

## Updates

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Challenge to Colorado Equal Pay for Equal Work Act Will Have Important (and Costly) Implications for Employers



Colorado's Equal Pay for Equal Work Act, SB19-085 (the Equal Pay Act), went into effect on January 1, 2021. Colorado's new law follows a string of laws in other states seeking to expand the protections related to equal pay, including widening the scope of employees who are covered and narrowing the affirmative defenses for employers. However, Colorado's law pushes the pay equity landscape into fairly new territory by requiring that employers (1) detail compensation and benefits information with each job posting and (2) post all promotional opportunities. The provisions of the Equal Pay Act create significant compliance burdens for employers, creating, in other words, a very expensive, ill-fitting suit.

Legal headwinds to the Colorado law have arisen. The Rocky Mountain Association of Recruiters (Rocky Mountain), has challenged these two provisions of the Equal Pay Act in the U.S. District Court for the District of Colorado. As part of its challenge, Rocky Mountain has filed a motion for preliminary injunction, to which the defendant, Scott Moss (the director of the Division of Labor Standards and Statistics of the Colorado Department of Labor and Employment) has now responded. Whether and to what extent the court enters injunctive relief will have important implications for employers.

### **Highlights of the Equal Pay Act**

The Equal Pay Act, especially its provisions regarding job postings, has already garnered a lot of attention. The act:

- Became effective on January 1, 2021

- Applies to all employers with at least one employee in Colorado
- Requires retention of records regarding job postings and wage rates for duration of employment plus two years
- Requires posting compensation and benefit information for job openings, including all jobs located in Colorado and all jobs that can be performed remotely, even outside Colorado [**Provision challenged by Rocky Mountain**]
- Requires posting all promotion opportunities, including in-line (or in-seat) promotions, to all Colorado employees, regardless of whether the promotion opportunity is located in Colorado or anywhere else across the globe [**Provision challenged by Rocky Mountain**]
- Prohibits using a prospective employee's pay history to set the employee's pay
- Prohibits retaliation against employees for discussing their pay (which is already prohibited under Section 7 of the National Labor Relations Act for nonsupervisory employees)
- Establishes fines for noncompliance that range from \$500 to \$10,000 per violation

## **Arguments Advanced by Rocky Mountain Versus Responsive Arguments Advanced by the State**

Rocky Mountain has raised arguments against two particular provisions of the Equal Pay Act: (1) the compensation-posting requirement and (2) the promotion-posting requirement (collectively the challenged provisions). Rocky Mountain seeks to enjoin enforcement of the challenged provisions based on a First Amendment argument and a Dormant Commerce Clause argument.

### **The First Amendment Claim**

Rocky Mountain's first argument is that the disclosures required by the challenged provisions amount to compelled speech by the employers and therefore violate the First Amendment.

The state responds that challenged provisions do not mandate the specific content of employers' speech. Rather, the employers fully control the nature of the disclosures because employers set the compensation ranges and post the specifics of the promotions. The state also argues that the challenged provisions are "reasonably related to the state's substantial interest in closing the wage gap and preventing discrimination" because they promote transparency.

### **The Dormant Commerce Clause Claim**

Rocky Mountain's second argument is that the disclosures required by the challenged provisions violate the Dormant Commerce Clause because employers cannot simultaneously comply with the challenged provisions and the provisions of other states' laws that prohibit salary disclosures. Rocky Mountain also argues that the challenged provisions run afoul of the Dormant Commerce Clause because they excessively burden interstate

commerce.

The state responds that Rocky Mountain has not identified any burden on interstate commerce, let alone an undue burden. According to the state, the narrow burdens alleged by Rocky Mountain fail to amount to the broad-based effects necessary to establish undue burden on interstate commerce. The state further argues that no conflict exists between the challenged provisions, which require disclosure of salary ranges for **potential** employees, and the laws of other states that limit disclosure of **current** employees' salaries. The state also argues that Rocky Mountain has not established that the burdens of complying with the challenged provisions will outweigh the benefits that will flow from enforcement of the challenged provisions.

## **Implications of the Court's Forthcoming Ruling on Rocky Mountain's Request for Injunctive Relief**

On February 16, Rocky Mountain filed its reply in support of its motion for preliminary injunction. Last week, on March 5, the court set oral argument on Rocky Mountain's motion for April 21. The primary question before the court will be "whether Plaintiff has established a likelihood of success on the merits of the action."

If the court does not enjoin enforcement of the challenged provisions, employers with even one employee in Colorado will need to continue their efforts to comply with the challenged provisions, in addition to continuing their efforts to comply with the other provisions of the Equal Pay Act that Rocky Mountain has not challenged. For employers, this potentially means:

- Adding staff to create postings for (or otherwise provide notice of) all promotion opportunities around the world, including in-line promotions, when many employers have rarely (if ever) announced in-line promotions. For large employers with tens of thousands of employees across the globe, this creates a monumental task. The Colorado Department of Labor and Employment's [Interpretive Notice & Formal Opinion \("INFO"\) #9](#) indicates that employers with promotional opportunities available outside Colorado must notify their Colorado employees of those promotional opportunities, though that notice need not include compensation and benefits information for positions located solely outside Colorado
- Determining how to best handle the requirement to post salary ranges for jobs located in Colorado, as well as for jobs that can be performed remotely, when other employees in the company are already performing those jobs and when salary ranges do not exist for certain positions

In short, the challenged provisions are placing significant demands on companies' resources. These demands, for example providing notice to a Colorado employee of an inline promotion opportunity available in India, appear to have little (if any) connection to closing the pay gap in Colorado.

## **How Perkins Coie Can Help**

Perkins Coie is keeping its clients up to date on the status of Rocky Mountain's challenge, as well as helping its clients implement strategic solutions for the heavy compliance requirements imposed by the Equal Pay Act.

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