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## Whitepaper

# Family and Medical Leave Insurance Program

### Summary:

The Family and Medical Leave Insurance Program requires Colorado employers to provide eligible employees with up to 12 (or 16) weeks of paid leave for specified family and medical reasons within a 12-month period.

#### **Important Notice:**

*The information provided herein is general in nature and designed to serve as a guide to understanding. These materials are not to be construed as the rendering of legal or management advice. If the reader has a specific need or problem, the services of a competent professional should be sought to address the particular situation.*

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## **I. Introduction**

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The Family and Medical Leave Insurance Program (FAMLI) is a State-run family leave program that will begin to be funded by employers on January 1, 2023 and will provide benefits to employees beginning January 1, 2024. The voter-approved law passed in 2020 ensures that Colorado employees will have access to paid leave to care for themselves or their family members during a serious health event or to grow their family. FAMLI will start providing benefits on January 1, 2024, when most Colorado employers will need to allow eligible employees to take up to 12 weeks of job-protected leave in a 12-month period for specified family and medical reasons. Those who experience pregnancy or childbirth complications will receive an additional four weeks. This document provides an overview of current FAMLI requirements known as of this publication date

## **II. Employer Coverage**

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FAMLI applies to all Colorado employers, public, private, nonprofit, and religious, of any size or industry, including sole proprietors. The law also applies to employers located outside of Colorado who have employees within Colorado.

Private employers may be eligible to opt out of the State program if they offer a privately funded family leave plan that offers benefits comparable to or better than benefits an employee would receive under FAMLI. Employers that wish to provide a private plan to employees may do so by buying that insurance from an approved third party or self-fund the plan. However, those employers who self-insure their own plan must apply to the State for approval of their plan and must maintain a surety bond to prove that benefits can be paid to employees.

Most short-term disability policies will not, by themselves, qualify to replace FAMLI. Qualified plans must convey the same or a greater level of benefits for the employee as the FAMLI leave program. They need to cover the same length of time and rate of pay to the employee and be provided at the same or lesser cost to the employee.

## **III. Employee Eligibility**

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To be eligible for FAMLI benefits, a Colorado employee must have earned at least \$2,500 in wages while working for a Colorado employer(s) over a period of a year. This time frame considers the time the employee has been working in Colorado, not the time the employee has been working for the employer. FAMLI benefits are portable and determined by the length of time employed in Colorado, not by the length of time with the same employer.

Self-employed workers (1099 or contract workers) may also be eligible if they have earned at least \$2,500 in wages in Colorado, they opt in to coverage, and live and work in Colorado.

## IV. Local Governments

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Local governments, as defined by statute and which include organizations such as school systems, towns, and certain special districts, are covered employers, but they have a statutory choice to opt out of the program with an affirmative vote by the governing body to decline participation, along with notice to the State of that vote. Employees of those local governments can opt in to the program separately.

Local governments have three options regarding participation in the FAMLI program:

- **Participate in FAMLI.** This option means the local government agency agrees to pay the employer share of the premium (0.45% of wages if the local government has 10 or more employees, and 0% of wages if the local government has fewer than 10 employees) and remit employees' share of the premium (0.45% of wages) along with wage data to the FAMLI Division once a quarter.
- **Decline participation in FAMLI.** To decline participation in the FAMLI program, the local government's governing body must vote to do so. The local government must then notify the FAMLI Division of their vote to decline participation. The decision to decline is good for eight years from the date of the vote to decline participation. The local government must hold another vote if it wishes to continue opting out beyond eight years.
- **Decline employer participation in FAMLI.** This option allows a local government agency to decline participation as described above, while allowing the agency to assist employees who want to individually participate in the FAMLI program by facilitating voluntary payroll deductions, with remittance of the employee share of the premium (0.45% of wages) and wage data once a quarter to the FAMLI Division.

Local governments can vote to opt out of FAMLI at any time during 2022, and local governments are not required to give the FAMLI Division notice of their decision to opt out by January 1, 2023. However, **local governments that do not notify the FAMLI Division of a vote to opt out by January 1, 2023 will be identified as participants in the FAMLI program.** The FAMLI Division will expect both wage data and premium payments due on April 1, 2023. To avoid paying premiums, they must notify the Division ahead of January 1, 2023.

Local governments that choose to fully participate in FAMLI after previously voting to decline participation, as well as individuals who self-elect coverage, must remain in the program and agree to pay premiums for a minimum of three years. If a local government wishes to withdraw from the program at the end of the three-year period, the Division requires a minimum of 90-days' notice, so the Division can update the systems to avoid overpayments and miscommunication.

## V. Leave Entitlement

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### TYPES OF LEAVE

Beginning January 1, 2024, a covered individual has the right to take paid family and medical leave and to receive family and medical leave insurance benefits while taking paid family and medical leave for the following reasons:

- For the care of a newborn, adopted child, or fostered child;
- To care for a family member with a serious health condition;
- For the employee's own serious health condition;
- For qualifying exigency leave;
- To address safety needs or the impact of domestic violence and/or sexual assault.

### DEFINITIONS OF FAMILY

The FAMLI statute defines "family member" very broadly and differently from other medical leaves, specifically the FMLA. Under FAMLI, "family members" are:

- Regardless of age, a biological, adopted or foster child, stepchild or legal ward, a child of a domestic partner, a child to whom the covered individual stands in loco parentis, or a person to whom the covered individual stood in loco parentis when the person was a minor;
- A biological, adoptive, or foster parent, stepparent, or legal guardian of a covered individual or covered individual's spouse or domestic partner or a person who stood in loco parentis when the covered individual or covered individual's spouse or domestic partner was a minor child;
- A person to whom the covered individual is legally married under the laws of any state, or a domestic partner of a covered individual as defined in section 24-50-603(6.5);
- A grandparent, grandchild, or sibling (whether a biological, foster, adoptive or step relationship) of the covered individual or covered individual's spouse or domestic partner; or
- As shown by the covered individual, any other individual with whom the covered individual has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship.

### SERIOUS HEALTH CONDITION

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

## LEAVE FOR BIRTH, ADOPTION, OR FOSTER CARE

Leave for birth and care, or placement for adoption or foster care, must conclude within 12 months of the birth or placement. Employees may take FAMLI leave before the actual placement or adoption of a child if the absence is required for the adoption or foster placement to proceed.

## SAFE LEAVE/EXIGENCY LEAVE

“Safe leave” means any leave because the covered individual or the covered individual’s family member is the victim of domestic violence, the victim of stalking, or the victim of sexual assault or abuse. Safe leave applies if the covered individual is using the leave from work to protect the covered individual or the covered individual’s family member by:

- (a) Seeking a civil protection order to prevent domestic violence;
- (b) Obtaining medical care or mental health counseling or both for themselves or for their children to address physical or psychological injuries resulting from the act of domestic violence, stalking, or sexual assault or abuse;
- (c) Making their home secure from the perpetrator of the act of domestic violence, stalking, or sexual assault or abuse, or seeking new housing to escape said perpetrator; or
- (d) Seeking legal assistance to address issues arising from the act of domestic violence, stalking, or sexual assault or abuse, or attending and preparing for court-related proceedings arising from said act or crime.

## CONTRIBUTIONS

FAMLI contributions will start on January 1, 2023. Contributions are a shared responsibility for employers with 10 or more employees at 0.45% each for a total of 0.90%, unless an employer chooses to pay the full premium covering the employer and employee contribution amounts. Employers with fewer than 10 employees are exempt from paying the employer share of the contributions, but they are responsible for remitting the employees’ share of the contribution. Contributions are based on gross pay up to the Social Security wage base, \$147,000 for 2022 and indexed annually.

Both employers and employees must begin paying into the fund on January 1, 2023, through payroll deductions. Employers will need to submit to the Colorado Department of Labor and Employment both their share (if required) and their employees’ share of the premium through an online system at the end of each quarter. It is expected that this system will be similar to how employers make their unemployment insurance premiums.

Exemptions from wages are:

- 1) Per-diem or mileage reimbursements
- 2) Amounts of payments made by the employer on behalf of the employee into other insurance or annuity accounts that are not associated with FAMLI, including but not limited to:

- a. Short- or long-term disability
- b. Medical or hospitalization expenses in connection with sickness or accident disability
- c. Death
- d. Earnings from investment-interest payments, dividends, or rent receipts from rental property except if the income is earned through a business owned or operated by the claimant.
- e. Severance pay, with the exceptions of payments pursuant to 8-73-110 C.R.S.

## PAID LEAVE BENEFITS

FAMLI leave is paid leave benefit with weekly payments to the employee. The benefit can be as high as 90% of income replacement based on a sliding scale. Lower-paid employees receive the highest benefit, with the percentage of income replacement decreasing as the wages for the employee increase. The FAMLI website contains a helpful [Premium and Benefits Calculator](#) for employees.

Weekly Wage	Weekly Benefits	Maximum Annual Benefits	Percent of Weekly Wage
\$500	\$450	\$5400	90%
\$1000	\$768	\$9,216	77%
\$1500	\$1018	\$12,216	68%
\$2000	\$1,100	\$13,200	55%
\$3000	\$1,100	\$13,200	37%

## COORDINATION OF PAID LEAVE WITH HFWA

The Healthy Families and Workplaces Act applies to all Colorado employers and mandates sick leave benefits for all employees in an amount of one hour for every 30 hours worked, up to 48 hours of leave for employees to care for themselves or family members.

While the State has announced that it will issue guidance on the nexus and differences between FAMLI and HFWA, there are some salient differences.

First, HFWA is internally managed by employers and consists of earned paid time off accrued by employees. The employees are paid for their time away at their regular rate of pay by their employer. This is paid time off for sick days. For life circumstances that may require long absences from work, such as serious health conditions, welcoming a new child, etc., employees may apply to the FAMLI program for a benefit paid to the employee by the State. The amount of the benefit is only a percentage of their regular rate of pay and is paid directly to the employee

by the State. Another salient difference is that an employee notifies the employer of the need to take sick leave, while the Division will notify the employer when the employee has applied and will be taking FAMLI leave.

## PAID LEAVE SUBSTITUTION

FAMLI leave is paid, but it only covers a partial wage replacement. The FAMLI statute prohibits an employer from requiring an employee to use or exhaust existing PTO before they are permitted to take FAMLI leave. However, under certain conditions, employees may elect, or employers may require employees to “substitute” (run concurrently) accrued paid leave (e.g., sick, vacation, or PTO) while on paid FAMLI leave to get the employee to 100% of wages. An employee’s ability to substitute accrued paid leave is determined by the terms and conditions of the employer’s normal leave policy. If the employee does not meet the conditions of the employer’s policy, the employee remains entitled to take FAMLI leave. Public-sector employers can require, or employees can elect, to use accrued compensatory time while on FAMLI leave.

## COORDINATION WITH THE FAMILY MEDICAL LEAVE ACT (FMLA)

The FAMLI program was designed to be able to run concurrently with FMLA. Therefore, employers subject to FMLA will need to coordinate that leave with FAMLI leave. Employees not covered by FMLA may still take FAMLI leave, as the eligibility for the state FAMLI program is not predicated on the length of time worked or a formal waiting period. Once an employee has made \$2,500 in wages, they may become eligible for the FAMLI benefit. Moreover, after an employee has worked for an employer for 180 days, their leave through the FAMLI program is a “job-protected” leave, similar to the job protections under FMLA.

## VI. Maintenance of Health and Other Benefits

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A covered employer is required to maintain group health insurance coverage for employees on FAMLI leave on the same terms as if the employee had continued to work. If applicable, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave.

Whether an employer is required to maintain other benefits for an employee on FAMLI depends upon the employer’s policy for providing such benefits when the employee is on other forms of leave.

## VII. Notice and Certification

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Employers must post a legible copy of the Department of Labor's fact sheet, “Colorado Family and Medical Leave Insurance (FAMLI).” This poster must be posted in a prominent place at each worksite. A poster is [available](#) on the CDLE website