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LEAVE AND DISABILITY REGULATORY COMPLIANCE

Summary of legislative and regulatory changes

Private employer sector | February 2024

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Colorado

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

Adopted Feb. 9, 2024

Effective April 1, 2024

Informational only – Sedgwick does not administer.

The Colorado Department of Labor and Employment has adopted amendments to the administrative rules implementing the Colorado Wage Act and Wage Protection Act. The final rules address the calculation of paid sick benefits under the Healthy Families and Workplaces Act (HFWA), as well as mediation procedures as authorized by amendments to the Colorado Equal Pay for Equal Work Act, the Wage Theft Enforcement Fund, and miscellaneous clarifications and additions to the rules.

The final rules provide methods of calculating pay rate and number of hours of leave under the HFWA, Colorado's paid sick leave law. The HFWA provides that all HFWA-accrued leave must be paid at the same hourly rate or salary, and with the same benefits the employee normally earns during hours worked. Existing rules provide that the pay rate is calculated based on the employee's pay over the 30 calendar days prior to taking leave. The final rules provide that, at the employer's option, any full pay period or consecutive full pay periods or work weeks totaling 28 to 31 days may be used for the calculation. If the employee has not yet worked 30 calendar days or 28 to 31 days, the maximum number of available days worked within the duration prior to leave may be used.

Existing rules provide that the number of hours of paid HFWA leave an employee can take is the number of hours the employer reasonably anticipated they would have worked during the period of the leave, based on: (1) their regular schedule of hours actually worked; (2) if leave is during a period the employee was anticipated to depart from a regular schedule, then hours anticipated for that period; or (3) if the number of hours the employee would have worked during the period cannot be reasonably anticipated, then their average hours worked during their most recent 30 calendar days of work.

The final rules provide that to calculate the number of hours an employee may take as HFWA leave, the employer may also use the most recent of any full pay period (or consecutive full pay periods or work weeks) totaling 28 to 31 days. If the employee has not yet been employed for the full 30 days (or other duration of 28 to 31 days), the regular schedule of hours actually worked, or if leave is during a period the employee was anticipated to depart from a regular schedule, the hours anticipated for that period.

Under the final rules, the Colorado Division of Labor Standards and Statistics ("Division") may invite or order parties to a complaint to mediate or otherwise attempt to resolve the complaint at any stage in the process. The final rules also contain directions regarding admissibility of mediation statements or submissions, as well as confidentiality of submissions to the Division.

The final rules also address disbursement of payments under the Wage Theft Enforcement Fund. In addition, the final rules clarify several definitions and procedural rules relating to investigations. Of particular interest, the final rules clarify that a "correct address" includes a physical or email address the party used or provided to the Division, the party's email address, the party's address on file with the Colorado Secretary of State or an address actually used or publicly posted as a current address for mail or deliveries by the party.

Delaware

19 DAC 1401 (final rules re: paid leave regulations)

Adopted March 1, 2024

Effective March 11, 2024

Benefits begin Jan. 1, 2026

The Delaware Department of Labor adopted amendments to the administrative rules implementing the Healthy Delaware Families Act (HDFA), which addresses the coordination of benefits and notice requirements for the HDFA and Delaware's Paid Family and Medical Leave (PFML) program.

The amended rules have added or clarified several definitions. "Family and medical leave benefits" means benefits that are received through the HDFA for family caregiving, medical or parental leave. Individuals are not entitled to these benefits if an individual is receiving temporary disability benefits for workers' compensation, personal injury protections due to an injury from an automobile accident or unemployment insurance benefits.

The definition of "employee" is clarified by the amended rules. Previously, the definition provided that, for purposes of the HDFA and the PFML program, an employee does not include those in business for themselves in a non-corporate form who offer services to the public as a sole proprietor or partner in a partnership. The amended rules clarify that whether an individual is an employee is determined by if they receive a W-2 form.

For purposes of PFML, the definition of "employer" has been clarified to include those with employees physically working in Delaware. In addition, an employer includes any successor of interest, an integrated employer and a joint employer.

Further, for purposes of PFML, the definition of a "covered individual" has been updated. Previously, a covered individual was defined as an individual employed for at least 1,250 hours of service performed within Delaware with the employer during the previous 12-month period. The amended rules add that a "covered individual" must also have worked for that employer for a period of at least 12 months. Although the minimum 12-month period of employment does not have to be consecutive, if the break in service has lasted more than seven years, the period of employment prior to the break is not counted.

The amended rules include multiple requirements regarding the coordination of other benefits that an employer may already offer, including for PFML leave that is taken on a reduced or intermitted schedule. However, the following coordination of benefits does not apply to employers that provide paid time off (PTO) benefits that have been "grandfathered" in.

An employer may require a covered individual to use not more than 75% of their earned but unused PTO before accessing PFML benefits. Any PTO required by an employer to be used prior to accessing PFML benefits may be counted against the length of the individual's PFML leave. Covered individuals cannot be required to use all their PTO.

In addition, upon agreement between a covered individual and their employer, a covered individual may use their PTO to supplement their wages up to 100% of their average weekly wage. An agreement must be in writing, signed and retained by the covered individual and their employer.

Further, employers must provide employees with notice of their coordination policy for PTO and PFML benefits. The notice must include: (1) whether use of unused, accrued PTO is required prior to accessing PFML benefits; (2) how much unused, accrued PTO is required to be used before accessing PFML benefits; and (3) whether the use of accrued PTO counts toward the total length of leave provided under the HDFA.

If PFML leave also qualifies for employer-provided short-term disability, long-term disability or other paid leave policy, employers may count both the wage replacement amount and the duration of the PFML leave against the benefit amounts and leave duration provided under any of the employer-provided policies. Employers must provide a written notice as required by the HDFA.

If an employer provides a disability or paid leave policy as primary coverage, the PFML benefit payments must be reduced to what the employer-provided policy pays so that the covered individual receives no more than 100% of their average weekly wage. If the PFML is primary, the employer-provided leave policy supplements the PFML benefit up to no more than 100% of a covered individual's average weekly wages. If there is no language within the employer's policy regarding whether the policy is primary or secondary, the PFML program will be secondary. The final rules emphasize that covered individuals cannot receive more than 100% of their average weekly wage during their PFML benefit period. Both employers and covered individuals are responsible to review benefit information to avoid any overpayment.

The amended rules provide that the Department of Labor's Division of Paid Leave will make a PFML notice for employers to use that meets HDFA's notice requirement available on its website. The written notice must be provided to all an employer's Delaware employees at least 30 days before the start of contributions on Jan. 1, 2025. The notice must also be provided upon the hiring of an employee, when an employee requests leave or when an employer acquires knowledge that an employee's leave may be a qualifying event under the HDFA. An employer may provide notice electronically to an email address provided to an employee by an employer or to the employee's personal email address.

The amended rules now require an employee to provide at least 30 days' advanced notice prior to filing a claim for leave under the PFML program. If the 30 days' notice is not practicable due to lack of knowledge of when leave will be required, a change in circumstances or a medical emergency, notice must be given as soon as practicable. "As

soon as practicable” is defined as soon as both possible and practical, considering the facts and circumstances in an individual’s case.

If an employee becomes aware of the need of PFML less than 30 days in advance, it should be practicable for an employee to provide notice of leave either the same day the employee knows they need leave or the next business day. If the leave is foreseeable at least 30 days in advance and the employee fails to give advance notice with no reasonable excuse, the employer may delay coverage until 30 days after the date the employee does provide notice. For the employer to delay the start of leave, the need for leave and approximate date leave would be taken must have been clearly foreseeable.

Previously, the rules stated employees on a reduced leave schedule and intermittent leave schedule should provide notice at least 30 days in advance or as soon as practicable. The amended rules have removed this requirement and clarified employee notice requirements for employees taking intermittent leave. If an employee is on intermittent leave due to a planned medical treatment for themselves or a family member with a serious health condition, an employee must provide the employer with as much advance notice as is reasonably possible prior to taking leave. If the need for leave is unplanned, the employee must notify the employer as soon as practicable in the usual and customary manner employees notify the employer if they will be absent from work.

Oregon

OAR Chapter 839 (final rule re: OFLA and sick leave)

Adopted March 1, 2024

Effective March 2, 2024

Oregon has amended the Oregon Family Leave Act (OFLA), which requires covered employers to provide eligible employees with up to 12 weeks of leave within any one-year period to care for the employee or a qualifying family member. These final rules clarify certain definitions, uses for leave and when an employer may request verification of leave. The final rules do not change any current claim processes used by Sedgwick as they are clarifications on these definitions. The final rules also clarify permissible uses of sick leave.

The final rules provide a definition of those related “by affinity,” which is included on the list of qualifying family members to care for whom an employee may take OFLA leave. “Affinity” is defined as a relationship where there is a significant personal bond that is like a family relationship when considered under the totality of the circumstances. Employees may demonstrate a relationship by affinity by showing any of the following factors, with no one factor being determinative:

- Shared personal responsibility, including leases, ownership of property, joint liability for bills or beneficiary designations
- Emergency contact designations
- An expectation to provide care because of the relationship or prior provision of care
- Cohabitation
- Geographic proximity
- Any other factors that may demonstrate a family-like relationship

If an employee uses OFLA leave to care for a family member by affinity, the employer may require written attestation (in a form provided by the employer) from the employee indicating that their relationship is like a family relationship.

The amended rules clarify that for an employee to take either parental or sick child leave under the OFLA, the child receiving care must be under the age of 18 or an adult dependent child substantially limited by a physical or mental impairment. Additionally, the final rules amend the definition of “serious health condition” to include pregnancy termination as well as fertility or infertility treatments. Accordingly, these are qualifying reasons for a covered employee to take OFLA leave for the purposes of pregnancy disability leave.

Under the final rules, the "leave year" to be used by employers to accrue OFLA leave is a one-year period beginning the Sunday immediately preceding the date on which the leave commences. If an employer transitions to this structure from any other leave year schedule, all the employer's OFLA-eligible employees must be provided with their full benefit year of leave on the first day of the new OFLA leave year. This adds clarification to the upcoming required transition of all OFLA leaves to the rolling forward calculation on July 1, 2024, and means all affected leaves will be provided the full benefit entitlement as of that date. In addition, when an employer calculates an employee's average hours worked per week, the employer must take into consideration any hours of protected leave taken by the employee as well as hours worked.

Employers may require employees to provide 30 days' notice of their need for foreseeable OFLA leave. The final rules clarify that when an employee has some advance notice of leave that is otherwise unforeseeable, they must give the employer as much notice as possible. Relatedly, when advance notice is not practicable, the employer must receive verbal or written notice within 24 hours of the leave commencing, either from the employee or any other person on their behalf. In these situations, employers may also require written notice from the employee within three days of their return to work.

The final rules remove certain limitations on the number of weeks an employee could take in OFLA leave to deal with the death of a family member as well as limitations on concurrent use of OFLA leave for the deaths of multiple family members. The final rules replace these provisions with the clarification that OFLA-eligible employees may receive notice of the death of a family member through any means and from any source.

If the state employment department or other authority denies an employee coverage under the state's paid family and medical leave insurance program ("Paid Leave Oregon") for an absence, the rules clarify that this denial is not a basis for an employer to deny the employee OFLA leave for the same absence. Rather, employers have an independent obligation to determine eligibility for OFLA leave. If an employee takes leave under Paid Leave Oregon for an absence and the reason for the absence would also qualify for OFLA leave, a covered employer may reduce the employee's period of supplemental leave under Paid Leave Oregon by the number of OFLA-qualifying days taken by the employee.

Under the final rules, employers may not require medical verification for parental leave, for sick child leave due to the closure of a school or care provider due to a public health emergency or leave for the death of a family member unless that family member is related to the employee by affinity. The final rules clarify that if an employee has taken sick child leave for any part of three separate days in one leave year, an employer may require medical verification from a healthcare provider on the fourth or any subsequent day this employee takes sick child leave in the leave year. If not covered by the employee's insurance plan, the employer must pay the cost of the requested verification, unless required by a CBA or federal, state or local law. Under the final rules, medical verification of OFLA leave from a healthcare provider is binding, and employers cannot require an employee to obtain a second opinion.

In situations where an employer may request non-medical verification for an employee's OFLA leave, the employer must request this information in writing from the employee within five days of the leave request or from when the

employer learns that the leave may be OFLA-qualifying. When an employee takes OFLA leave in an unforeseeable situation, an employer may provisionally designate this absence as OFLA leave until receiving sufficient information to determine whether this absence qualified for OFLA. A notification from the Oregon Employment Department that the employee has applied for Paid Leave Oregon for the absence is sufficient to consider the employee's absence as provisionally OFLA-qualifying.

The final rules also amend the process for verifying an employee's return to work after leave taken for the employee's own serious health condition. If an employer requires employees to present verification from a health care provider upon returning to work from OFLA leave for their own health condition, the employer must pay for this verification. Additionally, the rule requires that this verification policy must be uniformly applied to all return-to-work instances based on health conditions, including employees who do not utilize protected leave. Employers must also consider reasonable accommodations in assessing whether an employee is able to resume work.

Finally, Oregon employees may be able to access paid or unpaid leave under state laws in addition to OFLA, depending on their circumstances and the reason for their leave. These include the state's sick leave program as well as Paid Leave Oregon. The final rules clarify that an employee may use sick leave for purposes authorized under Paid Leave Oregon, including during periods of time that the employee takes sick leave for a circumstance that would also qualify as family or medical leave under Paid Leave Oregon.

Oregon

SB 1515 (Paid Leave Oregon and Oregon Family Leave Act amendments)

Passed senate; passed house Feb. 27, 2024

If enacted, effective July 1, 2024

The Oregon legislature has proposed amendments to Paid Leave Oregon and the Oregon Family Leave Act (OFLA). If enacted, the proposed amendments would make a number of changes to Paid Leave Oregon and OFLA and would clarify the application of the two leave benefit programs. Sedgwick is preparing for these changes in anticipation of the governor's signature.

If enacted, the proposed amendments to OFLA would remove unpaid, protected leave for employees to care for themselves or a family member with a serious health condition and unpaid, protected leave to care for an infant or newly adopted or newly placed foster child (leave related to serious health conditions would remain under Paid Leave Oregon), but would modify the sick child leave under OFLA to include all illnesses, injuries or conditions that require home care. The proposed amendments would reduce bereavement leave under OFLA to a maximum of four weeks in any one-year period.

The proposed amendments would modify the definition of "family leave" in Paid Leave Oregon to include leave for purposes of the legal process required for placement of a foster child or the adoption of a child effective Jan. 1, 2025. The proposed amendments would also add a temporary provision (expiring on Jan. 1, 2025) to OFLA allowing eligible employees to take an additional two weeks of protected, unpaid leave for the same purpose, as long as the employee provides notice to the employer when taking this leave.

The proposed amendments would entitle an employee to use any accrued paid leave offered by the employer in addition to Paid Leave Oregon benefits to the extent that the total combination of benefits does not exceed the employee's full wage replacement unless the employer allows the employee to receive combined amounts exceeding the employee's full wage replacement. The proposed amendments would also remove the 16-week leave cap per benefit year for leave taken in any combination under both Paid Leave Oregon and OFLA and would specify that leave taken under OFLA is in addition to leave taken under Paid Leave Oregon.

The proposed amendments would also clarify the circumstances under which two or more family members who work for the same employer may take protected leave concurrently under OFLA. Where an employee is taking pregnancy disability leave, the proposed amendments specify that the employee may begin OFLA leave without prior notice to the employer. Finally, the proposed amendments would modify the existing requirements for medical verification for leave under OFLA for a sick child, school closure due to public health emergency or pregnancy disability leave.

Utah

HB 245 (reserve military leave)

Passed house; passed senate; to governor March 1, 2024

If enacted, the effective date is not available at this time.

The Utah legislature has proposed a law that reenacts provisions relating to a leave of absence from employment for reserve members of the armed forces and expands protections to members of the Utah National Guard or the State Defense Force.

If enacted, the proposed law would grant, upon request, a leave of absence from employment for up to five years for any member of a reserve component of the United States armed forces who enters active duty, active duty for training, inactive duty training or state active duty. The proposed law would also provide, for up to five years, the same rights and protections as provided by federal law for activation to federal military service to members of the Utah National Guard or the State Defense Force when ordered to state military service by the governor. If general officers of the Utah National Guard or the State Defense Force are appointed to state employment by the governor or adjutant general, they would be afforded the same rights and protections as provided by federal law for the duration of their state appointment, even if the appointment exceeds five years.

If enacted, the proposed law would require that these military members be allowed to return to prior employment with the same seniority, status, pay and vacation as the employee would have had if they had not been absent for military purposes. It would be a class B misdemeanor under the proposed law to willfully deprive an employee who is absent as a military member of any of these benefits or to discriminate in hiring based on membership in any reserve component of the armed forces.

Virginia

SB 373 (paid family and medical leave insurance)

Passed senate; passed house Feb. 26, 2024

If enacted, effective July 1

If enacted, benefits begin Jan. 1, 2027.

The Virginia legislature has proposed a new law that would create a paid family and medical leave insurance program. If enacted, the Virginia Employment Commission ("commission") would administer the program beginning Jan. 1, 2026, with funding for the program through premiums (to be determined no later than Oct. 1, 2025) assessed to employers and employees beginning at the same time (unless the employer is exempt from contributions by electing an approved private plan meeting the proposed law's requirements). As of Jan. 1, 2027, the proposed law would provide a benefit amount that would be 80% of the employee's average weekly wage, not to exceed 80% of the state weekly wage (as adjusted annually). The proposed law would provide an eight-week cap on the duration of paid leave in any application year.

If enacted, the proposed law would apply to all employers who are covered by the state's unemployment compensation law, as well as any employee who meets the eligibility criteria for the unemployment compensation law. Employees would be eligible for family and medical leave benefits starting the first calendar day that the employee meets the eligibility requirements. The proposed law would define key terms, including family member, domestic partner, covered service member, next of kin, serious health condition and qualifying exigency leave, among others. The proposed law would require employers to display a poster to be provided by the Commission and to provide written notice (as specified by the proposed law) to each employee upon hiring and annually thereafter, as well as upon an employee's request for leave or when the employer has knowledge of an employee's intent to take leave.

Under the proposed law, family and medical leave benefits would be payable to any covered employee who: (1) because of birth, adoption or placement through foster care, is caring for a new child during the first year after the birth, adoption or placement of the child; (2) is caring for a family member with a serious health condition; (3) has a serious health condition that makes the employee unable to perform the functions of their employment position; (4) is caring for a covered service member who is the employee's next of kin or other family member; or (5) is eligible for qualifying exigency leave arising out of a family member being called to active duty or being notified of a pending call to active duty in the armed forces. In addition, the proposed law outlines the supporting certifications necessary for a claim for family and medical leave benefits. Any leave taken under the proposed law that also qualifies as leave under the federal Family and Medical Leave Act (FMLA) would run concurrently with leave taken under the FMLA.

If enacted, covered employees could opt to receive prorated paid family and medical leave benefits on an intermittent or reduced leave schedule. The employee would have to make a reasonable effort to schedule leave

so as not to unduly disrupt the employer's operations and would have to provide prior notice of the schedule for leave to the extent practicable. The proposed law would also require that the employer restore the employee returning from leave to the position held before leave or to a position with equivalent seniority, status, benefits, pay and other terms and conditions of employment.

Washington

SB 5793 (paid sick leave amendments)

Passed senate; passed house Feb. 27

If enacted, effective 90 days after adjournment.

The Washington legislature has proposed amendments to the state's paid sick leave law. If enacted, the proposed amendments would provide that authorized use of paid sick leave includes business or childcare closures for health-related reasons, weather or public emergency. In addition, if enacted, the proposed amendments would expand the definition of "family member" to mean a child (expanded to include a child's spouse), grandchild, grandparent, parent, sibling or spouse (defined as husband, wife or state registered domestic partner) of an employee, and would also include any individual who regularly resides in the employee's home or where the relationship creates an expectation that the employee care for the person, and that individual depends on the employee for care. While "family member" would include any individual who regularly resides in the employee's home, it would not include an individual who simply resides in the same home with no expectation that the employee care for the individual.

The Information contained within this document is intended to provide summary level information on proposed or enacted laws related to family and medical leave. It is not intended to provide guidance on the application of these legal requirements or as an update to your Company's attendance and/or leave policies. We recommend you consult with Legal Counsel to determine what changes, if any, should be applied to Company Policy.

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