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THE ROCKY MOUNTAIN STATE EQUALIZES PAY FOR ALL: A YEAR IN REVIEW

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In an effort to close the pay gap in Colorado and ensure that employees doing similar work receive the same wage rate regardless of sex, the General Assembly of the State of Colorado enacted The Equal Pay for Equal Work Act (“EPEW”), effective as of January 1, 2021 (C.R.S. § 8-5-101 et seq.).¹ Despite the federal Equal Pay Act of 1963 and policies outlawing pay discrimination, the General Assembly, relying on a March 2018 report by the Institute for Women’s Policy Research and The Women’s Foundation of Colorado, noted that women earn 86 cents for every dollar men earn, while Latinas earn 53.5 cents and black woman 63.1 cents, and that by eliminating the wage gap, a working woman will, on average, earn \$7,000 more per year.² While, in passing the EPEW, Colorado joined a number of states³ in its efforts to push for pay transparency and wage equality, this cause is also being championed under the current presidential administration at the federal level, with the Biden administration in March 2022 (commensurate with “National Equal Pay Day”) announcing a new series of steps geared towards these laudable goals, including banning the use of historical salary information in the hiring of Federal employees.⁴

Almost 18 months after the effective date of the EPEW, it is unclear whether the EPEW has had the intended effect on closing the gap on wages, or whether simply not enough time has passed to remedy this long-standing issue. One particular review, conducted approximately one year after the effective date of the EPEW, remarks that “the law’s ultimate effect remains to be seen.”⁵ Additionally, over the past year, we have kept watch for any updates on questions on the EPEW as it relates to physician compensation (whether they stem from litigation efforts or from the Colorado legislature itself), but have found no answers readily forthcoming.

The physician self-referral law (commonly referred to as the “Stark Law”)⁶ and federal Anti-Kickback Statute⁷ generally require compensation to be consistent with fair market value (“FMV”). In the context of physician employment arrangements, for example, FMV may be established by matching a physician’s estimated productivity to benchmark compensation, which is oftentimes based upon

¹ Available at <https://leg.colorado.gov/bills/sb19-085> (last accessed May 3, 2022).

² See Senate Bill 19-085 (2019) available at https://leg.colorado.gov/sites/default/files/2019a_085_signed.pdf.

³ Including California, Connecticut, Maryland, and Nevada. See “Equal Pay Day 2022: Key Trends in Pay Equity” available at <https://www.jdsupra.com/legalnews/equal-pay-day-2022-key-trends-in-pay-9505417/> (last accessed May 9, 2022).

⁴ See “FACT SHEET: Biden Harris Administration Announces Commitments to Advance Pay Equity and Support Women’s Economic Security” available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/15/fact-sheet-biden-harris-administration-announces-commitments-to-advance-pay-equity-and-support-womens-economic-security/> (last accessed May 9, 2022).

⁵ See “One Year Review: Is Colorado’s EPEW Working?” available at <https://www.5280.com/2022/01/one-year-review-is-colorados-equal-pay-for-equal-work-act-working/> (last accessed May 9, 2022).

⁶ As set forth in the Stark Law regulations at 42 CFR §411.351.

⁷ AKS as set forth in 42 U.S.C. § 1320a-7b.



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historical productivity. In addition to a prohibition on pay discrimination, and barring an exception⁸, the EPEW also prohibits prospective employers from inquiring or relying on the candidate employee's "wage rate history"⁹. Therefore, the black-letter of the EPEW makes it clear that employers should refrain from asking potential employees about prior W-2 compensation, in so far as it bars one from inquiring into the employee's prior "wage rate[s]". However, it is unclear whether the EPEW also prohibits employers from asking potential candidates for information that may have contributed to W-2 compensation, such as personally performed work relative value units ("wRVUs") in the case of physicians on a pure productivity compensation model, as compensation could be inferred with knowledge of wRVUs.

Until such questions are clarified, we encourage Colorado employers to act as prudently as possible when seeking to hire a medical provider. In order to comport with Stark and AKS, one or more recognized valuation approaches should be utilized to determine FMV of a prospective employee's compensation. With the introduction of the EPEW, however, the underlying data (such as historical production) that forms the basis of such determination may be limited, resulting in the need to recognize alternative methods for developing FMV compensation. For example, HealthCare Appraisers has developed a proprietary non-production market approach technique, which utilizes the specific candidate's professional and educational background to derive market indications of compensation, and stands ready to assist in determining FMV compensation while promoting equitable pay in the spirit of the EPEW.

⁸ Exceptions include, but are not limited to, compensation differentials based on (i) seniority, (ii) a merit system, and (iii) education, training, or experience. SB 19-085.

⁹ SB 19-085.

