

Colorado's Healthy Families and Workplaces Act

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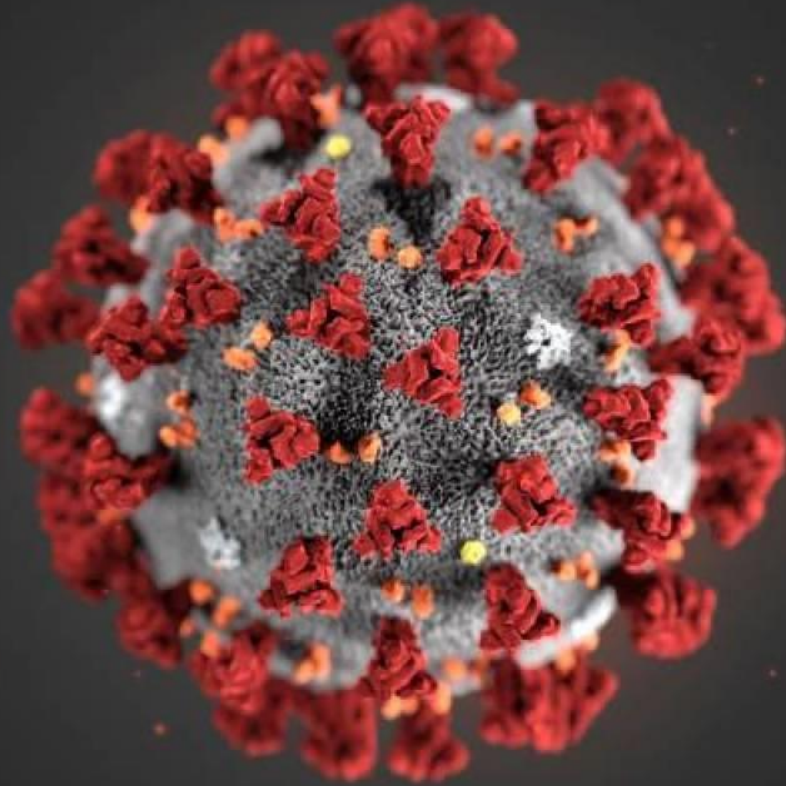
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COVID-19



Colorado Healthy Families & Workplaces Act (HFWA)

- ▶ In June / July 2020, the Colorado legislature passed the HFWA.
- ▶ This Act closely mirrors the FFCRA. The only difference is that it includes almost all employers.

HFWA After 2020

NEW PAID SICK LEAVE

- ▶ Starting **January 1, 2021**, employers with 16 or more employees (other employers start January 1, 2022) must provide employees with paid sick leave to be used for:
 - ▶ (i) employees' mental or physical illnesses, need for diagnosis or treatment, or preventative care;
 - ▶ (ii) an employee is caring for sick family members (defined as a person who is related by blood, marriage, civil union, or adoption; a child to whom the employee stands in loco parentis or a person who stood in loco parentis to the employee when the employee was a minor; or a person for whom the employee is responsible for providing or arranging health-or safety-related care) requiring diagnosis, treatment, or preventative care;

HFWA After 2020

NEW PAID SICK LEAVE

- ▶ (iii) an employee is the victim of domestic violence, harassment, or sexual abuse or need to assist family members who are victims of such conduct, and seek medical attention or counseling relating to such abuse; or
- ▶ (iv) in instances where a public health official has ordered the closure of the employee's place of business or the employee's child's school or place of care due to a public health emergency and the employee must therefore provide care to the child.

What Must Employers Provide?

- ▶ Beginning on the date of hire (or the applicable effective date of the Act, whichever is later), covered employees will accrue one hour of paid sick leave for every 30 hours worked, up to 48 hours, or six eight-hour workdays of accrued time.
- ▶ Employees can roll over unused paid sick time, though employers can limit use of leave to 48 hours in any given year. Employers alternatively may elect to front-load the full annual allotment of paid sick leave to an employee at the beginning of each year.

How are hours accrued?

Interpretive Notice #6B

- ▶ **Non-exempt Employees:** One hour of paid leave for every 30 hours worked up to 48 hours per year, is what employees must receive, starting their first day of work, unless an employer offers more. (C.R.S. 8-13.3-403.)
- ▶ **Exempt employees:** Overtime-exempt employees accrue leave as if they work 40 hours weekly, even if they work more – but non-exempt employees accrue paid leave equally for all hours worked, overtime or not.
- ▶ **Both non-exempt & exempt:** Employers can provide leave to employees as a lump sum.

HFWA – “A rose by any other name....”

- ▶ From the CDLE’s December 2020 Interpretive Notice from December 2020: HFWA does not require additional leave if an employer policy provides paid time off, often called a ‘PTO’ policy, for both HFWA and non-HFWA purposes (e.g., sick time and vacation) and states, in writing, that:
 - ▶ (A) its leave policy provides PTO --
 - ▶ (1) in at least an amount of hours and with pay sufficient to satisfy HFWA and applicable rules,
 - ▶ (2) for all the same purposes covered by HFWA and applicable rules, not a narrower set of purposes, and
 - ▶ (3) under all the same conditions as in HFWA and applicable rules, (e.g., accrual, use, payment, annual carryover of unused accrued leave, notice and documentation requirements, and anti-retaliation and anti-interference rights); and
 - ▶ (B) additional HFWA leave need not be provided if employees use all their PTO for non-HFWA reasons (e.g., vacation), except during a “public health emergency,” an employer must still provide supplemental leave.

What Must Employers Provide?



- ▶ An employee may be required to use paid sick leave in hourly increments unless the employer specifically allows paid sick leave to be taken in smaller increments of time.
- ▶ If an employee uses paid sick leave for four or more consecutive workdays, the employer may require reasonable documentation that the paid sick leave is for a purpose that is authorized by the Act.

Reasonable Documentation

- ▶ For leave for health-related needs: If the employee received services (including remotely) from a provider for the HFWA need, a document from the provider indicating a HFWA-qualifying purpose will suffice.
 - ▶ If they did not receive provider services, or cannot obtain a provider document in time or without added expense, they can provide their own writing that leave was for a HFWA need.
- ▶ (B) For leave for safety-related needs (domestic abuse, sexual assault, or criminal harassment): The same rules explained in (2)(A) above apply, except that also, if applicable, an employee can provide a legal document indicating a safety need for the leave (e.g., a restraining order or police report).

Reasonable Documentation



- ▶ Employers may not require that documents have a signature, be notarized, or be in any particular format.
- ▶ Employers may not require an employee to disclose details about health or safety information.
- ▶ Any such information that employers receive must be treated as confidential medical records, kept in separate files from other personnel documents, and may not be disclosed to others unless the employee consents in writing in advance.

Reasonable Documentation



- ▶ Documentation cannot be required to take leave, but can be required as soon as the employee can provide it after returning, or separating from employment if they do not return, whichever is sooner.
- ▶ If an employer reasonably deems an employee's documentation deficient, without imposing a requirement of providing more documentation than is permitted, the employer must:
 - ▶ notify the employee within seven days of either receiving the documentation or the employee's return to work (or separation, if the employee does not return), and
 - ▶ provide at least seven days to cure the deficiency after being notified.

Any Other Requirements?

Yes!!!

- ▶ An employer is not required to pay out unused, accrued paid sick leave upon termination, resignation, retirement, or other separation from employment.
 - ▶ Well, unless that's required under the Handbook policy.
- ▶ Employees can roll over unused paid sick time, though employers can limit use of leave to 48 hours in any given year. Employers alternatively may elect to front-load the full annual allotment of paid sick leave to an employee at the beginning of each year.

Any Other Requirements?

Yes!!!

- ▶ If an employee separates from employment and is rehired by the same employer within six months after the separation, the employer shall reinstate any paid sick leave that the employee had accrued but not used during the employee's previous employment with the employer and that had not been converted to monetary compensation to the employee at the time of separation from employment.

Public Emergency Leave under HFWA

- ▶ The Act also contains provisions relating to public health emergencies, which will require employers to supplement employees' otherwise available paid sick leave such that employees may take up to an additional two weeks (i.e., up to 80 hours) of paid sick leave during a public health emergency.
- ▶ According to the CDLE's Info #6C: "Employers with fewer than 16 employees must still provide 80-hour COVID leave, despite not having to provide 48-hour general paid leave until 2022."

Are we currently under a declaration of a Public Emergency?

- ▶ At the beginning of the COVID-19 pandemic, the federal government declared a public health emergency.
- ▶ On Friday, Oct. 2, HHS Secretary Azar indicated the COVID-19 PHE will be extended beyond Oct. 23. The new end date is expected to be Jan. 21, 2021.
- ▶ But for purposes of HFWA's Public-Health Emergency Leave, any declaration prior to January 1, 2021, is irrelevant: “On the day a public health emergency is declared, employers are required to immediately provide each employee with additional hours of paid leave...” Wage Protection Rules (effective Jan. 1, 2021).
- ▶ On December 22, 2020, the CDLE announced that Colorado is under a public health emergency.

Public Emergency Leave under HFWA

- ▶ This declaration means that all employers shall supplement each employee's accrued Paid Sick Leave balance as necessary to ensure that an employee may have available to him/her the following amounts of Public Health Emergency Paid Leave for the purposes specified above:
 - ▶ a. For employees who normally work 40 or more hours in a week: 80 hours maximum available for use.
 - ▶ For employees who normally work less than 40 hours in a week: At least the amount of time an employee is scheduled to work in a 14-day period, maximum, or the amount of time the employee actually works on average in a 14-day period, maximum, whichever calculation is greater, available for use.

Public Emergency Leave under HFWA

- ▶ The law states that employers may count an employee's accrued but unused time under the Act's general paid sick leave provisions toward this supplemental public health emergency sick leave requirement.
- ▶ In the CDLE's Interpretive Notice and Formal Opinion, #6B, it identified that "...during a public health emergency (PHE), employers must immediately provide each employee additional paid leave -- supplementing whatever HFWA leave the employee accrued before the PHE with enough supplemental leave to assure the employee can take leave in the [amounts identified.]"

Public Emergency Leave under HFWA

- ▶ The supplemental leave will be available until four weeks after the official termination or suspension of the public health emergency and may be used by employees:
 - ▶ Self-isolating due to a positive diagnosis, experiencing symptoms, seeking medical treatment or preventative care with respect to the illness causing the public health emergency;
 - ▶ Suffering from a preexisting condition that would make the employee more susceptible to serious harm if infected with the illness causing the public health emergency;

Public Emergency Leave under HFWA

- ▶ Where public health officials or the employer have deemed it to be unsafe for the employee to come to work due to the employee's exposure to, or displaying symptoms of, the illness causing the public health emergency; or
- ▶ If caring for a family member in the above circumstances, or if they must care for a child or other family member whose school or child-care facility is closed due to the public health emergency.
- ▶ Unlike the use of paid sick leave for the general reasons discussed above, an employer may not require an employee to provide documentation in order to take supplemental paid sick leave under the public health emergency provisions of the Act.

Family Member



- ▶ “Family member” means:
 - ▶ A person related by blood, marriage, civil union, or adoption;
 - ▶ A child to whom the employee stands in loco parentis or a person who stood in loco parentis to the employee when the employee was a minor;
 - ▶ A person for whom the employee is responsible for providing or arranging health or safety related care.

Public Emergency Leave under HFWA

- ▶ Employees retain their accrued leave rights during a public health emergency.
- ▶ They also continue earning accrued leave at their regulation rate, up to 48 hours per year.
- ▶ And they may use supplemental leave for any of the qualifying reasons before using accrued leave, if the reason for leave would qualify as both.

Any Other Requirements?

Yes!!!

- ▶ Unlike the use of paid sick leave for the general reasons discussed above, an employer may not require an employee to provide documentation in order to take supplemental paid sick leave under the public health emergency provisions of the Act.
- ▶ An employer may loan paid sick leave to an employee in advance of accrual of paid sick leave.

Any Other Requirements?

Yes!!!

- ▶ Employees must give notices “as soon as practicable,” but only when needing leave that is foreseeable such as for a scheduled appointment.
- ▶ An employer may develop a “reasonable procedures” on notice for “foreseeable” leave but shall not deny pay sick leave to the employee based on noncompliance with such a policy.

“Carry-Over” of Leave

- ▶ Any unused accrued leave, up to 48 hours per benefit year, carries forward for use in a later year – but an employer is not required to allow use of more than 48 hours in any one year.
- ▶ No paid leave is required if an entire business is completely closed.
- ▶ Employees may request, and employers must provide in writing or electronically, documents showing the then-current amount of paid leave the employee has (1) available for use and (2) already during that benefit year (both for sick leave and for public emergency leave). Employees may not request such information more than once per month, unless the need for leave arises.

HFWA After 2020

NEW PAID SICK LEAVE

- ▶ Notice Requirement:
 - ▶ Employer must (1) supply each employee with written notice, and (2) display a poster that CDLE has or will have available
 - ▶ The Division will create and make available both posters and notices that employers may use
 - ▶ <https://www.colorado.gov/pacific/sites/default/files/Poster%20C%20Paid%20Leave%20%26%20Whistleblower.pdf>
- ▶ Written notice must:
 - ▶ Specify the amount of paid sick leave to which employees are entitled and the terms of its use under Part 4
 - ▶ Notify employees that (1) employers cannot retaliate against an employee for requesting or using paid sick leave, and (2) an employee has the right to file a complaint or bring civil action if paid sick leave is denied or the employer retaliates.

Any Other Requirements?

Yes!!!

- ▶ Written notice must:
 - ▶ Specify the amount of paid sick leave to which employees are entitled and the terms of its use under Part 4
 - ▶ Notify employees that (1) employers cannot retaliate against an employee for requesting or using paid sick leave, and (2) an employee has the right to file a complaint or bring civil action if paid sick leave is denied or the employer retaliates

FFCRA Status



- ▶ **Paid Sick Time:** Employers are no longer required to provide FFCRA paid sick time. Those that do, are eligible for a tax credit for the paid sick time through March 31, 2021.
- ▶ **Paid Family Leave:** Employers are no longer required to provide FFCRA paid family and medical leave time. Those that do, are eligible for a tax credit for the paid sick time through March 31, 2021.



EMPLOYMENT LAW FOR BUSINESSES

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