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## **The New Year to Begin with New Obligations for Colorado Employers Providing Paid Sick Leave**

Starting January 1, 2021, Colorado employers with 16 or more employees must abide by new basic paid sick leave requirements – all employers will follow suit beginning in 2022. Public health emergency leave requirements have also been established that will impact all employers, regardless of size, at the beginning of the new year. On July 14, 2020, Governor Polis signed into law SB20-205, the “Healthy Families and Workplaces Act” (HFWA) to amend Colorado’s paid sick leave statutes, generally, and to provide COVID-19-related leave, specifically. (C.R.S. §§ 8-13.3-401 (2020).) The HFWA alters past basic sick leave requirements, addresses present sick leave demands relating to COVID-19, and braces for sick leave during potential future public health emergencies.

**Who / When:** The basic leave requirements of the HFWA become effective on different dates for employers based on their size.

**January 1, 2021:** Employers with 16 or more employees.

**January 1, 2022:** All employers, regardless of size.

The HFWA’s Public Health Emergency leave requirements (discussed in more detail below) apply to all employers, regardless of size, starting **January 1, 2021**. The HFWA’s COVID-19 leave provisions applied to all employers starting July 14, 2020, and continue through December 31, 2020.

**How Many Hours:** Employers must provide paid sick leave to all employees at an accrual rate of one hour of paid sick leave for every 30 hours worked, up to 48 hours per year. Workers who are exempt from overtime pay are to accrue leave as though they work 40 hours / week (even if they work more). Hourly workers accrue paid leave for all hours worked (including overtime hours). Accrual of paid sick leave begins simultaneously with employment.

The Colorado Department of Labor and Employment provides the following example of the minimum amount of leave expected to be provided under the HFWA:

*Examples:* An employee working 150 hours a month (35 a week) accrues just over 1 hour's leave every week they work—which totals 5 hours a month, reaching the yearly 48-hour maximum after about 9½ months. An employee working 20 hours a week accrues 1 hour's leave every 1½ weeks, reaching 32 hours by year's end (based on 48 workweeks, excluding holidays and unpaid time off).

(Interpretive Notice & Formal Opinion #6B (“INFO 6B”).)

Workers are permitted to carry-over up to 48 hours per benefit year for use in a later year, but employers do not have to permit use of more than 48 hours of paid sick leave in any given year.

There are two key sets of exceptions to the above general rules that employers should keep in mind:

*Exception:* If a business is completely closed for reasons other than a temporary government quarantine or isolation order, paid leave is not required.

*Exception:* The HFWA permits employers to provide a higher maximum accrual and to allow paid sick leave hours to accrue at a faster rate than what is specified above. Additionally, if an employer provides a PTO or other leave policy for purposes covered by the HFWA as well as other reasons (e.g., a leave policy that covers both sick leave and vacation), then it is possible that such policy will comply with the HFWA so long as it:

- meets the minimum requirements set forth in the HFWA,
- does not impose stricter requirements for using the leave than those permitted by the HFWA,
- provides leave for the same purposes as the HFWA,
- is set forth in writing, and
- provides for the supplemental leave required during a qualifying public health emergency (discussed in more detail below).

**Permitted Purposes:** As of January 1, 2021, the HFWA permits employees to use accrued paid sick leave for five categories of reasons:

- (1) a mental or physical illness, injury, or health condition that prevents work;
- (2) obtaining preventive medical care, or a medical diagnosis, care, or treatment, of any mental or physical illness, injury, or health condition;

(3) being a victim of domestic abuse, sexual assault, or criminal harassment who needs leave for medical attention, mental health care or other counseling, victim services (including legal), or relocation; or

(4) care for a family member who has a mental or physical illness, injury, or health condition, or who needs the sort of care listed in category (2) or (3);

(5) due to a public health emergency, a public official closed the employee's (A) place of business, or (B) child's school or place of care, requiring the employee to care for the child.

(C.R.S. §§ 8-13.3-404(1), (a)-(c).) A qualifying family member is a person who is (i) immediate family and related by blood, adoption, marriage, or civil union, or (ii) someone who the employee is responsible for providing or arranging health- or safety-related care for. (C.R.S. §§ 8-13.3-402(6), (a)-(c).)

Similar to the Family Medical Leave Act, employers may not demand that leave under the HFWA be taken in increments larger than one hour. In other words, an employer cannot demand that the employee take leave in whole-day or half-day increments. If the employer does not have a written policy requiring use of paid sick leave in one-hour increments, an employee may use paid sick leave in six-minute increments.

*Key Takeaway for Employers:* Ensure that you have a written policy requiring paid sick leave to be used in one-hour increments and that your current policies are written broadly enough to address all permitted reasons for leave under the HFWA.

**Documentation from Employees:** Employees should provide notice “as soon as practicable” of the need for leave under the HFWA, but only if the need for leave is “foreseeable.” (C.R.S. § 8-13.3-405(4)(a).)

If an employee takes paid sick leave of four or more consecutive days that the employee would've ordinarily worked (not necessarily calendar days), the employer may require “reasonable documentation” to verify the employee is taking or took leave for a reason authorized by the HFWA. Notably, documentation cannot be required to *take* leave, but may be required after the employee returns to work or after separation from employment if the employee does not return.

The guidance issued by the Colorado Department of Labor and Employment limits the type of documentation that can be requested. For example, for normal, non-pandemic, health-related needs, the employer may request a document from the medical provider (i.e., a “Doctor’s Note”); however, even then, certain circumstances may exist that would limit the employee’s obligation to provide that documentation. Additionally, employers likely will not be allowed to request extensive details about either the health-related needs or safety-related needs at issue.

*Key Takeaway for Employers:* Ensure employment policies address the different types of leave situations that may arise and be prepared to make exceptions to normal notice and documentation requirements in appropriate circumstances.

**Employer Documentation:** Employers must keep records relating to employees' hours worked, leave accruals, and use of leave for two-year periods. Employees may request information relating to the amount of sick leave they have used and have available (i) monthly, and (ii) when the need for sick leave arises.

**Anti-Retaliation Warning:** The HFWA protects employees from retaliation (defined in C.R.S. § 8-13.3-402(10)) or interference with employees' HFWA rights. Activity prohibited by the HFWA includes denying an employee leave that the employee has the right to take, or any other threat or adverse action (*e.g.*, firing, demoting, reducing hours, suspending, disciplining, etc.) taken to retaliate against or interfere with:

- (1) requesting to or taking HFWA paid leave, or attempting to exercise an employee's HFWA rights;
- (2) informing another person about, or supporting their exercise of, their HFWA rights; or
- (3) filing an HFWA complaint or cooperating in investigations or proceedings regarding HFWA rights.

(INFO 6B.) Employers *may not* take adverse action against employees for incorrect information or complaints if the employee held a reasonable, good faith belief in the information. Employers *may* impose consequences for misusing paid leave, dishonesty, or other leave-related misconduct. (*Id.*)

*Key Takeaway for Employers:* If an employee requests leave for a reason not covered by the HFWA, employers can deny leave. If the employee files a complaint but ends up being incorrect, or tells coworkers that the employer denied HFWA leave, absent evidence that the employee's belief was in bad faith or unreasonable, the employer may not take action against the employee.

**Employer Posting and Written Notice Duties:** The HFWA imposes two main notice and posting requirements. Employers must:

- (1) notify employees in writing of the right to take paid leave, in the amounts and for the purposes in the HFWA, without retaliation, and
- (2) display an information division poster.

(INFO 6B.) These requirements are both waived if the employer's business is closed due to a public health emergency. For all employees of employers without physical workspaces,

including remote workers, employers need only satisfy the first requirement, and can do so electronically. (*Id.*)

Notices and posters must be provided “in any language that is the first language spoken by at least five 5% of the employer’s workforce.” (C.R.S. § 8-13.3-408.) Employers can access versions of INFO publications and posters in multiple languages [here](#).

*Key Takeaways for Employers:*

**Employers can satisfy the first requirement** (notice) by providing employees versions of the latest Colorado Department of Labor INFO #6 publication or poster (accessed through the Colorado Department of Labor here: [6A](#), [6B](#)) or by displaying the corresponding poster (accessed through the Colorado Department of Labor [here](#)) either physically or electronically. (*Id.*) Beginning **January 1, 2020**, employers must post/provide INFO #6B and the 2021 poster, instead of INFO #6A and the 2020 poster.

**Employers can satisfy the second requirement** (posting) by displaying the Division poster in a conspicuous and accessible place in each establishment where employees work. (*Id.*)

**Hours of Leave During a Public Health Emergency (PHE):** During a PHE, employers must provide additional paid leave to employees to supplement their already-accrued HFWA leave so that employees can take leave in the following amounts:

(1) for employees normally working 40 or more hours per week, 80 hours of total leave; and

(2) for employees normally working under 40 hours in a week, the greater of the number of hours the employee is (a) scheduled for work or paid leave in the upcoming 14-day period, or (b) actually worked on average in the 14-day period prior to the declaration of the PHE.

Example: if an employee who normally works over 40 hours per week has 30 hours of accrued and *unused* sick leave prior to a PHE, the employer need only provide a supplemental 40 additional hours of paid sick leave to meet the PHE requirement of 80 hours for that employee. An employer will not be able to take a credit for sick leave hours used by the employee prior to the PHE being declared. For example, if an employer normally provides 48 hours of sick leave to its employees at the beginning of each year, and an employee has utilized 18 of those hours prior to the PHE being declared, that employee will be entitled to an additional 50 hours of PHE supplemental sick leave (not 32).

Employees may use their supplemental leave from the beginning of the PHE (marked as the date of the PHE’s declaration) until four weeks after the end of the PHE. Employees maintain their

accrued leave rights during the PHE and continue accruing leave at their regular rate during that time, up to 48 hours per year. Employees may use their supplemental leave, as compared to their regularly accrued leave, for any PHE-related event (as outlined in the HFWA and the Families First Coronavirus Relief Act (FFCRA)), so long as the event would qualify for both regularly accrued paid leave and PHE-supplemental leave. Acceptable reasons for PHE-related leave mirror those found in the FFCRA, which was implemented at the federal level earlier this year. Information about the FFCRA can be found [here](#), [here](#), and [here](#)).

**Leave Requirements Specific to COVID-19:** As of July 14, 2020, the HFWA established 80-hour COVID-related leave through 2020, and these requirements will continue into 2021. Section 406 of the HFWA covers all 2020 COVID-related leave, but this section expires on December 31, 2020.

Moving into 2021, section 405 of the HFWA requires 80-hour leave during PHEs, and COVID has been declared a PHE. So, any continuation or expansion of the COVID PHE into 2021 will provide new 80-hour leave for all 2021 COVID-related PHEs. So far, the COVID emergency declaration has been extended monthly since March. Most recently, Governor Polis on December 27, 2020, extended the COVID PHE for another month. (Colo. Exec. Order No. D 2020 290 (Dec. 27, 2020).) The basic leave provisions of the HFWA will interact differently with the HFWA's PHE leave requirements based on employer size:

*Employers with less than 16 employees:* Employers with less than 16 employees need not provide the HFWA 48-hour regular paid sick leave until 2022, but employers with less than 16 employees **must** comply with the PHE leave requirements. The provisions of the HFWA mandating PHE leave apply to all employers; so, all employers, **regardless of size** must provide 80-hour PHE-leave for the COVID-19 outbreak beginning January 1, 2021.

*Employers with 16 or more employees:* Starting January 1, 2021, employees with 16 or more employees must provide 48 hours of paid sick leave, while also providing employees with 80 hours of PHE leave.

If you have any questions about the Colorado Healthy Families and Workplaces Act, or need assistance navigating these changes, please contact our [Labor & Employment Law Practice Group](#). We encourage you to [subscribe](#) to our [Labor & Employment Publications](#) for the latest news, tips, and updates.

\*Woods Aitken's [Coronavirus Resources Page](#) includes valuable information regarding the coronavirus pandemic and our publications on COVID-19. We encourage you to visit this page often for updates.