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Many Large Employers in Colorado are Suddenly Obligated to Provide up to 80 Hours of Paid Sick Leave for COVID-19 Related Reasons

Effective April 27, 2020, many large employers in Colorado (those with 500 or more employees) are now required to pay up to 80 hours of sick leave at a rate of two-thirds employees' regular pay for a variety of COVID-19-related reasons.

A little over six weeks ago, on March 11, 2020, the Colorado Department of Labor ("CDLE") published rules referred to as Colorado Health Emergency Leave with Pay ("Colorado HELP"). As described in our previous alert, originally Colorado HELP required employers in just a few industries to provide up to four (4) days of paid sick leave for employees experiencing COVID-19 symptoms who were waiting for test results. The industries covered were those in which employees interacted with vulnerable populations (such as home health, nursing homes and community living facilities), serviced persons from outside Colorado (such as hospitality) and had a high level of physical contact or contact between shared equipment or items (such as food service, child care and education). CDLE later amended Colorado HELP to add "retail establishments that sell groceries" (on March 26, 2020) and "food and beverage manufacturing" (on April 3, 2020) to the list of covered employers.

The April 27, 2020, amendments take Colorado HELP to a whole new level. Now paid sick leave applies to any employer engaged in the following industries, as well as to any employee performing the following functions regardless of industry:

leisure and hospitality

food services

retail establishments

real estate sales and leasing

offices and office work

elective health services (including medical, dental or other health services)

personal care services (defined as hair, beauty, spas, massage, tattoos, pet care or substantially similar services)

food and beverage manufacturing

childcare

education at all levels (including related services, including but not limited to cafeterias and transportation to, from and on campuses)

home healthcare (working with elderly, disabled, ill, or otherwise high-risk individuals)

operating a nursing home

operating a community living facility

Some of these fields, particularly “office and office work,” are so broad that virtually every Colorado employer will have at least some, if not all, of its employees eligible for paid sick leave.

The April 27 amendments also increased the paid leave entitlement from up to four (4) days at full pay for employees waiting for test results, to up to fourteen (14) days at two-thirds of the employee’s regular rate of pay for employees who are:

having flu-like or respiratory illness symptoms; and

who are either (1) being tested for COVID-19 or (2) under instructions from a healthcare provider or authorized government official to quarantine or isolate due to a risk of having COVID-19.

Paid sick leave ends (1) when the employee receives a negative test result and (2) after the employee has been fever-free for 72 hours and other symptoms have resolved as well, but leave cannot end any earlier than seven calendar days (or 10 calendar days for healthcare workers covered by the rules) after leave began. In no event is an employee entitled to more than 14 paid sick days (capped at 80 hours for full-time employees).

Colorado HELP paid sick leave is not in addition to paid time off an employee is already entitled to receive from his or her employer if that paid time off is sufficient to comply with the rules, with one exception. In the event an employee has already exhausted all employer-provided paid time off, and he or she qualifies for paid sick leave under Colorado HELP, the employee is entitled to receive additional paid sick leave under Colorado HELP.

Finally, Colorado employers and employees are encouraged to comply with the procedures of the federal Family Medical Leave Act (“FMLA”) when requesting and certifying eligible paid sick leave under Colorado HELP, though no employee may be terminated for inability to provide documentation during a covered illness. FMLA provisions also cannot be used to narrow the rights and responsibilities provided by the rules. Colorado HELP provides detailed information regarding what paperwork can be requested by an employer and when and what notice employees can be required to provide to their employers.

Colorado HELP may not have a practical effect on many mid-size employers (those with fewer than 500 employees) that are already subject to the federal Families First Coronavirus Response Act (FFCRA). According to Colorado HELP, where a federal or local sick leave law provides greater benefits and protections to employees, that law governs instead. The FFCRA will in most instances provide greater protection to employees, insofar as eligible employees receive full pay (not merely two-thirds) for up to 80 hours of sick leave when they are experiencing COVID-19 symptoms and are seeking a diagnosis, are personally advised to stay home by a healthcare professional, or are subject to a quarantine or isolation order.

For some employers, particularly those in healthcare, whether the FFCRA or Colorado HELP governs is still far from clear. Under the FFCRA employers who employ “healthcare providers” or “first responders” (which are broadly defined under the FFCRA) have discretion to exclude those employees from coverage. Under Colorado HELP, employees engaged in the field of elective health services are eligible for paid sick leave. Similarly, the FFCRA permits employers to exclude from benefits any individual employed by an entity that is under contract with a healthcare facility. Under Colorado HELP, employees who perform “office work” must be provided with paid sick leave, apparently regardless of whether their employer is under contract with a healthcare facility. Thus, it is unclear whether Colorado HELP governs in circumstances where an employer has discretion to provide FFCRA benefits to certain employees, but chooses not to do so.

Perhaps the greatest impact of Colorado HELP will be on large employers with 500 or more employees. These large employers are not covered by the FFCRA, but they are subject to the provisions of Colorado HELP to the extent they are engaged in, or employing workers in, the enumerated fields. Presumably these state-level paid sick leave benefits are only payable to employees working in Colorado, not to the employer’s entire work force. These large employers may also find

themselves covered by a myriad of unique paid sick leave obligations arising out of other state or local laws, whether previously existing or recently created in response to COVID-19. While these large employers may already provide sufficient paid time off to their employees in the usual course of business, these employers must be wary of their obligation to provide additional paid sick leave under Colorado HELP if the employee has already exhausted his or her paid time off allotment. Finally, unlike the FFCRA, these employers will not receive a tax credit to compensate for the paid sick leave they are obligated to provide under Colorado HELP.

Contact us

If you have further questions or require more information regarding this update, please contact Barbara Grandjean, Stacey Bowman, Ashley Jordaan or your Husch Blackwell attorney.

COVID-19 Return-to-Work Resource

For the many businesses that partially or completely shuttered their on-site operations due to government-mandated COVID-19 orders, transitioning employees back to the workplace is an unprecedented and complex endeavor. Husch Blackwell's Return-to-Work Resource Center provides best practices, answers to common questions and potential issues to consider.