COLORADO
Department of Labor and Employment

Division of Labor Standards and Statistics
633 17th Street, Suite 600
Denver, CO 80202-2107 | (303) 318-8441 | www.coloradolaborlaw.gov

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 the requirements, ***as of January 1, 2021***, 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 with narrower coverage ***in 2020***, as explained in INFO **#6A**.[1]

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) having a mental or physical **illness, injury, or health condition that prevents them from working**;

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

(3) needing to **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);[2]

(4) the employee or the employee's family member having been a victim of **domestic abuse, sexual assault, or criminal harassment**, and needing leave for related medical attention, mental health care or other counseling, victim services (including legal services), or relocation; or

(5) due to a **public health emergency**, a public official having **closed** either (A) the employee's **place of business**, or (B) the **school or place of care** of the employee's child, requiring the employee needing to be absent from work to care for the child.[3]

How Much Paid Leave Employers Must Provide

One hour of paid leave for every 30 hours worked, up to 48 hours per year, is what employees must receive, starting on the first day of employment, unless an employer offers more. (C.R.S. 8-13.3-403.)[4]

> **Examples:** An employee working 150 hours a month (35 hours a week) gains just over 1 hour's leave every week -- which totals 5 hours a month, and reaches the yearly maximum (48 hours) after about 9½ months. But an employee working 20 hours a week gains an hour of leave every 1½ weeks -- reaching 32 hours by the end of the year (assuming 48 workweeks, by excluding holidays and unpaid time off). Overtime-exempt employees gain leave as if they work 40 hours per week, even if they actually work more -- but non-exempt employees gain paid leave for each hour worked, overtime or not.

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[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] 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.

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

[4] If an employer doesn't say otherwise, the "year" when paid leave accumulates is a *calendar* year, because HFWA's broad leave requirements all start with calendar years: January 1, 2021, for most employers; January 1, 2022, for small employers. But an employer *can* choose a different annual cycle if (A) it tells employees in writing in advance, and (B) switching to a different cycle doesn't diminish employee HFWA rights.

Leave must be paid at "**the same hourly rate or salary** and with the same benefits … the employee normally earns during hours worked."[5] 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).) An employer cannot deem employee regular hours "cut" to a lower number because they are taking leave.

But during a public health emergency, up to 80 hours must be provided (or, for an employee working under 40 hours per week, two weeks of their regular hours) -- 48 hours for any HFWA purpose (emergency-related or not); and 32 additional hours 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 a public health emergency;

(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 who is in category (1), (2), or (3), or whose school, child care provider, or other care provider is either unavailable, closed, or providing remote instruction due to the public health emergency.

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

Employers with 15 or fewer employees are exempt in 2021 from HFWA (but were not exempt from the 2020 HFWA requirement of COVID-related leave, as INFO #6A details). Employers with 15 or fewer employees are **no longer exempt as of January 1, 2022**. (C.R.S. 8-13.3-402(5)(b).)[6]

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.

> **Example:** 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).)

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[5] 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, employers must use the employee's average hours over the six months before leave started. If the varied-schedule part-timer has been employed less than six months, the employer must use the number of hours the employee agreed when hired, or if there is no such agreement, the average daily hours the employee was scheduled to work over their entire employment. Any of these calculations include hours the employee took leave, in addition to hours worked. (These are the methods the U.S. Department of Labor adopted, so employers can use the same method for federal and Colorado law.)

[6] To count whether an employer has 15, 50, or 500 employees, HFWA analysis will not depart from existing federal Emergency Paid Sick Leave Act standards, which include all "full-time and part-time employees within the United States," "employees on leave," and employees in "separate establishments or divisions" of the business. U.S. Dep't of Labor, Families First Coronavirus Response Act: Questions and Answers.

Employer Policies on Paid Leave

"Reasonable documentation" allowable if leave is 4+ days. HFWA lets employers require documentation that the leave is for an HFWA purpose, but with four limits (C.R.S. 8-13.3-404(6), 405(4)(b), 412(1),(2)):

(1) Documentation can be required only if leave is "four or more consecutive work days," not shorter leaves.

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

(3) Employers cannot require "details" about the employee's (or their family's) HFWA-related health or safety information. Any such information that employers receive must be kept confidential, and stored 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, because "reasonable" documentation is what can be required.

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).)

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.)

Unused leave rolls over, year to year -- but doesn't require allowing more than 48 hours' leave in a year. Any paid leave an employee doesn't use by year's end carries forward to the next year -- except the employer is not required to let the employee use more than 48 hours' paid leave in a year. (C.R.S. 8-13.3-403(3)(b).)

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

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, workers aren't on "leave," they're 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 denies an employee paid leave for a "life coach" appointment. The employee files 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.[7]
>
> **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.

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 will be available on the Division 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**.

Additional Information

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

[7] 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.