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## Compliance Connection

### April 2022 – Part I

#### State Compliance Update

**This is no April Fool's Joke...**

#### **Colorado Paid Family and Medical Leave Act is coming fast.**

On Nov. 3, 2020, Colorado voters passed [Proposition 118](#), creating a paid family and medical leave (PFML) insurance program for workers in the state. The new program covers virtually all employers (including state but not federal government employers) and applies to workers who have earned at least \$2,500 during a base period.

The program will be funded by premiums of 0.9% of an employee's wages, shared evenly between employers and workers, and remitted by the employer beginning **Jan. 1, 2023**, to a newly created state Division of Family and Medical Leave Insurance.

Under the measure, paid leave becomes available to employees on **Jan. 1, 2024**, for the following purposes:

- To care for a new child during the first year after the child's birth, adoption or foster care placement;
- To care for a family member with a serious health condition;
- For the worker's own serious health condition;
- For a qualifying military exigency; or
- Because the worker has a need for safe leave.

Employers with fewer than 10 employees are not required to contribute to PFML premiums. Employers with approved private plans may opt out of the program.

#### **Action Steps**

Employers should become familiar with the requirements and deadlines of the new PFML program. They should also watch for forthcoming regulations from the Division of Family and Medical Leave Insurance, which will likely provide further details on program mandates.

#### **Covered Employers**

The new law covers all employers that pay wages of at least \$1,500 during any calendar quarter in the preceding year, including the state—but not federal—government, and people acting in the employer's interest with regard to an employee. Local governments may decline to participate in the program, in accordance with rules to be developed by the new Division of Family and Medical Leave Insurance.

## **Covered Employees**

Workers are eligible for benefits under the program if:

- They perform labor or services for the benefit of another; and
- They have earned at least \$2,500 during the first four of the last five completed calendar quarters immediately preceding the first day of their benefit year.

Migratory laborers are covered, as are workers for whom the common-law relationship of master and servant does not apply. Self-employed individuals may opt in to the program. Employees of local governments that have opted out of the program may also opt in.

The PFML program does not cover individuals who are primarily free from control and direction in the performance of the labor or services they perform (in contract and in fact), and who are customarily engaged in an independent trade, occupation, profession or business related to the labor or services. Employees subject to the federal Railroad Unemployment Insurance Act are not covered.

## **Duration of Paid Family and Medical Leave**

Under the PFML program, covered workers may take up to 12 weeks of leave per year, or 16 weeks for a serious condition related to pregnancy or childbirth complications.

Workers may take intermittent leave in increments of an hour, or for shorter periods consistent with the employer's leave policies. However, benefits under the program are not payable until at least eight hours of leave are accumulated.

## **Permitted Use of Paid Family and Medical Leave**

Beginning Jan. 1, 2024, covered workers may take PFML leave:

- To care for a new child during the first year after the child's birth, adoption or foster care placement;
- To care for a family member with a serious health condition;
- For the worker's own serious health condition;
- For a qualifying exigency; or
- Because the worker has a need for safe leave.

**Qualifying exigency leave** is leave based on a need arising out of the worker's family member's active duty service (or notice of an impending call or order to active duty) in the armed forces. The need could include, for example, providing for the care or other needs of the military member's child or other family members, making financial or legal arrangements for the military member, attending counseling, attending military events or ceremonies, spending time with the military member during a rest and recuperation leave or following return from deployment, or making arrangements following the death of the military member. Other such needs may qualify for coverage as well.

## **Serious Health Condition**

"Serious health condition" is defined as an illness, injury, impairment, pregnancy, recovery from childbirth, or physical or mental condition that involves inpatient care in a hospital, hospice or residential medical care facility, or continuing treatment by a health care provider.

## **Safe Leave**

Any leave resulting from the worker or the worker's family member being the victim of domestic violence, stalking, or sexual assault or abuse. Safe leave may be used to protect the worker or family member by:

- Seeking a court order;
- Obtaining medical care or mental health counseling;
- Making the worker's home secure; or
- Seeking legal assistance.

Claims for PFML will be filed with the Division of Family and Medical Leave Insurance, which is charged

with administering the program. The division must promulgate rules for the program by Jan. 1, 2022.

### **Employee Notice**

The law requires employees to provide at least 30 days' advance notice of leave when the leave is foreseeable. When leave is not foreseeable, or when providing 30 days' notice is not possible, notice must be provided as soon as practicable.

In addition, in scheduling their leave, employees must make a reasonable effort not to unduly disrupt the operations of the employer.

### **Employer Notice**

Employers will be required to post a notice, to be created by the Division of Family and Medical Leave Insurance, that describes details of the PFML program. The notice must be posted in a prominent location in the workplace. Employers must also provide employees with written notice about the program upon hiring and when learning that an employee has experienced an event that triggers eligibility for PFML benefits.

### **Paid Family and Medical Leave Benefits**

Under the PFML program, workers on leave collect 90% of the part of their weekly wage that is equal to or less than 50% of the state average weekly wage (SAWW). Any portion of the employee's weekly wage that exceeds 50% of the SAWW is compensated at a rate of 50%. Benefits are capped at 90% of the SAWW, and (for PFML beginning before Jan. 1, 2025) at a weekly benefit amount of \$1,100. Employees may take leave from one or more of the jobs they hold.

#### **Program Funding**

Funding for the PFML program is split evenly between employers and employees, although employers with fewer than **10** employees are **exempt** from contributing. Beginning **Jan. 1, 2023**, employers must remit premiums to the state, in the total amount of 0.9% of the employee's wages; employers may collect the employee portion as a wage deduction. The director of the Division of Family and Medical Leave Insurance will set the premium rate starting with the 2025 calendar year and thereafter, up to 1.2% of each employee's wages. The amount of wages subject to premium assessment is capped at the maximum wages [subject to social security tax](#).

### **Job Protection and Continuation of Benefits**

Workers who have been employed with their current employer for at least 180 days before taking leave are entitled to be restored to their previous position—or an equivalent—with equivalent benefits, pay and terms on returning from leave. Employees do not accrue employment or seniority benefits while on leave.

Employers are required to maintain health care benefits for employees on leave as if they had not taken leave. Employees must continue to pay any share of health benefits required before the leave.

### **Employee Protections**

It is unlawful to:

- Interfere with, restrain or deny an employee their PFML rights
- Retaliate or otherwise discriminate against a person for exercising their PFML rights, including filing a claim or complaint, or testifying or assisting in any investigation, hearing or proceeding
- Count PFML as an absence that may lead to or result in discipline, discharge, demotion, suspension or any other adverse action

Employees alleging a violation of their PFML rights may bring a civil action for the damages and equitable relief available for violations of the federal Family and Medical Leave Act (FMLA). In addition, the Division of Family and Medical Leave Insurance may impose fines of up to \$500 for each violation.

### **Interaction With Other Laws**

Leave under the PFML law runs concurrently with FMLA leave. In addition, if they provide written notice to their employees, employers may require that PFML leave and payment run concurrently with, or be coordinated with, benefits under any disability policy or separate bank of time off provided solely for the purpose of family and medical leave.

However, employees may not be required to use any accrued vacation leave, sick leave or other paid time off before or while receiving PFML benefits, unless the aggregate amount an employee would receive would exceed their average weekly wage.

The PFML law does not diminish an employee's rights under any law that provides more leave benefits.

### **Private Plans**

Employers with private plans providing the same rights, protections and benefits as PFML are not required to provide PFML. However, private plans must be approved by the Division of Family and Medical Leave Insurance. In addition, if the private plan is self-insured, the employer must furnish a bond to the state. If the plan is provided by a third-party insurer, the insurer must be approved by the state.

More to come...

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