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Colorado Lawmakers Expand Paid Leave, Whistleblower Protections

Evidently accepting Winston Churchill's advice that one should never let a good crisis go to waste, the Colorado General Assembly passed, and Governor Polis has signed, two laws that, on their face, appear designed to address workplace issues that came to light during the COVID-19 pandemic, but that expand workplace protections for employees that had long been sought. Most significantly, the Healthy Families and Workplaces Act (HFWA) not only requires additional paid sick leave for virtually all Colorado employees during the current COVID-19 pandemic for up to 80 hours, but then goes further to require Colorado employers, starting January 1, 2021, to provide up to 48 hours of paid sick leave for employees' healthcare needs or to allow them to care for family members with healthcare needs. While many Colorado employers that already provide paid sick leave or paid time off (PTO) (generally, a combination of sick leave and vacation pay) may already be in compliance with a portion of the law, the impact on Colorado employers that have not historically provided paid sick leave will be significant. Hourly part-time workers in retail, hospitality and other lower-wage industries are likely to benefit the most from the new law.

The General Assembly also added a "Worker Rights Related to a Public Health Emergency" article to Title 8 (Labor and Industry) codifying whistleblower protections for workers who raise concerns about workplace safety related to a public health emergency. This law's robust private right of action has the potential to spawn a wave of future lawsuits. See our other related update.

Governor Polis signed the HFWA on July 14, 2020.

The **Healthy Families and Workplaces Act (SB 20-205)** provides for three types of sick leave: "regular" sick leave, "future pandemic" sick leave and COVID-19 sick leave.

Beginning January 1, 2021, employees earn up to 48 hours of “regular” sick leave in a year, accrued at a rate of 1 hour per every 30 hours worked.

On top of “regular” sick leave, also beginning January 1, 2021, “future pandemic” pay of up to 80 hours is required.

Effective immediately and for the remainder of 2020, up to 80 hours PTO for COVID-19 related issues is required, consistent with the federal Families First Coronavirus Response Act (FFCRA) paid sick leave requirements, but applicable to employers of any size or in any industry.

A. “Regular” paid sick leave entitlement

The new 48-hour paid sick leave requirement is intended to extend paid sick leave benefits to all classes of workers, including hourly and part-time workers. Employers that already provide paid sick leave that meet or exceed the HFWA requirements are not required to provide additional time off under the law for the “regular” paid sick leave. Employers with fewer than 16 employees can defer compliance with the “regular” paid sick leave provisions of the HFWA until January 1, 2022.

Accrual and Amounts. Beginning on the first day of employment, for every 30 hours worked, an employee earns one hour of paid leave, up to a maximum of 48 hours every year. A year is a consecutive 12-month period as determined by the employer. Thus, employees working at least 1,440 hours each year (equivalent to a little under 0.7 FTE) or more receive a full 48 hours paid leave every year.

As an alternative to accruing paid leave hours as they are earned, an employer may provide employees up to 48 hours (for those working at least 1,440 hours per year) and a lesser proportionate amount for employees working fewer hours, of paid sick leave at the beginning of the year. Employees may, however, only use time as it is accrued. Moreover, we interpret the statute to permit employers to comply with the law by providing PTO that meets or exceeds the law’s minimum requirements, as long as employers follow the law’s other provisions, including documentation requirements.

Employees may carry forward unused time and use it in subsequent years, though they may not use more than 48 hours in one year. Employers are not required to pay out unused sick leave upon separation, though any sick leave that an employer unlawfully prevented an employee from using counts as “wages” for which an employer can be liable under the backpay and penalty provisions of the Colorado Wage Act.

Permissible Use. The law permits an employee to use their accrued paid sick leave for a broad array of reasons including:

1. The employee's own, or a family member's
mental or physical illness

injury

health condition

seeking a medical diagnosis

care or treatment related to an illness, injury or condition

preventive medical care

2. The employee or his or her family member has been the victim of:

domestic abuse

sexual assault

criminal harassment

and needs time off to obtain victim services, seek counseling or legal services, or relocate.

3. Due to a public health emergency, a public official has ordered the closure of
the employee's child's school or place of care; or

the employee's place of business

Confidentiality Protections. Employers cannot require an employee to disclose details about domestic violence, sexual assault, stalking or the details of health information. Any health or safety information disclosed to an employer must be kept confidential and maintained in a separate file from employment records.

Family Leave. While the HFWA defines "family member" consistent with the Family and Medical Leave Act (i.e., person related by blood, marriage, civil union, or adoption, and children to whom the employee stands "in loco parentis"), it also includes any person "for whom the employee is responsible for providing or arranging health- or safety-related care." It remains to be seen what kind of "responsibility" the legislature intended, whether legal (i.e. an employee who holds power of attorney or is a conservator) or moral (i.e., a next-door neighbor without any close relatives for whom an employee feels "responsible").

Documentation Burden on Employer. Employees may request leave by any means, including oral, except if the time off is foreseeable, employers can institute reasonable procedures for requesting time

off. If the leave is not foreseeable, employees cannot be required to provide documentation or proof of their reasons for using paid time, so long as their absence does not exceed three consecutive workdays. For an absence of four or more consecutive workdays, employers can seek documentation to verify the leave is for an authorized purpose.

A failure to keep records creates a presumption that an employer violated the law. For those employers accustomed to an “if you don’t work you don’t get paid” practice, they must now keep records of each employee’s accrued and used PTO. This presumption may be very difficult to overcome, particularly where the employee alleging a violation is unlikely to be cooperative and may be the only person with documents reflecting his or her work hours. Further, for violations of the law, an employee may bring a claim for unpaid wages, with significant potential liability for back pay, penalties and attorney’s fees.

B. “Pandemic” paid sick leave

To continue to protect the health of employees in the event of a future pandemic, the HFWA requires up to 80 hours of paid sick leave beginning on the date a “public health emergency” is declared, and continuing until four weeks after the official termination or suspension of the “public health emergency.” An employer may count any unused, accrued “regular” paid sick leave toward the 80 hours. Pandemic pay covers employees needing to isolate or quarantine, care for themselves or a family member due to the disease, seek a diagnosis or seek preventive care due to the disease. Leave can also be used to care for children due to closure of school or place of care, or to allow an employee to stay home from work because of a health condition that renders him or her susceptible to severe illness from the disease. Although not clearly stated in the law, we assume that this “pandemic” leave will be applicable starting January 1, 2021, even if we are still dealing with the existing COVID-19 pandemic. Employers should also note that the documentation requirement for paid sick leave changed significantly in 2021.

C. COVID-19 paid sick leave during 2020

Finally, from July 15, 2020, through the end of 2020, the HFWA mandates that any employees that are not receiving paid leave under the Emergency Paid Sick Leave Act (EPSLA) in the FFCRA (Pub. L. 116-127), must now receive it. The EPSLA allows up to 80 hours of PTO (for full-time employees) when an employee is experiencing COVID-19 symptoms or is seeking a diagnosis, is required to quarantine or isolate, is caring for a child whose school or place of care is closed to COVID-19, or is caring for a family member adversely affected by COVID-19. It also provides a dollar-for-dollar tax credit for amounts paid out under the federal law. The FFCRA only applies to employers with less than 500 employees, and allows employers exercising “judicious” discretion to exclude health care providers and emergency responders from taking paid EPSLA leave. As such, large employers with Colorado employees who were not previously covered by the FFCRA will now be required to provide

paid COVID-19 sick leave, but without the federal tax benefit. Employers that are subject to the FFCRA but who excluded Colorado healthcare provider or first responder employees from EPSLA need to reconsider that exemption in light of HFWA. Importantly, under the COVID-19 sick leave provisions of FFCRA, there is no waiting period for employee eligibility. The Colorado Department of Labor and Employment has clarified that if any employee already received paid leave in 2020 for COVID-19-related needs, that counts toward the two weeks that HFWA requires.

What this means for employers

Prepare now if your company does not already provide at least 48 hours of paid sick leave.

Ensure good recordkeeping practices to track employees' use of sick time.

If your company already provides 48 hours or more to employees of PTO or has an unlimited PTO policy, while you may already be in compliance with a portion of the law, you should still track employees' sick days.

Make sure your existing leave policies are consistent with the law's confidentiality, documentation and request provisions, including those permitting oral requests by employees and restrictions on employers seeking verification of the purpose of an employee's leave.

Evaluate how the HFWA's expansion of the FFCRA's emergency paid sick leave requirement to cover virtually all employers and employees in Colorado will impact your current operations through the end of the year.

Contact us

If you have further questions or require more information regarding this update, please contact Stacey Bowman, Barb Grandjean, Chris Ottele or your Husch Blackwell attorney.

Comprehensive CARES Act and COVID-19 guidance

Husch Blackwell's CARES Act resource team helps clients identify available assistance using industry-specific updates on changing agency rulemakings. Our COVID-19 response team provides clients with an online legal Toolkit to address challenges presented by the coronavirus outbreak, including rapidly changing orders on a state-by-state basis. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.