COLORADO CHAMBER OF COMMERCE

TO: Colorado Division of Labor Standards & Statistics,
Colorado Department of Labor & Employment
FROM: Colorado Chamber of Commerce, Labor & Employment Council
DATE: October 28, 2020
RE: ***Proposed Equal Pay Transparency Rules, 7 CCR 1103-13***

On behalf of the Colorado Chamber of Commerce and the Chamber's Labor & Employment Council we hereby submit formal comments to the Division of Labor Standards & Statistics proposed rule 7 CCR 1103-13 regarding equal pay transparency. The Colorado Chamber of Commerce represents businesses of all sizes and industries across the State of Colorado and many have voiced their concerns with the Division's proposed Rules, especially those that relate to job posting requirements by employers. Details regarding those concerns are provided below:

Background:
During the 2019 Legislative Session, Senate Bill 19-085 (Equal Pay for Equal Work, the "Act"), was passed by the Colorado General Assembly and enacted into law. The legislative language regarding promotional opportunity and salary posting requirements can be found in Section 8.5.201 (1) and (2) as follows:

> ***Section 8.5.201 (1***): An employer shall make reasonable efforts to announce, post, or otherwise make known all opportunities for promotion to all current employees on the same calendar day and prior to making a promotion decision.
>
> ***Section 8.5.201 (2***): An employer shall disclose in each posting for each job opening the hourly or salary compensation, or a range of the hourly or salary compensation and a general description of all of the benefits and other compensation to be offered to the hired applicant.

***Concerns with Section 4.3.3 – Colorado Employer with Job Outside of Colorado*:**
The Council has significant concerns with the Division's proposed language in Section 4.3.3 due to the negative impacts to both Colorado employers and employees if the provision were to be adopted as written below:

> 4.3.3 Colorado employer with job outside of Colorado. If an employer with one or more employees in Colorado has a job that it requires or prefers to be performed outside Colorado, and if the employer accepts applicants from locales at least as distant as Colorado:
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> (A) Under C.R.S. § 8-5-201(1), it must notify all of its Colorado employees for whom the job would be a promotion.

(B) Under C.R.S. § 8-5-201(2), if the employer posts the job in Colorado or by electronic means accessible in Colorado (*e.g.*, on a website), it must include compensation and benefits in such job postings.

Section 4.3.3 as proposed is an expansion of authority by the Division which was not intended in the 2019 legislation and is not referenced in C.R.S. § 8-5-201. The proposed regulation allows the Division of Labor & Standards the ability to impose regulations on employers that hire outside of Colorado which is an expansion of jurisdictional authority over a company that has operations in another states. *See* C.R.S. § 8-1-111 (stating, "The director is vested with the power and jurisdiction to have such supervision of every employment and place of employment **in this state** as may be necessary adequately to ascertain and determine the conditions under which the employees labor…"). The only way the Director may have power or jurisdiction over another state is if a reciprocal agreement exists between Colorado and that other state. *Id.*

> ***Example**: If a worker employed by a Colorado employer is working remotely in the State of Wyoming and is injured, the company would be required to file a workers' compensation claim under the State of Wyoming workers compensation laws not under Colorado's workers compensation laws.*

The proposed regulation states that an employer who has at least one Colorado-based employee, is required to post a job opportunity and salary for a position that can be performed outside of Colorado, other states, or even in other countries. The proposed Rule would also regulate out-of-state employers that allow employees to work remotely in Colorado.

> ***Example 1**: An employer based in New York has one employee working in Colorado but has a vacancy based in New York for a Chief Financial Officer position. Based on the proposed Colorado regulation, that employer would be required to post the job and disclose the salary range for the CFO position not only in Colorado, but nationally and internationally.*

> ***Example 2**: A tech company has its headquarter office in Salt Lake City, Utah. Software Engineers are presumed to work out of headquarters in Salt Lake City but are permitted to work in Denver or other cities around the country remotely. Under the current language of the regulation, the remote employees would be considered Colorado employees and subject to the proposed Rule. They should not be subject to the proposed regulation because the location of their offices are out of headquarters, which are in Utah, not Colorado.*

The Rule should only apply if the job posting describes a job in Colorado. The proposed regulation would impose a significant administrative and costly impact for employers and create a disadvantage to qualified applicants. This requirement delays a critical hiring process by employers that need to fill a position quickly.

The proposed Rule also has severe impacts to job applicants and current employees in Colorado since it will be unlikely that any national company will post job openings for Colorado employees due to the requirement. Those nationally based companies will post the jobs everywhere except for in Colorado, preventing Colorado employees from the benefit of applying. Finally, the proposed Rule does not state how long a position must be posted before a promotion decision is made.

Recommendation: We would recommend that the requirement to post positions should be limited to positions located in Colorado, which is consistent with C.R.S § 8-5-201, and that once a promotion decision is made by the employer that the job posting can be withdrawn.

Concerns with Sections 4.3.1 – Colorado Employer with a Colorado job, wherever advertised:
The Council has similar concerns with Section 4.3.1 as proposed:

> 4.3.1 Colorado employer with a Colorado job, wherever advertised. If an employer with one or more employees in Colorado has a job to be performed in Colorado:
>
> (A) Under C.R.S. § 8-5-201(1), if the employer accepts applicants from outside Colorado, it must notify all of its employees in any state for whom the job would be a promotion.
> (B) Under C.R.S. § 8-5-201(2), if the employer posts the job outside Colorado, it must include compensation and benefits in such job postings.

This Section requires notification and posting of promotional opportunities and compensation and benefits information to *any* employees outside of Colorado.

> ***Example:*** *A Colorado company has a promotional opportunity for a management position in its Denver office. Based on the proposed Colorado regulation, a qualified employee in the Cheyenne, Wyoming office, who has never worked in Colorado, could file a complaint against the Colorado company in Colorado for failure to post the job opening in Wyoming.*

Like Section 4.3.3, this is an impermissible expansion of the Director's jurisdictional authority as stated under C.R.S. § 8-1-111. The Director only has authority over employment in the State of Colorado.

> *Recommendation*: We would recommend that the requirement to post positions should be limited to Colorado employees only, which is consistent with C.R.S § 8-5-201 and the Director's vested authority. Alternatively, Section 4.3.1 should be revised to permit employers to give notice only to those employees who are eligible for the position, per the alternative recommendation to revise Section 4.1's job posting requirements, explained below.

Concerns with Section 4.2 - Opportunities for Promotion:
We are concerned that this section too narrowly defines reasonable efforts to announce, post, or otherwise make known all opportunities for promotion. The posting on an employer's internal website should be deemed a sufficient communication "announcing" the job. At a minimum, a one-time notice to Colorado employees which enables them to review all available posted positions and promotional opportunities on the Company's intranet or careers site should be deemed to comply with the regulation. It would be administratively burdensome to require companies to proactively reach out to employees for each position.

Further, Section 4.2.1's requirement that a promotional opportunity be made in writing also poses an administrative and logistical burden to small businesses that lack intranets or career sites. The language in C.R.S. § 8-5-201 does not require the announcement to be in writing. An employer should be permitted to make an oral announcement of a promotional opportunity to its employers as is permitted by the statute.

Likewise, we are also concerned with the language in Section 4.2.3, which states:

> If an employer elects to post promotional opportunities rather than providing notice to each employee, the posting must 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.

Employers typically do not post job openings on physical bulletin boards, and employees in turn do not consult physical bulletin boards for job postings. The vast majority of large employers "post" job openings electronically, and employees in turn search for jobs electronically. However, Section 4.2.3 requires that an electronic job posting be accompanied by paper postings on bulletin boards. Some Colorado businesses have many locations within the state with varying numbers of employees at each location. The proposed regulation would require those employers to post job openings on bulletin boards in hundreds of locations throughout the state, including locations with only a handful of employees. The only feasible alternative is sending an email to each and every employee, which is administratively burdensome.

In addition, the statute and the proposed Rule do not make it clear that an employer would not have to post the role internally with a salary range in cases when the employer will not consider any internal candidates.

> ***Example****: A CEO has told the Board he is retiring on X date and the Board has determined it will fill the role with an external candidate. Since this would not be a promotion opportunity for any current employee, the employer should not have to announce, post, or otherwise make the role known internally prior to announcing the new CEO. The same could be true for any role where the employer has determined no internal candidate would have the expertise needed and needs to recruit a candidate externally.*

The Council also recommends clarifying "promotional opportunities" in Section 4.2.4. "Promotional opportunity" should mean an opportunity for promotion for a given employee. Section 4.2.4 specifically bars employers from limiting "notice to those employees it deems qualified for the position." As proposed, the language of the regulation requires that every single promotion be posted to every single employee at a company, even if that employee would not meet the minimum qualifications for the position. For employers with a large number of openings, this practice would result in "spamming" employees, who in turn would learn to ignore these notifications.

> ***Example 1:*** *A large Denver law firm has an open position for an associate attorney position, which would technically be a promotion to a paralegal due to increased compensation and benefits. Under the proposed regulation, the firm would be required to give notice of this "promotional opportunity" to every paralegal, even though paralegals would never qualify for the associate attorney position without a legal degree.*

> ***Example 2:*** *Denver Health has a job opening for a Head Surgeon. This position would technically be a promotion to a janitor due to increased compensation and benefits. Under the proposed regulation, the hospital may not limit its promotional announcement to current surgeons at the hospital. Instead, the hospital must post the promotional announcement to every employee at the hospital, including doctors with no experience in surgery, and janitors without medical degrees.*

Example 3: *A company in Denver requires an employee to work in a sales technician role to gain critical experience before being eligible for promotion to a sales management position. The company should only have to announce, post, or otherwise make the sales manager position known to employees with sales technician job experience.*

Recommendations: Revise the proposed Rule to clarify that positions posted on an employer's intranet or careers site, which is the regular means of posting roles, is sufficient notice of new job openings or promotional opportunities. Revise the proposed Rule so that the posting or announcement does not have to be in writing. Also clarify that when an employer has determined that no internal candidate has the expertise needed for a new or an existing job role, the employer is not required to post the role internally with the salary range. Revise the proposed Rule to clarify that the definition of promotional opportunities excludes positions where an employer has a succession plan in place, certain high-level executive positions, in-line promotions, temporary positions and union-represented positions.

Concerns with Section 4.1 – All Job Postings:

We are concerned with the proposed language in Section 4.1 since the proposed language is inconsistent with the current statute for the following reasons.

The proposed language in Section 4.1 misconstrues the General Assembly's legislative intent in C.R.S. §§ 8-5-201(1) and 8-5-201(2). It is the Council's position that Subsection (1) and Subsection (2) are not meant to be read in conjunction. Subsection (1) only addresses posting requirements for promotional opportunities. Subsection (1) does not state that promotional announcements or postings require disclosure of the hourly or salary compensation, or a range of the hourly or salary compensation, and a general description of benefits and other compensation. It is also inconsistent with the statute because Subsection (2) only addresses new job openings and opportunities and does not include or mention promotions. The proposed language requiring disclosure of hourly or salary compensation for all job postings is therefore an expansive reading of the statute as written.

Moreover, employers should be permitted to omit the hourly or salary compensation disclosure from a new job opportunity provided that the job posting includes instructions about how an applicant may locate the information, if such information is made freely available to applicants. Similarly, employers should be permitted to omit detailed information about benefits from a job posting provided it includes instructions to locating that information. Many employer benefit offerings are standardized, and a meaningful description of those benefit offerings would result in a long and ponderous job posting.

The statute requires that employers post a range of hourly or the salary compensation, but only provide a general description of benefits and other compensation offered. This proposed language also exceeds the requirements in the statute, and specifically as it relates to bonuses for employees. Bonuses provided by employers are discretionary and employers do not use ranges for providing bonuses to employees.

Recommendation: Revise the proposed regulation to be consistent with the statute to require employers to post a range of salary and a general description of benefits for new job positions only. Clarify that any posting of a promotional job opportunity is not required to include a disclosure of salary and a general description of benefits. Additionally, revise the Rule so that employers may omit the hourly or salary compensation disclosure for a new job opportunity

provided that the job posting includes instructions about how an applicant may locate the information. The regulation should clarify that with regard to the hourly, salary, or benefits description that is required, information can be made available on a separate section of the employer's intranet and external careers web sites. Finally, the Rule should be revised to clarify that promotion opportunities would only be posted in cases where an employer has no succession plan in place.

Concerns with Section 4.1.2 – Posting of Compensation Range:
We are concerned with this proposed language which states that a posted compensation range may extend from the lowest to the highest pay the employer in good faith believes it might pay for the particular job, depending on the circumstances. This section is problematic in that it will result in every candidate trying to negotiate for the top of the range.

Recommendation: Revise this regulation to allow employers to post the median point of the salary range rather than the entire range.

***Concerns with Certain Procedural Language in Section 3*:**
The Council has additional concerns with the Division's proposed language in Section 3 regarding Complaint, Investigation, and Appeal Procedures. The Council believes the following sections should be amended and supplemented to reflect similar procedures in the Colorado Anti-Discrimination Act ("CADA"):

Rule 3. Complaint, Investigation, and Appeal Procedures:
3.2.4 The Division will not accept complaints of violations that occurred before the later of: January 1, 2021, or more than twelve (12) months prior to the date of the complaint.

The twelve-month time period to file a complaint is overly burdensome to employers. There is no apparent rationale for allowing a complainant twelve months to file a complaint under the Act, especially where other Colorado legislation protecting employees' rights allow half that time to file a complaint. For example, under CADA, a charge of employment discrimination must be filed with the Colorado Civil Rights Division ("CCRD") within six months. *See* C.R.S. § 24-3-403.

Recommendation: Revise Section 3.2.4 to allow a complainant six (6) months to file a complaint under the Act.

Rule 3. Complaint, Investigation, and Appeal Procedures:
3.4.3 In a Complaint investigation, the Division will send the employer a Notice of Complaint, along with any relevant supporting documentation submitted by the Complainant, via U.S. mail, electronic means, or personal delivery. The employer must respond within fourteen (14) days after a Complaint is sent, unless an extension is granted.

As with Section 3.2.4, the Council believes this Section should be amended to conform with the response requirements of an employment charge filed pursuant to CADA. The CCRD allows an employer thirty days to respond to an employment discrimination complaint or charge. *See* Colorado Civil Rights Division, Complaint Process, https://ccrd.colorado.gov/complaint-process. Section 3.4.3 should similarly allow employers at least thirty days to respond to complaints under the Act given the liability an employer may experience as a result of such a claim.

Recommendation: Revise Section 3.2.4 to allow employers thirty (30) days to respond to a complaint filed under the Act.

Concerns with Omitted Deadlines in Section 3:
The Council also believes that Section 3 omits two important time limitations.

First, Section 3.5, regarding Determinations, does not state a time limit for an investigation determination by the Division. Under CADA, the CCRD must complete its administrative process within 270 days, though each party may exercise a 90-day extension to that deadline. *See* C.R.S. § 24-34-306(11). A similar time restraint should be added to Section 3.5 to ensure fairness to each party, and the timely dispensation of each claim.

Recommendation: Revise Section 3.5 to add Section 3.5.4 stating a 270-day time limitation, plus an option to request a 90-day extension for each party, for the Division to complete its administrative process. Second, Section 3.7, regarding Appeals, does not state a time limit for when an appeal must be filed. Under CADA, the charging party has ten (10) days to file an appeal. *See* C.R.S. § 24-34-306(2)(b)(1)(A). A similar time constraint should be added to Section 3.7 to ensure fairness to both employers and employees.

Recommendation: Revise Section 3.7 to add Section 3.7.3 stating a ten (10)-day time limit to file an appeal of a Division's determination.

Concerns About Rebuttable Presumption:

The proposed regulations also do not provide any direction to the Courts in drawing a rebuttable presumption against the employer, under C.R.S § 8-5-203(5) for failure to retain the records as required by C.R.S. § 8-5-202. A typical pay discrimination case focuses on the treatment of comparable employees, not a written job description. Entering a rebuttable presumption for failure to create or retain a job description is an unwarranted punitive measure where, as is typically the case, the job description is unrelated to the actual merits of the claim. For consistency and fairness, the regulations should point to factors such as fault of the employer, actual prejudice to the employee, and availability of other evidence.

Recommendation: Supplement the regulations to add factors for judges to consider under C.R.S. § 8-5-203(5), such as: fault of the employer, actual prejudice to the employee, and availability of other evidence.

Thank you for your consideration of the concerns raised by members of the Colorado Chamber of Commerce and Labor & Employment Council. Please contact Loren Furman at lfurman@cochamber.com or at 303-866-9642 with any questions/concerns regarding this matter.