

Colorado Expands Emergency Paid Sick Leave Act to Require Virtually All Private Employers to Provide Paid Sick Leave Benefits

Article By:

David L. Zwisler

Raul Chacon, Jr.

Colorado Governor Jared Polis is expected to sign the [Healthy Families and Workplaces Act \(HFWA\), Senate Bill 20-205](#), which will immediately make all Colorado employers, excluding the federal government, subject to the provisions of the federal Emergency Paid Sick Leave Act (EPSLA) in the [Families First Coronavirus Response Act \(FFCRA\)](#). Beginning January 1, 2021, the HFWA will require employers with 16 or more employees to provide full-time employees with up to 48 hours of paid sick leave per year. Beginning in 2022, employers of all sizes will have the same mandate. The HFWA also requires employers to provide employees with up to 80 hours of paid sick leave upon the declaration of a public health emergency. The law also creates notice requirements for employers and allows employees to seek damages in the event of noncompliance.

The HFWA's provisions grant new rights to almost all employees, with limited exceptions for employees subject to the federal Railroad Unemployment Insurance Act and employees of the federal government. Certain provisions of the HFWA may be inapplicable, however, where an employee is covered by a collective bargaining agreement that "provides for equivalent or more generous paid sick leave" and, on a going-forward basis, the collective bargaining agreement expressly waives those requirements imposed by the HFWA.

The HFWA does not "limit or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for a greater amount, accrual, or use by employees of paid sick leave or that extends other protections to employees." For example, if an employee is entitled to additional leave under the [Colorado Health Emergency Leave with Pay \(HELP\) rules](#), the HFWA may not limit an employee's entitlement to any pay under the Colorado HELP rules that provide for paid leave to certain employees seeking testing for COVID-19 or under instructions to quarantine or isolate due to COVID-19 concerns.

Immediate Effects of the Expansion of the EPSLA

Although several of the HFWA's provisions do not take effect until 2021 or 2022, the act immediately

applies to employers that were not covered by the EPSLA. The HFWA requires all employers in Colorado, regardless of size, to “provide paid sick leave in the amount and for the purposes provided” in the EPSLA to each employee who is not covered by the EPSLA.

The EPSLA applies only to employers with fewer than 500 employees and requires that covered employers provide employees with paid sick leave equivalent to 2 weeks (80 hours for full-time employees) for any of the following reasons:

- *Quarantine/Isolation Order*—when the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- *Self-Quarantine*—when the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- *COVID-19 Symptoms*—when the employee is experiencing symptoms such as a fever, dry cough, shortness of breath, or other COVID-19 symptoms recognized by the U.S. Centers for Disease Control and Prevention and is seeking a medical diagnosis;
- *Care for Others*—when an employee is caring for an individual who is subject to a quarantine or isolation order or whose health care provider has advised the individual to self-quarantine due to concerns related to COVID-19; and
- *School/Childcare Closure*—when the employee is caring for a son or daughter because the school or childcare provider has been closed, or the childcare provider is unavailable due to COVID-19 precautions.

Additionally, the EPSLA authorized the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor, to specify “substantially similar conditions” under which leave may be required.

The amount an employer must pay an employee for sick time under the EPSLA varies depending on the reason for the use of sick time. When an employee is quarantined or takes leave due to his or her own inability to work, the employer must provide paid sick time at the higher of the employee’s average regular rate, the federal minimum wage, or the local minimum wage. This amount, however, is capped at \$511 per day (\$5,110 in the aggregate). When an employee is absent from work to care for others or because of childcare obligations, employers must provide paid sick time at two-thirds of the employee’s average regular rate and such pay is capped at \$200 per day (\$2,000 in the aggregate).

Under the EPSLA, an employer may not require an employee to use already existing paid sick leave or other paid time off before using EPSLA leave. Additionally, the EPSLA prohibits employers from requiring employees to look for replacements to do their work while out on leave.

Employers with 500 or more employees are not covered by the EPSLA. The EPSLA also provides exemptions for small businesses with fewer than 50 employees, if providing emergency leave and pay would jeopardize the viability of the business. In addition, the EPSLA allows employers to exclude health care providers and emergency responders from the paid leave requirement, even where an employer is otherwise covered by the EPSLA. Critically, the HFWA does not extend the exemptions provided by the EPSLA. Instead, all employers must provide paid sick leave specified in

the EPSLA “to each employee who is not covered under the [EPSLA].” Thus, employers with 500 or more employees and those with fewer than 50 employees are required to provide paid sick leave consistent with the EPSLA. Similarly, those employees working for a covered employer under the EPSLA, but who were subject to the health care provider or emergency responder exemptions, are now entitled to paid sick leave under the HFWA.

The EPSLA allows covered employers to claim tax credits for providing employees with paid leave. Each quarter, covered employers are entitled to a refundable tax credit equal to 100 percent of the qualified EPSLA leave wages paid to eligible employees. The HFWA does not create tax credits equivalent to those available to employers under the EPSLA. Thus, employers now obligated to provide employees with paid leave under the HFWA will not be entitled to the tax credits available under the EPSLA and no provision of the HFWA otherwise allows employers to recoup any costs associated with the provision of the paid sick leave.

Employers previously exempted from the EPSLA’s coverage must now adopt policies and procedures granting employees paid sick leave in the amount and for the purposes provided by the EPSLA. Until or unless the Colorado Department of Labor and Employment (CDLE) promulgates rules relating to the implementation of the EPSLA’s requirements under the HFWA, then presumably, the regulations promulgated by the U.S. Department of Labor relating to the EPSLA govern.

Paid Sick Leave Obligations Beginning in 2021

Beginning January 1, 2021, employers with 16 or more employees are required to provide 48 hours of paid sick leave on an annual basis. The requirement extends to all covered employers, regardless of size, beginning on January 1, 2022.

Under the HFWA, immediately upon the commencement of employment, an employee will accrue “at least one hour of paid sick leave for every thirty hours worked by the employee.” The HFWA, however, limits an employee’s accrual or use of paid leave to 48 hours each year. For an exempt employee, paid sick leave is accrued “based on the assumption that the employee works forty hours per week.” If the exempt employee works fewer than 40 hours per week, the employee accrues paid sick leave based on the number of hours that the employee works in a normal workweek. Employers have the option to satisfy the HFWA’s accrual requirements through an existing paid leave policy that provides the employee with an amount of paid sick leave that meets or exceeds the act’s requirements at the beginning of the year, and employers may loan paid sick leave to an employee in advance of accrual.

Paid sick leave must be paid in an amount equal to the hourly rate or salary, and with the same benefits, that the employee normally earns. For employees paid on a commission basis only, paid sick leave must be paid at a rate no less than the applicable minimum wage. For employees paid on an hourly, weekly, or monthly wage and also paid on a commission basis, paid sick leave must be paid at the greater of the employee’s hourly, weekly, or monthly wage or the applicable minimum wage.

Employers are required to “allow an employee to use ... accrued paid sick leave to be absent from work when the employee:

- has a mental or physical illness, injury, or health condition that prevents the employee from working;

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- needs to obtain a medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or
 - needs to obtain preventive medical care.”

Employees may also use paid sick leave to care for a family member who has a similar need. The HFWA requires employers to grant use of paid sick leave where “the employee or the employee’s family member has been the victim of domestic abuse, sexual assault, or harassment” and the leave is to seek medical attention, obtain services from a victim services organization, obtain mental health or other counseling, seek relocation, or seek legal services as a result of the domestic abuse, sexual assault, or harassment. Employers may not require employees to disclose details “relating to domestic violence, sexual assault, or stalking or details of an employee’s or an employee’s family members’ health information as a condition of providing paid sick leave.”

An employee may also use paid sick leave where, due to a public health emergency, a public official has ordered the closure of the employee’s place of business or the school or place of care of the employee’s child and the employee needs to be absent from work to care for [his or her] child.

The HFWA does not impose any waiting period before an employee may use accrued paid sick leave and expressly provides that an employee “may use accrued paid sick leave as it is accrued.” Employees “must use paid sick leave in hourly increments unless the ... employer allows paid sick leave to be taken in smaller increments of time.” Additionally, the HFWA allows an employee to carry over up to 48 hours of paid sick leave that the employee accrues in a year but does not use; however, “an employer is not required to allow the employee to use more than forty-eight hours of paid sick leave in a year.”

Employers are required to “allow an employee to use paid sick leave upon the request of [the] employee,” and such request “may be made orally, in writing, electronically, or by any other means acceptable to the employer.” Although employers may provide written policies that contain procedures for employees to provide notice when the use of paid sick leave is foreseeable, an employer cannot deny paid sick leave to employees for noncompliance with any such policy. Moreover, employers may require documentation for use of paid sick leave only where the leave is for four or more consecutive days.

Paid leave under the HFWA is now considered “wages.” However, unlike other forms of “wages” under Colorado law, accrued but unused paid sick leave does not ordinarily need to be paid out upon an employee’s termination of employment. However, “an individual may recover paid sick leave as a remedy for a retaliatory personnel action that prevented the individual from using paid sick leave.” In the event that “an employee separates from employment and is rehired by the same employer within six months,” the HFWA requires that the employer “reinstate any paid sick leave that the employee had accrued but [did] not use[] during the employee’s previous employment with the employer.”

The HFWA expressly provides that it does not preclude employers from providing employees with more paid sick leave than required by its terms, and it further provides that if an employer has a paid leave policy that satisfies the paid sick leave provisions of the act, it is not required to provide additional paid sick leave to employees.

Additional Paid Leave During Public Health Emergencies

The HFWA requires employers to supplement paid sick leave in the event that a public health emergency is declared under certain circumstances. For employees who normally work at least 40 hours in a workweek, employers will be required to provide such employees with at least 80 hours of paid sick leave. For those employees working fewer than 40 hours per week, an employee will be eligible for the amount of time the employee is scheduled to work or actually work in a 14 day period, whichever is greater. The supplemental sick leave prompted by a public health emergency may be used “until four weeks after the official termination or suspension of the public health emergency.”

In the event of a public health emergency, the supplemental paid sick leave may be used where an employee needs to:

- “self-isolate and care for oneself because the employee is diagnosed with a communicable illness that is the cause of a public health emergency”;
- “self-isolate and care for oneself because the employee is experiencing symptoms of a communicable illness that is the cause of a public health emergency”;
- “seek or obtain medical diagnosis, care, or treatment if experiencing symptoms of a communicable illness that is the cause of a public health emergency”;
- “seek preventative care concerning a communicable illness that is the cause of a public health emergency”; or
- care for a family member who is self-isolating, needs medical diagnosis, treatment, or care, or is seeking preventative care due to the communicable illness that is the cause of the public health emergency.

Additionally, an employer must allow an employee to use the supplemental paid sick leave where a state, local, or federal public health official or the employee’s employer “determines that the employee’s presence on the job or in the community would jeopardize the health of others” or where the employee must care for a family member who has been deemed to “jeopardize the health of others.”

An employee may also use the supplemental paid sick leave to “care [for] a child or other family member when the individual’s child care provider is unavailable due to a public health emergency, or if the child’s or family member’s school or place of care has been closed by a local, state, or federal public official or at the discretion of the school or place of care due to a public health emergency.”

The supplemental paid sick leave may also be used by an employee who is unable to work because “the employee has a health condition that may increase susceptibility to or risk of a communicable illness that is the cause of the public health emergency.”

Employees do not need to provide employers with documentation to take supplemental paid sick leave prompted by a public health emergency. However, employees may take such leave only “once during the entirety of a public health emergency even if [the] public health emergency is amended, extended, restated, or prolonged.”

Employer Liability for Noncompliance and Retaliation

The HFWA prohibits employers from retaliating or discriminating against any employee or former employee “because the person has exercised, attempted to exercise, or supported the exercise of rights protected under the [HFWA].” In addition to granting employees the right to take paid sick leave, the HFWA gives employees “the right to file a complaint ... or inform any person about any employer’s alleged violation of [the act’s requirements].” An employee is also entitled to cooperate with the CDLE in its investigation of any alleged violation and “inform any person of the person’s potential rights” under the act. Thus, an employer’s retaliation based on any of these protected activities is prohibited.

Employers are also prohibited from “count[ing] paid sick leave taken by an employee pursuant to [the HFWA] as an absence that may lead to or result in discipline ... or any other retaliatory personnel action against the employee.”

The CDLE is empowered to investigate any claimed denial of paid sick leave and retaliation. Following an investigation, the CDLE may assess fines and penalties and may issue an order for the employer to reinstate the employee, and pay the employee’s lost pay.

Additionally, aggrieved employees may file a lawsuit for alleged violations of the HFWA after either submitting a complaint to the CDLE or making a written demand upon the employer. A court may award a prevailing employee with back pay, front pay, and attorneys’ fees, and may order reinstatement, promotion, increase in pay, payment of lost wages, and liquidated damages.

Posting and Record Retention Obligations Under the HFWA

Under the new law, employers are required to provide notice to employees that they are entitled to paid sick leave. Employers must give employees written notice of “the amount of paid sick leave to which [they] are entitled” and notify them that “employers cannot retaliate against an employee for requesting or using paid sick leave and that an employee [can] file a complaint or bring a civil action if paid leave is denied by the employer or the employer retaliates against the employee for exercising [her or his] rights.”

The HFWA also requires employers to display a CDLE poster “in a conspicuous and accessible location” in each location where employees work. Both the written notices and posters must be “in English and in any language that is the first language spoken by at least five percent of the employer’s workforce.” Willful violations to provide employers with notices and to display posters may result in the imposition of civil fines not to exceed \$100 for each separate violation.

The new law requires employers to “retain records for each employee for a two-year period, documenting hours worked, paid sick leave accrued, and paid sick leave used.” To the extent an employer possesses any health or safety information regarding an employee or employee’s family member, such information must be maintained separately from other personnel information, be treated as confidential medical records, and not be disclosed except to the affected employee or with the express permission of the affected employee.

Next Steps for Employers

Employers’ obligations to provide paid leave consistent with the EPSLA commence immediately upon the effective date of the HFWA. Thus, employers that were previously exempt from the EPSLA’s coverage may want to assess the impacts of the HFWA. Additionally, employers with 16 or

more employers may want to begin developing policies to implement the HFWA's paid sick leave requirements in advance of January 1, 2021, and all other employers will need to develop such policies before January 1, 2022.

Additionally, because the HFWA grants the CDLE with rulemaking authority, employers may want to stay apprised of any rules promulgated interpreting or clarifying employers' obligations.

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