CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

GLENN SPENCER
SENIOR VICE PRESIDENT
EMPLOYMENT POLICY DIVISION

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November 5, 2020

Mr. Michael Primo, Division Rule Coordinator
Colorado Department of Labor and Employment
Division of Labor Standards and Statistics
633 17th Street, Suite 201
Denver, CO 80202-3660

Via email: michael.primo@state.co.us

RE: Comments on Proposed Regulations Implementing Part 2 of the Equal Pay for Equal Work Act, C.R.S. §§ 8-5-201-203

Dear Mr. Primo:

The U.S. Chamber of Commerce submits these comments on behalf of our members who operate in the state of Colorado. Among the Chamber's members are companies with a presence in Colorado as well as many other states. These members have raised the following concerns about the proposed regulations to implement Part 2 of the Equal Pay for Equal Work Act ("the EPEWA," "the Equal Pay Act," "the Act").[1]

At the outset, the Chamber and its members, including those who operate in Colorado, state unequivocally that they oppose inequitable compensation practices that result from improper distinctions or discriminatory intentions. Compensation determinations often represent many factors driven by business necessity and competition for talent in the labor market. We agree with laws mandating that employees receive equitable pay for similar work but consider public disclosure of salaries and other benefits to be problematic.

Unfortunately, the Chamber and its members in Colorado believe the proposed rules go beyond the stated purpose of the Act in not aligning with several well-established principles limiting states' ability to regulate economic activity in other states and requiring employers to inform unqualified employees of openings. In addition, more clarity is needed regarding some of the key terms, and the time frame for implementation would impose significant burdens for nationwide employers affected by these regulations. Accordingly, the Chamber urges the Division to either modify the provisions in question with the suggestions below or withdraw the relevant portions of the proposed regulations.

Finally, we endorse comments submitted by the Colorado Chamber of Commerce. They provide very helpful examples of the broad array of problems these proposed regulations are likely to cause Colorado employers.

[1] For relevant legislative and proposed regulatory text, see Appendix A, attached.

The Proposed Regulations Go Beyond the Terms of the EPEWA and Are Inconsistent with Well Established Limits on States' Economic Regulation.

Section 4.3 (4.3.1-4.3.3) are contrary to multiple U.S. Supreme Court precedents interpreting the Commerce Clause, and specifically the "dormant Commerce Clause," as well as the U.S. Supreme Court's extraterritoriality doctrine.

The U.S. Supreme Court has explained that the Commerce Clause of the U.S. Constitution precludes state regulation of interstate commerce under an interpretation known as the "dormant Commerce Clause." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019). The Court's "dormant Commerce Clause cases reflect a 'central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" *Id.* (quoting *Granholm v. Heald*, 544 U. S. 460 (2005)). By attempting to regulate conduct outside of Colorado, the proposed regulations, if finalized, would be unconstitutional under the dormant commerce clause. Indeed, the Supreme Court has "articulated virtually a per se rule of invalidity for extraterritorial state regulations – i.e., laws which directly regulate out-of-state commerce, or laws whose operation is triggered by out-of-state events." Laurence H. Tribe, American Constitutional Law, 1074 (3rd Ed. Foundation Press). The nearly per se invalidity of extraterritorial state laws reflects "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989).

Additionally, the proposed regulations violate the extraterritoriality doctrine established by the U.S. Supreme Court, under which "the extraterritorial effects of state economic regulation" are declared impermissible; a state statute's application to commerce that takes place wholly outside of a state's borders is impermissible, whether or not the commerce has effects within the state. *Healy*, 491 U.S. at 335-36 (citing *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U. S. 573, 581-83 (1986) and *Edgar v. MITE Corp.*, 457 U. S. 624, 642-643 (1982) (plurality opinion)). "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336 (citing *Brown-Forman*, 476 U.S. at 579). "The practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336-37.

Here, the proposed implementing regulations would be unconstitutionally extraterritorial because they expressly propose to regulate conduct outside of Colorado, specifically the proposed requirement to notify employees outside of Colorado and the proposed regulation of notices related to jobs that are located outside of Colorado. Reading proposed regulation Section 4.3.1 and 4.3.3 together, employers that do not limit the geographic scope of where applicants come from would be required to provide salary and benefit information on all jobs nationwide and then notify all employees nationwide of promotional opportunities. If other states imposed

requirements with such an extraterritorial reach, the interstate job market would be burdened by overlapping and potentially inconsistent requirements. Courts have routinely limited the application of state employment laws in cases seeking to apply them extraterritorially. *See, e.g.*, *Cotter v. Lyft, Inc.*, 60 F.Supp.3d 1059, 1063-64 (N.D. Cal. 2014) (refusing to apply California wage and hour law to employees who worked outside of California due to dormant commerce clause concerns).

These proposed sections also plainly exceed the reach of the underlying statute they purport to implement. The Equal Pay Act indicates no intent to regulate conduct outside of Colorado. Courts apply a "well-established presumption against the extraterritorial application of state laws." *See Sanchez v. Q'Max Solutions, Inc.*, 2018 WL 1071133, at *1 (D. Colo. Feb. 27, 2018) (citing *Morrison v. Nat'l Australia Bank*, 561 U.S. 247, 255 (2010) and *Peerless Ins. Co. v. Clark*, 487 P. 2d 574, 575 (Colo. App. 1971)).

Similarly, the proposed regulations impose posting and notice requirements on Colorado employers with a job opening that expressly would not be filled in Colorado (see proposed section 4.4.3). Multinational companies often recruit for roles throughout the United States and globally. How this would benefit Colorado residents is entirely unclear as such a job is not associated with the state.

The Department of Labor and Employment has no statutory authority for its proposed regulation seeking to extend the reach of the EPEWA to conduct outside of Colorado and, accordingly proposed regulations 4.3.1-4.3.3 should be withdrawn.

The Proposed Regulations Would Require Employers to Inform Unqualified Employees of Job Openings.

In any national and global company, the vast majority of employees are not going to be qualified for many of the available roles. Proposed regulation 4.2.4 prohibits employers from taking qualifications into account when notifying employees of promotional opportunities. This provision is not anchored to any language in the Act.

Under this proposed section, employers would have to notify employees who do not meet minimum qualifications of a potential opening even though they are not eligible for the role. For example, if a company had an opening in its in-house legal department, they would have to notify all employees for which the role would be a promotion, ***even those without a law degree and legal license***. Ironically, the state would not allow such an employee to be hired for that job due to a lack of a legal license, but this section requires an employer to inform that employee of the job.

Moreover, in a Statement of Basis, Purpose, Specific Statutory Authority, and Findings issued after the proposed regulations, the Department confirmed how the proposed regulations exceed the scope of authority granted to it by the Equal Pay Act. The justification for Section 4.2.4's requirement that employers cannot take qualifications into account was that "one added value of transparency is for postings to be shared with others lacking opportunity, so a janitor may not be qualified for an accounting posting, but may share it with a relative or acquaintance who completed an accounting degree but lacks professional connections." However, the Equal Pay Act does not require employers to notify non-employees and people outside their workforce

of promotional opportunities. The Act applies only to employer communications with its employees. The proposed regulations are designed to protect and benefit non-employees, thus exceeding the intent of the law and section 4.2.4 should be withdrawn.

The Proposed Regulations Lack Clarity in Some Key Areas.

Neither the Equal Pay Act nor the proposed regulations draw a distinction between internal job openings that could be promotions, and normal career progression steps. Consequently, whether an employer would need to post an "opening" when, for instance, an employee progresses from Analyst I to Analyst II is not clear. Employers should not be required to post "openings" for positions envisioned for internal candidates if the promotion is a normal career progression.

Additionally, the proposed rules should be revised to clarify that promotional opportunities exclude positions where an employer has a succession plan in place, high level executive positions, and conversions from short-term employment to regular employment.

The Mandate to Post Promotion Opportunities Will Require Changes to Policies, Processes, And Recruiting Resources And Warrants a Grace Period.

Large companies post many promotional opportunities for internal movement, but there are always exceptions and managers have some flexibility to move employees internally within their organization. A requirement to post all promotion opportunities is not realistic in a global workforce. Given the sheer number of promotions annually, a significant expansion of recruiting resources would be required to enable posting, screening and processing all internal jobs. To ensure that all internal promotion opportunities are posted would require changes to policies, processes and systems, as well as expenditure of additional resources.

Another complication is that the requirement for employers to post compensation and benefit packages is based on an assumption that employers have predetermined compensation and benefit packages associated with job openings that merely need to be made public. In reality, some employers do not decide what the compensation and benefit package will be for a specific opening until they select a candidate. At that point, based on local market factors related to compensation and benefits, the employer will decide what to offer. To be compliant with the posting requirements, these employers would have to concoct salary ranges specifically for posting purposes that would be so broad they would not give applicants any clear sense of what to expect in compensation or benefits for the position.

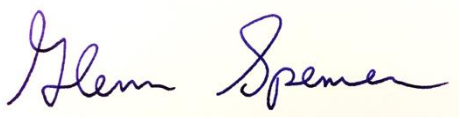
Collectively, these changes would take considerable time to achieve—well beyond the January 1, 2021 effective date indicated. For this reason, the Department of Labor and Employment should provide a grace period of one year during which no penalties are imposed if employers are acting in good faith to achieve compliance.

Conclusion

Employers with operations in Colorado are ready to work with the Department on crafting regulations that stick to the intent of the Equal Pay Work and provide transparency to

Colorado employees. For example, the law would clearly allow regulations requiring employers to provide salary and benefit information to all jobs listed in Colorado. Similarly, the law would also support regulations requiring Colorado employers notifying its Colorado employees of promotional opportunities for roles within the state of Colorado. The business community in Colorado is simply seeking workable, efficient regulations that faithfully implement the Act.

Sincerely,



Glenn Spencer

Appendix A: Relevant Statutory and Regulatory Text

The legislative language regarding promotional opportunity and salary posting requirements can be found in Section 8.5.201 (1) and (2) of the Equal Pay for Equal Work Act as follows:

> ***Section 8.5.201*** **Employment opportunities—opportunities for promotion or advancement—pay rates in job listings.**
>
> ***(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.
>
> ***(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.

Proposed Regulatory Text

Rule 4. <u>Job Posting Requirements</u>

4.1 All job postings, including but not limited to promotions: An employer is required to "disclose in each posting for each job the hourly or salary compensation, or a range of hourly or the salary compensation, and a general description of all of the benefits and other compensation to be offered to the hired applicant." C.R.S. § 8-5-201(2).

4.1.1 Employers must include the following compensation and benefits information in each posting: (1) the hourly rate or salary compensation (or a range thereof) that the employer is offering for the position, including any bonuses, commissions, or other forms of compensation that are being offered for the job; and (2) 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; as well as any other benefits that must be reported for federal tax purposes; but not benefits in the form of minor perks.

4.1.2 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. An employer may ultimately pay more or less than the posted range, if the posted range was the employer's good-faith and reasonable estimate of the range of possible compensation at the time of the posting.

4.2 Opportunities for promotion: An employer is required to 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." C.R.S. § 8-5-201(1).

4.2.1 A communication announcing, posting, or otherwise making a promotional opportunity known must be in writing and include at least (A) job title, (B)

compensation and benefits per Rule 2.2, and (C) means by which employees may apply for the position.

4.2.2 An employer makes "reasonable efforts" if it (A) uses the employer's regular and customary method of communication with its employees and, (B) for any employees not reachable by that method, uses an effective alternative method to notify those employees. If employers have no or multiple regular and customary method(s) of communicating with any employee, "reasonable efforts" require advance written notice to such employee of the location and/or means by which promotional opportunities will be announced, posted, or made known.

4.2.3 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.

4.2.4 Employers must 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.

4.3 The following particular cases as to C.R.S. §§ 8-5-201(1)-(2) require notice as follows.

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.

4.3.2 Colorado employer with remote job. If an employer with one or more employees in Colorado has a job that can be performed anywhere, *e.g.*, a remote position that could be performed by a Coloradan because the job has no requirement or preference for the employee to reside in a particular area:

(A) Under C.R.S. § 8-5-201(1), the employer 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.

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:

(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