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Colorado Issues First Round of Regulations and Guidance on its Paid Family and Medical Leave Insurance (FAMLI) Program

Posted May 19, 2022 - In 2020, Colorado enacted a statewide [paid family and medical leave insurance program](#), following roughly a dozen states that have adopted similar programs in recent years. Since that time, the state has been building a new state-run Paid Family and Medical Leave Insurance (FAMLI) program pursuant to this law, and recently published a series of guidance documents and regulations regarding FAMLI.

The FAMLI program is not yet live, and the obligation to provide paid benefits under the program does not begin until January 1, 2024. However, the first phase of the FAMLI program take effect on **January 1, 2023**, which means that employers should start planning for this new program now to avoid being caught unprepared. While we anticipate additional guidance from the Colorado Department of Labor and Employment (CDLE or Department), Colorado employers should start thinking today about the implications that FAMLI will have on their business.

The Department has already indicated that it will be publishing guidance on benefit rules and the interplay of FAMLI with private paid family and medical leave programs in the coming months. We will provide additional guidance based on these regulations once they are issued.

Nearly All Colorado Employers Will Be Covered By FAMLI

To briefly recap, starting January 1, 2024, employees covered by the FAMLI program will be entitled to take paid leave for any of the following reasons:

- To care for their own serious health condition.
- To care for a family member's serious health condition.
- To care for a new child, including adopted and fostered children, during the first year after birth, adoption, or placement of the child.
- To make arrangements for a family member's military deployment.
- To take "safe leave," meaning leave because the employee or employee's family member is the victim of domestic violence, stalking, or sexual assault or abuse.

Employees can take 12 weeks of paid leave, unless leave is needed due to a pregnancy- or childbirth-related complication, in which case, an employee can receive an additional 4 weeks of FAMLI leave, giving the employee a total of 16 weeks. The FAMLI benefits will not be full wage replacement, and eligible employees will instead receive partial wage replacement depending on their earnings, capped at \$1,100 per week.

Any employer with at least one employee in Colorado must provide paid family and medical leave to its eligible Colorado employees. This includes permanently remote employees located in Colorado, even if the employer otherwise does not do business or have a worksite in Colorado. The regulations provide that an employee is subject to premiums if "[t]he employee's entire service is performed within Colorado."

The program is structured similarly to unemployment insurance, in that the state will pay employees directly when they are on FAMLI leave. Employers are not responsible for paying an employee's salary or wages while they are on FAMLI leave.

Premiums

One area of the law on which the state has already issued regulations relates to premiums to fund the program. While employees cannot take FAMLI benefits until 2024, premiums are due under the program starting **January 1, 2023**.

As of January 1, 2023, employers will need to begin deducting premiums, in the form of a .9% payroll tax, for all Colorado employees to fund the FAMLI program. FAMLI will be funded by payroll taxes split 50/50 between the employer and the employee (meaning the employer and employee will each pay .45% of their payroll to fund the program). Employers may also elect to pay the full amount if they choose to offer this as an added perk for their employees.

Included as “wages” subject to this payroll tax are salary or hourly wages, commissions, payments on a piecework basis, bonuses, or other forms of compensation (such as board, lodging, or payments in kind). Premiums are capped at the Social Security Wage base, which as of 2022 is \$147,000.

Notably, employers with fewer than 10 employees are not required to pay the employer share of the premiums. Employers with at least 10 employees in the first quarter of 2023 will need to pay the employer share of the premiums for all calendar quarters in 2023, even if they employ fewer than 10 employees in subsequent quarters of 2023.

For example, an employee with an annual salary of \$50,000 working for an employer with 10+ employees, would result in an annual premium of \$450 (.9% of \$50,000), of which the employee and employer would each be responsible for \$225. The CDLE has also published a FAMLI Premiums and Benefits Estimator, available [here](#).

Beginning January 1, 2023, employers will need to collect these payroll deductions and submit to the state both their share (if required) and their employee's share of the premium through an online system at the end of each quarter. These quarterly filings should be similar to how most companies presently submit their unemployment insurance.

Private Paid Family & Medical Leave Plans

Some employers already offer employees paid family and medical leave benefits. Under the law, employers may opt to use a private FAMLI plan rather than the state’s FAMLI Program. However, the private plan must be at least equally as generous as the public plan, offering the same rights, protections, and benefits as the public plan. Employers may require employees to contribute to the private plan, but not more than what the employee would have contributed under the state plan.

Beginning in November 2023, carriers can submit proposed plans to the Division for approval. If the private plan is approved, the employer need not withhold premiums to fund the FAMLI program. The Department has announced that it will be publishing additional guidance on private plans in the coming months, which should flesh out these obligations.

FAMLI’s Interaction with Other Leave Programs

In addition to the FAMLI program, employers will need to continue to navigate other leave programs, including the federal FMLA, short- and long-term disability programs, paid sick leave under the state Healthy Families and Workplaces Act (HFWA), and other paid time off policies. Based on guidance from the state to date, here is how each of these programs will interact with FAMLI:

Vacation Leave, Sick Leave, and Other Paid Time Off. Employers cannot *require* employees to use accrued vacation, sick leave, or other paid time off before or while receiving FAMLI. However, employers and employees can agree that an employee taking FAMLI can use accrued paid time off to “top off” their pay/make themselves whole. Employees cannot, however, receive more in compensation than their average weekly wage.

FMLA. The FAMLI benefit is designed to run concurrently with FMLA. This means that, as long as employers specify that the leave runs concurrently, an individual will not be able to “stack” leave by first taking up to 16 weeks of FAMLI, and then an additional 12 weeks of FMLA leave. To be sure, though, employees could be eligible for FAMLI even when they are not eligible for FMLA. Unlike the FMLA, FAMLI does not require that employees work for 1,250 hours or 12 months to be eligible for FAMLI leave. Most Colorado employees

become eligible to take paid leave after they have earned at least \$2,500 in wages within the state within the last four calendar quarters, and thus may be eligible for FAMLI benefits without regard to how long they have worked for an employer.

Short-Term & Long-Term Disability. Employers can require FAMLI benefits to run concurrently with the employer's disability insurance so long as the employer provides written notice to employees of the requirement.

Collective Bargaining Agreements and Other Preexisting Agreements and Policies. Nothing in FAMLI diminishes employee rights under a collective bargaining agreement, employer policy, or employment contract.

Workers' Compensation and Domestic Violence Leave. Rulemaking regarding how FAMLI and (1) domestic violence leave under Colo. Rev. Stat. § 24-34-402.7 and (2) workers' compensation is underway and will provide additional clarification regarding the interplay between these benefits.

Local Government May Opt Out of FAMLI

While participation in the FAMLI program is mandatory for private employers, local government employers may choose to opt out of the FAMLI program. To do so, local governments must hold a vote in **2022**. Notice to local government employees must be provided prior to the vote "in the same manner as any other business" before the governing body of the local government.

If a local government elects to decline to participate in the FAMLI program, it must then give notice to its employees within 30 days of the vote. This notice must include information relating that a local government *employee* may still opt into the FAMLI program, which follows similar procedures as a self-employed or independent contractor opting into the program.

Local governments must also notify the Division in writing of any decision to opt out of the FAMLI program by **January 1, 2023**. If local governments fail to notify the Division by January 1, 2023, they will be presumed to be participants in the FAMLI program and required to submit both wage data and premium payments to the Division.

What Notice Must Employers Provide to Employees Regarding FAMLI?

Employers must post the Division's poster, available [here](#), in a prominent location in the workplace and notify employees of FAMLI benefits upon hiring. In addition, upon learning that a covered individual has experienced or is experiencing a triggering event under the program, the employer must remind the employee about the benefit.

What Action Should Employers Take Before FAMLI Takes Effect?

While the FAMLI program continues to be developed by the state, there are some steps employers can take now to begin to plan for this new benefit. In the coming months, employers can:

- Continue to educate themselves about the FAMLI program as the Department issues additional guidance.
- Register with the FAMLI Division (registration will open in Q3 of 2022).
- Determine estimated premium liability to budget for the impact of this new program on the business.
- Decide whether to adopt a private plan rather than participate in the state's program.
- Notify employees that FAMLI payroll deductions will begin January 1, 2023, but emphasize that benefits will not be available until 2024.
- Notify human resources and payroll departments regarding FAMLI and its associated payroll deduction, and, once additional guidance is issued, update employee handbooks to include information regarding FAMLI.
- In Q4 of 2022, post the Division's poster (available [here](#)) in a prominent location in the workplace.

Most importantly, stay informed! FAMLI-related rulemaking is underway, and it is critical that employers stay up to date on related developments, which will shed more light on the program's precise requirements. We are closely monitoring this rulemaking and will publish updates concerning any significant developments.

This content is from David C. Gartenberg and Carolyn Theis, [Colorado Issues First Round of Regulations and Guidance on its Paid Family and Medical Leave Insurance \(FAMLI\) Program](#), Littler Insight (May 16, 2022).