

FYI[®]

For Your Information[®]

Complying with Colorado's new COVID-19 paid sick leave mandate

Last month, Colorado enacted the Healthy Families and Workplaces Act requiring employers that are not covered by the federal Families First Coronavirus Response Act to provide COVID-related paid sick leave through December 31, 2020. Recent guidance from the Colorado Department of Labor and Employment clarifies employer compliance obligations under the COVID-19 provisions of the new law.

Volume 43

Issue 50

August 11, 2020

Authors

Nancy Vary, JD

Abe Dubin, JD

Background

Earlier this year, Congress enacted the Families First Coronavirus Response Act (FFCRA) that required private employers with fewer than 500 employees and governmental employers of any size to provide up to 12 weeks of emergency paid sick leave and expanded paid family and medical leave to employees for reasons related to the COVID-19 outbreak. (See our [March 18, 2020 FYI](#).)

On July 14, Colorado enacted the [Healthy Families and Workplaces Act](#) (HFWA or law) — a statewide paid sick leave law covering only COVID-related needs in 2020 but broader needs in 2021. The new law extends COVID-related paid sick leave protections through December 31, 2020 to employees who are not covered by the FFCRA's Emergency Paid Sick Leave Act (EPSLA) — those who work for employers with 500 or more employees. Beginning January 1, 2021, it will require most Colorado employers to provide employees with up to 48 hours of earned paid sick leave per year and supplemental leave as needed to ensure that employees may take up to 80 hours of paid leave during a public health emergency. (See our [August 6, 2020 FYI](#).)

CDLE guidance

The Colorado Department of Labor and Employment (CDLE) has now released [Interpretive Notices & Formal Opinions](#) (INFO) on the new law's requirements along with a model notice and poster that can be used to satisfy immediate notice and posting requirements. [INFO #6A](#) covers the 2020 COVID-

related paid sick leave requirements that are in effect through December 31, 2020. Highlights of the CDLE guidance follow.

Covered employers and employees

With limited exceptions, the HFWA requires each employer in Colorado — regardless of size — to provide paid leave for COVID-related needs in 2020. The requirement does not cover the federal government, apply to employees covered by the Railroad Unemployment Insurance Act, or extend to employers that already provide “equivalent or more” paid leave rights under a collective bargaining agreement. The law also clarifies when employers are liable for paid leave owed by other employers they acquire.

Qualifying for COVID-19 leave

The conditions and needs for COVID-related paid leave under the new law parallel those under the FFCRA. Specifically, an employer must provide the leave to an employee in any of the following three categories:

1. Having COVID-19 symptoms and seeking a medical diagnosis
2. Being ordered by a government agent (federal, state, or local), or advised by a health provider, to quarantine or isolate due to a risk of COVID-19
3. Taking care of someone else due to COVID-19 precautions — either someone in category 2 above, or a child whose school, place of care, or child care is closed or unavailable

Buck comment. The HFWA will require less paid leave but cover a broader range of conditions beginning January 1, 2021.

Available leave

Through December 31, 2020, an employer must provide up to two weeks (80 hours) of COVID-related paid leave for the qualifying conditions listed above. However, no paid leave is required if an entire business is completely closed (whether temporarily or permanently) — unless a workplace is closed due to a temporary government quarantine/isolation order.

An employee regularly working 40 hours a week or more is eligible for 80 hours of leave. A part-time employee with a regular schedule is eligible for the number of hours normally worked in a two-week period. If an employee’s hours vary, the employer must use their average hours over the six months preceding the leave. If employed for less than six months, the employer must use the number of hours the employee agreed to work when hired or, if no such agreement exists, the average daily hours the employee was scheduled to work over their entire employment.

Rate of pay

The HFWA requires leave used for qualifying COVID-related conditions in 2020 to be paid at the same hourly rate or salary and with the same benefits (including health care benefits) that the

employee normally earns during hours worked. However, CDLE guidance provides that COVID-related leave is payable at the employee's regular rate or at two-thirds of their regular rate depending on whether the leave is for their own or for a family member's care. The lower rate applies only to leave under category 3 described above — leave to care for someone else.

Buck comment. Unlike the FFCRA pay provisions, the HFWA does not include daily or aggregate pay caps.

The pay rate, which includes nondiscretionary pay based on predetermined criteria or formulae (e.g., by production or accuracy), must be at least the state required minimum wage but need not include overtime, bonuses, or holiday pay. Employees paid commissions or other sales-based pay must receive their hourly or salaried rate or minimum wage, whichever is greater.

Leave offsets

Employers may count paid leave that an employee received in 2020 for any of the three COVID-19 conditions that the new law covers towards its two week (up to 80 hours) leave requirement, whether provided under federal or state law or the employer's policy. If, however, prior leave was paid at a lower rate than under the HFWA, the employer's credit is reduced by the difference between the amount of pay required by that law and the amount the employee received. Paid leave previously provided for non-HFWA purposes (such as a non-COVID condition or a vacation) does not count toward leave required by the HFWA in 2020.

Notice and posting requirements

Employers are required to notify employees in writing of their rights to paid leave under the HFWA and to conspicuously display an informational CDLE poster in each establishment where employees work. The guidance waives both the notice and posting requirements during any time an employer's business is closed due to a public health-related emergency.

Employers may satisfy the notice obligation by providing employees — including those working remotely or without a physical workspace — with the latest version of INFO #6A or the CDLE poster (on paper or electronically). The 2020 [poster](#) (effective July 15 to December 31, 2020) is now available for employer use to satisfy the law's notice and/or posting requirement. Notices and posters must be provided in "any language that is the first language spoken by at least five percent" of its workforce. Spanish versions of both the poster and the INFO are available on the CDLE website.

Employer policies

With the limited exception of the waiver of specific paid leave rules in collective bargaining agreements that do not diminish the amount or availability of paid leave, any waiver or agreement to waive an employee's rights under the HFWA is void.

Reasonable documentation

The guidance confirms that the HFWA incorporates through December 31, 2020 the EPSLA's provisions that allow employers to require certain documentation from employees that their leave is for a qualifying HFWA purpose. While documentation is not required to take paid sick leave, it can be required as soon as the employee reasonably can provide it. The CDLE cautions that which documents may be required, and under what circumstances, will change significantly in 2021.

Reasonable notice

While an employer generally may not require an employee to provide advance notice of the need for COVID-related leave, it may require "reasonable" notice "as soon as practicable" after the first workday (or portion thereof) when leave is taken. However, advance notice must be provided for child care leave due to a COVID-related closure if the need is "foreseeable." Notice must provide only enough information for the employer to determine whether the leave is for an HFWA purpose, subject to the limitations described above. If an employee fails to give notice, the employer must notify them of the failure and provide an opportunity to provide notice before denying the requested leave.

Existing policies

Whether an employer may use an existing policy to satisfy its compliance obligations under the HFWA largely depends on when it was adopted. According to the guidance, an employer's paid leave policy not limited to COVID that was adopted on or after April 1, 2020 (the effective date of the FFCRA) may satisfy those obligations "if it (A) provides the same quantity and pay rate of leave as HFWA, for all situations HFWA covers, and (B) lets employees take HFWA-required leave even if they already used their leave under the policy for other purposes (e.g., a vacation or non-COVID-related health need)." However, "HFWA-required leave must be provided 'in addition to' leave under 'an employer policy that existed prior to April 1, 2020,' and 'an employee may first use' HFWA-required paid leave 'before using any other leave' under 'an employer policy that existed prior to April 1, 2020.'"

Retaliation or interference with employer rights

An employer cannot deny paid leave that an employee has a right to take under the new law. Nor can it fire, threaten, or otherwise retaliate against, or interfere with, an employee for: requesting or taking HFWA leave; informing another person about, or supporting their exercise of, HFWA rights; filing a complaint or cooperating in an investigation about a potential HFWA violation.

The law prohibits adverse employment action against employees for incorrect complaints or information, provided their belief was reasonable and in good faith. However, employers can take action for misusing paid leave, dishonesty, or other leave-related misconduct.

Remedies for violation

Because HFWA paid leave counts as "wages" under Colorado law, an employee who is denied paid leave can file a complaint with the CDLE for unpaid wages up to \$7,500 or file a lawsuit. An employee can also file a complaint with the CDLE or in court for unlawful retaliation or interference with their

statutory rights. Available remedies may include lost pay, reinstatement, and/or fines or penalties under Colorado statutes for noncompliance.

In closing

The HFWA's COVID-related paid sick leave provisions are in effect through December 31, 2020. Employers with operations in Colorado should review their leave, disciplinary, and attendance policies and make any necessary revisions to ensure compliance. Employers should also monitor the CDLE's website for updated guidance on the law's general earned paid sick leave and public health emergency provisions that take effect on January 1, 2021.

Produced by the Compliance Consulting Practice

The Compliance Consulting Practice is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, training, and knowledge management. For more information, please contact your account executive.

You are welcome to distribute *FYI*® publications in their entirety. To manage your subscriptions, or to sign up to receive our mailings, visit our [Subscription Center](#).

This publication is for information only and does not constitute legal advice; consult with legal, tax and other advisors before applying this information to your specific situation.