

Blog Post

New Obligations for Colorado Employers

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Two new statutes affecting all employers operating in Colorado, the Equal Pay for Equal Work Act (EPEWA) and paid sick leave through Colorado's Healthy Families and Workplaces Act, will add to the compliance burden of all employers operating in Colorado effective January 1, 2021.

The impact of each new law on employers is discussed below.

The Equal Pay for Equal Work Act

The EPEWA prohibits discrimination on the basis of sex (including gender identity), or sex in combination with another protected status, by paying employees of one sex differently than another sex for substantially similar work. The statute also prohibits an employer from: (i) seeking wage history from an applicant; (ii) restricting employees from sharing their wage information with others; or (iii) retaliating against an applicant or employee for refusing to provide wage history if asked.

The statute does include some exceptions to the prohibition against having a wage difference between sexes if the employer demonstrates a wage differential is based on any of the following factors, so long they are reasonably applied and account for the entire difference in the wage rate:

- A seniority system

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- A merit system
- A system that measures earnings by production quantity or quality
- The geographic location where the work is performed
- Education, training, or experience, if they are reasonably related to the work in question
- Travel, if the travel is a regular and necessary condition of the work performed

An important component of the EPEWA is the law's employer notice and record-keeping requirements. Beginning January 1, 2021, Colorado employers must:

1. Announce to all employees opportunities for advancement and job openings, including the pay range for each job opening; and
2. Maintain records of job descriptions and wage rate histories for each employee while employed and for two years after employment ends.

Employers recently received some clarification of compliance with the EPEWA in the form of final rules issued by the Colorado Department of Labor and Employment (called the "Equal Pay Transparency Rules" or the "Rules"). The Rules, adopted on November 10, 2020, provide clarity on two of the most troublesome requirements of the law:

1. Job Postings. The Equal Pay Transparency Rules clarify that the EPEWA applies to postings for all job openings, except for those jobs to be performed entirely outside Colorado. An employer must include the following information in such postings.

- (a) The hourly rate or salary compensation (or a range thereof) that the employer is offering for the position, including a general description of any bonuses, commissions, or other forms of

compensation that are being offered for the job;
and

(b) A general description of all employment benefits the employer is offering for the position, including health care benefits, retirement benefits, any benefits permitting paid days off (including sick leave, parental leave, and paid time off or vacation benefits), and any other benefits that must be reported for federal tax purposes, but not benefits in the form of minor perks.

The rules also provide a “safe harbor” for employers in describing a range of compensation. As long as the employer can show that the described range of compensation was based on what it “in good faith believes it might pay for the particular job, depending on the circumstances,” there is no violation of this part of the Act.

2. Opportunities for Promotion. A “promotional opportunity” exists when an employer has or anticipates a vacancy in a new or existing position that could be considered a promotion for one or more employees in terms of compensation, benefits, status, duties, or access to further advancement. The Rules require employers to make reasonable efforts to “notify all employees of all promotional opportunities, and may not limit notice to those employees it deems qualified for the position, but may state that applications are open to only those with certain qualifications, and may screen or reject candidates based on such qualifications.” Each such notification must: (i) be in writing; (ii) include the compensation and benefits information of the opportunity (see job posting requirements above); and (iii) indicate how to apply.

The Rules provide limited exceptions to the requirement that an employer post all promotional opportunities:

(a) **Confidentiality.** A promotional opportunity does not need to be posted if the employer has a compelling need to keep the opening confidential because the position is still held by an incumbent employee who is not yet aware they will be separated. If any employee is told of a confidential promotional opportunity, the employer must tell all employees who (1) meet the minimum qualifications or (2) have a job “substantially similar” to any employee told of the opportunity. If the need for confidentiality ends, the job must be posted in compliance with the Act;

(b) **Automatic Promotion After Trial Period.** An employer is not required to post a promotional opportunity where the employer makes a written representation that an employee will be automatically considered for a promotion to a specific position within one year of hire based solely on the employee’s own performance and/or employer needs;

(c) **Temporary, Acting, or Interim Hires.** An employer is not required to make an immediate promotion posting when a position is filled on a temporary basis for up to six months while the employer is searching for a permanent candidate. If the interim hire may become permanent, the required promotion posting must be made in time for employee’s to apply for the permanent position; and

(d) **Outside Colorado.** An employer is not required to post a promotional opportunity for employees entirely outside Colorado.

The Rules also make clear that the new law applies to any employer (including public employers, political subdivisions, schools, and individuals) with at least one employee in Colorado, *including in limited situations, to job openings outside of the state.*

Prior to the effective date of the new law, all employers with an employee in Colorado should take the following actions:

- Conduct a compensation audit to identify any discrepancies in pay based on sex (or any other protected class);
- Create a process and procedure for posting all job openings and opportunities for promotion;
- Create/review files describing each job and establish a process for creating and approving job descriptions; and
- Train managers on the requirements and prohibitions of the EPEWA

Healthy Families and Workplaces Act

Annual Paid Sick Leave

Employers will soon be required to provide their Colorado employees up to 48 hours of paid sick leave per year, including an additional 80 hours of paid sick leave when a federal, state, or local official declares a public health emergency. Colorado's Healthy Families and Workplaces Act (the "Act") applies to all employees in the state and becomes effective on January 1, 2021 for employers with sixteen or more Colorado employees. The Act becomes effective on January 1, 2022 for all other Colorado employers, excluding the federal government.

All employees whose primary place of employment is in Colorado are eligible to accrue paid sick leave at a rate of one hour for every 30 hours worked per calendar year, up to a maximum of 48 hours. For accrual purposes, exempt employees are assumed to work 40 hours per week, unless they are normally scheduled to work fewer than 40 hours a week. Where an exempt employee is scheduled to work fewer than 40 hours a week, the employee will accrue time based on his/her regular schedule.

Sick time begins to accrue on the employee's first day of actual work, and employees are permitted to use earned sick time as soon as it is accrued. Unless the employer and employee agree to a shorter time, an employee can use accrued sick leave in hourly increments.

Employees are permitted to carry over up to 48 hours of paid sick leave, but employers may limit an employee to 48 hours in any calendar year.

Employees may use any accrued paid sick leave for the following purposes:

- For the employee's own mental or physical illness, injury, or health condition if it prevents the employee from working;
- When an employee needs to care for a family member with a mental or physical illness, injury, or health condition;
- For the medical diagnosis, care (including preventative care), or treatment of the mental or physical illness, injury, or health condition for an employee or the employee's family member;
- For specific reasons related to domestic violence, sexual assault, or harassment regarding the employee or the employee's family member; or
- The employee's place of business or the school or daycare provider for the employee's child is closed due to a public health emergency.

Under the Act, a "family member" not only includes the employee's immediate family members, but also a child to whom the employee stands *in loco parentis*, a person who stood *in loco parentis* to the employee when the employee was a minor, or a person for whom the employee is responsible for providing or arranging health or safety-related care.

Employers may request reasonable advance notice where the absence is foreseeable and anticipated.

Where it is not, employees must provide notice as soon as is practicable.

An employer cannot request documentation of the injury, illness, or health condition unless an employee will use four or more consecutively scheduled workdays.

Unless required by another agreement or policy, including the employer's written leave policy, an employer is not required to pay an employee for any unused accrued sick leave upon the employee's termination, resignation, or any other separation from employment.

Additional Paid Sick Leave During a Public Health Emergency

Where a local, state, or federal official has declared a public health emergency, an employee is entitled to additional accrued paid sick time based on the number of hours they work in a typical workweek. Where an employee normally works 40 or more hours, the employee is eligible for an additional 80 hours of paid leave. Where an employee works fewer than 40 hours in a typical workweek, the employee is eligible for the greater of the amount of time the employee traditionally works in a two-week period or the amount of time the employee actually works in the average two-week period.

An employer can require an employee to use any unused, accrued paid sick leave under the Act concurrently with any additional leave available during a public health emergency.

Employees are eligible for additional paid sick leave only during a public health emergency and only one time during that public health emergency, regardless of its duration, when the absence is related to:

- An employee's need to self-isolate and care for oneself because the employee is diagnosed with or is experiencing the symptoms of a

communicable illness that is the cause of the public health emergency;

- Any employee's need to care for a family member who is self-isolating because the family member is diagnosed with or is experiencing the symptoms of a communicable illness that is the cause of the public health emergency;
- The employee or a family member needing medical diagnosis, care, or treatment because the employee or family member is experiencing the symptoms of a communicable illness that is the cause of the public health emergency;
- The employee or family member is seeking preventative care related to the illness that is the cause of the public health emergency;
- The decision of a local, state, or federal public health official or health authority that the employee's or family member's presence at a worksite would jeopardize the health of others because of the employee's or family member's exposure to the illness or because the employee or family member is experiencing symptoms of the illness;
- The employee must care for a child or other family member because the employee's childcare provider is unavailable or the individual's school or place of care has been closed directly due to the public health emergency;
- The employee has a health condition that may increase the employee's susceptibility to the communicable illness that is the cause of the public health emergency; or
- A public official has ordered the close of the employer's place of business or the school or place of care of an employee's child due to the public health emergency.

Employees must give as much advance notice as is practicable when the need for the leave is foreseeable and the employer's place of business has not been closed.

Employers cannot require documentation of the need for the additional paid sick leave during a public health emergency.

Employers must provide written notice of an employee's rights under the Act, including the right to be free of retaliation, preferably in their employee handbooks or through a poster yet to be distributed by the state. The notice must be in English, as well as in any language that is the first language spoken by at least five percent of the employer's workforce. Employers who do not comply with the notice provisions face fines of \$100.

Employers must keep records of all hours worked, paid sick leave accrued, and paid sick leave used for each employee for two years.

Employers in Colorado should carefully review their policies with employment counsel to ensure their compliance with the Act. They should also review and begin preparing their payroll and administrative procedures to so that they can implement all requirements of the Act in January 2021.

Conclusion

Colorado joins other states with offering these expanded protections for employees. For assistance in complying with these new laws, contact your Akerman counsel.

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