

## Updates

June 08, 2021

### District Court Denies Preliminary Injunction Against Colorado's Equal Pay Act

On May 27, 2021, the U.S. District Court for the District of Colorado (court) denied Rocky Mountain Association of Recruiters' (Rocky Mountain) motion for preliminary injunction. Rocky Mountain was seeking to prevent implementation of some of the more burdensome requirements of Colorado's Equal Pay for Equal Work Act, SB19-085 (the Equal Pay Act); as a result of the Court's decision, the Equal Pay Act remains applicable to Colorado employers.

## **Background**

The Equal Pay Act went into effect on January 1, 2021. The Equal Pay Act creates significant compliance burdens for employers by (1) requiring employers to post compensation and benefits information with each job posting and (2) requiring employers to post all promotional opportunities regardless of location to all Colorado employees. As a result, Rocky Mountain filed a motion for preliminary injunction seeking to prevent implementation of these burdensome provisions. Our summary regarding the key features of the Equal Pay Act and Rocky Mountain's challenge [can be found here](#).

## **Arguments Advanced by Rocky Mountain**

Rocky Mountain raised two primary arguments against the enforcement of the Equal Pay Act. First, Rocky Mountain argued that the challenged provisions' disclosure requirements amount to compelled speech in violation of the First Amendment. Second, Rocky Mountain argued that the challenged provisions excessively burden interstate commerce and thus violate the Dormant Commerce Clause. The court did not find either argument compelling.

## **The First Amendment Claim**

The court held that the challenged notice provisions of the Equal Pay Act do not violate the First Amendment because the provisions are both (1) reasonably related to a substantial government interest and (2) not unduly burdensome. The court held that the goal of eliminating the gender wage gap is a "substantial government interest." Additionally, the court found that both the lack of compensation information in prior job postings and a failure to post all promotional opportunities was "reasonably related" to the gender wage gap.

The court rejected Rocky Mountain's assertion that the Equal Pay Act creates an undue burden on employers by requiring fundamental changes to their recruiting systems. The court reasoned that employers could reasonably comply with the challenged provisions of the Equal Pay Act without unduly burdening their operations because the required postings do not need to be particularly long. Accordingly, the court did not find that the challenged provisions negatively affected employers' First Amendment rights.

## **The Dormant Commerce Clause Claim**

The court held that the Equal Pay Act did not violate the Dormant Commerce Clause because Rocky Mountain failed to sufficiently show that the challenged provisions place an undue burden on interstate commerce. Under

*Pike v. Bruce Church Inc.*, the U.S. Court of Appeals for the Tenth Circuit has recognized that state statutes violate the Dormant Commerce Clause when they impose "a burden on interstate commerce incommensurate with the local benefits secured."

The court held that Rocky Mountain failed to raise a *Pike* claim, because it merely presented legal rather than factual arguments. The court indicated that Rocky Mountain overemphasized the intrastate rather than interstate impacts of the challenged provisions and would instead need clearly show interstate impacts, such as: "how employers will be forced to change their human resources practices . . . ; how long worldwide promotions will be delayed so that Colorado residents can be notified of potential promotion opportunities; and . . . how these administrative burdens will result in harms to the interstate labor market." Given the lack of such evidence, the court denied Rocky Mountain's motion on Dormant Commerce Clause grounds.

## **Implications of the Court's Ruling**

Employers with even one employee in Colorado will need to continue their efforts to comply with the challenged provisions of the Equal Pay Act, along with its other provisions. All employers with a single employee in Colorado will need to determine how to post any promotional opportunity (even inline step promotions) across their entire operations. For example, a technology company with one worker in Colorado will not be able to promote an employee in Miami who is due a step promotion from Analyst 1 to Analyst 2 without posting the "opportunity" nationwide. Moreover, the requirement to post salary ranges for job postings will pose compliance challenges for employers with workers in Colorado.

Although the court denied Rocky Mountain's motion for a preliminary injunction, it is possible the court will grant an injunction at a later stage in the litigation. The court denied Rocky Mountain's Dormant Commerce Clause argument due to a lack of fact-based evidence. (The court appeared less receptive to Rocky Mountain's First Amendment argument.) The court may rule in favor of an injunction if Rocky Mountain presents clear evidence showing changes in national and international human resources practices, promotion timelines, and other harms to the interstate labor market.

## **How Perkins Coie Can Help**

Perkins Coie is keeping its clients up to date on the status of Rocky Mountain's challenge. We will continue helping clients navigate the unique provisions of the Equal Pay Act and implement strategic solutions for the heavy compliance requirements it imposes.

*The authors wish to acknowledge the contributions of Summer Associate Jeremy Wright.*

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