

THE EMPLOYER'S ADVISORY

PERIODICAL NEWSLETTER

HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES
PREPARED BY ATTORNEYS BETTY BECHTEL, CHRISTINA HARNEY,
MICHAEL SANTO, AND TIM WOLFE

December

BECHTEL & SANTO

2022

FAMLI Leave is just around the corner. Is your business ready?

In November 2020, Colorado voters went to the polls in record numbers and voted in favor of creating a paid leave program entitled Paid Family and Medical Leave Insurance ("FAMLI") for Colorado employees. And while employees aren't eligible to take FAMLI leave until January 2024, most Colorado organizations are required to register with the FAMLI program and begin making premium deductions from all employees' paychecks starting in January 2023. As this unprecedented leave prepares to kick off, employers have a number of questions. For example:

What does FAMLI provide? FAMLI will provide Colorado workers 12 weeks (16 weeks for pregnancy or childbirth complications) of paid leave per year for the following reasons: (1) to manage their own serious health condition; (2) to care for a family member with a serious health condition; (3) to care for a new child (within the 1st year of birth, foster placement, or adoption); (4) to make arrangements for military deployments; and (5) to address immediate safety needs and impact of domestic violence/sexual assault.

How much income will an employee receive while they are on FAMLI Leave? During these leaves, employees will receive up to 90% of their weekly wage from the Colorado Department of Labor and Employment FAMLI program, which will process requests for leave and payments much like how employees seek unemployment benefits. The amount that an employee may receive while on leave is capped based on the employee's weekly earnings. For example, employees earning \$500 per week will have a weekly benefit of \$450 and a maximum annual benefit of \$5,400 and employees earning \$1,500 per week will have a weekly benefit of \$976.60 and a maximum annual benefit of \$12,216. Employees earning more will receive different amounts and have different maximum annual benefits.

How will the State of Colorado fund this program? Premiums to fund this program are currently set to 0.9% of the employee's wage, with 0.45% paid by the employee and, if the employer has ten (10) or more employees, the employer pays an additional 0.45%. So, for an employee making \$500 per week, the employer will make a weekly deduction of \$2.25, and employees earning \$1,500 will have a weekly deduction of \$6.75.

How will an employee get FAMLI leave?
Starting in 2024, employees will apply for benefits

THE EMPLOYER'S ADVISORY is published quarterly by BECHTEL & SANTO, 205 N 4th St Ste 401 Grand Junction CO 81501, (970) 683-5888. Legal editors are Betty Bechtel, Christina Harney, Michael Santo, and Tim Wolfe. This publication is designed to provide information about legal issues facing employers, but not to provide legal advice with regard to specific circumstances. Readers with legal questions should address them to their legal counsel.

Prepared by Attorneys Betty Bechtel, Christina Harney, Michael Santo, and Tim Wolfe.
Copyright 1994-2022 Bechtel & Santo.

to the FAML I Division when a qualifying event occurs or is planned (e.g., an upcoming surgery) and, upon receipt of the application, the FAML I Division will evaluate the claim, request documentation as needed, and then approve or deny benefits. Unlike an employer-provided leave, the employer is not required to determine when the employee qualifies for benefits because the State will make that determination; though both employees and employers may appeal the State's determination.

Are there any exceptions for employers?

Yes, but not many. There are only three categories of exemptions from the FAML I Program: (1) local government entities; (2) self-employed individuals; and (3) privately insured organizations. Keep in mind that even though the employer may be exempted from contributing to the FAML I program, the employees of these organizations may still be able to sign up and receive FAML I benefits.

When an employee returns from leave does the organization have to give them their job back?

In short, "yes." Employees who have worked with the employer for 180 or more days must be restored to the same or equivalent position upon return to work from FAML I Leave. So, in sum, employers may not count FAML I absence as a "ding" against the employee.

How long does an employee have to work with an organization before the employee can take FAML I?

FAML I leave isn't conditioned on how long the employee works with the employer. Instead, any Colorado worker who makes more than \$2,500 in yearly wages within the state is leave eligible; even those employees who work for exempt organizations. So, an employee can request leave on the first day of employment as long as the employee meets the \$2,500-wage requirement.

What happens to an employee's health insurance while they are on leave? Employers must maintain healthcare benefits for employees who are

on leave, but employees may be required to continue paying their share of premiums.

Does FAML I run at the same time as other leaves the organization provides?

Yes and no. That is, employers can require the employee to use leave under the federal Family and Medical Leave Act at the same time as FAML I, but the organization cannot require the employee to use employer-provided paid leave (e.g., Vacation, Paid Time Off, leave under Colorado's Healthy Families and Workplaces Act) at the same time as FAML I. But the employee may be given the opportunity to use such leave to offset the difference between what FAML I pays and what the employee normally receives.

Is an employee required to use FAML I as a block of leave or can they use it on an intermittent basis?

Employees aren't required to use leave in blocks of time. Instead, employees may receive Division-approved leave in increments as small as one hour. But employees will not be paid by the Division for these increments until an employee has used eight hours of paid leave.

What information will an employer receive from the FAML I Division when an employee requests leave?

Because employees request FAML I through the FAML I Division, just like an employee requests unemployment through CDLE Unemployment, an employer may not be the first to know that the employee has requested FAML I leave. But upon an employee requesting FAML I leave, the employer will receive: (1) notice that an employee applied for benefits, including an opportunity to submit information to the Division; (2) the determination made by the FAML I Division; (3) procedures for employer-appeal process; and (4) anticipated leave duration and return date.

Is there any chance that this whole FAML I Leave thingy won't actually take place? Frankly, the Broncos have a better chance of winning the Super Bowl this year than there's a chance that FAML I goes away any time soon. In short, it's pretty much a "done deal" at this point.

So, what do I need to do next? With FAML I kicking off in January 2023, employers must start doing and preparing to do three things. First, register their business on the FAML I website at famli.colorado.gov. Second, get information out to employees by the end of 2022 regarding FAML I. Finally, start making premium deductions on the first paycheck in 2023 and prepare to make a matching contribution to the Division at the end of the first quarter.

Flu and other Respiratory Illnesses Now a Public Health Emergency

In 2020, the Colorado legislature enacted the Healthy Families and Workplaces Act ("HFWA"). This Act provided Colorado employees two types of leave: (1) Sick Leave; and (2) Public Health Emergency Leave ("PHEL"). The PHEL part of HFWA required employers to make up to 80 hours of leave available for employees needing leave for the condition covered by the declared public health emergency.

Of course, at that time, the main issue PHEL covered was COVID. But as specifically stated in the Act, HFWA PHEL not only covered COVID, but covered leave caused by condition that was a "public health emergency."

The Act defined "public health emergency" as:

- (a) an act of bioterrorism, a pandemic

influenza, or an epidemic caused by a novel and highly fatal infectious agent, for which:

- (I) an emergency is declared by a federal, state, or local public health agency; or
 - (II) a disaster emergency is declared by the governor; or
- (b) a highly infectious illness or agent with epidemic or pandemic potential for which a disaster emergency is declared by the governor.

During the summer of 2022, President Biden declared monkey pox to be a public health emergency. But that declaration was not covered by PHEL, and thus, did not provide Colorado employees an additional 80 hours of leave because monkey pox did not meet the definition of "highly fatal."

Recently, though, Colorado Governor Polis declared flu, respiratory syncytial virus ("RSV"), and similar respiratory illnesses, to be a public health emergency. Now, as recently explained by the Colorado Department of Labor, those with flu or RSV symptoms were already likely covered as having COVID symptoms. But this declaration by Governor Polis means that PHEL is usable for a range of PHE-related needs. PHEL-related needs include:

- Symptoms of COVID, flu, RSV or other similar respiratory illnesses
- Quarantining or isolating due to exposure
- Testing for COVID or similar

respiratory illnesses

- Vaccination and its side effects
- Inability to work due to health conditions that may increase susceptibility or risk of COVID, flu, RSV or similar respiratory illnesses
- Needs to care for family (illness, school closure, etc.)

Employers cannot require documentation from employees to show that leave is for PHEL-related needs.

In sum, as we enter what's traditionally "flu season," keep in mind that employees can use PHEL for flu and other respiratory illnesses, not just COVID.

2022 / 2023 Resolutions

It's that time of year again. Time for winter driving, sunsets before 5:00 p.m., the countdown to Spring Training, and, of course, New Year's resolutions. So, to join in this long-standing tradition, the Employer's Advisory created the following resolutions, in no particular order:

#1. *Legislation, legislation, legislation.*

To borrow an oft-repeated expression, "if you don't get involved in legislation before it's passed (e.g., write emails to your representatives/senators; participate in local governmental/legislative committees), you lose the right to complain about it after it's passed." The 2022 Colorado legislative session is certain to be a very active one regarding employment laws. So, now is the time to get involved in shaping how those laws will look.

#2 *Sign-up for FAMILI.* The Colorado Paid Leave FAMILI website recently went live. All

employers can now access and register their business at famli.colorado.gov. My FAMILI+ Employer will operate similarly to My UI Employer, allowing employers to report wage data, remit premium payments, apply for an exemption with a private plan, and upload letters of declination votes. Most Colorado businesses will need to register in My FAMILI+ Employer before the first premium payment is due April 30, 2023.

#3 *Let employees know about FAMILI.*

Employers are required to notify their employees about the new FAMILI program by January 1, 2023. So, now is the time to start posting the CDLE FAMILI poster, sending out paycheck stuffers, etc. See e.g., <https://famli.colorado.gov/employers/famli-toolkit-for-employers>.

#4. *Make sure job descriptions accurately describe the duties you want the employee to perform.* Job descriptions not only convey to employees what they should be accomplishing, but they are invaluable to identify in unemployment claims, EEOC charges, litigations, etc. what the employer considers to be the essential functions of the position. Additionally, these job descriptions are absolutely essential in defending a claim under the Equal Pay Act. So, don't overlook these critical documents.

#5. *Distribute policies and conduct training regarding the requirement that nonexempt employees may not perform work off-the-clock.* Class-action lawsuits regarding employees claiming that they performed work off-the-clock continue to increase and increase and increase. To attempt to limit liability in such claims, organizations should ensure that they take steps to require nonexempt employees to document all time worked and that they are diligent in reminding employees to track **ALL** time worked.

#6. *Make sure supervisors receive training regarding the organization's policies and procedures.* Do your supervisors understand the finer points of the ADA when their subordinates talk to them about a recent medical issue or explain why the employee shouldn't receive a reprimand because of a certain medical condition? Are they ready for the upcoming FMLI leave in 2024 and all the reasons an employee can request leave? Do they understand that unlawful harassment and discrimination claims are not limited to sex, but can include religion, age, race, ethnicity, genetic information, gender identity, gender expression, disability, marital status, etc.? These are just a few examples of training that supervisors should receive from organizations.

#7. *Remain cognizant that harassment charges are on the rise.* According to the EEOC's Enforcement and Litigation Data, employers paid nearly half a trillion dollars (\$439.2 billion) to resolve more than 70,000 discrimination/harassment claims with the EEOC. Sexual harassment cases have become the most active areas of enforcement, jumping more than 50 percent year over year. The agency responded to over 470,000 calls to its toll-free number and more than 187,000 inquiries in field offices, including 122,775 inquiries through the online intake and appointment scheduling system, reflecting the significant public demand for EEOC's services. These numbers require that organizations train supervisors and employees about the importance of "see something, say something." This means that employers should not only focus on educating all employees about what constitutes unprofessional conduct, but the importance that inaction is never an acceptable response.

#8. *Ensure that your organization's harassment and discrimination policy contains an effective and lawful complaint procedure.* One of the best defenses to a harassment claim is that an employer has a well-documented anti-harassment policy and complaint procedure that is conveyed to

every employee and is followed when a complaint is received.

#9. *Si sus trabajadores hablan varios idiomas, las políticas de la compañía deben estar en varios idiomas.* If you didn't understand that, perhaps you shouldn't expect employees who predominantly speak Spanish to understand the organization's English-only policies. In short, consider having your key employment policies translated into Spanish for workers who predominantly speak Spanish.

#10. *Treat every e-mail and text as though it could be "Jury Exhibit #1."* Many people look at e-mails and texts as more "casual" than documents, letters, etc. But they aren't. Further, hitting that "delete" button doesn't erase the e-mail or text from the system; it can be discovered years later. All employees within your organization should be advised to read and write e-mails and texts from this perspective.

So, with these resolutions (and other(s)) now prepared, we can look forward to the coming year!!! And we here at the Employer's Advisory wish everyone "Happy Holidays" and a wonderful start to the new year.

HAPPY HOLIDAYS!!!!