



# 8 FAQs for Colorado Employers Facing New Paid Family and Medical Leave Insurance Obligations for 2023

Insights

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All Colorado employers will be subject to new paid family and medical leave insurance obligations — starting on January 1 — thanks to the Colorado Family and Medical Leave Insurance (FAMLI) program. What do Colorado employers need to know about their responsibilities under the new law? Here are the answers to eight frequently asked questions to help you prepare for upcoming compliance deadlines.

## 1. What is the FAMLI Program?

By ballot measure, Colorado voters approved a state-run paid Family and Medical Leave Insurance program in November 2020. Beginning in January 2024, most Colorado workers will be eligible to apply for FAMLI leave benefits and receive compensation from the state while addressing family and medical needs for themselves or family members.

While leave eligibility does not begin until January 2024, Colorado employers have an obligation — starting January 1, 2023 — to collect FAMLI insurance premiums from workers' wages and provide notice to workers about their new benefit. Private employers with at least 10 employees also must contribute insurance premiums to the state of Colorado to help finance the FAMLI program.

## 2. What Contributions Will Employees and Employers Make to FAMLI?

The employee share of FAMLI premiums is set at 0.45% of employee wages. All Colorado employers are required to facilitate collection of FAMLI premiums for their Colorado employees through a simple payroll deduction.

Employers with 10 or more employees are responsible for separately paying 0.45% of their Colorado employee wages as FAMLI premiums. This is true even if an employer has one to nine employees in Colorado and the remaining employees working outside the state of Colorado. Employers with fewer than 10 employees total do not have to make separate employer contributions and are responsible only for facilitating collection of the employee share of FAMLI premiums for their Colorado employees.

Employers are required to remit payment of FAMLI premiums to the state of Colorado on a quarterly basis. The first quarterly premium payments are due on March 31, 2023. There is a 30-day grace

basis. The first quarterly premium payments are due on March 31, 2023. There is a 90-day grace period, however, allowing payment by April 30, 2023.

For 2023 and 2024, the employee and employer contribution rates are capped at 0.45%. The director of the FAML I Division sets the premium rate and may raise rates beginning in 2025. Contributions are statutorily capped at 1.2%.

### **3. For What Purposes Can Employees Use FAML I Leave?**

Eligible employees have access to FAML I leave for the following purposes after January 1, 2024:

- The employee is caring for a child during the first year after the birth, adoption, or foster care placement of that child;
- The employee needs to care for a family member with a serious health condition;
- The employee needs to care for their own serious health condition;
- The employee needs to make arrangements for a family member's military deployment; or
- The employee or family member has been the victim of domestic abuse, sexual assault, or criminal harassment and needs to be absent from work for purposes related to medical attention, mental health care or other counseling, victim services (including legal), or relocation.

### **4. How Much FAML I Leave Can Employees Take?**

Starting January 1, 2024, employees are eligible to receive up to 90% of their average weekly wages — although FAML I compensation is capped at \$1,100 per week. Employees generally have access to 12 weeks of paid leave, and employees with serious health conditions due to pregnancy complications or childbirth have access to an additional four weeks of paid leave (for a total of 16 weeks). FAML I leave may be taken in increments of as little as one hour, but Colorado will not pay FAML I leave benefits until an employee takes eight hours of FAML I leave.

### **5. What Rights and Obligations Do Employees and Employers Have Under the Act?**

Almost all employees are immediately eligible for FAML I leave upon hire, and all employees are eligible for FAML I leave once they earn \$2,500 in wages from their current employer. Notably, the FAML I program differs from the federal Family and Medical Leave Act (FMLA) because employees are not required to work a certain number of hours for a specific employer before becoming eligible for FAML I leave. Colorado workers have a right to FAML I leave if they earned at least \$2,500 over the previous year for work performed in Colorado for *any* employer. Employees are not allowed to opt out of the program and must contribute to the FAML I program even if they never intend to use the benefit. Employees who believe their employer has retaliated or interfered with their use of FAML I benefits may contact the FAML I division of the Colorado Department of Labor and Employment (CDLE) or file a civil lawsuit.

If an employee has worked at least 180 days for an employer and exercises their right to FAML I leave, the employer is obligated to restore the employee to the same or a comparable position to the one held prior to FAML I leave. However, an employee who has not met the 180-day threshold is not entitled to job protection under the FAML I program.

Employers can require employees to inform them directly of their need for FAML I leave, separate and apart from the employee's obligation to inform the state of Colorado of their need for FAML I benefits. Employers are prohibited from retaliating against any employee who uses FAML I leave or otherwise exercises their rights with regard to FAML I leave.

## **6. What if I Already Provide (or Plan to Provide) Paid Family and Medical Leave to My Employees?**

Employers who have already implemented or plan to implement a paid family and medical leave program for their employees may obtain approval from the state of Colorado to opt out of their FAML I obligations. However, until the state of Colorado determines that an employer's private paid family and medical leave program provides equal or greater benefits and protections as FAML I, the employer must comply with FAML I's contribution and notice provisions.

To qualify as a FAML I-replacement private plan, an employer's plan must:

- Provide benefits for the same number of weeks as FAML I;
- Provide the same level of wage replacement;
- Include no additional requirements or conditions;
- Deduct the same amount from employee paychecks; and
- Cover all employees for the duration of their employment.

You should note that all employers — including those with private paid family and medical leave benefits for their employees — must pay premiums starting January 1, 2023. The state of Colorado will allow refunds for any premiums paid in 2023 for employers who submit approved private plans with an effective date on or before January 1, 2024. To be eligible for a refund, employers must submit their private plan applications to the CDLE by October 31, 2023.

## **7. How Does FAML I Interact with Other Laws and Employer Policies?**

- ***FAML I and Workers' Compensation Act.*** FAML I benefits do not run concurrently with the Workers' Compensation Act of Colorado. If an absence from work is caused by circumstances that would entitle an individual to benefits under the Workers' Compensation Act, the individual is not entitled to FAML I benefits for that absence. An individual must notify the FAML I Division if they receive any benefits under the Workers' Compensation Act during a period that they receive FAML I benefits. If employees fail to disclose either a workplace injury or the receipt of benefits

under the Workers' Compensation Act, it may constitute grounds for disqualification of FAML I benefits.

- **FAMLI and Unemployment Insurance Benefits.** FAML I benefits do not run concurrently with benefits under the Colorado Employment Security Act (CESA). If an absence from work is caused by circumstances that would entitle an individual to benefits under CESA, the individual is not eligible for FAML I benefits. Failure to disclose receipt of CESA benefits constitutes grounds for disqualification of FAML I benefits.
- **FAMLI and Employer-Provided Paid Leave.** An employee may choose whether to take FAML I leave or employer-provided paid leave. An employer may not require an employee to exhaust employer-provided paid leave before using FAML I leave. Further, an employee is not entitled to receive both FAML I benefits and employer-provided paid leave for the same hours absent. An employer and employee, however, mutually may agree that the employee may use any accrued employer-provided leave as a supplement to FAML I leave in an amount not to exceed the difference between the employee's FAML I benefits and average weekly wage. So, an employer can make an employee whole by supplementing FAML I benefits with paid leave, but an employer cannot rely on FAML I benefits to improve an employee's weekly compensation while the employee is out on leave. An employer may recoup an overpayment by any legal means, including by deducting money from an employee's paycheck.
- **FAMLI and Colorado Health Families and Workplaces Act (HFWA).** An employee may choose whether to take FAML I leave or HFWA paid sick leave. An employer may not require an employee to exhaust HFWA paid sick leave before using FAML I leave. Further, an employee is not entitled to receive both FAML I and HFWA paid sick leave for the same hours absent. However, an employer and an employee can mutually agree that the employee may use any accrued paid sick leave as a supplement to FAML I payments in an amount not to exceed the difference between the individual's wage replacement benefits under FAML I and the individual's average weekly wage. Any overpayments may be recouped by any legal means, including by deducting money from an employee's paycheck. The employer must then replenish the employee's bank of accrued employer-provided paid leave in the amount recouped as an overpayment. Employers should not read the FAML I and HFWA regulations in a manner that reduces rights under either statute.
- **FAMLI, Short-Term Disability, and Long-Term Disability.** If you provide required FAML I notice and an employee takes FAML I leave for a reason that also qualifies for a short-term or long-term disability benefit, you may count both the wage replacement amount and the duration of the FAML I leave against the benefit amounts and leave duration provided under the short-term or long-term disability policies. The terms of the applicable long-term or short-term disability policy will govern whether the employer, employee, or both must notify the policy's program administrator of concurrent paid family and medical leave insurance benefits received by the employee.
- **FAMLI and FMLA.** FAML I leave that also qualifies as FMLA leave runs concurrently with the FMLA. If an employee requests FMLA leave, the employer must notify the employee that they may be eligible for paid FAML I leave.

## 8. What Should Employers Do to Comply?

You should act quickly to comply with FAMLII requirements and consider take the following seven steps now:

1. Determine how FAMLII will apply to your business by assessing how many people you employ and what portion of FAMLII costs you'll need to cover.
2. Register your businesses with [the CDLE's FAMLII Division](#). Registration is now open, and all employers will have to register to make their first FAMLII premium payments by April 30, 2023.
3. Update your employee handbook and leave policies to ensure FAMLII compliance.
4. Communicate with employees about FAMLII, deductions the company will take from wages in 2023, and available leave in 2024.
5. Display the [2023 FAMLII Program Notice](#) in a prominent place at your worksite.
6. Prepare to collect employee FAMLII premiums beginning January 1, 2023.
7. Consult with an employment attorney to assess compliance with FAMLII and other federal, state, and local employment regulations.

### Conclusion

We will continue to monitor these developments and provide updates as necessary. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to receive the most up-to-date information. If you have questions about new FAMLII program requirements, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in [our Denver office](#) for assistance.

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