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LEGAL UPDATES

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Final Rules Issued on Private Plans Under Colorado's Paid Family and Medical Leave Insurance Act

On November 1, 2022, the Family and Medical Leave Insurance Division (the Division) of the Colorado Department of Labor and Employment adopted final rules that employers must follow to offer private plans under Colorado's Paid Family and Medical Leave Insurance Act (FAMLI). Employers who already offer generous family leave benefits to employees have been considering this option, at least in part to avoid the administrative burden of enrolling with the state. Employers who want to offer private plans in lieu of paying premiums to the state-administered insurance plan, which become due beginning January 1, 2023, have been awaiting the issuance of the final rules as they prepare to comply with the law.

FAMLI creates a state-administered insurance program that will pay employees for qualifying types of leave starting January 1, 2024, much like unemployment insurance. The program will be funded by premiums paid by employers and their employees through wage deductions, starting a year earlier on January 1, 2023.

Employers and their employees are exempt from paying premiums if the employer provides a private plan for paid family and medical leave approved by the Division. In a frustrating development for employers that intend to take advantage of the private plan option, all employers, including those applying for an approved private plan, must begin withholding premiums and remitting those premiums to the Division in 2023. Once the employer's private plan is approved, the employer may then seek reimbursement for premiums paid in 2023 and cease collecting and remitting premiums.

The final rules, briefly summarized below, provide employers a blueprint on how to obtain approval for such plans, whether the plan is self-insured by the employer or obtained through an insurer approved by the state.

Private plan requirements

An employer's private plan must provide the same rights, protections, and benefits as the state-administered FAMLI program, including:

Allowing paid leave for all purposes specified by FAMLI (i.e., to care for the employee's child, to care for a serious health condition of the employee or employee's family member, to take qualifying exigency leave, or to take safe leave);

Providing leave for the same number of weeks as FAMLI (i.e., 12 weeks, with an additional 4 weeks for pregnancy or childbirth complications);

Providing a wage replacement rate and maximum weekly benefit no less than the amounts required by FAMLI (currently capped at \$1100 per week);

Allowing intermittent leave or a reduced schedule;

Not imposing additional conditions or restrictions on benefits not authorized by FAMLI; and

Providing a plan at a cost to employees no greater than what is charged to employees under FAMLI.

Application requirements

An employer must submit an application with the Division and obtain approval before the private plan's implementation. Applications may be submitted at any time and must include:

The employer's federal employer identification number (EIN);

The employer's name;

The employer's business address;

The employer's mailing address;

A designated contact person, with that person's name and contact information;

A copy of the employer's self-insured private plan or, if the plan is provided by an insurer approved by the state, a copy of that insurance policy form;

Attestations, completed by the employer, that the private plan satisfies the requirements of FAMLI and that the forms used by employees and/or health care providers will be no more onerous than the forms used under the state-administered plan;

A copy of the posted notice required by 7 CCR 1107-5 § 5.9.4;

Other information as required on the application form (which the Division will make available on the My FAMLI+ Employer portal once finalized); and

An administration fee of \$500.00 for private plan applications received through 2024.

Additional requirements for self-insured plans

If the private plan is self-insured by the employer, the following must also be included in the application:

A surety bond in an amount equal to one year of total premiums along with payroll documentation supporting the surety bond calculation; and

An attestation that the employer has complied with the separate account requirements (discussed below).

In another requirement that will frustrate employers that already provide generous leave benefits, employers who are approved to self-insure a private plan must establish and maintain a separate account: (1) into which all employee contributions are deposited and kept, and (2) from which all benefits are paid, and administrative costs may be paid.

Timing

According to separate guidance from the Division, it anticipates opening the private plan application process between the first and third quarters of 2023. The Division will review applications as they are received. Private plans cannot take effect earlier than 60 days after the application date to allow the Division time to review the application. Approval of a private plan will last for eight years subject to renewal.

If an employer pays premiums in 2023 and later obtains approval of a private plan with an effective date no later than January 1, 2024, the employer may apply for premium reimbursement. The Division will, within 90 days, reimburse the employer for premiums paid in 2023 less the \$500 private plan administration fee.

Continuing obligations

The above summary is not exhaustive of the many requirements private plans must satisfy to maintain Division approval. Continuing obligations for an approved private plan include annual maintenance fees and attestations to the Division; requirements regarding recordkeeping, reporting, employee notices, and confidentiality; and rules governing plan modification and termination. Further, employers electing a private plan may still be subject to scrutiny from the Division, for example, if an employee files a claim with the Division that a leave request was improperly denied.

What this means to you

Employers and their employees are exempt from paying premiums if the employer provides a private plan for paid family and medical leave approved by the Division; however, all employers—including those applying for an approved private plan—must begin withholding premiums and remitting those premiums to the Division in 2023. Once the employer's private plan is approved, the employer may then seek reimbursement for premiums paid in 2023 and cease collecting and remitting premiums.

Contact us

If you have questions on how the new FAMLI program impacts your business or other Labor & Employment questions, contact Barbara Grandjean, Ashley Jordaan, Chris Ottele, Shawna Ruetz, Owen Davis or your Husch Blackwell attorney.