COLORADO
Department of Labor and Employment

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Interpretive Notice & Formal Opinion ("INFO") # 6A:

Paid Leave under the Healthy Families and Workplaces Act ("HFWA") through Dec. 31, 2020

Overview

This INFO covers the ***2020*** requirements of paid leave under Colorado's "Healthy Families and Workplaces Act" (SB 20-205, July 14, 2020) ("HFWA"). HFWA fully took effect on July 15, 2020, but its coverage broadens on January 1, 2021, and is explained in INFO **#6B**, which covers the HFWA requirements as of ***2021***.[1]

When Employees Must Have Paid Leave, and For What Conditions and Needs

Through December 31, 2020, an employer must provide paid leave to an employee in any of these **three categories related to COVID-19** (C.R.S. 8-13.3-406(1),(2)):

(1) having COVID-19 **symptoms** and seeking a medical **diagnosis**; or

(2) being ordered by a government agent (federal, state, or local), or advised by a health provider, to **quarantine or isolate** due to a risk of COVID-19; or

(3) taking care of **someone else** due to COVID-19 precautions -- either someone ordered to **quarantine or isolate**, or a **child whose school, place of care, or child care** is closed or unavailable.

As of January 1, 2021, HFWA requires less paid leave -- one hour per 30 hours worked, with a maximum of 48 hours' paid leave a year -- but covers a broader range of conditions. (C.R.S. 8-13.3-403.) INFO #6B details what HFWA requires as of 2021.

How Much Paid Leave Employers Must Provide

Through December 31, 2020, an employer must provide **up to two weeks** of paid leave (up to **80 paid hours**) for the three categories of COVID-related needs listed above. Leave is at the employee's **regular pay rate and hours**,[2] except that leave in category 3 above (care for someone else) can be at **⅔ pay**. (C.R.S. 8-13.3-406.)

> **Examples:** An employee regularly working 25 hours a week can take 50 hours' leave, because that is 2 weeks' pay. An employee regularly working 40 hours a week *or more* can take 80 hours' leave. An employer cannot deem regular hours "cut" to a lower number due to an employee taking leave.

Leave must be paid at "the same hourly rate or salary and with the same benefits … the employee normally earns during hours worked," or ⅔ of that rate for leave in category 3 above. The rate must be at least the applicable minimum wage, but need *not* include overtime, bonuses, or holiday pay. Employees paid commissions or other sales-based pay must receive whichever is greater: (A) their hourly or salaried rate; or (B) minimum wage. (C.R.S. 8-13.3-402(8).)

If an employee **already received paid leave in 2020** for any of the three categories of **COVID-related needs** that HFWA covers, the employer can count that as part of the two weeks that HFWA requires in 2020. But if

[1] From March 11 to July 14, 2020 (the day before HFWA fully took effect), the Colorado Health Emergency Leave with Pay ("Colorado HELP") Rules required paid leave for various COVID-related situations. The Colorado HELP Rules still apply to employment situations that occurred during that roughly four-month period

[2] Leave for a part-time employee with a regular schedule is at the number of hours normally worked in a two-week period. If an employee's hours vary, the employer must use their average hours over the six months before the leave. If the varied-schedule part-timer was employed less than six months, the employer must use the number of hours the employee agreed to work when hired, or if no such agreement exists, the average daily hours the employee was scheduled to work over their entire employment. (These are methods the U.S. Department of Labor adopted, 29 C.F.R. 826.21(b), so employers can use them for federal and Colorado law.)

INFOs are not binding law, but they are the Division's officially approved opinions and notices to employers, employees, and other stakeholders as to how the Division applies and interprets various statutes and rules. The Division will continue to post and update INFOs on various topics; to suggest a topic, please email cdle_labor_standards@state.co.us.

the prior leave was at **less than full pay** for a condition in category 1 or 2 (the categories HFWA requires *full* pay for), then it **counts toward the HFWA requirement with a discount** for how much the pay was reduced.

> **Example:** In April 2020, an employer gave a full-time employee ⅔ pay for two weeks of quarantine for suspected COVID-19; in August 2020, the employee actually gets COVID-19. The employee is entitled to leave in August at full pay. However, the employer already provided paid leave in April that equals 53 and ⅓ hours of the employee's regular rate. So in August, the employer must provide 26 and ⅔ hours' paid leave, because that is what totals 80 hours' paid leave at the employee's full regular rate.
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> **Example:** In April 2020, an employer gave a full-time employee ⅔ pay for two weeks of caring for a child during a school closure; in August 2020, the employee gets COVID-19. The employee is entitled to leave in August at full pay. But the employer gets credit for already providing paid leave in April that equals 53⅓ hours of the employee's regular rate. In August, the employer must provide 26 and ⅔ hours' paid leave, because that is what totals 80 hours' paid leave at the employee's full regular rate.
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> **Example:** In April 2020, an employer gave a full-time employee ⅔ pay for two weeks of taking care of a child during a school closure. Because that is only 53⅓ hours' paid leave, the employee then asks for more paid leave in August 2020 for another school closure. The employee is not entitled to more paid leave, having already received the maximum HFWA requires for child care: ⅔ pay for two weeks.

In each of the above examples, the employer receives credit for providing leave that HFWA requires, regardless of whether it provided that leave under federal law, state law, or its own leave policy -- as long as the prior leave was for one of the three COVID-related conditions that HFWA covers. If an employer already provided paid leave for non-HFWA purposes (like a non-COVID condition or a vacation), then that paid leave does not count toward the 80 hours' leave required for the three COVID-related conditions that HFWA covers.

All Employers and Employees Are Covered by HFWA, with the Following Exceptions

"**Each employer in the state, regardless of size**," must provide the paid leave for COVID-related needs that HFWA requires in 2020. (C.R.S. 8-13.3-406.) INFO #6B details a small-employer exemption that applies only from January 1, 2021, through December 31, 2021.

An employer that, under a collective bargaining agreement ("CBA"), already provides "equivalent or more" paid leave, is exempt from other HFWA requirements, as long as the ways the CBA differs from HFWA would not diminish employee rights to "equivalent" paid leave.

> **Examples:** A CBA can depart from the HFWA requirement that leave must be in hourly increments, but cannot eliminate HFWA rights to take leave without interference (or, relatedly, to file a complaint if HFWA is violated). (C.R.S. 8-13.3-415(2),(3).)

"Employee" and "employer" generally have the same meanings as in existing wage law. HFWA adds that while the federal government is not covered, other government employers are, and employees covered by the federal "Railroad Unemployment Insurance Act" are not covered. HFWA also clarifies when employers are liable for paid leave owed by other employers they acquire. (C.R.S. 8-13.3-402(4),(5),(12).)

Employer Policies on Paid Leave

"Reasonable documentation" allowable. HFWA, which incorporates the federal Emergency Paid Sick Leave Act through December 31, 2020, lets employers require employees to provide documentation that the leave is for a HFWA purpose. Following is the documentation that federal law allows.

(1) If an employee is requesting paid leave in category 1 or 2 on page 1 (seeking a diagnosis due to COVID-19 symptoms, or being instructed to quarantine or isolate), the documentation provided to the employer must include a signed statement with the employee's name and the following information:

   (a) the date(s) for which leave is requested;

(b) the qualifying reason for leave;

(c) a statement that the employee is unable to work or telework because of the qualifying reason; and

(d) the name of the health care provider who advised the employee (or family member) to quarantine or self-isolate, ***or*** the name of the government entity issuing the quarantine or isolation order.

(2) If an employee is requesting paid leave in category 3 on page 1 (to care for a child due to a COVID-related closure), the documentation provided to the employer must include a signed statement with the employee's name and the following information:

(a) the date(s) for which leave is requested;

(b) the name of the child requiring care;

(c) the name of the school, place of care, or child care provider that is closed or unavailable; and

(d) a statement that no other suitable person is available to care for the child during the leave period.

(3) Any HWFA-related health information that employers receive must be kept confidential, in a separate file.

(4) Documentation is not required *to take* paid sick leave, but it can be required as soon as the employee reasonably can provide it.

However, which documents may be required, and under what circumstances, change significantly under HFWA in 2021. See INFO #6B for details on the HFWA documentation and other requirements as of January 1, 2021.

Notice "as soon as practicable." An employer may not require an employee to provide notice in advance of needing to take paid leave. An employer may require "reasonable" notice "as soon as practicable" after the first workday (or portion thereof) when leave is taken. But if leave is for child care due to a COVID-related closure, advance notice must be provided if the need is "foreseeable." Notice can be oral, and must provide only enough information for an employer to determine whether the leave is for an HWFA purpose. An employer may not require notice to include information or documentation beyond what is allowed in the documentation above. An employee's representative (*e.g.*, spouse, adult family member, or other responsible party) may provide the notice if the employee cannot do so personally. If an employee fails to give notice, the employer must notify the employee of the failure and provide an opportunity to provide notice before denying the requested leave.

Paid leave cannot be counted as an "**absence**" that may lead to firing or other action against the employee, and an on-leave employee can't be required to find a "replacement worker." (C.R.S. 8-13.3-404(4), 407(2)(b).)

Policies by any name can comply. Compliance can be through a broader paid leave policy, such as allowing "paid time off" for any purpose, health-related or not -- as long as the policy (A) provides as much time off as HFWA requires, (B) for all conditions and situations that HFWA covers. (C.R.S. 8-13.3-403(4), 8-13.3-415.)

Policies can be more generous. An employer can offer more than 80 hours' leave if it chooses. Offering more generous leave is optional, though it may become binding if offered in a way that makes it a contractual commitment. (C.R.S. 8-13.3-403(2)(a),(b), -403(6), -413.)

No waiver allowed in a policy or agreement. Any agreement "to waive the employee's rights" under HFWA "is void" (C.R.S. 8-13.3-418), just as wage law generally voids any agreement "to waive or to modify" rights to payment of any "wages" due (C.R.S. 8-4-121). The one exception is the waiver of specific paid leave rules in collective bargaining agreements that do not diminish the amount or availability of paid leave, as noted above.

No paid leave required if an entire business is completely closed. Unless a workplace is closed due to a temporary government quarantine/isolation order, no paid leave applies **if an entire business is completely closed** (whether temporarily or permanently) – because then employees are not on "leave," they are on furlough or layoff (which makes unemployment insurance, not paid leave, the possible remedy).

Retaliation or Interference with HFWA Rights

Unlawful acts under HFWA include denying paid leave that an employee has a right to take, as well as any threat or adverse action (which includes firing, demoting, reducing hours, suspending, disciplining, etc.) that is done to retaliate against, or interfere with, either (C.R.S. 8-13.3-402(10), 8-13.3-407):

- requesting or taking paid leave under HFWA, or attempting to exercise other HFWA rights;
- informing another person about, or supporting their exercise of, their HFWA rights; or
- filing a HFWA complaint, or cooperating in any investigation or other proceeding about HFWA rights.

HFWA disallows acting against employees for *incorrect* complaints or information, as long as the employee's belief was reasonable and in good faith. (C.R.S. 8-13.3-407(3).) Employers *can* impose consequences (firing or otherwise) for misusing paid leave, dishonesty, or other leave-related misconduct. (C.R.S. 8-13.3-408.)

> **Example:** An employer grants an employee request for paid leave for a COVID test, but then learns the employee went bowling and never really had that appointment. The employer then (A) denies the request for paid leave and (B) fires the employee for dishonest misuse of leave. The employee files a complaint claiming (A) denial of paid leave and (B) retaliation against HFWA rights. The employer did nothing wrong: (A) leave was not for an HFWA purpose, and (B) the firing was not retaliation because by taking leave with no HFWA purpose, the employee did not act reasonably or in good faith.

Employee Complaint Rights

HFWA paid leave counts as "wages" under Colorado law (C.R.S. 8-13.3-402(8)). An employee denied paid leave can file a complaint with the Division for unpaid wages up to $7,500. An employee can instead file a lawsuit in court if they prefer, but only after sending the employer a written demand and giving the employer at least 14 days to respond. (C.R.S. 8-13.3-411(4).) For more on the Division wage claim process, see INFO #2.

An employee can file a complaint for unlawful retaliation or interference with rights, either with the Division or (after sending the employer a written demand and giving the employer at least 14 days to respond) in court. If retaliation or interference is proven, the employer may be ordered to pay the employee any lost pay (for the leave and/or for a firing or other action that cost the employee any pay), reinstate the employee (if the violation ended the employee's job), and/or pay fines or penalties under Colorado statutes for non-compliance. (C.R.S. 8-13.3-407, 411.) While the Division investigates *all* claims of *unpaid wages*, it investigates only *some* retaliation claims -- but will inform any employees whose claim it doesn't investigate. (C.R.S. 8-13.3-407(4).)

Employer Posting Duty

HFWA requires employers to both (1) notify employees in writing of the right to take paid leave, in the amounts and for the purposes in HFWA, without retaliation, and (2) display an informational Division poster "in a conspicuous and accessible" place in "each establishment" where employees work. (C.R.S. 8-13.3-408.)

- Requirement #1 (notice) can be satisfied by giving employees versions of the latest version of this INFO *or* the poster (on paper or electronically). Requirement #2 (posting) is satisfied by posting the Division poster.
- Both requirements are waived during any time an employer's business is closed due to a public health-related emergency. For employees working remotely, and for all employees of employers without a physical workspace, complying with requirement #1 (notice) is enough, and can be done electronically.
- Employers must provide notices and posters in "any language that is the first language spoken by at least five percent" of its workforce; Spanish versions of the poster and this INFO are available.
- Before providing notices or postings, check the Division INFO page for the latest INFO and poster versions. **As of January 1, 2021, INFO #6B and the 2021 poster replace INFO #6A and the 2020 poster**.

Additional Information

Visit the Division's website, call 303-318-8441, or email cdle_labor_standards@state.co.us.