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

Paid Leave under the Healthy Families and Workplaces Act ("HFWA"), as of Jan. 1, 2021

Overview

This INFO covers paid leave, ***as of January 1, 2021***, under the "Healthy Families and Workplaces Act" (S.B. 20-205, July 14, 2020). "HFWA" fully took effect July 15, 2020, with narrower 2020 coverage (see INFO #**6A**).[1]

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

Employers with 15 or fewer employees are HFWA-exempt in 2021 but covered in 2022, and were not exempt from the 2020 HFWA requirement of COVID-related leave (see INFO #6A). (C.R.S. 8-13.3-402(5)(b).)[2]

"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).)

An employer that, under a collective bargaining agreement ("CBA"), already provides "equivalent or more generous" 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. Wage Protection (WP) Rules, 7 CCR 1103-7, Rule 3.5.8.

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

An employer must provide paid leave for various health- and safety-related needs (C.R.S. 8-13.3-404(1)):

(1) a mental or physical **illness, injury, or health condition that prevents work**;

(2) obtaining **preventive medical care**, or a **medical diagnosis, care, or treatment**, of any mental or physical illness, injury, or health condition;

(3) being a victim of **domestic abuse, sexual assault, or criminal harassment** who needs leave for medical attention, mental health care or other counseling, victim services (including legal), or relocation; or

(4) **care for a family member** who has a mental or physical illness, injury, or health condition, or who needs the sort of care listed in category (2) or (3);[3]

(5) due to a **public health emergency**, a public official **closed** the employee's (A) **place of business**, or (B) child's **school or place of care**, requiring the employee to care for the child.[4]

How Much Paid Leave Employers Must Provide:

One hour of paid leave for every 30 hours worked ("accrued leave"), up to 48 hours per year, is what

[1] From March 11 to July 14, 2020, paid leave for various COVID-related needs was required by the Colorado Health Emergency Leave with Pay ("Colorado HELP") Rules, which still apply to situations during that time period.

[2] For the rules as to how to count the number of employees, see Wage Protection Rule 2.7.4, 7 CCR 1103-7.

[3] Qualifying "family" members are (a) immediate family (related by blood, adoption, marriage, or civil union), or (b) anyone else the employee is responsible for providing or arranging health- or safety-related care for.

[4] Only COVID-related needs were covered in 2020, but covered needs as of 2021 need *not* be COVID-related.

employees must receive, starting their first day of work, unless an employer offers more. (C.R.S. 8-13.3-403.)[5] Overtime-exempt employees accrue leave as if they work 40 hours weekly, even if they work more -- but non-exempt employees accrue paid leave equally for all hours worked, overtime or not.

> **Examples:** An employee working 150 hours a month (35 a week) accrues just over 1 hour's leave every week they work -- which totals 5 hours a month, reaching the yearly 48-hour maximum after about 9½ months. An employee working 20 hours a week accrues 1 hour's leave every 1½ weeks, reaching 32 hours by year's end (based on 48 workweeks, excluding holidays and unpaid time off).

For fee-for-service employees without tracked hours, use a best estimate of all "time worked" defined by the Colorado Overtime and Minimum Payment Standards (COMPS) Order, 7 CCR 1103-1, Rule 1.9. Adjunct faculty in higher education who are paid per credit, or per course, are deemed to work three hours total for each in-class hour.

Leave must be paid at "the same hourly rate or salary and with the same benefits … the employee normally earns during hours worked." The pay rate must be at least the applicable minimum wage, but need *not* include overtime, bonuses, or holiday pay. For employees with non-hourly pay, leave must be paid at the employee's "regular rate" (over the 14 days the employee worked prior to qualifying for leave), as defined by COMPS Order, 7 CCR 1103-1, Rule 1.8. Employees paid commissions or other sales-based pay must receive the greater of: (A) their hourly or salary rate; or (B) minimum wage. (C.R.S. 8-13.3-402(8).) An employer cannot deem employee regular hours "cut" to a lower number due to taking leave. Leave must be paid on the same schedule (payday) as regular wages.

But during a public health emergency (PHE),[6] **employers must immediately provide each employee additional paid leave** -- supplementing whatever HFWA leave the employee accrued before the PHE with enough supplemental leave to assure the employee can take leave in the following amounts:

(1) for employees normally working 40 or more hours in a week, 80 hours of total leave; and

(2) for employees normally working under 40 hours in a week, the greater of the number of hours the employee (a) is scheduled for work or paid leave in the upcoming fourteen-day period, or (b) actually worked on average in the fourteen-day period prior to the declaration of the public health emergency.

Employees can use this supplemental leave immediately upon the declaration of the PHE, until four weeks after the end of the PHE, for any of the below purposes (C.R.S. 8-13.3-405(3)):

(1) needing to self-isolate due to either being diagnosed with, or having symptoms of, a communicable illness that is the cause of the PHE;

(2) seeking a diagnosis, treatment, or care (including preventive care) of such an illness;

(3) being excluded from work by a government health official, or by an employer, due to the employee having exposure to, or symptoms of, such an illness (whether or not they are actually diagnosed with the illness);

(4) being unable to work due to a health condition that may increase susceptibility or risk of such an illness; or

(5) caring for a child or other family member in category (1), (2), or (3), or whose school, child care provider, or other care provider is unavailable, closed, or providing remote instruction due to the emergency.

Employees retain their accrued leave rights during a public health emergency. They continue earning accrued leave at their regular rate, up to 48 hours per year. And they may use supplemental leave for any of the above-listed qualifying conditions before using accrued leave, if the reason for leave would qualify for both.

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[5] The "year" paid leave accrues is a *calendar* year unless (A) an employer tells employees in writing, in advance, it will use a different annual cycle, and (B) switching to that cycle doesn't diminish HFWA rights.

[6] "Public health emergency" is defined by C.R.S. 8-13.3-402(9), and includes a range of pandemic, infectious disease, or other disaster emergencies declared by the Governor or a federal, state, or local health agency.

Employer Policies on Paid Leave:

"Reasonable documentation" allowable if leave is 4+ days. HFWA lets employers require documentation from employees to show leave is for a HFWA purpose, but with several limits.

(1) Documentation can be required **only** if leave is **four or more consecutive days** the employee would've ordinarily worked (not just four calendar days), and can't be required for **public health emergency leave**.

(2) Only "reasonable documentation" can be required, not more than needed to show a valid reason for leave.

(A) For leave for **health-related needs**: If the employee received services (including remotely) from a provider for the HFWA need, a document from the provider indicating a HFWA-qualifying purpose will suffice. If they did not receive provider services, or cannot obtain a provider document in time or without added expense, they can provide their own writing that leave was for a HFWA need.

(B) For leave for **safety-related needs** (domestic abuse, sexual assault, or criminal harassment): The same rules explained in (2)(A) above apply, except that also, if applicable, an employee can provide a legal document indicating a safety need for the leave (*e.g.*, a restraining order or police report).

(C) Employers may not require that documents have a signature, be notarized, or be in any particular format. Documentation may be submitted by any reasonable method, including electronically.

(3) Employers may not require an employee to disclose **details about health or safety information**. Any such information that employers receive must be treated as confidential medical records, kept in separate files from other personnel documents, and may not be disclosed to others unless the employee consents in writing in advance.

(4) Documentation cannot be required *to take* leave, but can be required as soon as the employee can provide it after returning, or separating from employment if they do not return, whichever is sooner.

(5) If an employer reasonably deems an employee's documentation deficient, without imposing a requirement of providing more documentation than is permitted, the employer must: (A) notify the employee within seven days of either receiving the documentation or the employee's return to work (or separation, if the employee does not return), and (B) provide at least seven days to cure the deficiency after being notified.[7]

Employee notice "as soon as practicable" is required, but only when needing leave is "foreseeable," such as for an appointment scheduled in advance, unless the employer is closed. (C.R.S. 8-13.3-405(4)(a).) An employer "written policy" may adopt "reasonable procedures" on notice for "foreseeable" leave, but "shall not deny paid sick leave to the employee based on noncompliance with such a policy." (C.R.S. 8-13.3-404(2).)

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).)

Any unused accrued leave, up to 48 hours per benefit year, carries forward for use in a later year -- but an employer is not required to allow use of more than 48 hours in any one year. (C.R.S. 8-13.3-403(3)(b).)

Employees may use leave immediately upon accrual, but employers may correct accrual calculations if, in the ordinary course of business and in good faith, it verifies employee hours within a month after work is performed, and adjusts accrued leave to correct any inaccuracy, as long as it notifies the employee in writing.

Use of leave in hourly or smaller increments. An employer may require use of HFWA leave in hourly increments, or may require or allow smaller increments. If an employer does not specify a minimum increment in writing, employees may use leave in increments of a tenth of an hour, *i.e.*, six minutes.

Policies can be more generous. An employer can offer more than 48 hours' leave, and can let employees accrue leave more quickly -- for example, letting employees start with 24 or 48 hours' leave, or providing 1

[7] C.R.S. 8-13.3-404(6), 405(4)(b), 412(1),(2); WP Rules, 7 CCR 1103-7, Rule 3.5.6.

hour of leave per 20 hours worked (rather than per 30). Offering more generous leave (or letting employees take leave in advance of fully earning it) 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.)

Policies by any name can comply. HFWA does not require additional leave if an employer policy provides fully paid time off, often called a "PTO" policy, for both HFWA and non-HFWA purposes (*e.g.*, sick time and vacation) and makes clear to employees, in a writing distributed in advance of an actual or anticipated leave request, that:

(A) its leave policy provides PTO --

(1) in at least an amount of hours and with pay sufficient to satisfy HFWA and applicable rules (including but not limited to the supplemental leave required during a qualifying public health emergency),

(2) for all the same purposes covered by HFWA and applicable rules, not a narrower set of purposes, and

(3) under all the same conditions as in HFWA and applicable rules, not stricter or more onerous conditions (*e.g.*, accrual, use, payment, annual carryover of unused accrued leave, notice and documentation requirements, and anti-retaliation and anti-interference rights); and

(B) additional HFWA leave need not be provided if employees use all their PTO for non-HFWA reasons (*e.g.*, vacation), except during a "public health emergency," an employer must still provide supplemental leave.[8]

Employer records of paid leave hours. An employer "shall retain records for each employee for a two-year period, documenting hours worked, paid sick leave accrued, and paid sick leave used" (C.R.S. 8-13.3-409(1)). Employees may request, and employers must provide in writing or electronically, documents showing the then-current amount of paid leave the employee has (1) available for use and (2) already used during that benefit year (both accrued and supplemental public health emergency leave). Employees may make such requests no more than once per month, except they may make an additional request when a need for HFWA leave arises. Employers may choose a reasonable system for fulfilling such requests.

No paid leave is required if an entire business is completely closed, unless a workplace is closed due to a temporary government quarantine or isolation order that triggers paid leave.

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.

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 denies an employee paid leave for a "life coach" appointment. The employee files

[8] C.R.S. 8-13.3-403(4), 8-13.3-415; WP Rules, 7 CCR 1103-7, Rule 3.5.4.

a complaint at the Division, and tells coworkers the employer is wrongly denying paid leave. The Division rules that this appointment was *not* HFWA-covered. That means the employer did nothing wrong by denying leave. But without evidence the employee's belief that HFWA covered the appointment was unreasonable or in bad faith, the employer *can't* take action against the employee for requesting leave, filing a complaint, or telling co-workers she believed the employer violated HFWA.[9]

Example: An employer grants an employee request for paid leave for a blood test and physical exam. The employer then learns the employee went bowling and never really had that appointment, so it (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 using 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.

See the Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving Rules ("WARNING Rules"), 7 CCR 1103-11, for more on retaliation and interference protections.

Employee Complaint Rights:

HFWA paid leave counts as "wages" under Colorado law (C.R.S. 8-13.3-402(8)).[10] 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 and Written Notice Duties:

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. (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 displaying the Division poster "in a conspicuous and accessible" place in "each establishment" where employees work. Employers should provide (A) notice to new employees promptly, no later than other onboarding documents or work policies are provided, and (B) any updated notices and posters for current employees by the end of the calendar year, after the Division's publishing of any annual updates by December 1st.
- 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; versions in other languages (including Spanish) are available on the Division

[9] The Division is not now deciding whether the "mental … condition" or "preventative care" categories *could* cover certain life coaching. The example just shows a category that, without more explanation, *may not* qualify.

[10] Employers need not provide pay or reimbursement for unused leave to departing employees, except an individual may recover pay for leave they did not get to take due to unlawful retaliation or interference.

INFO page.

- 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**.

For Additional Information:

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