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LEAVE AND DISABILITY REGULATORY COMPLIANCE

Summary of legislative and regulatory changes

Private employer sector | December 2022

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Colorado

7 CCR 1107-4 (final rule re: coordination of benefits)

Enacted Nov. 22, 2022

Effective Dec. 30, 2022

Benefits begin Jan. 1, 2024

Colorado has issued final rules addressing the use of the state's paid family and medical leave insurance (FAMLI) program benefits and the reimbursement of advance payments under the program. The law provides 12 weeks of paid family and medical leave funded through a payroll tax to which both employers and employees contribute. An additional four weeks of paid leave are available for pregnancy or childbirth complications, bringing the maximum potential amount of paid leave to 16 weeks. Employer and employee contributions to the FAMLI program begin Jan. 1, 2023, and FAMLI leave and benefits will be available Jan. 1, 2024.

Employees and employers can mutually agree that the employee may use accrued employer-provided leave as a supplement to FAMLI benefits, as long as the aggregate amount they would receive does not exceed the employee's average weekly wage. For purposes of FAMLI benefits, the term "employer-provided paid leave" covers various paid leave programs, such as vacation, paid sick leave, paid personal leave and paid parental leave. The rules clarify that the term does not include benefits under a commercial disability policy, whether short-term or long-term. However, the rules separately establish the circumstances under which an employer can count both wage replacement benefits and the leave provided against benefits provided under short-term and long-term disability policies.

The rule explains the circumstances under which employer-provided paid leave that is supplemented by FAMLI wage replacement benefits can be considered an overpayment. When such an overpayment occurs, the employer can recoup that overpayment by any legal means, including one or more lawful deductions. However, the employee's paid leave bank must be replenished with an amount of paid leave that is equal to the amount of recouped overpayment. Failure to replenish a paid sick leave bank can constitute a violation of Colorado's Health Families and Workplaces Act. The rule also adds that the mutual employer-employee agreement to supplement FAMLI benefits with employer-provided paid leave must be in writing and retained by the employer.

Leave taken with FAMLI wage replacement benefits that also qualifies as protected leave under the federal Family and Medical Leave Act (FMLA) runs concurrently with FMLA leave. If the qualifying reason for paid family and medical leave does not constitute a qualifying reason for leave under the FMLA, then the extent to which paid family and medical leave runs concurrently with FMLA leave is governed by the FMLA. Under the new regulation, the employer must notify employees who request FMLA leave that they may also be eligible for paid leave under the FAMLI Act.

The law details circumstances under which employers may qualify for a reimbursement of advance FAMLI wage replacement benefits payments made to employees. This rule clarifies the circumstances and requirements for the employer to qualify for reimbursement. These updates include requiring the employer to verify to the Division of Family and Medical Leave Insurance that it proactively paid the employee a payment designated as a paid family and medical leave wage replacement benefit.

Colorado

7 CCR 1107-1 (final rule re: FAMLI program premiums)

Enacted Nov. 22, 2022

Effective Dec. 30, 2022

Colorado has amended its rules regarding the collection of premiums to fund the state's paid family medical leave insurance program (FAMLI). The law provides 12 weeks of paid family and medical leave funded through a payroll tax to which both employers and employees contribute. An additional four weeks of paid leave are available for pregnancy or childbirth complications, bringing the maximum potential amount of paid leave to 16 weeks. Under the law, individuals that are not required to provide coverage can elect to do so. The rules detail how individuals can elect coverage and how to determine the contributions these individuals must make.

The paid family and medical leave law applies to any employer that has at least one employee in Colorado. However, the law lessens the cost burden on smaller employers, defined as those with fewer than 10 employees. These smaller employers do not have to pay the employer's share of the premium, although they still must withhold and pay the employees' contribution into the fund.

The amended regulations make clear that, to determine an employer's size, an employee counts towards the total number of employees if that employee is employed during 20 or more workweeks in the preceding calendar year. A person is considered "employed" during a workweek if that person performs any work for the employer during the workweek, or if the person is on any type of paid or unpaid leave during the workweek and the employer anticipates that the employee will return to active employment. An employer's size will be calculated at the time the employer registers with the program, and then annually during the first quarter of the year. Changes to premium liability resulting from a change in employer size can only happen once per year.

Colorado

7 CCR 1103-7 (final rule re: wage protection act)

Enacted Nov. 10, 2022

Effective Jan. 1, 2023

Informational only – Sedgwick does not administer

Colorado has amended its wage payment rule to clarify the pay rate calculation for paid sick leave. The amended rule also provides procedures for administrative liens and levies for Healthy Families and Workplaces Act (HFWA) leave. The rule provides that the pay rate for leave under the HFWA is calculated using the same rules applicable to calculating an employee's regular rate, except that: (1) bonuses included in the regular rate calculation are excluded; (2) only the method in COMPS Rule 1.8.3(A) may be used for employees with variable hourly rates, except that the rate is measured over 30 days; and (3) the HFWA regular rate must be determined based upon the employee's pay over the 30 calendar days prior to taking leave, unless the employee has not yet worked 30 calendar days, in which case the longest available period will be used.

The amended rule clarifies the calculation and provides that the HFWA pay rate must be calculated based upon the employee's pay over the 30 calendar days prior to taking leave; must include any set hourly or salary rates, shift differentials, tip credits and commissions; and must not include overtime, bonuses or holiday pay.

The amended rule clarifies that the Colorado Wage Act limit of $7,500 for wage claims is a limit per individual employee. The new rule applies existing Division of Labor Standards and Statistics (Division) burden of proof and pleading standards to complaints filed on behalf of similarly situated employees, or complaints that other similarly situated employees may join. The new rule also clarifies that the Division's authority to investigate, or decline to investigate, such complaints does not affect its authority to initiate direct investigations.

The rule provides that a valid appeal must be timely, signed and allege a clear error. The amended rule allows appeals to be adjudicated on the papers, as long as parties have notice and opportunity to be heard on whether a live hearing is needed. In addition, the new rule clarifies that an appeal filing does not, except to the extent that a stay is granted, automatically toll deadlines applicable under, or triggered by issuance of, the determination, decision or order being appealed.

The new rule sets forth procedures for parties in administrative claims to apply for attorney fees or costs, dispute other parties' fee or cost applications, and appeal fee or cost decisions. The rule clarifies that fees and costs are available only to "employees, or other applicable claimants or complainants."

The Colorado Wage Act gives the Division authority to issue notices of administrative liens and levies against employers or other persons with possession, custody or control of assets of a party that fails to pay wages, fines or

penalties determined to be due. The new rule sets forth the procedures for parties to claim exceptions or exemptions, or file appeals for joint accounts; for the Division to decide the merits of such claims or appeals; and for the Division to provide notice of such determinations.

District of Columbia

B 916 (short term disability insurance benefit protection)

Enacted Oct. 17, 2022

Effective Dec. 13, 2022

Expires July 26, 2023

The District of Columbia has temporarily amended the Universal Paid Leave Act regarding the Act's effect on insurance benefits. Under the law, an insurer that provides temporary or short-term disability insurance policies may not reduce or offset the benefits it provides to an individual based on the paid leave benefits that the individual may receive under the Act, subject to certain exceptions. The amended law clarifies that this provision applies regardless of the jurisdiction in which a policy was issued, executed, written or delivered.

New Hampshire

NHAC Ins. 8000 (final rule re: FMLA wage replacement coverage)

Enacted Nov. 30, 2022

Effective Nov. 30, 2022

New Hampshire has enacted regulations related to family and medical leave wage replacement benefits found in insurance policies issued for delivery in the state. New Hampshire's paid family leave law, the Granite State Paid Family Leave Plan, is voluntary for private employers.

The new regulations require all family and medical leave insurance (FMLI) policies to pay at least 60% of the insured person's average weekly wage while they are absent from work. The regulations explain benefit calculation. No benefits will be provided during medical leave for which the employee is also paid workers' compensation or other disability insurance benefits.

Under FMLI policies, the benefit is payable for at least six weeks when an individual is absent: (1) to care for their parent, spouse or child with a serious health condition; (2) to bond with their child during the first 12 months after its birth or placement for adoption or foster care; or (3) due to a qualifying exigency related to foreign deployment with the armed services or to care for a service member (the individual's spouse, child, parent or next of kin) with a serious injury or illness as described in the federal Family and Medical Leave Act.

The regulations provide several exceptions to these permissible reasons for leave, such as a serious health condition that arises out of professional sports. Additionally, an FMLI policy can provide benefits for the insured person's own serious health condition, treatment or recovery if they cannot perform the functions of their job. An individual may receive a total of 12 weeks of benefits during a 12-month benefit period.

Individuals can use FMLI benefits intermittently, in increments of at least four hours on any one day. An insurance plan may require an individual to use their accrued paid time off benefits before FMLI benefits will be paid. The regulations provide that a policy may contain an elimination period, or waiting period, of up to seven days before benefits can be used. Additionally, a policy may require a waiting period of up to seven months before benefits may be used.

Under the regulations, an employer may obtain a group policy for its eligible employees, premiums for which may come from employer and employee contributions. Additional rules apply for members of labor unions, professional employer leasing companies and bona fide professional associations.

The regulations provide requirements regarding non-renewals and terminations of insurance benefits as well as information about benefit payments due if the insured individual dies. Additional required provisions for health carriers that offer FMLI policies are included in the regulations.

Washington

Wash. Ann. Code §§ 296-128-99010 to 296-128-99290 (final rule transportation network companies and drivers)

Enacted Nov. 30, 2022

Effective Jan. 1, 2023

Informational only – Sedgwick does not administer

Washington has issued administrative regulations to implement the 2022 state law establishing workplace standards for the conditions for drivers working for ridesharing companies like Lyft and Uber. The new regulations clarify requirements related to paid sick leave for drivers. They also provide details not included here as to driver compensation requirements, allowable deductions from driver compensation, electronic receipts and weekly trip notices, reimbursements from the driver resource center, driver deactivations from the platform, and requirements for an accessible system and communication system for drivers.

The regulations apply to any ridesharing company that provides a driver platform in Washington. The regulations cover drivers who transport passengers using applications or software provided by a commercial transportation services provider, such as Lyft, Uber and other similar ridesharing companies, as long as the company: (1) does not unilaterally set specific dates, times or minimum hours during which a driver must be available to provide services through the company's platform; (2) is not allowed to terminate a driver's account for not accepting a specific transportation request; (3) does not prohibit the driver from performing services for another ridesharing company, unless the driver would be providing service simultaneously to more than one company; and (4) does not prohibit the driver from working in any other lawful occupation or business.

In addition to a notice of rights detailed in the new regulations, ridesharing companies are required to notify drivers they are entitled to paid sick time. The notice may be distributed via the driver platform or app and must include: (1) the accrual rate; (2) the authorized uses of paid sick time; and (3) that companies cannot retaliate against drivers for lawful use of paid sick time for authorized purposes. Under the new regulations, ridesharing companies are also required to notify drivers at least monthly of their paid sick time balance, any increase or decrease in accrual, the average hourly compensation rate for paid sick time used and how that amount was calculated, and the driver's expected average hourly rate of compensation for paid sick time used during the month following the notification.

The new regulations also provide for mandatory paid sick time for drivers. Beginning Jan. 1, 2023, drivers will accrue one hour of paid sick time for every 40 hours of passenger platform time worked. Drivers must be allowed to carry over at least 40 hours of accrued, unused paid sick time to the following calendar year and companies may cap carryover at 40 hours. Any additional paid sick time accrued in the new calendar year would be in addition to the time accrued in the previous year and carried over. Drivers are not required to provide advance notice of paid sick time use for an authorized purpose.

Ridesharing companies may provide drivers with a more generous paid sick time accrual rate and may allow drivers to accrue paid sick time for time not considered passenger platform time. The company must allow drivers to use accrued paid sick time if they have recorded passenger platform time in the preceding 365 days, but unused leave lapses after a driver has been inactive for 365 consecutive days.

Drivers must be paid their average hourly compensation while using paid sick time. Average hourly compensation includes bonus and incentive pay and can be calculated in one of two ways: (1) divide the compensation during passenger platform time during the 365 days preceding the day paid sick time is used by the number of total hours of passenger platform time during that period; or (2) adopt a consistent practice of dividing the compensation earned during the last 12 full calendar months immediately prior to the day paid sick time is used by the total of passenger platform hours worked during that period. Average hourly compensation does not include tips or reimbursements. Ridesharing companies may instead offer a Paid Time Off (PTO) program, as long as it meets the requirements of the paid sick time law, including rate of accrual, carryover, payment rate and use.

Ridesharing companies may not require drivers to document the reason for using paid sick time unless the absence exceeds three calendar days. Drivers must be allowed at least ten days after the first paid sick day to provide documentation. Requests for documentation cannot cause an unreasonable expense or burden to the driver and must be in accordance with a sick leave policy filed with a third-party administrator and provided to the driver before the paid sick time is requested. A paid sick time policy must outline the driver's right to explain that providing documentation would be an unreasonable expense or burden, and the company must make a reasonable effort to provide an alternative for the driver to meet the documentation requirement within 10 calendar days by either accepting the driver's explanation or mitigating the driver's costs for obtaining medical verification. Drivers may not be asked to provide documentation for paid sick time taken during a period of account deactivation. If a ridesharing company can demonstrate that a driver's use of paid sick time was not for an authorized purpose, the driver must be notified and payment for that time may be withheld, but the time cannot be deducted from legitimately unused accrued paid sick time.

Companies may establish a shared paid sick time program to allow drivers to donate paid sick time to another driver. This program must be part of a written policy or agreement with a third-party administrator and drivers must be notified of the policy.

Under the new regulations, companies can opt to frontload paid sick time before accrual. Companies wishing to frontload paid sick time must have a written policy or an agreement with a third-party administrator which addresses the requirements for use of frontloaded paid sick time and meets all statutory and regulatory requirements regarding paid sick time. Frontloaded hours must be calculated using a reasonable calculation to determine how much paid sick time a driver would earn during the period for which sick time is frontloaded. If a driver uses more frontloaded paid sick time than earned, companies cannot seek reimbursement for unaccrued time used, unless there is a specific agreement with a third-party administrator in place. If a driver earns more paid sick time than they are frontloaded, the ridesharing company must make the additional accrued paid sick time available within 30 calendar days of identifying the discrepancy.

The new ridesharing regulations allow companies to contract with a third-party administrator to administer the paid sick time requirements. The driver resource center may be contracted to act as a third-party administrator. Third-party administrators may contract with multiple ridesharing companies to pool a driver's earned paid sick time from multiple ridesharing companies, as long as the accrual rate is at least one paid hour per 40 hours of passenger platform time worked.

Wisconsin

Ch. DWD 226 (final rule re: bone marrow and organ donor leave)

Enacted May 23, 2022

Effective July 1, 2022

Wisconsin has issued rules implementing the state's law on bone marrow and organ donor leave. Wisconsin's bone marrow and organ donor leave law requires employers with 50 or more permanent employees to provide eligible employees up to six weeks of leave in a 12-month period for the purpose of serving as a bone marrow or organ donor. The new rules explain how employers should determine whether they meet the 50-employee threshold for coverage, clarify that eligible employees can use bone marrow and organ donor leave intermittently, and expand upon employee notice requirements.

The new rules indicate that an employer is employing at least 50 individuals if, during at least six of the preceding 12 months, the employer actually treated at least 50 individuals as being permanent employees. To be eligible for bone marrow or organ donor leave, an employee must have been employed by the same employer for more than 52 consecutive weeks and have worked for the employer for at least 1,000 hours during the preceding 52-week period. The rule further explains that an employee is considered to have been employed by the same employer for more than 52 consecutive weeks if the person has actually been treated by the employer as an employee for each of those 52 weeks, regardless of the number of hours worked in those weeks or whether the employee was off for one or more weeks on another leave, or on layoff, if the layoff was initiated by the employer and the employer allowed the employee to return to work at the end of the leave or layoff without having to reapply.

The new rules establish that leave may be taken in non-continuous increments if necessary for the employee to undergo and recover from the bone marrow or organ donation procedure. An employee can take partial absence leave in increments of less than a full workday, if the employer allows any other leave to be taken in increments of less than a full workday. The shortest increments of bone marrow and organ donation leave must be equal to the shortest increment of leave the employer allows to be taken for any other non-emergency leave offered. Altogether, an employee cannot take more than six weeks of bone marrow and organ donation leave in a 12-month period.

The law requires that an employee must schedule their proposed bone marrow or organ donation leave so that it does not unduly disrupt the employer's operations and provide advance notice of the leave in a reasonable and practicable manner. The rules expand upon these requirements, indicating that the employee must provide notice of their intent to take leave with at least the shortest amount of notice that the employee must give for taking any other non-emergency or non-medical leave. Employees must also provide a schedule of proposed leave that is sufficiently definite for the employer to be able to schedule replacement employees if necessary. The employee notice must be in writing, if: (1) an employer has a written policy requiring written notice; (2) the policy applies to

all employees within the state; and (3) the employee has been made aware of this policy. An employee will be considered to have given advance notice of the bone marrow or organ donation leave in a reasonable and practicable manner under the law if the employee's notice provides the planned dates of the leave and is given to the employer with reasonable promptness after the employee learns of the probable need for the leave.

An employer may deny an employee's request for leave if the employee fails to do at least two of the following: (1) provide notice in writing; (2) identify the planned dates of leave; (3) provide a proposed schedule for leave with reasonable promptness; or (4) provide a proposed schedule that is sufficiently definite to allow the employer to schedule replacements if needed.

The new rules specify that bone marrow and organ donor leave cannot run concurrently with family and medical leave provided under state law but can run concurrently with leave provided under the federal Family and Medical Leave Act. The rules also explain that an employee entitled to bone marrow or organ donor leave can, but is not required to, substitute any other accrued paid or unpaid leave for either bone marrow or organ donor leave. If any other leave is substituted for bone marrow and organ donor leave, and any seniority or employment benefit would normally accrue to the employee during that other type of leave, then that seniority or employment benefit must accrue during the taking of that substituted leave.

Under the bone marrow and organ donor leave law, employers are required to maintain group health coverage during leave under the same conditions as applied immediately before leave began. If the employee continues making any contribution required for continued coverage, the employer must also continue making required contributions as though the employee were not on leave. The new rules explain that an employee will be considered to make their required contributions under a group health plan if the employee pays the contribution required by the employer within the time required by the employer. The employer may not require an employee to pay the employee's contribution, except into an escrow account as provided, more frequently or in greater amounts than was required of the employee before the leave was taken, and the employer may not deny the employee's requested leave under the law based upon nonpayment by the employee into the escrow account.

The rules provide detailed guidance for who may file complaints about violations of the law, as well as how and when complaints may be filed. The rules spell out the required contents of any complaints and set forth the process for the amendment and withdrawal of filed complaints. The rules specify the responsibilities of the Wisconsin Department of Workforce Development with respect to reviewing and investigating any filed complaints, and the employer's obligations in responding to any filed complaints. The rules further detail the procedure for hearing complaints and issuing decisions on complaints, and for appeals of any decisions rendered.

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