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## MEMORANDUM

TO: Poudre River Public Library District

FROM: Seter & Vander Wall, P.C.; Kim J. Seter, Esq. and Elizabeth A. Dauer, Esq.

DATE: July 7, 2021

RE: Legal Status Report for the July 12, 2021 Meeting

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### Executive Director Search

**Task:** Conduct a search for a new executive director upon the retirement of Executive Director, David Slivken.

**Status:** The Board currently anticipates:

- a. Publicize vacancy July 31;
- b. Applications due Sept. 6;
- c. Resume screening by Becky and Fred;
- d. Zoom interviews of 6 or 7 candidates the week of Sept. 27;  
and,
- e. Final live interviews and selection the week of Oct. 25.

**Action:** None at this time.

### Options for Funding Future Facilities Development

**Task:** Summarize financing options the District can consider to fund future facilities development.

**Status:** **No change. This item is for informational purposes.**

The District has three options to pay for the construction of new libraries or the improvement of existing branches: (1) Cash out of reserve/budgeted funds; (2) General obligation bonds; and (3) Lease/purchase financing with or without certificates of participation. Each is summarized below. We recommend use of certificates of participation as a simple and cost-effective approach.

Cash on Hand: Availability of this “pay as you go” option depends on the

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scale of the project, the District's financial position, and budget considerations for not only the next year, but in years to come. It is often best to utilize cash on hand to provide current services.

General Obligation Bonds: The most common form of government financing. Bonds are secured by the full faith credit and taxing power of the government issuer. Bonds offer low interest rates and are attractive to investors due to their double tax-exempt status. However, the issuance of debt through general obligation bonds requires an election as does the corresponding increase in taxes pursuant to Art. X, §20 of the *Colorado Constitution* (“**TABOR**”).

Lease/Purchase with or without Certificates of Participation (“**COP**”): Libraries are in a unique position to take advantage of sale/lease back financing. From a legal perspective, this method involves selling or leasing a property that is owned by the District. The funds received are used to buy new or improve old facilities. The property sold/leased by the District is leased back to the District which pays rent consisting of principal and interest to the investor[s]. The lease back to the District contains an option to purchase the property at the end of the lease for a nominal fee, often \$1.00. Lease/purchase financing does not constitute long-term debt obligations of the issuing authority, and is therefore exempt from state and local laws that require voter approval under TABOR.

We recommend lease/purchase financing as the best option. However, we are ready to assist on any method the District may ultimately pursue.

**Action:** No action is required at this time. This item is being retained as placeholder for future considerations.

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## MEMORANDUM

TO: Poudre River Public Library District Board of Trustees

FROM: Seter & Vander Wall, P.C.; Kim J. Seter, Esq.; Beth Dauer, Esq.

DATE: July 7, 2021

RE: Equal Pay for Equal Work Act (SB19-085)

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### ENACTMENT AND PURPOSE

The Equal Pay for Equal Work Act (“Act”) was approved and signed by Governor Polis on May 22, 2019, and takes effect January 1, 2021, and applies to all Colorado employers, including local governments. The Act establishes new restrictions, rights, remedies, and requirements with the goal of closing the gender pay gap in Colorado, and to ensure that employees with similar job duties are paid the same wage rate regardless of the employees’ gender, or gender plus another protected status. It modifies the existing Colorado Revised Statutes regarding wage equality laws under §§ 8-5-101, *et seq.*, and creates new provisions under §§ 8-5-201, *et seq.*, regarding “Transparency in Pay and Opportunities for Promotion and Advancement.”

### THE ACT’S DISCRIMINATION RESTRICTION

The Act generally requires that an employer not discriminate based on:

- Gender;
- Gender in combination with another protected status (i.e. disability, race, creed, religion, age, and other protected status provided in § 24-34-402, C.R.S.).

An employer “discriminates” if (a) payment to an employee of one gender is less than payment to an employee of a different gender, and (b) the employees perform substantially similar work. Job title is not a factor in determining whether work is “substantially similar;” instead, consideration of the work must be based on a composite of skill, effort, and responsibility.

The Act does allow payment to differ when the difference is based on:

- A seniority or merit-based system;
- A system that measures earning by quantity or quality of production;
- Geographic location of the employees’ work;

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- Education, training, or experience to the extent that they are reasonably related to the work being compensated;
- Travel, if travel is a regular and necessary condition of the work.

However, the factors considered for the exception to the general requirement (a) must be applied reasonably, (b) must account for the entirety of the difference, and (c) must not be based on the employees' wage history.

### **THE ACT'S PROHIBITED ACTIONS**

The Act prohibits an employer from:

- Seeking wage history of a prospective employee or using wage history of a prospective employee to determine a wage;
- Discriminating or retaliating against a prospective employee for refusing to disclose wage history;
- Discharging, discriminating, or retaliating against an employee for enforcing the restrictions or assisting another in the enforcement of the restrictions;
- Discharging, disciplining, discriminating, coercing, intimidating, threatening, or interfering with an employee or other person due to an inquiry, disclosure, comparison, or other form of discussion related to an employee's wage;
- Prohibiting an employee from disclosing their wage; and
- Requiring that an employee sign a waiver or other document that prohibits or otherwise denies the right to disclose a wage.

### **EMPLOYEE RIGHTS REGARDING DISCRIMINATION AND PROHIBITED ACTS**

The Act provides an employee with rights to enforce its provisions, and the Colorado Director of Labor Standards and Statistics is authorized to create and administer a process to accept and mediate complaints and otherwise provide legal resources regarding alleged violations. Final rules were adopted in November, 2020, and take effect January 1, 2021 (See 7 CCR 1103-8 regarding "Direct Investigation Rules" and 7 CCR 1103-13 regarding "Equal Pay Transparency Rules").

In addition to reporting a violation to the Director of Labor Standards and Statistics, the Act provides employees with a civil claim of action against employers so long as the claim is brought within two years of the alleged violation.

Lastly, the Act expressly preserves the right for an employee to file a charge with the Colorado Civil Rights Division under § 24-34-306, C.R.S.

### **EMPLOYER REQUIREMENTS UNDER THE ACT**

The Act imposes new requirements on employers, which include:

- Prior to making a promotion, the employer must make a reasonable effort to announce, post, or otherwise communicate all opportunities for promotion to all current employees at the same time;
- Each job opening posted must provide the hourly or salary compensation, or a range of the same, including a general description of all of the benefits and other compensation included with the job; and
- Keeping record of job descriptions, communications, and wage history for all employees for the duration of their employment, and two years after employment ceases.

The Director of Labor Standards and Statistics (“Director”) is charged with administering, carrying out, and enforcing these requirements.

Each occurrence of an employer’s failure to comply is considered a violation. Employees have a right to enforce these requirements by filing a complaint with the Director, provided the violation occurred within one year of the employee learning of the violation. The Director may impose a fine between \$500 and \$10,000 for each violation.

In addition, an employee that brings a claim of discrimination and/or prohibited acts and proves a failure to comply with these requirements is entitled to relief from the Court. This includes, but is not limited to, the establishment of a rebuttable presumption that the employer did not keep records because they contained information favorable to the employee’s claim, which can be evidence indicating that the employer did not act in good faith.

## **EMPLOYER LIABILITY REGARDING DISCRIMINATION AND PROHIBITED ACTS**

If a court determines a violation has occurred, the employer is subject to the following liability:

- Legal and equitable relief, which may include employment, reinstatement, promotion, pay increase, payment of lost wages, and liquidated damages;
- Reasonable costs and attorney fees; and
- Liability under any other claim provided by statute or common law.

An employer may be liable for back pay for the entire time the violation continues, not to exceed three years, and shall be liable for (a) “economic damages” calculated by determining the difference between what the employer paid an employee and what the employer should have paid had there been no violation, and (b) liquidated damages in the amount of the “economic damages.”

There is an exception for liquidated damages when the employer can demonstrate that the act or omission causing the violation was (a) made in good faith, and (b) the employer had reasonable grounds to believe it did not commit a violation. A fact finder may consider evidence of an employer’s thorough and comprehensive pay audit designed to identify and remedy pay disparities in determining good faith, provided that the employer completed the audit no more than two years prior to commencement of the action.

## **RECOMMENDED ACTIONS FOR COMPLIANCE AND IMPLEMENTATION**

Employment law experts are making the following recommendations to employers to ensure compliance and implementation of the Equal Pay for Equal Work Act:

1. To ensure that no pay disparities exist amongst employees, conduct a pay audit of existing employee hourly wages and salaries, including all benefits and other compensation. If any disparity exists, make sure it is entirely due to one of the listed exceptions (i.e. seniority, production, relevant education/training, etc.). If a pay disparity is not due entirely to one or more exceptions, adjust the hourly wage or salary to eliminate the disparity.
2. Repeat the employee audit process regularly; two years is a recommended time frame.
3. Update all rules and regulations to ensure compliance with the Act, including employee manuals / handbooks and policies related to employee hiring procedures, employee compensation, personnel files and other record keeping.
4. Create clear job descriptions, ensure that employees actually perform the job as described, and state what factors are considered in an employee's salary.
5. Ensure that all executives, managers, or other employer personnel responsible for employment decisions understand what constitutes "discrimination" under the Act, and that they understand the prohibited acts, requirements, and consequences of violations under the Act.