings,” if the employer already has at least one employee working in Colorado (i.e., it is a “Colorado employer”) AND an employee can perform the job from Colorado, then the job listing/posting must include the required “pay data.” Similarly, if the virtual posting is a “promotional opportunity” for an employer’s Colorado employee which can be performed “remotely” (i.e., anywhere in the world), the employer is required to provide notice (or what the law calls “postings”) to your Colorado employee of the “promotional opportunity” with the required “pay data”.

First, the company is subject to the law because it is a Colorado “employer” under the statute (employs at least one person in Colorado). Second, REMOTE roles that can be performed from anywhere, including from Colorado, *could be* performed in Colorado, and as such they require “pay data” information regardless whether this is a position which could be filled within the United States or outside the U.S. (the DLSS notes in its Statement of Basis, Purpose, Specific Statutory Authority, and Findings that this is true because: “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”). Additionally, [INFO #9](https://cdle.colorado.gov/sites/cdle/files/INFO%20%239_%20Equal%20Pay%20Transparency%20Rules%20%282021%29.pdf) explicitly notes that “Remote jobs for a covered employer (*i.e.*, an employer with any Colorado employees), as of the posting, are not out-of-state jobs, and therefore are not excluded.”

However, as to “job openings,” to the extent you are trying to meet the obligations of the law without exposing all U.S. virtual postings to the requirement, we interpret the EPEWA and the DLSS’ Final Rule to more likely than not require your company, a Colorado employer, to either (a) not post in the state of Colorado, or (b) post your job in Colorado and include the required “pay data” information. Said another way, there is no language in either the EPEWA or the Colorado Division of Labor Standards & Statistics (“DLSS”) Final Rule to prohibit a Colorado employer (a) from choosing to not post a remote job opening in Colorado, or (b) from choosing to post (outside of Colorado) a remote job opening (this is like a Virginia employer choosing to not post a job outside of Virginia). We also think there is nothing in the EPEWA or the DLSS Final Rule prohibiting an employer from choosing to advertise jobs that do not exist in Colorado or which cannot be filled in Colorado. We think this is analogous to a Virginia employer saying the job exists only in Virginia, or only in Virginia, Maryland and let’s say El Paso. In such a case, the DE Member or DE/Recruit Rooster customer would want to request DE or Recruit Rooster to “turn off” DE’s feed of this job to Colorado. We think this is so because nothing in the EPEWA requires an employer, even a Colorado employer, to post job oepnings in the state of Colorado (as INFO #9 notes, “Employers are *not* required to ‘post’ jobs, or have job postings”). Rather, all the EPEWA and the DLSS Final Rules require is that if a Colorado employer chooses to post a job in Colorado, or one which could be filled in Colorado, that posting must include EPT information.

We will have to leave it to your company to consider whether this Colorado avoidance policy decision as to “job openings” would leave a “bad taste” in the mouths of Colorado regulators dealing with any of your colleagues remaining in Colorado. Your company may also wish to consider how its employees inside and outside of Colorado might view this Colorado avoidance policy. However, these are matters of policy, we believe, left to the sound discretion and judgment of the company and are not decisions the Colorado EPEWA reaches.

This ability to avoid posting remote “job openings” in Colorado discussed above does NOT apply to “promotional opportunities,” since the EPEWA requires an employer to inform Colorado employees of all “promotional opportunities” within the company regardless of location. Thus, Colorado employees would have to receive notice (called a “posting” by the law) of all promotional opportunities company-wide. The requirement of including the relevant “pay data” information in these “promotional opportunities” notice though is limited to promotion opportunities in Colorado or “remote” positions that an employee can perform anywhere. *See* Rule 4.3A of the [DLSS Final Rule](https://cdle.colorado.gov/sites/cdle/files/7%20CCR%201103-13%20Equal%20Pay%20Transparency%20Rules_0.pdf).

**Q: Do we need to directly email all employees to let them know of promotion opportunities? What does the “how” to notify look like?**

**A:** You do not have to notify all employees letting them know of promotion opportunities under the EPEWA. Rather, the EPEWA pertains only to Colorado employees in regard to promotion opportunities; thus, an employer is required to let all Colorado employees know of any promotion opportunities the company has.

The “how” as to notifying Colorado employees of a promotional opportunity does not require a direct email. Rather, the rules pertaining to notifying Colorado employees of a promotional opportunity are identified in INFO Sheet #9, which requires that notice of promotional opportunities (or promotional opportunity “postings” as the EPEWA calls it) must be: (1) in writing; (2) by any method reaching all Colorado employees; (3) to all Colorado employees for whom the position would be a promotion, and in such a way that they receive the notice all on the same calendar day; and (4) sufficiently in advance of the promotion decision so that employees receiving notice may apply. This means it can be an email, it can be an intranet posting, it can be a physical posting on an HR message board; so long as it is in writing, it reaches all Colorado employees for whom the position would be a promotion on the same calendar day, and with enough time so such Colorado employees can apply for the promotion. Promotion opportunities that are to be performed outside of Colorado need not include the “pay data” information pursuant to Rule 4.3A of the DLSS Final Rule, but you still have to let them know about the promotion opportunity.

**Q: Does notice to Colorado employees of promotional opportunities “regardless of location” apply to international job opportunities?**

**A:** Because there is no language that limits notice of promotional opportunities to just opportunities in the United States, we believe the notice requirement to Colorado employees of promotional opportunities DOES include notice of international job opportunities. The [EPEWA](https://leg.colorado.gov/sites/default/files/2019a_085_signed.pdf) specifically requires an employer make known “**all** opportunities for promotion to all current employees” (emphasis added); the Final Rule and INFO #9 reiterates the statutory language (as a requirement to Colorado employees) and references a promotional opportunity as being “a 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.” In other words, there is no limitation as to just promotions in the United States, but rather all opportunities for promotion. Again, however, while you would be required to inform Colorado employees of such international “promotional opportunities,” you are not required to include the “pay data” information for those promotional opportunities that an employee can only perform internationally. *See* Rule 4.3A of the DLSS Final Rule.

**Q: What about a natural progression promotional opportunity? During the annual performance process, if someone meets the requirements to move up to the next level, does this position need to be posted to Colorado employees?**

**A:** Yes, the law does require notifying Colorado employees of natural progression promotional opportunities as well, so long as the natural progression promotional opportunity is not a promotion that automatically follows a trial period of one year or less promised in a writing (one of the exceptions specifically noted in the DLSS’ Final Rule and INFO #9). A “promotional opportunity” exists “when an employer has or anticipates a 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.” A “vacancy in an existing position” is when an employer has or anticipates a vacancy when an existing position the employer intends to fill is open or is held by a departing employee.

Specific to your question, a “vacancy in a new position” exists when an employer adds a position, *or gives an existing employee a new position*, including by changing their title and/or materially changing their authority, duties, or opportunities. This includes “*a promotion along a fixed, in-line career trajectory for which a current employee is eligible.*” (Emphasis added).

Thus, a natural progression promotional opportunity (like a fixed, in-line career trajectory move) is still a promotional opportunity the employer must provide notice of to its Colorado employees. The only exception the law provides for natural progression promotional opportunities is one that an employer promises in a written agreement and that occurs in one year or less. For example, if Joe Worker signs an offer letter to work as an Accountant I, with a promise to make him an Accountant II within one year, then such example would be an exception to the law and an employer would not have to notice the “promotional opportunity” to its Colorado employees. But, absent a written promise occurring within one year or less, then the employer must provide notice to its Colorado employees for whom the position is superior in terms of compensation, benefits, status, duties, opportunities, or access to further career advancement.

Again, in instances where the employer must notify Colorado employees of a promotional opportunity that is available, the inclusion of “pay data” information in such notice is required only if the promotion is to be performed in Colorado or “remotely” anywhere in the world (which would include allowing performance in Colorado).

**Q: There appears to be a requirement to notify Colorado employees about career progression promotions, but it doesn’t seem that this notification is required before the promotion. What is the minimum information that we can provide? Will effective date of the promotion and new job title suffice? We obviously have private concerns with providing identifiable and confidential employee data to other employees.**

**A:** The EPEWA, as interpreted by the DLSS’ Final Rule and INFO Sheet #9, does identify the timing of any notice for promotional opportunities, as well as the minimum information to provide. To summarize:

* The requirement to provide notice (i.e., a “posting”) of all promotional opportunities applies to Colorado employees; the law does not require employers to post or notify non-Colorado employees of all promotional opportunities.
* Notice of a promotional opportunity has to be in writing, by any method reaching all employees, to all Colorado employees for whom it may be a promotion on the same calendar day, and “sufficiently in advance of the hiring or promotion decision” such that employees receiving notice may apply. Thus, specific to the question, the notice must be sufficiently in advance it allows Colorado employees an opportunity to apply for the promotion. This would suggest the notice must occur before the actual promotion, otherwise the Colorado employees entitled to notice would not have an opportunity to apply for the promotion.
* The notice must include the job title of the position and the means by which an employee may apply for the position.
* For “promotional opportunities” that are to be performed in Colorado or may be performed remotely (i.e., a person could work in the position from Colorado), employers must include the “pay data” information in the notice of the promotional opportunity.

Given the foregoing, in reference to your concern about confidential employee data, it is unclear what identifiable and confidential employee data an employer would reveal in the notice. A job title is not confidential; furthermore, the “pay data” information that an employer must include in notices for promotions that will be performed in Colorado or “remotely” relates to “pay data” information of the promotional opportunity, a position that no one has yet filled and thus is not attributable to a specific employee.

**Q: The Colorado law provides a safe harbor clause related to an existing pay disparity as long as the employer has conducted a pay analysis and is taking steps to remediate pay disparities not supported by the six defensible reasons to pay. Do you have information on when that analysis must be completed by?**

**A:** There is no “safe harbor” clause in the EPEWA that completely precludes liability against an employer for pay disparities. You may be referencing Section 8-5-104(1)(b) of the EPEWA, which states that evidence an employer completed a thorough and comprehensive pay audit of its workforce with the goal of identifying and remedying unlawful pay disparities may be considered “good faith” such as to prohibit an award of liquidated damages. NOTE: this only limits recovery for liquidated damages against an employer; an employer would still be liable for actual economic damages, such as backpay and reasonable costs associated with bringing suit, and equitable damages, such as reinstatement, hiring, or promotion.

The only limits to employer liability for pay disparities is the pay disparity analysis described above that may evidence “good faith” for purposes of rejecting liquidated damages (such pay analysis must occur within two years prior to the date of commencement of any civil action against the employer), and Rule 3.2.4 of the DLSS’ Final Rule, which notes the DLSS will not accept complaints of wage disparity violations that occurred before January 1, 2021 (i.e., the wage discrimination prohibition law does not apply retroactively).

**Q: INFO #9 provides that multi-state employers need not include compensation or benefit information in notices to Colorado employees for positions outside of Colorado, but must notify Colorado employees of such promotional opportunities. Does this mean jobs outside of Colorado may not need compensation or benefits information?**

**A:** For purposes of “promotional opportunities,” notices about “promotional opportunities” to Colorado employees need not include the “pay data” information if the “promotional opportunity” is work performed outside of Colorado. If the “promotional opportunity” is in Colorado, or may be performed remotely from anywhere (including potentially Colorado), the notice (what the EPEWA calls a “posting”) to Colorado employees for the “promotional opportunity” must include the “pay data” information.

**California Pay Data Reporting Requirements**

**Q: How do we have to report hours worked for exempt employees?**

**A:** As noted during the webinar, when calculating the total hours worked of an exempt employee for the purposes of the pay data reports, there are two options for employers:

1. If you have your exempt employees fill out timesheets or other time records, use these timesheets plus all hours the employee was on paid time off. So, if Susan CEO had timesheets showing she worked 2,250 hours and took two weeks of paid time off (80 hours), she would count as 2,330 hours (2,250 + 80 hours of paid time off).
2. However, if you do not have exempt employees keep timesheets (as most employers don’t), then the DFEH instructs employers to calculate the total number of days an exempt employee worked during the Reporting Year and took paid time off (whether for sick leave, paid time off, medical leave, or other paid time off) and multiply the days by the average number of hours the employee worked per day. So, if Susan CEO worked 200 days during the Reporting Year, and took 20 days of paid time off (2 sick days, 10 vacation days, and 8 days of medical leave), and Susan CEO averages 10 hours of work per work day, Susan’s hours for annual pay data reporting purposes would be (250 work days + 20 paid days off) x 10 hours a day, or 2,700 total hours.

**Q: We are a Colorado employer, but have employees in California (fewer than five). Do we need to file the annual California pay data report?**

**A:** Depends on the total number of employees you have. An employer must submit an annual pay data report to California if it is” a private employer that has 100 or more employees and which is required to file an annual EEO-1 report pursuant to federal law.” Employees are those who are on your payroll; either as full-time employees, part-time employees, temporary employees on your payroll, employees on medical leave or vacation, or even employees on unpaid leave.

So, if you have 100 Colorado employees and 4 California employees on your payroll, you are subject to California’s annual pay data reporting requirement. The employees for whom you would report the required information, such as race, sex, pay band, and annual hours, depends on your appetite: you must include in your annual pay data report employees who work in California, and employees outside of California who report to a California establishment. You may also include data for all your other employees if you so wish (but why would you so wish?)

**Q: What if our system does not provide for identifying as non-binary? Will that somehow count against us?**

**A:** The DFEH’s [FAQs](https://www.dfeh.ca.gov/paydatareporting/faqs/) specifically state, “DFEH requires employers to report non-binary employees in the same manner as male and female employees.” (Emphasis added). Thus, employers are required to report information for non-binary personnel to the extent any of its employees identify as non-binary, and failure to do so will “count” against the employer. Thus, for employers with a system that does not identify non-binary employees, employers who have been informed by their employee of their non-binary status will have to manually calculate these individuals’ information for inclusion in the annual pay data report. The only relief that may be available to you is the assumption that since you use a system that does not provide for identifying non-binary employees, that none of your employees have identified as non-binary to you as the employer. But if they have, then an update to your system is recommended to avoid having to bear the administrative burden of calculating information manually.

**Q: For the California hours worked reports, would that include paid bereavement, jury duty, etc.?**

**A:** The DFEH’s FAQs regarding the new California pay data reporting requirement instructs employers to include “any form of paid time off for which the employee was paid by the employer.” Thus, if the employer provides pay to employees for bereavement, jury duty, etc., those hours would be included in any calculation of total hours worked.

1. Questions edited for clarity and to remove identifying markers. [↑](#footnote-ref-1)