

FAMLI ACT & OTHER DEVELOPMENTS ON THE LABOR & EMPLOYMENT LAW FRONT



Presented by:

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FAMLI Act Overview

- Purpose of C.R.S. Section 8-13.3-501 *et seq.*
- Eligibility
- Duration
- Amount of benefits
- Premiums
- Leave and employment protection
- Coordination of benefits
- Notice and documentation

FAMLI Act - Purpose

- Covers all employers regardless of size
- Operates like unemployment comp via state insurance program or approved private plans
- Quite a bit of overlap with FMLA
- 12 weeks of paid family and medical leave funded through a payroll tax paid by employers and employees - 50/50 split.
 - Additional four weeks of leave for pregnancy or childbirth complications.
- Premiums paid beginning January 1, 2023; benefits start January 1, 2024.

FAMLI Act - Eligibility

- Covered individual:
 - Employee who earns \$2,500 during base period
 - Or who elects coverage because self-employed or local government worker
- Covered leaves:
 - Birth, adoption, or placement within first year
 - Family member with serious health condition (SHC)
 - Domestic partners
 - “significant personal bond” like a family relationship
 - One’s own SHC
 - Qualifying exigency (military) leave
 - Safe leave (domestic violence, stalking, sexual assault/abuse victims)

FAMLI Act - Duration

- 12 weeks for any purpose, or purposes in the aggregate
 - Based on a rolling annual year
 - Concurrent with FMLA
- Along with additional 4 weeks if pregnancy/childbirth complications
- Can be intermittent (1 hour or shorter if employer uses shorter increments to measure leave)
- Employee must make reasonable effort to schedule so as not to unduly disrupt operations
- 30 days' advance notice if foreseeable; otherwise, as soon as practicable

FAMLI Act – Amount of Benefits

- Employees only receive a portion of their paycheck dependent on their average weekly wage and not the full amount
- Benefits capped at \$1,100.00/week until 1/1/25
- Employees are not required to use PTO before taking leave under the FAMLI program, but employers may allow employees to use their accrued PTO to cover the remaining balance to “make them whole” while on leave

FAMLI Act - Premiums

- Start 1/1/23
- Shared fee between employers and employees based on 0.9% of wages - rate is set through 2025
- If 10 or more employees, employer may deduct up to 50% of the 0.9% premium as a standard payroll deduction
 - less than 10 employees, no required employer share
- Formula used to calculate premiums:
 - $(\text{annual income} \times .009) / 2 = \text{employer share}$
 - $(\text{annual income} \times .009) / 2 = \text{employee share}$
- Calculator on CDLE website (Employer tab)

FAMLI Act – Leave/Employment Protections

- Right to take leave and non-retaliation
- Job restoration for those employed 180 days or more
 - Same or substantially equivalent position
- Employer must maintain health-care benefits on same terms
- Employer cannot count FAMLI leave as unexcused, or use it as the basis for discipline or discharge
- Enforced through civil action, with same remedies as FMLA
- 2-year SOL (unless willful, which is 3-year SOL)

FAMLI Act - Coordination of Benefits

- Worker's and Unemployment Comp benefits do not overlap with FAMLI – you get one or the other
- Recent rulemaking in this area – FAMLI and employer-provided PTO or paid leave
 - Employees don't get both for the same hours absent, however . . .
- Employees aren't required to use or exhaust any accrued vacation/sick leave, or other PTO prior to or while receiving FAMLI benefits
 - So they can stack benefits

FAMLI Act - Coordination of Benefits

- Employee and employer may mutually agree that the employee may use any accrued vacation/sick leave, or other PTO while receiving FAMLI benefits
 - Up to the employee's average weekly wage
 - Employer can recoup overpayments through pay deductions
 - But, Employer may have to replenish the employee's bank of accrued employer-provided paid leave/PTO/sick leave equal to the amount recouped as an overpayment
- Employers will have to carefully track requirements under FAMLI leave and HFWA paid sick and PHE leaves

FAMLI Act - Notice and Documentation

- Notice to employees posted by 1/1/23
- Posters (including translated ones) can be found here:
 - <https://famli.colorado.gov/employers/famli-toolkit-for-employers>.
- Paycheck stuffer and FAMLI employee handbook available as well
- Register business at My FAMLI+ Employer before 4/30/23
- Employers can require the same documentation as under the FMLA, which will be helpful

FAMLI Act – Approved Private Plans

- Substitution of private plans
 - Must apply to FAMLI Division for approval (by 10/31/23 to get reimbursed below)
 - Must satisfy 14-factor test and application requirements in the Division's Rules
 - Must afford employees all of the same protections as state plan
- Plan denials of benefits are subject to appeal before the FAMLI Division
- Same civil action rights and remedies
- Reimbursement of advance payments
 - Because premiums likely will be paid before private plans are approved

FAMLI Act Employer FAQs

- <https://famli.colorado.gov/employers/employer-faqs>.

LABOR & EMPLOYMENT LIGHTNING ROUND

Resurrection of the 80/20 Rule

- Tip credit may only be taken for time spent by the employee when they are “engaged in” a tipped occupation. *Time spent outside of the tipped occupation must be paid at minimum wage without a tip credit applied to those hours.*
- An employer loses the tip credit if a tipped employee spends more than 20% of their *weekly* hours performing **work that is not tip-producing work or work that directly supports tip-producing work.**
- An employer loses the tip credit for a tipped employee who performs “directly-supporting work” for a *continuous* period that exceeds 30 minutes (think side work). This is true even if the continuous time spent on this work amounts to less than 20% of the employee’s total work for the week.

Resurrection of the 80/20 Rule

- Tip-producing work?
 - walking to the kitchen or bar to retrieve prepared food and drink and delivering those items to the customers;
 - filling and refilling drink glasses;
 - attending to customer spills or items dropped on the floor adjacent to customer tables;
 - processing credit card and cash payments; and
 - removing plates, glasses, silverware, or other items on the table during the meal service.
 - **NOT:** general food preparation, including salad assembly, is not part of the tipped occupation of a server

Resurrection of the 80/20 Rule

- Directly supporting work?
 - Defined as “work which is performed by a tipped employee in preparation of, or to otherwise assist tip-producing customer service work.”
 - Work “performed by a tipped employee such as a server or busser in a restaurant before or after table service, such as rolling silverware, setting tables, and stocking the busser station, which is done in preparation of the tip-producing customer service work.”

Resurrection of the 80/20 Rule

- USDOL example:
 - **A server is employed for 40 hours a week and performs 5 hours of work that is not part of the tipped occupation, such as cleaning the kitchen, for which the server is paid a direct cash wage at the full minimum wage. The server also performs 18 minutes of non-tipped directly supporting work twice a day, for a total of three hours a week.** The employer may take a tip credit for all of the time the employee spends performing directly supporting work, because this time does not exceed 20 percent of the workweek. Because this employee has been paid the full minimum wage for a total of five hours a week, the employee could perform up to seven hours of directly supporting work ($35 \text{ hours} \times 20 \text{ percent} = 7 \text{ hours}$) without exceeding the 20 percent tolerance.

Resurrection of the 80/20 Rule

- If you utilize the tip credit . . .
 - Consider developing a process where employees can notify management if they have performed directly supporting work in excess of either time limitation so that management can take steps to adjust their compensation appropriately.
 - Consider whether to implement an acknowledgement affirming whether the employee performed any work outside *tip-producing work* or *directly-supporting work*, and if so, for how long that work lasted.



OTHER ONGOING WAGE & HOUR ISSUES

- Illegal Tip Pools
- Proper payment and carryover of vacation/PTO
- COMPS Order 38 >>> 39
 - Increased minimum wage
 - Increased salary basis for exemptions
 - Rest period litigation
 - Class and collective actions still on the rise



HFWA Update

- New Info Sheet 6B
- PHE expansion
- Myths surrounding the 80-hour rules
- Death of PHE leave has been greatly exaggerated

CO Secure Savings Program

- Not intended to replace your existing 401(k) programs – covers employers with 5 or more employees
- Employees are automatically enrolled in the new program
 - Percentage of employee pay (the default is likely 5%) will be automatically deposited into an Individual Retirement Account (IRA)
 - Account belongs to each employee and is portable from job to job - employees can opt out of the program or decrease the percentage of pay being withheld
- Nothing is required right now – awaiting “employer implementation package” (with model disclosures) and an “employee information packet” (with an explanation of how to opt out) – October 2022

Questions?



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Thank You



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