

THE EMPLOYER'S ADVISORY

PERIODICAL NEWSLETTER

HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES

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FAMLI PLANNING PART I: Action Items for Organizations in 2022

The upcoming Colorado Family and Medical Leave Insurance ("FAMLI") program requires all Colorado employers, except self-employed individuals and local governments, to participate in some form of paid family and medical leave insurance that will guarantee most Colorado employees up to 12 weeks (or, for some pregnancy complications, 16 weeks) for qualifying events. Employees won't be able to take FAMLI leave until 2024, but there are some steps all organizations should take this calendar year to prepare for premium deductions that start in 2023.

Local Government Timeline. Initially, local governments/special districts are able to exempt themselves from FAMLI. But those organizations must take steps this summer and fall to decide whether they are going to opt in or opt out so that they can provide notice to the FAMLI Division and their employees of their decision early enough to be exempt from premiums on January 1, 2023. In order to be exempted from the program, local governments and special districts must take active steps to notify the FAMLI Division of their intent to opt-out of the program.

Those steps include: (1) securing an affirmative vote of the local government's governing body to decline participation in FAMLI, (2) providing written notice of their decision to employees within 30 days of such vote, and (3) providing written notice of their intent to decline participation to the FAMLI Division.

To undertake such a vote, local governments must engage in a public notice and comment process. The law requires that the local government's employees must be notified in writing prior to the vote and provided both information regarding the vote process and an opportunity to submit comments through a public process to the governing body prior to the vote taking place. While there is no specific deadline, the time to start preparing for such a vote is this summer and fall, so that all invested parties have time to prepare and consider their options.

You may have seen reports and newsletters that identify that that vote needed to take place prior to the start of July. But the FAMLI Division recently provided guidance stating that local governments are not required to conduct this vote 180 days before January 1, 2023 (in other words, by July 5th, 2022). Local governments, as a practical matter, should conduct this process in

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2022 so that, if they choose to opt out, no premiums will be collected in 2023. However, there is no hard deadline as to when this must take place in statute, regulation, or guidance. So, the best approach would be to prepare to make a vote early enough to ensure that everything is in place.

If a local government does opt out, some employees may want to participate in FAMILI, and those employees may do so by contacting the Division directly. These employees will be responsible for paying their own share of the premiums under FAMILI, but the government employer will not be responsible for matching the employee's premium, nor is the government employer responsible for providing alternative private benefits that match the protections and benefits of the FAMILI program to employee if the government employer opts out. Local government employers who have opted out may elect to withhold participating employees' share of premiums and remit such premiums to the Division on behalf of employees, or they may choose to have no part in transferring premiums from employees to the Division. Whichever route the employer takes, the employer should give employees forewarning so that employees have time to prepare.

All Other Employers. All employers other than local governments and self-employed individuals are required to either (1) participate in the FAMILI program, or (2) provide its employees a private alternative to the FAMILI program that provides all the same benefits, rights, and protections for the same or lesser cost to the employee. Notably, employers with nine or fewer employees are not required to contribute the employer's 50% of FAMILI premiums.

So, 2022 is the perfect time to discuss which route the organization wants to go and undertake any necessary financial planning in order to comply with these requirements. If an employer decides to go

private, the employer must submit an application to the FAMILI Division before the employer will be exempted from submitting premiums directly to the Division. The regulations governing such applications have not yet been released. So, at this time, we don't know when such applications should be submitted, what the applications must contain, or how to submit them. This information will be released in the coming months.

In addition to deciding whether to go "public" or "private" for FAMILI compliance, organizations need to calculate the costs associated with the FAMILI program, formulate policies, and modify employee handbooks to reflect the changes expected in the 2023 calendar year.

Part of determining an organization's compliance costs is to determine how many employees you have, or will have, during the 2023 and 2024 compliance years. The standard to determine how many employees you have under FAMILI mirrors the requirements of the FMLA. This process is relatively simple for traditional businesses, but is more complex for seasonal employers, or employers whose employees span multiple states in the administration of their duties. If your business falls into either category, it may be wise to block out extra time to evaluate the "size" of your organization under the regulations to determine your compliance obligations.

In short, now is the time to start thinking about the changes coming in 2023, and to prepare for how your organization is going to adapt to this new paid leave landscape under the FAMILI Act when paid leave becomes available to employees in 2024.